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# Protecting the Environment through Sports? Public-Private Cooperation for Regulatory Resources and International Law

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## Abstract

*This article examines a common, yet insufficiently researched, phenomenon: regulatory cooperation between public and private actors at the global level. It uses a case study that starts from the cooperation between the Olympic Movement and the United Nations Environmental Programme and then examines more broadly areas of convergences between sports and environmental regulation. The article depicts why a private regulator and an international organization would cooperate and what this tells us about the relationship between 'expertise', 'power' and 'legitimacy' within global governance. Two arguments are put forward and developed in the article. First, regulators cooperate because, in an unsettled global space with no hierarchical framework, cooperation is necessary for them to acquire sufficient authority to secure compliance with their regulatory agenda; cooperation opens a venue for the exchange of necessary regulatory resources and, thus, ultimately helps regulators establish and strengthen their authority. Second, because of the rate of recurrence of regulatory cooperation on a global scale, the article calls for the integration of the concept of regulatory cooperation into international law scholarship to help recognize and formalize this practice. It aims to encourage a debate about the risks and benefits involved in these regulatory interactions and about a (legal) framework that could safeguard important public policy interests.*

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## 1 Introduction

Few events are more global than the Olympic Games. Broadcasting of the London Olympics reached 4.8 billion people,<sup>1</sup> and, in Rio, athletes from more than 200 states and territories competed.<sup>2</sup> Since the establishment of the modern Olympics, the Games have played a role in reflecting and shaping interstate relationships, most notably during the Cold War era.<sup>3</sup> The Games have also been at the forefront of emerging global regulatory developments. Environmental protection, which will be at the centre of this article, is one example; tackling increasing economic and social inequality is another. The Olympics have not only served as a venue for reaching a broader public with these concerns but also have been a target of political activism. In the 1980s, the Olympic Movement started to become a powerful economic actor based on changes it induced in its sponsorship structures and the sale of broadcasting rights.<sup>4</sup> With these transformations came, on the one hand, demands to take greater responsibility for certain global political matters and, on the other hand, tendencies to reject its authority altogether. Despite such challenges, the International Olympic Committee (IOC) is a key example of a powerful group of privately incorporated actors that create transnational regulatory frameworks and thereby shape international and national law and regulation. Others to name in this context are, for instance, technical standards bodies such as the International Organization for Standardization (ISO) and large multinational enterprises regulating supply chains across borders.

This article examines the Sports and Environment Programme of the Olympic Movement, in which the United Nations Environment Programme (UNEP) was significantly involved. As will be demonstrated, the example is representative of broader trends regarding the establishment and distribution of international authority, particularly the increased importance of private actors in transnational rule making. Most importantly, however, the case study illustrates the increase of interactions between diverse types of regulators and regulatory regimes at the global level. This is reflected by numerous memoranda of understanding (MOUs) laying out cooperation terms between various types of actors and the development of frameworks by international organizations, which specify collaboration with the private sector.<sup>5</sup>

<sup>1</sup> All numbers stem from the 2012 London Summer Olympics, see International Olympic Committee (IOC), *Marketing Media Guide*, London (2012), at 6, 11, available at [www.olympic.org/Documents/IOC\\_Marketing/London\\_2012/IOC\\_Marketing\\_Media\\_Guide\\_2012.pdf](http://www.olympic.org/Documents/IOC_Marketing/London_2012/IOC_Marketing_Media_Guide_2012.pdf).

<sup>2</sup> Olympic Countries, Rio (2016), available at [www.rio2016.com/en/countries](http://www.rio2016.com/en/countries).

<sup>3</sup> Literature on this topic is vast; examples are A. Bairner and G. Molnar (eds), *The Politics of the Olympics: A Survey* (2010); K. Young and K. Wamsley (eds), *Global Olympics: Historical and Sociological Studies of the Modern Games* (2005).

<sup>4</sup> J.-L. Chappellet and B. Kübler-Mabbott, *The International Olympic Committee and the Olympic System* (2008), at 34ff. Olympic Marketing Fact File (2017), available at [https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/IOC-Marketing-and-Broadcasting-General-Files/Olympic-Marketing-Fact-File-2017.pdf#\\_ga=2.80038615.114034181.1507716313-1916146811.1485878730](https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/IOC-Marketing-and-Broadcasting-General-Files/Olympic-Marketing-Fact-File-2017.pdf#_ga=2.80038615.114034181.1507716313-1916146811.1485878730).

<sup>5</sup> See, e.g., United Nations (UN), *Guidelines on Cooperation between the United Nations and the Business Sector*, 20 November 2009; *Memorandum of Understanding between the UN Global Compact Office and the International Organization of Standardization*, Doc. ISO/TMB/WG SR N 82, 9 November 2006;

To understand and address the increase of private authority and regulatory interactions, we need a thorough theoretical inquiry into the changed architecture of the international space, the distribution of authority therein and the ways in which international law is coping with these phenomena. This has not yet happened to a satisfactory degree, the article posits. Private actors do have a place in international law scholarship, as examples as early as Philip Jessup's Storrs lecture reveal.<sup>6</sup> Yet, a conceptual integration of regulatory interactions remains underdeveloped. The Global Administrative Law (GAL) project, for instance, only hesitantly includes private actors and hybrid forms of governance<sup>7</sup> and, so far, the mechanisms and instruments of such interactions have not been analysed in much detail.<sup>8</sup> In contrast, this has happened elsewhere.<sup>9</sup> Recent works in international relations scholarship focus on specific forms of interactions between international organizations and other actors.<sup>10</sup> Similarly, national debates on new forms of regulation not only consider 'the creation of a constant dialogue between regulators and regulated', crucial for '[e]ffective regulation in

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Memorandum of Understanding between the Organisation for Economic Co-operation and Development (OECD) and the International Organization of Standardization, Doc. ISO/TMB/WG SR N 144, 19 June 2008. Just recently, collaboration between the Olympic movement and the UN was intensified through the conclusion of a memorandum of understanding (MOU) aimed at intensifying mutual engagements. The MOU was accompanied by a UN General Assembly resolution acknowledging the role of sports for central international topics such as health, development and peace. GA Res. 69/6, 31 October 2014.

- <sup>6</sup> P.C. Jessup, *Transnational Law* (1956). Moreover, there has hence been a growing body of literature (some works relate to Jessup, others do not) that examines their role as the addressees of international norms. E.g., Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Doc. A/HRC/8/5, 7 April 2008; P. Alston (ed.), *Non-State Actors and Human Rights* (2005); A. Clapham, *Human Rights Obligations of Non-State Actors* (2006). And, more recently, even within international legislative and regulatory processes. S. Tully, *Corporations and International Lawmaking* (2007); A. Peters et al. (eds), *Non-State Actors as Standard Setters* (2009) and, particularly, Peters, Koechlin and Fenner Zinkernagel, 'Non-State Actors as Standard Setters: Framing the Issue in an Interdisciplinary Fashion', in Peters et al., *ibid.*, 1, at 4ff; see also United Nations Conference on Environment and Development, 3–14 June 1992; Agenda 21, 13 June 1992, UN Doc A/CONF. 151/26 (1992), ch. 27; Agenda 2030, Doc. GA 70/1, 21 October 2015.
- <sup>7</sup> Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems* (2005) 15, at 23: 'We cautiously suggest that the margins of the field of global administration be extended to the activities of some of these non-governmental bodies.'
- <sup>8</sup> Notable exceptions are Azis, 'Global Public-Private Partnerships in International Law', 2 *Asian Journal of International Law* (2012) 9; Meidinger, 'The Administrative Law of Global Private-Public Regulation: The Case of Forestry', 17 *European Journal of International Law (EJIL)* (2006) 47; see also contributions in 'Hybrid Public-Private Organizations and Private Bodies Exercising Public Functions', in S. Cassese et al. (eds), *The GAL Casebook* (3rd edn, 2012), available at <http://irpa-c02.kxcdn.com/wp-content/uploads/2012/10/Contents.pdf>.
- <sup>9</sup> E.g., K.W. Abbott et al. (eds), *International Organizations as Orchestrators* (2015); Wood et al., 'The Interactive Dynamics of Transnational Business Governance: A Challenge for Transnational Legal Theory', 6 *Transnational Legal Theory (TLT)* (2015) 333; de Búrca, Keohane and Sabel, 'Experimentalist Governance', 44 *British Journal of Political Science (BJPS)* (2014) 477; Eberlein et al., 'Transnational Business Governance Interactions: Conceptualization and Framework for Analysis', 8 *Regulation and Governance* (2014) 1.
- <sup>10</sup> Abbott et al., *supra* note 9; Abbott, Levi-Faur and Snidal (eds), 'Regulatory Intermediaries in the Age of Governance (Special Issue)', 670 *Annals of the American Academy of Political and Social Science* (2017) 14.

conditions of great complexity',<sup>11</sup> but also pay significant attention to the structures and methods by which this can be achieved.<sup>12</sup> Translating debates on regulatory interaction into international law is a highly complex task, and not all facets can be addressed in one article. Therefore, this article will focus on two central aspects.

