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We are proud to announce a new publishing and ground-breaking venture providing quarterly reports on the worldwide legal and tax aspects of sport and their practical implications, including EC legal and tax developments, which will be available in print and online. The launch date for the first issue of Global Sports Law and Taxation Reports will be the end of November 2010. Next and subsequent year’s issues will be published in March, June, September, and December.

The Editors
The new Journal Global Sports Law and Taxation Reports will be edited by Professor Ian Blackshaw and Dr Rijckele Betten, with specialist contributions from the world’s leading practitioners and academics in the sports law and taxation fields.

Prof. Ian Blackshaw is a well-known and acknowledged leading international sports lawyer and academic, active in many sports law associations and a Member of the Court of Arbitration of Sport (CAS) in Lausanne, Switzerland. He is also a prolific author of books and articles and regular Speaker at International Seminars and Conferences on various aspects of Sports Law, including the business side of Sport, which is now a global industry worth more than 3% of world trade.

Dr Rijckele Betten is likewise involved in the field of international tax. Since 1995, he has been publishing and speaking on international tax law at many international events, and during the past 10 years has specialized in international tax issues impacting on the mega incomes to be derived by sports persons, sports event organisers, sports marketers and broadcasters from sports and associated activities.

Messrs Blackshaw and Betten have each built up a prodigious personal and professional network of experts and contacts worldwide, and through these networks they are able to offer subscribers to Global Sports Law and Taxation Reports very valuable information and practical insights of a topical nature at the highest possible levels.

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6. Doping and its Financial Consequences

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FIFA Signs Historic Agreement with Interpol

As part of FIFA’s plans to clean up the ‘beautiful game’, and, no doubt, with an eye on his re-election at the FIFA Congress at the beginning of June, which is being opposed, Sepp Blatter, announced on 9 May, 2011 the signature of an historic Cooperation Agreement with INTERPOL, the international policing organisation with members in 188 countries in the world.

This Agreement is designed to rid football, the world’s favourite and most lucrative sport, of illegal and irregular betting and match-fixing, and involves a ten-year programme with INTERPOL and a grant of several millions of Euros a year - the first two years of €4m each year and €3.5m for each of the remaining eight years. This grant - the biggest ever single one made by a private institution to INTERPOL - will support the setting up of a dedicated FIFA Anti-Corruption Training Wing within the INTERPOL Global Complex in Singapore. According to INTERPOL, illegal gambling in football will account for hundreds of millions of US$ in Asia alone this year! So, it is a big problem. As Blatter has said: “the threat of match-fixing in sport is a major one, and we are committed to doing everything in our power to tackle this threat. Match-fixing shakes the very foundations of sport, namely fair play, respect and discipline. That’s why FIFA employs a zero-tolerance policy.” Fighting words indeed!

This development comes against the following background:
In Germany, for example, there are apparently 300 suspicious games currently under scrutiny; and illegal betting and match-fixing affects all levels of the game, including international friendlies, a Champions League and some Europa Cup games, as well as some lower league semi-pro matches. So, the problem is quite widespread and undermines the integrity of football. It is also prevalent in other sports, as the recent spot-fixing in test cricket has shown. But, as far as football is concerned, the match-fixing scandal involving several leading Italian clubs in 2006, is perhaps the one that brought the problem to prominence. But, whatever one may think about Blatter - and he certainly has his supporters as well as his opponents - he never fails to surprise by pulling rabbits out of the hat! The latest example of which is this major initiative with INTERPOL! A move, it must be added, that is well needed, and one, incidentally, that has been foreseen in the forthcoming latest Book in the Asser International Sports Law Series on ‘Sports Betting: Law and Policy’ of which the author of this Editorial is one of the Contributors and Editors.

Ian Blackshaw
Transnational Sports Law

by Franck Latty*

Certain legal expressions are in everyday use in doctrine or practice, as if their meaning was obvious, despite the conceptual vagueness that continues to surround them. The notion of “Transnational Sports Law” undoubtedly falls into this category. With this contribution, I aim to demonstrate that, regardless of the meaning given to the expression, the addition of the adjective “transnational” has conceptual virtues that provide a pertinent analytical framework.