First, the argument is put forward that as successful regulation depends predominantly on a regulator's ability to exercise authority over its targeted communities and since regulators, in the fragmented, pluralistic context characterizing the international sphere, possess incomplete authority,<sup>13</sup> individual actors need to cooperate to stabilize authority, to achieve compliance with their regulatory agendas and, consequently, to succeed as regulators. Cooperation is thereby mainly used as a venue to exchange resources necessary in the regulatory process such as power, legitimacy or expertise. Thus, cooperation allows organizations to access resources relevant for the specific regulatory challenges. In particular, it allows them to shape and foster support by the relevant communities.

Second, as a consequence, a more pronounced consideration of public and private interactions within the international legal framework is warranted. This article aims to integrate recent interdisciplinary debates on regulatory interactions into international law scholarship by proposing an enhanced focus on forms of regulatory cooperation between traditional international public entities (international organizations) and private actors (business and civil society). Conceptually incorporating regulatory cooperation will necessitate an expansion of GAL, in particular, as well as international organization law scholarship. Such an expansion should emphasize the potential of normative stabilization between different types of transnational regimes, putting the impact that different actors have on each other, and the ways in which public interests can be safeguarded, at the centre. This approach will also open space for future research that (critically) analyses existing frameworks for such cooperation.

The article will first set the scene by providing background information regarding transnational regulation and the distribution of authority among different types of regulators in an international context as well as an overview over the case study – the sport and environment program of the Olympic Movement. The third section will then explain in detail the regulatory resource exchange using examples from the sports and environment field. The fourth section will address the second argument raised above and proposes cooperation to frame regulatory interactions in an international law context.

## 2 Setting the Scene

### *A Authority, Regulatory Cooperation and International Law*

Two broader developments must be addressed to provide a background for an understanding of regulatory cooperation: on the one hand, the transnationalization of law and governance and, on the other, the deregulation, or new or better regulation,

<sup>11</sup> M. Moran, 'Review Article: Understanding the Regulatory State', 32 *BJPS* (2002) 391, at 398, referring to I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

<sup>12</sup> Moran, *supra* note 11.

<sup>13</sup> N. Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (2013), at 136.

movements that developed during the 1980s and 1990s, particularly in the British and American contexts. The term ‘transnational law’ was first coined by Philip C. Jessup, who endeavoured to expand the borders of traditional international law by opening it up to actors other than states, such as international organizations and corporations.<sup>14</sup> Since his Storrs lecture, the field has become ‘a series of contemplations about the form of legal regulation with regard to border-crossing transactions and fact patterns transgressing jurisdictional boundaries that involve a mixture of public and private norms’.<sup>15</sup> At the national level, after a period of deregulation, ‘better regulation’ became dominant on the political agenda within the United Kingdom and the European Union (EU) in the 1990s. This led to the introduction of new governance models into nation states’ administrations. Private actors (especially business actors) were increasingly required to engage in (self-)regulation, and public administrations started experimenting with private law tools (such as administrative contracts and public private partnerships).<sup>16</sup>

In this context, regulation moved increasingly beyond the national realm and is now frequently carried out at the supra-national or transnational level. As a result, international and national governance activities have merged, transforming national regulatory and traditional international relations structures. Authority once considered to be clearly located within the nation-state now extends transnationally and spreads over a plurality of actors within and across issue areas: international organizations, networks of regulators and national government entities exercise regulatory activities with global, regional or cross-border effects.<sup>17</sup> At the same time, the demand for ‘private regulation’ has been rising. As a result, both commercial entities and civil society actors produce regulatory schemes that often have third party effects.<sup>18</sup> Here, one can point to the many certification schemes that have been developed over the last two decades, such as the Forest Stewardship Council, a civil society driven organization that provides for certification in the forestry sector;<sup>19</sup> GlobalGAP, an industry-driven

<sup>14</sup> Jessup, *supra* note 6.

<sup>15</sup> See Zumbansen, ‘Evolving Transnational Law’, in J.M. Smits, *Elgar Encyclopedia of Comparative Law* (2nd edn, 2012) 898, at 898.

<sup>16</sup> Baldwin, Cave and Lodge, ‘Introduction: Regulation – The Field and the Developing Agenda’, in R. Baldwin, M. Cave and M. Lodge (eds), *Oxford Handbook of Regulation* (2010) 3, who state that there was a ‘a long-standing interest in introducing “rational planning” tools into regulatory policy-making and thereby limiting the scope for bureaucratic and political knee-jerk regulation. One key example of such rationalist tendencies in the practice of regulation has been the spread of “regulatory impact assessments” and “cost-benefit analysis”’ (at 8). See furthermore Ayres and Braithewaite, *supra* note 11. Yet, for a more nuanced account, see M. Moran, *The British Regulatory State: High Modernism and Hyper-Innovation* (2003), who also outlines developments away from self-regulation (at 67ff); see furthermore G.-P. Callies and P. Zumbansen, *Rough Consensus Running Code* (2010), at 105.

<sup>17</sup> See, e.g., Kingsbury, Krisch and Stewart, *supra* note 7, at 20. A.-M. Slaughter, *A New World Order* (2005); Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’, 107 *American Journal of International Law (AJIL)* (2013) 295.

<sup>18</sup> Hall and Biersteker, ‘The Emergence of Private Authority in the International System’, in R.B. Hall and T.J. Biersteker (eds), *The Emergence of Private Authority in Global Governance* (2002) 3; Cafaggi, ‘New Foundations of Transnational Private Regulation’, 38 *Journal of Law and Society* (2011) 20.

<sup>19</sup> Information available at <https://us.fsc.org/>. See furthermore Meidinger, *supra* note 8.

organization providing food safety certifications,<sup>20</sup> or, even more prominently, technical standard setters such as the ISO, which has a long-standing connection with the world trade system.<sup>21</sup> Founded in the 19th century, the Olympic Movement is the dinosaur in this context. Yet, its regulatory agenda and its social and economic impact has significantly changed over the last decades.<sup>22</sup> What all these institutions have in common today, despite their different histories, structures and goals, is that they are established transnational actors that are directly and indirectly involved in global legal and political processes.

Given the plurality of transnationally operating actors, ‘public, private and (increasingly) hybrid organizations often share regulatory authority’.<sup>23</sup> Nonetheless, the debate regarding authority in political and legal theory has long been dominated by a rather fierce public–private divide, usually based on a formal distinction. Liberalism, for instance, is built on a dichotomy whereby the private is said to represent the individual, free markets and economic exchange and the public side is said to consist of ‘state authority and legitimate compulsion’.<sup>24</sup> Yet the private sphere is often far from being ‘a consensual realm of civic and economic freedoms, ... distinct from the political and (at least ultimately) coercive realm of the state’.<sup>25</sup> In particular, in a globalized context, boundaries between the public and private are constantly shifting. As was indicated in the previous paragraph, states for some time have been pursuing political programmes that transfer powers to private actors as much as they have been transferred to international organizations. Changes in communication methods and market structures have led to the explosion of new forms of private interaction and increased power of non-state entities in the international political economy.<sup>26</sup> Today, ‘global private rule-making is an important complement to, or even substitute for, formal legal collaboration through

<sup>20</sup> More information available at [www.globalgap.org/uk\\_en/](http://www.globalgap.org/uk_en/).

<sup>21</sup> WTO Agreement on Technical Barriers to Trade (TBT Agreement) 1979, 1186 UNTS 2, Arts 2, 5; Annex 3 of the TBT Agreement – the Code of Good Practice for the Preparation, Adoption and Application of Standards; International Organization of Standardization (ISO) / International Electrotechnical Commission (IEC), Using and Referencing ISO and IEC Standards to Support Public Policy, available at [www.iso.org/sites/policy/documents/Using%20and%20referencing%20ISO%20and%20IEC%20standards%20to%20support%20public%20policy%20-%20EN.pdf](http://www.iso.org/sites/policy/documents/Using%20and%20referencing%20ISO%20and%20IEC%20standards%20to%20support%20public%20policy%20-%20EN.pdf).

<sup>22</sup> See section 2.B below.

<sup>23</sup> Mattli and Woods, ‘In Whose Benefit? Explaining Regulatory Change in Global Politics’, in W. Mattli and N. Woods (eds), *The Politics of Global Regulation* (2009) 1; Baldwin, Cave and Lodge, *supra* note 16, at 9; referring to Black, ‘Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory” World’, 54 *Current Legal Problems* (2001) 103; Hancher and Moran, ‘Organising Regulatory Space’, in L. Hancher and M. Moran (eds), *Capitalism, Culture and Economic Regulation* (1989) 1.

<sup>24</sup> C. Cutler, *Private Authority and Global Authority: Transnational Merchant Law in the Global Political Economy* (2003), at 66ff.

<sup>25</sup> *Ibid.*, at 68; see furthermore Hall and Biersteker, *supra* note 18, at 5.

<sup>26</sup> See Hall and Biersteker, *supra* note 18, at 6, referring to Strange, ‘Territory, State, Authority, and Economy: A New Realist Ontology of Global Political Economy’, in R.W. Cox (ed.), *The New Realisms: Perspectives on Multilateralism and World Trade Order* (1997) 9; I. Hurd, ‘Legitimacy and Authority in International Politics’, 53 *International Organization* (1999) 381.

international treaties among governments'.<sup>27</sup> A consequence of this, apart from a pluralization of legal regimes and a fragmentation of a perceived international legal order, is the proliferation of interactions between more traditional international institutions (that is, states or international organizations) and private or semi-private actors.<sup>28</sup>

This development warrants more detailed explanations on a political-theoretical level. As transnational regulation is exercised by a multitude of different actors, 'regulatory authority is [also] distributed across a wide variety' of actors and regimes.<sup>29</sup> There are no clear relationships of authority from the outset – no overarching framework and no universal global hierarchy. Yet, within different issue areas, a distinction can be found between centralized and decentralized structures. The former are characterized by internal fragmentation, the latter by internal hierarchy and integration.<sup>30</sup> A decentralized scenario consists of a multitude of public or private standard setters that are engaged in an area and have developed instruments fully or partly independent (non-integrated or disjunctive)<sup>31</sup> of each other. These different actors and instruments may be subject to a competitive 'selection process through which one set of rules achieves market dominance and thus becomes the single global standard'.<sup>32</sup> In the centralized scenario, 'a single institution is internationally recognized as the predominant forum for writing rules in the issue area; any particular standard that it develops becomes the global standard not through market selection but by virtue of having been promulgated by this focal institution'.<sup>33</sup>

How do these structures impact the authority of transnational regulators and lead to cooperation? The need for cooperation in a decentralized context is more self-explanatory. Any actor engaging in transnational rule making does not, *prima facie*, possess the necessary authority. As Tim Bütthe and Walter Mattli state, whether a certain set of rules will prevail depends on market selection or, put differently, on the uptake by the targeted addressees. This again is determined by the actor's ability

<sup>27</sup> T. Bütthe and W. Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (2011), at 16.

<sup>28</sup> See, e.g., Eberlein *et al.*, *supra* note 9; Abbott *et al.*, *supra* note 9. Interactions are a commonly adopted tool of international organizations. Abbott *et al.*'s edited volume, which provides several examples for orchestration. A conclusive list encompassing all forms of international public private interactions would go beyond the scope of this article. Commonly mentioned examples are, e.g., climate governance (see, e.g., Pattberg, 'Public-Private Partnerships in Global Climate Governance', 1 *Climate Change* (2010) 279) or the ISO 26000 on the standard-setting process, which involved the OECD, the International Labour Organization (ILO) and the UN Global Compact.

<sup>29</sup> Abbott and Snidal, 'Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit', 42 *Vanderbilt Journal of Transnational Law* (2009) 501, at 547.

<sup>30</sup> Bütthe and Mattli, *supra* note 27, at 18ff, introduce this distinction to conceptualize rule making in global markets. A similar distinction is the one of Abbott and Snidal, *supra* note 29, at 501, who talk of centralized and decentralized governance. They, however, ascribe centralized governance to 'old' state-based governance, in contrast to 'new' transnational decentralized governance. The description is fairly accurate when, as done by Abbott and Snidal, describing the transnational realm generally. Yet, in different issue areas, strong centralization can be found.

<sup>31</sup> Cf. Roughan, *supra* note 13, at 47ff.

<sup>32</sup> Bütthe and Mattli, *supra* note 27, at 18ff.

<sup>33</sup> *Ibid.*

to build and maintain a bigger market share, which necessitates ‘a mix of political and commercial strategies’.<sup>34</sup> Regulators in this context provide regulatory options, which their addressees can opt for or not. Thus, regulators need to take measures to increase their market share and to make sound strategic decisions.

Yet, as will be shown shortly, cooperation can become necessary even for those who hold regulatory monopolies. In a centralized scenario, regulators dominate the issue area. However, this does not mean that they possess automatic, unlimited and unquestioned authority. Problems can arise, for instance, when regulation leads to distributional inequalities among addressees. Conflict can also emerge if addressees and beneficiaries feel that the regulator is no longer adequately addressing the crucial concerns in the issue area. Furthermore, struggles may arise within an organization between different stakeholder groups.<sup>35</sup> Lastly, regulators can be active in a hierarchical and a fragmented area at the same time. As such, their authority may be integrated regarding one part of their regulatory activities and disjointed regarding another.<sup>36</sup>

This section has covered a wide field starting from the emergence and proliferation of private transnationally operating actors to their involvement in global rule setting and, consequently, their interaction and cooperation with traditional public actors. The next section will depict this development using the example of the Olympic Movement.

## **B *Introducing the Sport and Environment Programme***

The focus of this study is on the cooperation between the Olympic Movement’s main governing organ, the IOC and UNEP. Regulatory cooperation between the Olympic Movement and UNEP can be traced back to the early 1990s when the IOC began to identify the relationship between environmental concerns and the Olympic Games. Two incidents triggered this action. First, there was the United Nations Conference on Environment and Development in Rio in 1992, which encouraged various organizations (public and private) to recognize the importance of environmental concerns and the necessity of global partnerships for sustainable development.<sup>37</sup> In response, International Sports Federations and National Olympic Committees (NOCs) signed the so-called Earth Pledge, the first environmental commitment of the Olympic Movement.<sup>38</sup> Second, there was the criticism the Olympic Movement faced at the time regarding its own environmental impact. The 1992 Winter Games in Albertville were considered by many an ‘environmental disaster’ and led to widespread and

<sup>34</sup> *Ibid.*, at 37.

<sup>35</sup> *Ibid.*, at 35.

<sup>36</sup> Roughan, *supra* note 13, at 47ff.

<sup>37</sup> See IOC, *Sustainability through Sport, Implementing the Olympic Movement’s Agenda 21* (2012), at 9, available at [https://stillmed.olympic.org/Documents/Commissions\\_PDFfiles/SportAndEnvironment/Sustainability\\_Through\\_Sport.pdf](https://stillmed.olympic.org/Documents/Commissions_PDFfiles/SportAndEnvironment/Sustainability_Through_Sport.pdf).