Yet it is still necessary to acknowledge the existence of “sports law,” something which is rejected by a certain school of thought. For E. Grayson, for example

“No subject exists which jurisprudentially can be called sports law. As a soundbite headline, shorthand description, it has no juridical foundation; for common law and equity create no concept of law exclusively relating to sport. Each area of law applicable to sport does not differ from how it is found in any social or jurisprudential category [...]”

 Rejecting the idea of sports law, these authors entitle their discipline “Sport and the law”, which consists of analysing the manner in which the law - namely state law (e.g. employment law, contract law, criminal law, etc.) - applies to the sporting domain. At best, certain of these authors recognise that the particularities of sport give rise to an independent offshoot of state law. This restrictive doctrinal approach can be criticised for at least two reasons:

i) First of all, because it can only be relevant for certain countries - generally through common law - which have not adopted legislation in the sporting domain. However, other states - often by tradition of civil law - have legislated on the subject. This is very much the case for France, which since the second half of the 20th century, has developed an increasingly dense body of legislation that is now grouped together in a sporting code covering numerous aspects of sporting activities. The code essentially allocates responsibilities in terms of the organisation of sporting activities between government, regional authorities, associations, companies, federations, the National Olympic Committee, etc., specifying the rights and obligations of the different parties involved (athletes, trainers), as well as organising the anti-doping effort; it also regulates the practice of sporting activities (sports facilities, insurance, hygiene and safety, etc.) and includes other measures relating to the funding of sport. Through a system of public service delegation, French law even operates a form of nationalisation of the national federations: although they retain association status under private law, their decisions are regarded as administrative decisions and come under the competence of the administrative judge. Undoubtedly, therefore, there exists French sports law of state origin which even attracts to it the sporting standards of the federations, thus invalidating the theory of “Sports and the Law”.

ii) Secondly, the “Sports and the Law” theory is state-centred, ignoring the law produced by the sporting bodies, whether they are international (the international federations and the International Olympic Committee, in particular) or national in scope. However, it is these bodies which, even before the states, organise sporting competition in its manifold aspects (rules of play, technical rules, qualification of athletes, anti-doping rules, in some cases the status and contracts of athletes, etc.). Taking the view that these standards cannot claim to have the quality of legal rules amounts to having a highly restrictive conception of the law, which is well out of step with the realities on the ground. The “Sports and the Law” theory finds its roots in the state positivism that necessarily links the law to the state, the sole entity capable of imposing compliance through physical constraint. However, pluralist theories have shown that neither power nor law are in essence linked to the state, but that they manifest themselves in any organised social group, whether it be pre-, infra-, supra- or para-state.

From this perspective, it becomes clear that sporting bodies do indeed produce legal rules - a fact which in no way prejudices their degree of autonomy with regard to the law emanating from the states.

Having confirmed the existence of sports law, resulting both from public (state or even, by extension, inter-state) and private sources (the rules of sporting bodies), it is now necessary to analyse what the adjective “transnational” adds to or takes away from the concept.

An a contrario approach would permit the exclusion of sports law of national scope from the notion. Once the idea of transnationality involves going beyond a defined national territory, both the state rules applicable to sport and the rules of the national sporting bodies have to be set aside. It should, however, be noted that the rules of the national federations are often merely a transposition of the rules laid down by the international federations.

Transnational Sports Law can also be distinguished from International Sports Law, as the concept of international law (understood as international public law) originally refers to a law applicable to inter-state relations. With the diversification of international society, international law these days involves more varied subjects (intergovernmental organisations and private bodies, to a certain extent), of which it governs the status or relations. International law still only intervenes infrequently in the field of sport, so that, logically, the sporting bodies are not characterised as a subject of international law - with the possible exception of the International Olympic Committee, which has succeeded in obtaining quite unique status, not dissimilar to that of the International Committee of the Red Cross.

With the a contrario approach proving insufficient to precisely define the concept of Transnational Sports Law, a positive definition becomes inevitable. If we depart the sporting domain for a moment, it appears that the notion of transnational law, very common in legal literature and even in practice, is characterised by an ambiguity which, far from constituting an obstacle to its application to the field of sport, on the contrary helps to highlight the diversity of the legal phenomenon that is sports law.

Three meanings can be drawn from this: a wide meaning, based on the theory of Jessup, covering any rule with external scope (I); a hybrid meaning, characterising the legal relations between public and private entities (II); a strictly private meaning, referring to the sectoral rules produced by self-regulated private global parties (III). While the last of these is the most meaningful from a conceptual point of view, the fact remains that the first two help to illustrate the varied dimensions of sports law.

* Professor of public law - University of Auvergne (France). This article is taken from a communication presented on 22 September, 2010 at the International conference on les sports at the Universitas Pelita Harapan in Jakarta. The author would like to thank the conference organiser for their invitation and especially the Lex Sportiva Institute and its director Hinch IP Pandjaitan.

3 www.legifrance.gouv.fr
4 See the writings of Kunt, Hegel, Carré de Malberg, Kelsen etc.
6 Contrast, see J. Nafziger, International Sports Law, 2nd Ed., Transnational Publ. Dobbis Ferry, N.Y., 2003, 376 p., for whom the conception of International Sports Law is close to that explained in the first part of this paper.
I. The wide conception: Jessup's transnational law

1. The spread of the expression “transnational law” within legal circles owes a great deal to the book of the same name published in 1956 by the renowned American lawyer Philip Jessup, who went on to become a judge in the International Court of Justice during the 1960s. Mindful of going beyond the traditional distinctions between international law and internal law and between public and private law, Jessup proposes the grouping together under a single description of all rules with an extra-national dimension:

“I shall use, instead of “international law” the term “transnational law” to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.”

Apart from the rules of public international law and the national rules of private international law, the concept also encompasses internal law with international scope - public and private (civil or criminal) - and the principles applied to legal relations forged directly between private bodies. Defined in this way, transnational law embraces all legal rules, independently of their origin, that exceed the framework of a single national legal order. Through this emphasis of the existence of standards that were little known at the time, such as the law of international organisations or the general principles resulting from arbitration case law, Jessup raised the issue of the traditional boundaries of international law, which amounts to a success still palpable today in terms of the theory of transnational law.

Applied to sports law, Jessup’s Transnational Law would make it possible to group all standards into a single set “which regulates actions or events that transcend national frontiers” in the area of sport. The private rules of the international federations and the International Olympic Committee would thus sit alongside the few rules stemming from the international legal order, such as the 2005 UNESCO Convention against Doping in Sport, the conventions of the Council of Europe against doping and violence in stadiums, and the texts imposing a sporting embargo on certain nations (United Nations Convention against Apartheid in Sport of 10 December 1985, Resolution 757 (1992) of the Security Council imposing an embargo on Yugoslavia). To this list can be added the numerous soft law texts adopted by the United Nations General Assembly, UNESCO and other international bodies. Finally, the state rules likely to be applied to transnational sporting relations, for instance the Swiss law on associations - the IOC and most international federations have their headquarters in Switzerland - would also come under Transnational Sports Law.

2. Nonetheless, Jessup’s theory is not intended to be merely descriptive. His project consists of suggesting that any judge (national or international, public or private) faced with a dispute transcending state borders may choose the rule of transnational law which they regard as being most commensurate with reason and justice for the resolution of the dispute. From this perspective, Jessup’s theory has not met with the anticipated success, insofar as each judge is the organ of an established legal order that does not leave them the latitude to import external standards at will. But what about specifically in relation to sport? There is no doubt that if a sport-related dispute is being heard by a judge at a state court - which is tending to become rarer due to the more widespread recourse to arbitration - they would give precedence to their national law and take the applicable international law into account only if their Constitution recognised its value8, while the laws of another state would be implemented if the mechanisms of private international law referred to it9. Similarly, they would apply the laws of international sporting bodies if so authorised by national law, via an explicit reference10 or by means of contractual mechanisms. However, under no circumstances would a state judge be authorised to draw on a patchwork of transnational rules potentially concerning the situation in dispute. It is for this reason that the French Conseil d’Etat traditionally considers the rules of the international federations to be devoid of legal effect in French law unless they have been transposed by the national federations11. At the level of the Court of Arbitration for Sport, this is more of a grey area, as the CAS’s arbitration rules leave its arbitrators considerable room for manoeuvre. Within the framework of the appeals process, in addition to the “applicable regulations and the rules of law chosen by the parties” and, secondarily to “the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled”, the CAS may apply “the rules of law, the application of which of the Panel deems appropriate”12. In practice, it can be observed that the CAS’s divisions sometimes have differing interpretations of these provisions on the applicable law. While all divisions in the first instance apply the rules of the sporting bodies concerned, some make abundant reference to state law, sometimes making the sporting rules secondary to this13, while others spontaneously free the sporting standards from any national legal order14. Moreover, at the level of the relevant ad hoc division at the Olympic Games, “The Panel shall rule on the dispute pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate”15. The divisions of the CAS therefore enjoy a degree of freedom of choice in terms of the rules to be applied, which appears to correspond to Jessup’s recommendations. The theory of Transnational Law is therefore implemented, at least to a certain extent, at the level of the CAS, not solely in its descriptive aspects (diversity of the rules applicable to transnational sporting relations) but also in its operational aspects (application of the most relevant rules by the judge).