<sup>38</sup> *Ibid.* Earth Pledge, reprinted in IOC, *Sustainability through Sport, Implementing the Olympic Movement’s Agenda 21* (2012), at 9.



well-covered protests by environmentalist groups.<sup>39</sup> One of the main points of critique was that the IOC had no environmental policy in place.<sup>40</sup> The following Winter Games in Lillehammer in 1994 constituted the turning point. Unlike Albertville, Lillehammer put special emphasis on environmental protection and included environmental standards in the planning and execution of the Games. In the aftermath of the Games, the Centennial Olympic Congress, held in Paris in 1994, recognized the ‘importance of environment and sustainable development’.<sup>41</sup> This was followed by the inclusion of an additional paragraph in Rule 2 of the Olympic Charter<sup>42</sup> and the recognition of the environment as the third pillar of the Olympic Movement, alongside sport and culture.<sup>43</sup> The agreement between UNEP and the IOC was reached in the same context; it foresaw the promotion of environmental protection in and through sports.<sup>44</sup> In the aftermath, the IOC engaged in a great number of activities and launched several programmes related to the environment. Prominent examples are the creation of the Sport and Environment Commission (now named the Sustainability and Legacy Commission), the draft of the Olympic Movement’s Agenda 21 (or the World Conferences on Sport and the Environment), the Agenda 2020 and a more recent, comprehensive engagement with the United Nations (UN) generally.<sup>45</sup>

The Olympic Games are the key deliverable of the Olympic Movement and are also the most visible event that carries significant potential for problematic environmental effects. Civil society, the media and environmental activists all specifically focus on the Games and their sustainability and environmental impact.<sup>46</sup> Thus, at the local level, several actor groups meet. Moreover, different regulatory levels (municipal, regional and national) intersect. The IOC’s transnational rules need to function in this context. Although the IOC does have a powerful position and host city obligations go as far as

<sup>39</sup> See Cantelon and Letters, ‘The Making of the IOC Environmental Policy as the Third Dimension of the Olympic Movement’, 35 *International Review for the Sociology of Sport* (2000) 294, at 299ff.

<sup>40</sup> *Ibid.*

<sup>41</sup> See Sustainability and Legacy Commission, Advocacy, available at [www.olympic.org/sustainability-and-legacy-commission?tab=advocacy](http://www.olympic.org/sustainability-and-legacy-commission?tab=advocacy).

<sup>42</sup> Olympic Charter, 2004, Rule 2, para. 13, available at [www.olympic.org/Documents/olympic\\_charter\\_en.pdf](http://www.olympic.org/Documents/olympic_charter_en.pdf), lists as a mission of the IOC ‘to encourage and support a responsible concern for environmental issues, to promote sustainable development in sport and to require that the Olympic Games are held accordingly’.

<sup>43</sup> See Sustainability and Legacy Commission, *supra* note 41.

<sup>44</sup> Cooperation Agreement between the International Olympic Committee and the United Nations Environment Programme, February 1994 (on file with the author but not publicly available). For more information, see United Nations Environment Programme (UNEP), About UNEP, Sport and the Environment, available at [http://staging.unep.org/sport\\_env/about.aspx](http://staging.unep.org/sport_env/about.aspx).

<sup>45</sup> For a summary of the different environment-related activities, see IOC, Factsheet – The Environment and Sustainable Development, available at [www.olympic.org/Documents/Reference\\_documents/Factsheets/Environment\\_and\\_sustainable\\_development.pdf](http://www.olympic.org/Documents/Reference_documents/Factsheets/Environment_and_sustainable_development.pdf); furthermore IOC, Olympic Agenda 2020: 20 + 20 Recommendations, available at [www.olympic.org/Documents/Olympic\\_Agenda\\_2020/Olympic\\_Agenda\\_2020-20-20\\_Recommendations-ENG.pdf](http://www.olympic.org/Documents/Olympic_Agenda_2020/Olympic_Agenda_2020-20-20_Recommendations-ENG.pdf); IOC, Cooperation with the UN, available at [www.olympic.org/cooperation-with-the-un](http://www.olympic.org/cooperation-with-the-un).

<sup>46</sup> For further information, see scholarship on mega events and their interrelations with civil society. E.g., Renou, ‘Resisting the Torch’, in G. Hayes and J. Karamichas, *Olympic Games, Mega-Events and Civil Societies* (2012) 236ff.; Hayes and Karamichas, ‘Introduction: Sport Mega-Events, Sustainable Development and

requiring changes in local laws to accommodate specific interests of the movement,<sup>47</sup> drawing the conclusion that the IOC can impose and enforce rules as it wishes underestimates the complexities of accommodating a plurality of actors in this context.

Furthermore, it insufficiently recognizes the very different starting points of host cities regarding environmental expertise and regulation and the interests and power of local stakeholders and governments in relation to the IOC.<sup>48</sup> Host cities with high administrative expertise and comprehensive environmental regulation in place are able to integrate technical regulatory requirements and can ensure participation by relevant actors.<sup>49</sup> In cases where local expertise is less developed, cooperation with an experienced organization such as UNEP is often needed to improve both technical implementation as well as the harmonization of aspirations and interests (government, business and local or transnational civil society groups) in the regulatory processes.<sup>50</sup> For this reason, one can find comprehensive agreements between the organizing committees and UNEP in the context of some Olympic Games. These agreements stipulated in detail which different contractual services were to be provided. UNEP was tasked with delivering several items within a specific time frame, such as conducting an environmental assessment. In return, the organizing committees usually had to fulfil several obligations to UNEP, such as provide the necessary information for the assessments.<sup>51</sup> To integrate the very different types of stakeholders in the preparatory process, UNEP involved other specialized non-governmental organizations (NGOs).<sup>52</sup> As mentioned, the scope of each agreement varied from city to city. In the London Olympics, for instance, UNEP's involvement was less pronounced since the

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Civil Societies', in Hayes and Karamichas, *Olympic Games, ibid.*, 1, at 14ff. See furthermore Dansero *et al.*, 'Olympic Games, Conflicts and Social Movements: The Case of Torino 2006', in Hayes and Karamichas, *Olympic Games, ibid.*, 195; Whitson, 'Vancouver 2010: The Saga of Eagleridge Bluffs', in Hayes and Karamichas, *Olympic Games, ibid.*, 219.

<sup>47</sup> See, e.g., London Olympic Games and Paralympic Games Act 2006, c. 12, available at [www.legislation.gov.uk/ukpga/2006/12/section/19](http://www.legislation.gov.uk/ukpga/2006/12/section/19).

<sup>48</sup> For a depiction on the local situation regarding the 2016 Rio Olympic Games, see J. Watts, 'Rio 2016: "The Olympics Has Destroyed My Home"', *The Guardian* (19 July 2015).

<sup>49</sup> Regarding the first example of the Lillehammer Games, see Olympic Movement, *Olympic Games Legacy: Lillehammer 1994 Set the Stage for Sustainable Games Legacies* (2014), available at [www.olympic.org/news/lillehammer-1994-set-the-stage-for-sustainable-games-legacies/219117](http://www.olympic.org/news/lillehammer-1994-set-the-stage-for-sustainable-games-legacies/219117); Myrholm, 'Greening the Olympics', 8 *Our Planet* (August 1996), available at [www.ourplanet.com/imgversn/82/myrholt.html](http://www.ourplanet.com/imgversn/82/myrholt.html); with regard to the London Olympics, see, e.g., UNEP News Center, *London 2012 Will Leave a Lasting Legacy for the UK and the Olympic Movement: UNEP Executive Director* (2005), available at [www.un.org/sport/node/203160](http://www.un.org/sport/node/203160).