Il. The hybrid conception: transnational law as the law governing mixed relations

The adjective “transnational” is commonly used in a specific sense to qualify relations between a state and a foreign private entity, especially in the context of investment law. The practice of state contracts (a petroleo contract, for example) gives rise to “hybrid”16 or “asymmetrical”17 relations between the state and a foreign private company. The term “transnational” takes into account the atypical nature of these legal relations in which contractual equality and state sovereignty are opposed, without in many cases being wholly reduced to either national or international law. These contracts generally include an arbitration clause providing for a tribunal to rule on disputes between the parties. This is commonly referred to as “transnational arbitration” or “mixed arbitration”. Much has been written about the law applicable to disputes of this type.

10 See Ph C. Jessup, op. cit., pp. 106 et seq.
11 In France, article 55 of the Constitution envisages that international treaties have a value superior to the law.
12 See E. Looqin, “Sport et droit international”, in Lamy Droit du sport, nos 186-95.
13 The French law of 1757 (amended on several occasions since 1984) thus envisaged that the sports federations were responsible for ensuring “compliance with the technical and ethical rules of their disciplines laid down by the international federations, the International Olympic Committee and the French National Olympic and Sports Committee”.
14 See for example the Conseil d’Etat’s advisory opinion dated 20 November 2003, in Revue juridique et économique du sport, no. 72, September 2004, p. 65: “The international sports federations are subject to the legislation of the state where each of them has its headquarters and the regulations which they lay down do not apply within France’s internal law.”
15 Art. 85 of the Code of Sports-related Arbitration. “In the latter case, the Panel shall give reasons for its decision”.
18 Art. 17 of the Arbitration Rules for the Olympic Games (Vancouver 2010). The arbitration rules for other major international competitions (FIFA World Cup, UEFA European Championship, Commonwealth Games) envisage similar provisions (see for example art. 18 of the arbitration rules for the final phase of the FIFA World Cup 2010).
by transnational tribunals: law of the contracting state? International public law? Other rules? In view of certain decisions reached in disputes of this type where general principles belonging to no identified legal order have been applied23, some authors have posited the idea of transnational law specifically tailored to these mixed relations24. Since the 1980s, however, the debate has lost its momentum and interest due to the exponential development of Bilateral Investment Treaties (BITs) between states. With the majority of disputes relating to investments now being raised on the basis of one of these BITs (even in the absence of contractual relations between the investor and the state), the transnational courts of arbitration are almost always called upon to settle disputes by applying international (public) law25.

How does this hybrid conception of transnationality relate to sports law?

1. In the first place, Transnational Sports Law understood in this way could offer a characterisation of the standards adopted by the World Anti-Doping Agency (WADA). This body at the origin of the world anti-doping code and associated international standards is formed jointly by representatives of the public authorities and representatives of the Olympic movement26. Formally at least, the standards which it produces are acts of private law, since the agency has foundation status under Swiss law despite its premises being located in Montreal. However, it is not out of the question to consider that the agency’s mixed composition in a way reflects upon the law which it produces - transnational law in the hybrid sense of the term. The world anti-doping code and the international standards do not, however, possess any intrinsic legal force. They have an effect only insofar as the sporting bodies transpose their content into their own anti-doping regulations, while the states have adopted the UNESCO convention against doping, the main objective of which is to recognise the Code. But it is precisely because the WADA’s global anti-doping programme is the product of co-regulation within the agency that it can obtain the consent of both the sporting bodies and the public authorities.

2. Secondly, and de lege ferenda, the practice of State Contracts referred to above could effectively be found to apply at major international competitions (the Olympic Games or the FIFA World Cup, for example). The legal framework developed for the staging of these events does not guarantee full legal security to the sporting institutions, which are only contractually bound to the host city (for the Olympic Games) or to the chosen federation (in the case of the FIFA World Cup). However, the holding of such events on a country’s soil involves commitments on its part, if only to provide access to its national soil to athletes from all over the world. The states supply plenty of high-quality guarantees, appended to the bid and then to the organisation contract27, but in the event of a state defaulting, the sporting body risks only being able to count on its own resources to remind the state of its commitments. In practice, certain “hiccups” crop up now and then, such as the attempt by the Chinese authorities, on the eve of the opening of the Beijing Games, to limit accredited journalists’ access to websites deemed by it to be “subversive”28, a problem eventually resolved via discreet “Olympic diplomacy”29. Similarly, in the build-up to the 1976 Montreal Games, the Canadian authorities refused to let Taiwanese athletes enter their territory, as their country was not recognised by Canada30.

Consequently, the international sporting bodies might seek to secure their legal relationship with the host state by entering into a “state contract” similar to those which foreign private companies make with the destination states for their investments. Subject to international law (so as to avoid national law, which the contracting state has the power to amend to its advantage), such agreements strengthen the position of the private body, which is placed on equal footing with the sovereign state. The presence of arbitration clauses whereby any dispute is submitted to transnational arbitration also possesses certain dissuasive virtues which might suffice to prevent disputes between the body and the state hosting the event. A proposal of this type was formulated during the 1980s by the authors of a study commissioned by the IOC on the improvement of its legal status31, but it failed to get past the Olympic drawing-board stage and subsequent changes to international investment law mean that its revival would not be worthwhile.

3. Lastly, it has to be acknowledged that the development of Bilateral Investment Treaties is likely to offer protection to international sporting bodies whose international events must be held on the territory of sovereign states. These treaties generally contain provisions whereby the state parties guarantee the investor parties equal, fair and non-discriminatory treatment (national treatment and/or treatment of the most favoured nation), together with full and complete protection and security. Some contain a clause concerning respect of the commitments made vis-à-vis investors, while the freedom of payments and money transfers relating to the investments is guaranteed. These treaties again offer the investors direct lines of recourse against the state, usually before the International Center for the Settlement of Investment Disputes (ICSID) or according to the arbitration regulations of the UNCITRAL (United Nations Commission on International Trade Law).

It is also worth noting that Brazil, which is due to host the FIFA World Cup in 2014 and the Rio Olympic Games in 2016, concluded a BIT in 1994 with Switzerland, the “home country” of both the FIFA and the IOC.32. Due to Brazil’s failure to ratify it, the treaty has not entered into force, but there is nothing to prevent this case being used as a basis for reasoning. If a state, through its behaviour, was to present an obstacle to the successful staging of the World Cup or the Olympic Games, or more prosaically, if it failed to fulfill the guaranteed provided in terms of freedom of transfer of capital, for example, could the FIFA (or the IOC) not invoke its international liability on the basis of a BIT in force? The crucial and novel legal issue would be to determine whether the sporting competition could be regarded as an investment, as transnational case law fluctuates on this definition33. After all, it has to be acknowledged that the construction of the infrastructure required to stage the Olympic Games or the World Cup involves investments made not by


27 Concerning the requirements of the IOC on the subject, see F. Latty, La lex sportiva, pp. 84 et seq. The state guarantees demanded by FIFA are not included in any public FIFA regulation. However, the reading of the bid evaluation reports for the 2018 and 2022 World Cups, which include a paragraph headed “Legal and Government Guarantees”, permits the identification of the nature of FIFA’s requirements in this area. They concern access to the state’s territory for the competitors and persons affiliated to FIFA, security during the event (and the exclusion of any liability of FIFA in this regard), currency exchange, FIFA commercial rights, the use of national anthems and flags, telecommunications and the importing of the equipment required for the event’s organisation. These guarantees and also required to include total tax exemption for FIFA and its affiliates.

28 Essentially websites of human rights defenders or bodies or those in favour of a Free Tibet…

29 “Internet: sous la pression, Pékin assouplit sa position” (Internet: under pressure, Beijing softens its stance), Le Monde, 3-4 August 2008.