<sup>50</sup> See UNEP, *Independent Environmental Assessment, Beijing 2008 Olympic Games* (2009), available at [http://wedocs.unep.org/bitstream/handle/20.500.11822/7882/BEIJING\\_REPORT\\_COMPLETE.pdf?sequence=3&isAllowed=y](http://wedocs.unep.org/bitstream/handle/20.500.11822/7882/BEIJING_REPORT_COMPLETE.pdf?sequence=3&isAllowed=y); UNEP, *Beijing 2008 Olympic Games: An Environmental Review* (2007), at 26. See furthermore regarding the Sochi Olympics, the Memorandum of Understanding between the Sochi 2014 Organizing Committee and UNEP (Sochi 2014 MOU), 5 June 2009 (on file with the author).

<sup>51</sup> See, e.g., the Sochi 2014 MOU, *supra* note 50.

<sup>52</sup> See, e.g., UNEP, *Beijing 2008 Olympic Games*, *supra* note 50; UNEP, *Independent Environmental Assessment*, *supra* note 50; this approach was less successful in the case of the Sochi Olympics. See A.

city of London was equipped with extensive environmental expertise and execution abilities. In contrast, the Olympics in Sochi in 2014 and in Beijing in 2012 had more involvement.<sup>53</sup>

### 3 Regulatory Resources Exchange between the Olympic Movement and UNEP – Power, Legitimacy and Expertise

In this section, the central argument – namely, that what makes actors cooperate in a transnational environment is their need to overcome authority deficits and to manage and strengthen authority *vis-à-vis* their subjects, is expanded upon. Cooperation operates as a way to exchange regulatory resources. Starting from the sports and environment case, this section will point to several ways in which resource exchange takes place. Three resources will be at the centre of the analysis: power, legitimacy and expertise.

#### *A Power in Complex Multi-Level Regulatory Structures*

To apprehend how authority functions in a transnational context understanding its relationship with power is crucial. Max Weber draws a distinction between power and authority by introducing a voluntary element to the latter. Thus, when referring to authority (or domination, as he calls it), he states that ‘every genuine form of domination implies a minimum of voluntary compliance – that is, an interest (based on ulterior motives or genuine acceptance) in obedience’.<sup>54</sup> According to this definition, there is, at least initially, a voluntary element inherent in authority (a ‘pro attitude toward the agent on part of the subject’<sup>55</sup>), which does not work solely through power, narrowly defined ‘as direct coercion by means of force’.<sup>56</sup> However, it shall be emphasized here that this element must not be confused with genuine consent to the concrete command. Rather, ‘authority always demands obedience’ and is thus ‘incompatible with persuasion, which presupposes equality and works through a process of argumentation’.<sup>57</sup> Authority takes place within a hierarchical framework and cannot be based on egalitarian grounds. Practical authority must therefore be seen as a particular form of exercising power.<sup>58</sup> Consequently, we

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Duval, The Environmental Legacy of Sochi: Time to Take the Olympic Charter Seriously!, available at [www.asser.nl/eel/dossiers/sochi-environmental-legacy/](http://www.asser.nl/eel/dossiers/sochi-environmental-legacy/); World Wildlife Fund (WWF), Mistakes of Sochi 2014, available at [www.wwf.ru/about/positions/sochi2014/eng](http://www.wwf.ru/about/positions/sochi2014/eng).

<sup>53</sup> See, e.g., Sochi 2014 MOU, *supra* note 50.

<sup>54</sup> M. Weber, *Economy and Society: An Outline of Interpretive Sociology* (1978), at 214.

<sup>55</sup> Christiano, ‘Authority’, in *Stanford Encyclopedia of Philosophy* (rev. edn, 2012), at 3, available at <http://plato.stanford.edu/entries/authority/>.

<sup>56</sup> Venzke, ‘Between Power and Persuasion: On International Institutions’ Authority in Making Law’, 4 *TLT* (2013) 354, at 358.

<sup>57</sup> H. Arendt, *Between Past and Future* (1977), at 93.

<sup>58</sup> Claire Cutler therefore states that, [as Lincoln notes,] “force is always implicit in authority” It is implicit in the asymmetry in power relations between the “ruler and ruled, officer and private, teacher and

must adopt a broader understanding of power, one that is not only understood as passing ‘through the barrel of the gun’ but also ‘through institutions and broader social relationships’.<sup>59</sup> The taxonomy adopted here will allow for an understanding of the varieties of power in a transnational context.<sup>60</sup> Within this framework, variables can be distinguished, such as whether power is ‘expressed’ in interactions or constitutions or whether it is exercised directly or indirectly.<sup>61</sup> Thus, apart from direct compulsory power, often named are also institutional, structural and productive power.<sup>62</sup> This section will rely predominantly on an institutional conception of power, focusing on international organizations and private associations. Institutional power presupposes ‘power-conferring norms’ (that grant or constitute this power) that ‘are essentially institutional’ in that they ‘form part of some social practice or institution’.<sup>63</sup> Yet, as will be shown below, such a conception can be enriched by the other understandings, particularly with regard to ‘epistemic power’ as well as with regard to the complex interactions of different individual groups in the regulatory processes.

Cooperation is important as it creates linkages through which power can be exercised. Thus, depending on the architecture of the issue area, regulators may have a monopoly (in the case of a centralized issue area) or they may have to compete (or at least arrange themselves) with other regulators in a fragmented context. In the first case, the monopolist most likely possesses a high degree of normative power, as those who are regulated have little choice (if any at all) apart from a potential ‘take-it-or-leave-it’ option. One possibility, which regulatory cooperation could thus open, is to link less powerful regulators from weaker and fragmented areas with strong monopolists. This is also one explanation when trying to understand why UNEP engaged in the regulatory relationship; given the Programme’s rather weak position as an environmental anchor organization.<sup>64</sup> One of its major weaknesses apart from budgetary problems has been its governance structure.<sup>65</sup> Until recently, membership in UNEP resulted from an election within the UN General Assembly. The Governing Council of UNEP had been composed of 58 member states that each had a four-year mandate;

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student, parent and child” Liberalism obscures this asymmetry by posting a consent-based social unity which tends to equalize relations between members of society’. Cutler, *supra* note 24, at 68. Cutler refers in this quote to B. Lincoln, *Authority: Construction and Corrosion* (1991), at 6.

<sup>59</sup> Venzke, *supra* note 56, at 357, 358.

<sup>60</sup> See Barnett and Duvall, ‘Power in Global Governance’, in M. Barnett and R. Duval (eds), *Power in Global Governance* (2005) 1, at 8ff.

<sup>61</sup> *Ibid.*, specifically at 9, 11.

<sup>62</sup> *Ibid.*, at 12.

<sup>63</sup> Marmor, ‘An Institutional Conception of Authority’, 39 *Philosophy and Public Affairs* (2011) 238, at 240, 241.

<sup>64</sup> Ivanova, ‘UNEP as Anchor Organization for the Global Environment’, in F. Biermann, B. Siebenhüner and A. Schreyögg (eds), *International Organizations in Global Environmental Governance* (2009) 151, at 152.

<sup>65</sup> *Ibid.*, at 161ff.

however, this has now been changed to universal membership.<sup>66</sup> In addition, UNEP has always struggled from the conclusion of numerous other environmental treaties, all of which come with treaty organs that have 'autonomous influence' that is sometimes stronger than that of UNEP. Similarly, within the UN family and *vis-à-vis* other international organizations, UNEP was not able to emerge as the central institution for environmental issues.<sup>67</sup> Rather, environmental regulation remains fragmented, and UNEP's activities have dispersed. Many organizations are not willing to give up important features of their governance activities just because they relate to the environment and UNEP lacks not only the capacity but also the 'institutional vision' to take a more prominent role.<sup>68</sup> UNEP has therefore tended to rely on cooperation with existing organizations, both public and private.

In contrast, as outlined in the introduction, the IOC is a powerful actor with a broad reach. It has the 'supreme authority and leadership' over the Olympic Movement.<sup>69</sup> The IOC's strong influence, however, is not only with members of the sport community but is also exercised *vis-à-vis* public actors like host cities. In the context of the Olympic Games, the IOC negotiates the host city agreement, setting the terms of the Games with municipalities and other state actors, often taking a strong position.<sup>70</sup> UNEP does benefit from this reach. However, the way it engaged in individual games reflects the complexity of power relations in multi-actor and multi-level interactions and goes beyond purely 'inner-institutional' relations.

As mentioned, UNEP has been very actively involved in some cases at the host city level, where it usually facilitated the implementation of environmental commitments that the host city had made in its contract with the IOC. In the case of Beijing, these commitments covered the areas of air and water quality, transport, energy, ecosystems and protected areas.<sup>71</sup> The measures taken in the individual areas were manifold,

<sup>66</sup> Within the general transformation process taking place at the organization at the moment, at its 27th session held in Nairobi on 18–20 February 2013, the Governing Council adopted a resolution on paragraph 88 of the Rio + outcome document, which opens UNEP for universal membership and thus replaces the Council with the Environmental Assembly. See GA Res. 66/288, 11 September 2012, as well as the Annex to GA Res. 66/288; and GA Res. 67/213, 21 December 2012, para. 4. See Annex to GA Res. 66/288, where it is stated: 'In this regard, we invite the Assembly, at its sixty-seventh session, to adopt a resolution strengthening and upgrading the United Nations Environment Programme in the following manner: (a) Establish universal membership in the Governing Council of the United Nations Environment Programme, as well as other measures to strengthen its governance as well as its responsiveness and accountability to Member States.'

<sup>67</sup> Ivanova, *supra* note 64, at 158.

<sup>68</sup> *Ibid.*

<sup>69</sup> Olympic Charter, *supra* note 42, Rule 1.1.

<sup>70</sup> This reflects the situation described in the quote of the introduction, which states: 'Mega events', such as the Olympic Games, are 'negotiated between public and private non-state actors, such as FIFA, UEEA and the IOC, and their national emanations. ... these latter international organizations are "sovereignty-free actors" who engage in contractual relationships with other sovereignty-free actors and with "sovereignty-bound" state actors. Their increased political saliency reflects the diffusion of political and economic authority in the multi-centric post-Cold War context.' Hayes and Karamichas, 'Introduction', *supra* note 46, at 5.

<sup>71</sup> See UNEP, Independent Environmental Assessment, *supra* note 50, at 13, 14ff.

ranging from raising public awareness for environmental concerns to concrete infrastructure construction, the promotion of environmentally friendly industries and detailed pollution reduction efforts.<sup>72</sup> Thus, through its cooperation with the IOC, UNEP was able to affect environmental concerns in the sports community and also in the context of some Olympic Games at the national and local level.

Thus, we can see that power dynamics including third party actors played a role in the IOC–UNEP cooperation. Due to their wide reach, mega events such as the Olympics receive a lot of attention. Therefore, the impact of the Games on the environment, civil (participatory) rights or on the use of economic resources and restriction of access to economic benefits (such as the prohibition of the sale of non-licensed products in and around the sports venues) comes under close public scrutiny.<sup>73</sup> Furthermore, mega events are often used as a platform to spread messages to a wider audience – for instance, by dissident groups in the host country or interest groups that challenge host country policies, such as the ‘free Tibet’ protests in advance of the Beijing Olympics.<sup>74</sup> As outlined above, civil society groups were strongly involved in the initial campaigns criticizing the Olympic Movement’s environmental policy, which led to the launch of the sports and environment programme.<sup>75</sup> Before the Albertville Olympic Games, failures to sufficiently protect the environment would have been considered a problem of the local organizers; however, with increased global awareness of environmental destruction, ‘the local led directly to the global’.<sup>76</sup> In this context, environmental groups actually applied a very direct form of compulsory power, by using ‘rhetorical and symbolic tools, and shaming tactics, to get [the Olympic Movement] to comply with the values and norms that they advance’.<sup>77</sup> Later, some of these groups were at least loosely included within the institutional framework of the Movement. Thus, NGOs such as Greenpeace and the World Wildlife Fund (WWF) were involved in implementing environmental rules on the host-city level by taking part in preparations and participating in UNEP’s impact assessment report.<sup>78</sup> Yet such integration is fragile, as was UNEP’s more general ability to benefit from the Movement’s unique position as a powerful monopolist in the sports realm. First, the impacts of UNEP on the organizers and the organizing countries of the Olympic Games have been mixed. While many Games since the 1990s have been considered fairly successful in terms of their environmental impact, the Winter Games in Sochi came under fierce criticism.<sup>79</sup> Already at an early stage, UNEP pointed to a number of environmental issues that emerged

<sup>72</sup> See UNEP, Beijing 2008 Olympic Games, *supra* note 50, at 26ff, which also provides a detailed overview over the different projects into which the money was allocated.

<sup>73</sup> See Hayes and Karamichas, ‘Introduction’, *supra* note 46, at 14ff. See furthermore Dansero *et al.*, *supra* note 46; Whitson, *supra* note 46.

<sup>74</sup> See Renou, *supra* note 46.

<sup>75</sup> See section 2.B above.

<sup>76</sup> Cantelon and Letters, *supra* note 39, at 302.

<sup>77</sup> Barnett and Duvall, *supra* note 60, at 15; referring to M.E. Keck and K. Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (1998).

<sup>78</sup> UNEP, Beijing 2008 Olympic Games, *supra* note 50, at 145–158.

<sup>79</sup> Cf. WWF, *supra* note 52.

in the preparations of the Sochi Games in 2014 as well as to problems regarding the interaction between the local organizers and other third party stakeholders such as NGOs that were involved.<sup>80</sup> However, problems persisted, and the NGOs, unlike in previous events, withdrew their support and involvement in the preparations.<sup>81</sup> The IOC did not seem to be able to turn this development around.

One reason for this shortcoming is that once a host city has been elected and preparation has started, it is difficult to withdraw from the Olympic Games. Especially at a later stage, finding an alternative location for such a mega event is close to impossible. At the same time, lucrative sponsorship contracts depend on the execution and the success of the Games. All of this leads to a sunk-cost dynamic that significantly lowers both the ability and will to enforce ultimate sanctions in the case of host city contract violations.<sup>82</sup> Thus, as much as cooperation can enable weaker regulators to benefit from the powerful position of monopolists in certain regulatory areas, such benefits are also limited by the actual abilities and the will of the latter to properly implement and enforce the cooperative agenda.

## B A Return to Traditional Forms of Legitimization?

Cooperation between public and private organizations can also provide a venue to 'outweigh' specific legitimacy deficits.<sup>83</sup> Given the complexity of legitimacy claims in the transnational realm, actors often orient themselves towards more traditional venues of justification. Thus, public organizations are favoured partners for cooperation as their public nature gives the impression of standing for both procedural and substantive legitimacy.<sup>84</sup> Such a tendency, as will be outlined below, could also be observed in this case study where the IOC, particularly in the beginning of its sports and environment programme, strongly favoured cooperation with UNEP – the central environmental organization at the time.

The following sections will elaborate this argument further using a framework, according to which legitimacy depends on the recognition of those it seeks to regulate. Thus, the approach taken here will not be a normative one that tries to determine what requirements an authority should meet to be legitimate.<sup>85</sup> Rather,

<sup>80</sup> UNEP, Sochi 2014: Report of the UNEP 2nd Expert Mission, 28–30 January 2010.

<sup>81</sup> See, e.g., Duval, *supra* note 52; WWF, *supra* note 52.

<sup>82</sup> For a critical assessment regarding the IOC's enforcement of environmental host city contract stipulations in the case of Sochi, see Duval, *supra* note 52.

<sup>83</sup> See Peters, Förster and Koechlin, 'Towards Non-State Actors as Effective, Legitimate, and Accountable Standard Setters', in Peters *et al.* *supra* note 6, 492, at 523.

<sup>84</sup> There is a significant number of already existing forms of cooperation between private actors and public organizations. Examples include the ISO 26000 on social responsibility, which involved a number of public international organizations such as the ILO and the OECD. For more information, see Diller, 'Private Standardization in Public International Lawmaking', 33 *Michigan Journal of International Law (MJIL)* (2012) 481. The UN and many of its sub-agencies are also significantly engaged with the private sector. See, e.g., UN, *supra* note 5; Food and Agriculture Organization (FAO) Council, FAO Strategy for Partnership with Civil Society Organizations, Doc. CL 146/8, February 2013; FAO, FAO Strategy for Partnership with the Private Sector, Doc. JM 2013.1/2, March 2013, s. V; UNEP, UNEP Partnership Policy and Procedures, Policy Outline no. 1/2011, 21 October 2011.