31 B. Simma / Ch. Vedder, Suggestions for Improving the Legal Position of theIOC as Regards to its Relationship with States and Intergovernmental Bodies, 1985, study not published but referred to in E. Latty, La lex sportiva…, op. cit., pp. 158-159. V. also the debate on the neutralisation of the OG, launched at the time of the boycotts, when several proposals were formulated.


33 B. Simma / Ch. Vedder, Suggestions for Improving the Legal Position of the IOC as Regards to its Relationship with States and Intergovernmental Bodies, 1985, study not published but referred to in E. Latty, La lex sportiva…, op. cit., pp. 158-159. V. also the debate on the neutralisation of the OG, launched at the time of the boycotts, when several proposals were formulated.
the IOC or the FIFA but by local partners not protected by the BIT. Having said that, it is also noteworthy that the Switzerland/Brazil BIT includes international property rights and expertise in the definition of the investment32, which would make it possible to include the international competition within the scope of the treaty. Once past the a priori surmountable obstacle of the existence of an investment, it would remain to be verified that the state concerned has indeed breached its international obligations resulting from the treaty. At the end of the process, the system would enable the body to obtain recompense for the damage incurred33, although it is doubtful that the CIO or FIFA would wish to “jurisdictionalize” their generally peaceful relations with the states. So the corrective or even simply dissuasive virtues of this mechanism, which is highly (overly?) favourable to investors, should still not be neglected.

III. The private conception: transnational law as a form of global sectoral self-regulation

We will now deal with the final manner in which Transnational Sports Law can be conceived, and in terms of the overall analysis of sports law, it is the most useful of the three.

1. Once again, it is in the economic sphere that this specific conception of transnational law has been developed, to refer to the self-regulation of international economic players. Observation of the contractual practices of private operators from international commerce and analysis of commercial arbitration case law in this field have led certain authors to propose the theory of a new lex mercatoria34 or New Law Merchant35 - in reference to the lex mercatoria of the Middle Ages, developed by market traders as a remedy for the legal insecurity arising from the multiplicity of feudal laws. The repetition of standard contracts for commercial uses and the formulation by the arbitrators of general principles of law are supplying this new lex mercatoria which, for a part of the doctrine, could even be used in relation to state contracts36. Taking as a basis the institutionalist theory of the Italian lawyer Santi Romano37, the existence of a “lex mercatoria legal order” concurrent with the legal orders of the states has even been propounded, an idea which has been written about extensively38.

The debate on the lex mercatoria, the existence of which is still debated39, has had the merit of promoting the idea that legal communities depending on transnational solidarity are likely to self-regulate outside the framework of state law. Moreover, the phenomenon is not limited to the economic field, as an examination of the religious domain shows. The Catholic Church, the most institutionalised of the three main monotheist religions, is a grouping of a transnational community of followers subject to the canon law produced by the Church. Like the lex mercatoria, canon law is therefore a manifestation of the legal phenomenon characterised as transnational law: a law produced by private parties, without intervention from the states and beyond their borders, and intended to govern activities within the community concerned. Several transnational legal orders can be said to exist: commercial, religious… and sporting.

The law produced by the international sporting bodies (International Olympic Committee, international federations, continental federations, etc.) in effect constitutes a legal phenomenon similar to the lex mercatoria or to religious laws, insofar as these bodies - which are private entities - are at the origin of globally or at least extra-nationally-applied rules, designed to govern the system of sporting competition. Thus the neologism “lex sportiva” is being increasingly used as a direct reference to the lex mercatoria, either to indicate the set of transnational sporting rules40, or in a more limited sense, referring only to the case law of the Court of Arbitration for Sport41. Like the arbitrators of international commerce, the CAS has formulated a whole series of legal principles, either inspired directly by internal laws or deduced from the necessities of the sporting competition42. Applying to the Olympic Movement as a whole, these principles combine with the Olympic Charter and the World Anti-Doping Code to ensure the unity of the transnational sporting legal order. Considerably more institutionalised, through the Olympic Movement, than the lex mercatoria, the lex sportiva constitutes a particularly clear manifestation of “transnational law”.