<sup>85</sup> See discussion below.

it aligns with proponents of an understanding of legitimacy that ‘[rests] on the acceptability and credibility of the organization to those it seeks to govern’<sup>86</sup> or, in other words, on the recognition of an authority as legitimate.<sup>87</sup> In such a framework, regulators can manage different kinds of legitimacy claims directed at them. Regulators can conform to legitimacy claims, can select the environments that confer legitimacy and, finally, can manipulate legitimacy claims that are made upon them.<sup>88</sup> Mark C. Suchman, in his work on institutional legitimacy, distinguishes between pragmatic, moral and cognitive legitimacy claims. Pragmatic legitimacy claims are based on the interests of an organization’s most immediate audience, moral legitimacy on normative approval and, cognitive legitimacy on comprehensibility and ‘taken for grantedness’.<sup>89</sup> Normative approaches usually lead to different types of claims: constitutional claims, which ‘emphasize conformance with written norms’; justice claims, which refer to the values or goals pursued by the regulator; performance claims, which deal with the outcomes of regulation and, finally, democratic claims, which deal with the ‘extent to which the organization or regime is congruent with a particular model of democratic governance’.<sup>90</sup> Another distinction can thus be made between input or procedural legitimacy (which would cover, for the most part, constitutional and democratic claims) and output or substantive claims (which include justice and performance claims).

Voluntariness, as expressed in explicit consent or in forms of participation, plays an important role in legitimizing institutions. Many normative accounts of legitimate authority use consent as the main, or at least as a necessary, form of justification.<sup>91</sup> In practice, consent is relevant for many entities (particularly in a transnational context), which are (at least in their initial self-understanding) of a voluntary nature and only as such considered legitimate by their addressees.<sup>92</sup> To what extent this consent stretches in individual circumstances, and where its limits

<sup>86</sup> Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’, 2 *Regulation and Governance* (2008) 137, at 145.

<sup>87</sup> Zürn, Binder and Ecker-Ehrhardt, ‘International Authority and Its Politicization’, 4 *International Theory* (2012) 69, at 83.

<sup>88</sup> See Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’, 20 *Academy of Management Review* (1995) 571, at 587ff; see also Black, *supra* note 86, at 146ff.

<sup>89</sup> Suchman, *supra* note 88, at 578ff, 582.

<sup>90</sup> Black, *supra* note 86, at 145ff.

<sup>91</sup> This article will not replicate all of the nuances of the philosophical debate on the legitimacy of public authority. Rather, reference is made here not only to classical consent theories such as John Locke’s but also to consensus positions under which members of a society agree to structures and institutions which fulfil also particular substantive requirements (justice). See, e.g., J. Rawls, *Political Liberalism* (1993), at 3ff. A different example is D. Estlund’s normative consent theory, which requires only hypothetical consent. See *Democratic Authority* (2008), ch. VII, in particular, at 117. For an overview over the different positions using a consent-based, or a partially consent-based, approach, see Christiano, *supra* note 55; a very comprehensive summary can furthermore be found in Roughan, *supra* note 13, at 31ff.

<sup>92</sup> See also Marmor, *supra* note 63, at 251.



are, is complex and varies from institution to institution and from case to case.<sup>93</sup> Often it will not go beyond certain participatory rights enshrined in the procedures of these institutions. Generally, it can be assumed that ‘the more participation in a given practice is voluntary ... the more it is the case that justifying one’s subjection to the rules or conventions of the practice is based on consent’.<sup>94</sup> However, against the background of the transnational architecture, many problems emerge using this approach.

In international law, for instance, legitimacy was for a long time considered a matter of state consent. Additional ‘international legitimacy’ was deemed unnecessary.<sup>95</sup> As formal international law became ‘side-lined’ by other ‘institutional normative orders’, with the result of a ‘decaying role ... of [state] consent’ in the global realm, questions of participation and consent surfaced again.<sup>96</sup> Since an enhancement of democratic legitimacy in the global sphere<sup>97</sup> was considered problematic for a variety of reasons,<sup>98</sup> other participatory aspects have become increasingly important.<sup>99</sup> Examples can be found in the GAL project,<sup>100</sup> in considerations on the legitimacy of global governance institutions<sup>101</sup> as well as in constitutionalist frameworks.<sup>102</sup> These approaches list participation and other procedural aspects such as transparency as important venues for legitimizing global governance.

Private regulators depend to a larger degree on voluntary participation since they cannot easily rely on laws or a wider administrative apparatus to enforce or otherwise ensure compliance with their regulatory regime.<sup>103</sup> This voluntariness has often served as a first justification for regarding private regulation as legitimate. However, there are many instances where voluntariness can only provide limited reasons for

<sup>93</sup> See also *ibid.*

<sup>94</sup> *Ibid.*, at 250.

<sup>95</sup> This view, however, was disputed from very early on. For a general overview over the development, see Wolfrum, ‘Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations’, in R. Wolfrum and V. Röben (eds), *Legitimacy in International Law* (2008) 1, at 6; Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’, 15 *EJIL* (2004) 907; Buchanan and Keohane, ‘The Legitimacy of Global Governance Institutions’, 20 *Ethics and International Affairs* (2006) 405, at 412; Bodansky, ‘The Legitimacy of International Governance’, 93 *AJIL* (1999) 596.

<sup>96</sup> On this development, see particularly Krisch, ‘The Decay of Consent: International Law in an Age of Global Public Goods’, 108 *AJIL* (2014) 1.

<sup>97</sup> Falk and Strauss, ‘On the Creation of a Global People’s Assembly: Legitimacy and the Power of Popular Sovereignty’, 36 *Stanford Journal of International Law* (2000) 191. See generally Wolfrum, *supra* note 95, at 3ff.

<sup>98</sup> See Buchanan and Keohane, *supra* note 95, at 416–417.

<sup>99</sup> See, e.g., Franck, ‘The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium’, 100 *AJIL* (2006) 88, at 93; Buchanan and Keohane, *supra* note 95, 416–417; Kingsbury, Krisch and Stewart, *supra* note 7. Wolfrum, *supra* note 95, at 5; Wolfrum, ‘Kontrolle Auswärtiger Gewalt’, 56 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (1997) 38.

<sup>100</sup> Kingsbury, Krisch and Stewart, *supra* note 7, at 37.

<sup>101</sup> Buchanan and Keohane, *supra* note 95, at 417ff.

<sup>102</sup> Kumm, *supra* note 95, at 924ff.

<sup>103</sup> Black, *supra* note 86, at 148; Wheatley, ‘Democratic Governance Beyond the State’, in Peters *et al.* (eds), *supra* note 6, 215, at 223.

the legitimacy.<sup>104</sup> First, many regimes may appear voluntary in formal terms (actors have the option to take it or leave it) but are *de facto* mandatory (sports organizations are at the forefront here). Furthermore, certain stakeholders such as beneficiaries and other third parties may be strongly affected by regulation but have no option to participate in the organization and its standard-setting processes.<sup>105</sup> Basing the legitimacy of a private organization on the voluntary engagement of its members alone is therefore in many cases insufficient. Finally, attempts to create more inclusive participation procedures on the transnational level face a practical problem – namely, the complexity of governance that is so common in the transnational realm, with ‘authorities ... entwined by their procedural justifications’.<sup>106</sup> Thus, it is difficult to establish which actors must be involved and which can be excluded. In a functionally divided, yet highly interlinked, context, these questions become extraordinarily difficult to answer as regulators face multiple legitimacy claims.