2. The lex mercatoria theory’s sole aim is not to describe the “internal coherence”43 specific to the community of economic operators. It encompasses an “external” dimension which requires the verification of its “survival” when it comes up against state or inter-state standards. This question of the degree of autonomy of transnational standards is precisely that which is endlessly posed on the subject of sporting standards. In this regard, the theory of transnational law offers a framework that makes it possible to understand this question in terms of relations between legal orders, or “relations between systems”, as Kelsen would say44. Santi Romano, who has defended a pluralist conception of the law distinct from Kelsen’s monism, has very specifically insisted on the different relations likely to be forged between legal orders: a relationship in which one order is the presupposition of another; a relationship in which several orders which are independent of each other depend on another; relevance granted unilaterally by one order to another from which it is independent; a relation of succession between several orders45.

Due to the difficulty of verifying, in a few lines, the degree of autonomy of the lex sportiva as regards legal orders likely to restrict its effects46, only a few main “trends” will be mentioned, concerning the relationship between the transnational sporting legal order and the national and international legal systems.

Insofar as the international sporting bodies have internal legal statutes, they are by nature subject to the legal order of their headquarters. This being so, the liberalism of Western democracies per-
Is There Such A Thing As EU Sports Law?*

by Stephen Weatherill**

1 Introduction
The simple answer to the question posed in the title to this paper is: yes, there is such a thing as EU sports law!

But most simple answers tend to mislead, and the risk is real here too. There is such a thing as EU sports law, in the sense that since the entry into force of the Treaty of Lisbon on 1 December 2009 sport has been explicitly recognised as an area in which the EU has authority to intervene. However, this is apt to mislead in two quite different senses. First, it obscures the point that December 2009 was certainly a notable milestone in the shaping of EU sports law, but that in fact the relevant newly-introduced Treaty provisions are cautiously drafted and limited in their scope. They emphatically do not elevate the EU to the position of general ‘sports regulator’ in Europe. So, in short, one should not get too excited about them. Second, a focus on the Treaty reforms of 2009 obscures appreciation that for some 23 years the EU has already exerted an influence on sports governance in Europe. Beginning with its famous Waldner and Koeb judgment in 1974, the Court of Justice has subjected sport to the requirements of what was then EC law, and is now EU law, in so far as it constitutes an economic activity. So sport has been brought within the explicit scope of the EU Treaties only as late as December 2009 but well in advance of that date sport, though unmentioned by the Treaty, was required to comply with its rules in so far as it constituted an economic activity – which meant, most prominently, that sporting practices fell to be tested against the Treaty prohibitions against practices which are anti-competitive or which obstruct interstate trade or which discriminate on the basis of nationality. So an EU sports law (of sorts) developed as a result of the steady accretion of decisional practice where sports rules exerted an economic effect and interfered with the fulfilment of the EU’s mission.

This paper begins by considering the provisions on sport which were introduced into the EU Treaties by the Lisbon Treaty with effect from December 2009. It then steps backwards to show how, beginning in 1974, EU law has affected sport by subjecting its practices to control, initially in the name of promoting free movement of players across borders and more recently in the name of competition law. So there was already, pre-2009, a type of ‘EU sports law’. The EU did not stipulate how sport should be organised; but it did rule out choices that contravene the Treaty. The paper then reflects on whether the provisions introduced in 2009 are likely to change the shape of this pre-existing EU sports law. They might! It then concludes: yes, there is such a thing as EU sports law, and it is of practical importance and intellectual interest, but it is less systematic and comprehensive than one would expect to find at national level.

2 The Lisbon Treaty
The overall structural effect of the Lisbon reforms is formally to abolish the three pillar structure crafted for the EU at Maastricht twenty years ago. From 1 December 2009 the European Union has been founded on two Treaties which have the same legal value: the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). It is the amendments to what was the EC Treaty, and is now the TFEU, which grant sport its newly recognised formal status within the EU’s legal order.

However, inspection of the detailed content of this competence newly granted by the Member States to the EU is rather deflating, at least for those who would advocate a more aggressive role for the EU. The details are found in the rambling Part Three of the TFEU, which is entitled ‘Union Policies and Internal Actions’, specifically in Title XII of Part Three Education, Vocational Training, Youth and Sport. Under the post-Lisbon re-numbering the relevant Treaty Articles are Articles 165 and 166 TFEU. Article 165 stipulates that the Union ‘shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function’. And, pursuant to Article 165(2), Union action shall be aimed at ‘developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.’ Article 165(3) adds that the Union and the Member States ‘shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe’.

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47 See S. Weatherill: “Fairness, Openness and the Specific Nature of Sport: Does the Lisbon Treaty Change EU Sports Law?”