In the present example, the IOC is first and foremost a sporting association. It has strong capacities to lead the international sporting movement and to (co-)deliver the Olympic Games. It had, and still has, however, less capacity in environmental regulation; a field that is not at the centre of its mandate. Yet, as the example shows, its legitimacy as a regulator was questioned based on the effects of the Olympic Games on the environment. One means of tackling such challenges for private actors is cooperation. As a result, the IOC, when engaging in environmental regulation cooperated with environmental organizations; UNEP being the most prominent. Private regulators specifically tend to be interested in expanding participation and, thus, more easily bring about legitimization by cooperation with a public organization. Even though state participation is not an exclusive (and often not even a very useful) criterion for a transnational actor to be considered legitimate, many states do possess a democratic infrastructure, which allows public institutions to more easily link back to this kind of legitimacy. For private regulators, this infrastructure is less easily accessible. Through cooperation, they can align (admittedly indirectly and often far down the legitimation chain) with this form of legitimization. As much as the link between consent by democratic states and international organizations’ administrative actions seems farfetched (it would probably not withstand scrutiny under many normative consent-based positions), the case study indicates that public participation is considered to be of great relevance or even indispensable at least as soon as public policy issues are involved.<sup>107</sup>

<sup>104</sup> F. Cafaggi, *A Comparative Analysis of Transnational Private Regulation: Legitimacy, Quality, Effectiveness and Enforcement* (draft version), para. 156ff, available at [http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/discussions/HIII%20Comparative%20Report\\_final%20june.pdf](http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/discussions/HIII%20Comparative%20Report_final%20june.pdf).

<sup>105</sup> *Ibid.*

<sup>106</sup> Roughan, *supra* note 13, at 140.

<sup>107</sup> In the specific case here, UNEP was at least initially heavily involved in the setting up of the Olympic Movement’s environmental programme. It is also still part of more recent initiatives such as Agenda 2020, which in Recommendation 5 points to several ways by which sustainability is to be implemented in the Movement’s daily operations. IOC, Agenda 2020, *supra* note 45, para 3: ‘To achieve the above, the IOC to cooperate with relevant expert organisations such as UNEP.’ See furthermore, Abbott and Snidal, ‘The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State’, in W. Matli and N. Woods (eds), *The Politics of Global Regulation* (2009) 44, at 66.

Although procedural legitimacy can be achieved in many different forms, established models such as traditional state-based legitimacy are of great force and relevance, given the complexity of the transnational realm and the challenges many actors face in including the variety of the affected stakeholders.

Procedural aspects are not the only way to legitimize authorities.<sup>108</sup> Authority has been considered legitimate based on the actual outputs it produces. For instance, for some, authority is legitimate if it serves to encourage people to act in conformity with reason.<sup>109</sup> Under the account adopted here, it is not possible to simply integrate normative notions as a way of explaining why authorities are considered legitimate. Neither do these notions explicate why cooperation is engaged to overcome (perceived) legitimacy deficits – however, they are indicative. As the previous section showed, consent is often not given in practice, and institutions are only voluntary to a limited extent. What defines whether authority is considered legitimate depends on whether there are ‘good reasons’ to have the particular practice or institution in which the authority operates.<sup>110</sup> An assessment of this type of legitimacy rests on complex factors to be determined in each context individually, but there is certainly room for cooperation between different actors if it leads to better outputs. International organizations and, particularly, the UN and its sub-organizations such as UNEP have a long-standing reputation in their respective issue areas. Despite the problems outlined above, they are regarded as producing good and valuable regulation. Cooperation can therefore also function as a form of certification; for instance, UNEP monitoring the implementation of the environment-related bidding commitments and approving the measures taken can be understood in this way.

The case study, however, also points out that cooperation is not always sufficient to overcome legitimacy deficits. Again, looking at the example at hand, it can first be said that the IOC’s cooperative approach improved its reputation.<sup>111</sup> Yet, the IOC was still measured by the success of its own activities; it could not outsource the burden of delivering environmentally friendly Games. The alleged failures of Sochi, therefore, also predominantly fell back on the movement.<sup>112</sup> Moreover, not only can cooperation fail to produce legitimacy-boosting effects, but it can also negatively impact the

<sup>108</sup> For an overview, see Christiano, *supra* note 55, s. 4.

<sup>109</sup> Raz, ‘Authority and Justification’, in J. Raz (ed.), *Authority* (1990) 115, at 129: ‘[T]he normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him ... if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly’ (original is in italics).

<sup>110</sup> Marmor, *supra* note 63, at 239.

<sup>111</sup> See, e.g., WWF, *supra* note 52.

<sup>112</sup> See, e.g., Duval, *supra* note 52. See furthermore the statement by Greenpeace: ‘Greenpeace Russia believes that preparation of XXII Olympic Winter Games resulted in significant violation of the stated principles in waste management and this situation should be identified and corrected immediately. Otherwise we would have to testify a breach of the responsible approach to the environment declared by the Olympic Movement.’ Greenpeace Russia, Russia Fails to Fulfill Zero Waste Commitments for the Sochi Olympics, available at [www.greenpeace.org/russia/en/news/21-03-2012-olympic-waste-eng/](http://www.greenpeace.org/russia/en/news/21-03-2012-olympic-waste-eng/).

legitimacy the organization has sought out. As such, it can lead to an alienation of constituencies and an overall loss of regulatory authority. In the sports and environment example, UNEP was not very successful in supporting environmentally friendly Games in Sochi, and, more importantly, it was also criticized for the way it dealt with what was, in the eyes of many NGOs, a failure. Thus, the WWF, an NGO that had been involved in the preparations of several Olympic Games, stated that '[it] believes that the United Nations Environmental Programme (UNEP) must admit that attempts to make winter Olympic Games in Sochi environmentally friendly have failed, and stop publicly praise [sic] their organizers'.<sup>113</sup> Criticism was still rather modest, but it points to a more general problem. Being linked to both the IOC and the local organizers through contractually formalized cooperation, UNEP had a difficult time fulfilling the demands that were voiced by the WWF. Moreover, the long-term cooperative benefits might have been too valuable to be put at risk over a one-time event such as the Sochi Olympics. This approach, however, is not supported by other partners and constituencies, which might become alienated through it.

### C Expertise and Varieties of 'Epistemic Authority'

The need for expertise-driven governance is steadily increasing, and it is therefore also not surprising that expertise – epistemic authority – is a resource that is featured in regulatory cooperation. Traditionally, epistemic authority was clearly distinguished from political authority. Epistemic authority is said to extend over 'some area of intellectual inquiry [where the respective person or actor] is an expert',<sup>114</sup> who provides 'knowledge and moral integrity'.<sup>115</sup> It does not need to 'convince people factually and in detail' but relies on the overall 'reputation' of the organization.<sup>116</sup> For many, this stands in contrast to political authority in that it lacks a power component.

However, such stark distinction no longer holds (if it ever did). After all, there is a 'power component' involved in epistemic authority, namely an imbalance in the distribution of knowledge, which puts the epistemic authority in a more dominant position.<sup>117</sup> Many epistemic authorities are much more powerful and much less apolitical than one might suppose. In fact, they have a great impact in shaping the global political economy.<sup>118</sup> Thus, experts set out the basic understanding of products and processes in an ever more complex, technical and knowledge-driven world. Even when an expertise-based authority only formally gives advice, this advice might ultimately be so compelling that one cannot ignore it but must follow it to stay

<sup>113</sup> See WWF, UN Mission to Sochi Failed to Build Dialogue between Public and Sochi-2014 Organizers, (2010), available at [www.wwf.ru/resources/news/article/eng/7412](http://www.wwf.ru/resources/news/article/eng/7412).

<sup>114</sup> See Christiano, *supra* note 55, at 3.

<sup>115</sup> Zürn, 'From Constitutional Rule to Loosely Coupled Spheres of Liquid Authority: A Reflexive Approach', 9 *International Theory* (2017), 261, at 271.

<sup>116</sup> *Ibid.*

<sup>117</sup> See, e.g., M. Foucault, *Power/Knowledge, Selected Interviews and Other Readings*, edited by C. Gordon (1980).

<sup>118</sup> See Bütthe and Mattli, *supra* note 27, at 2ff.

in the game.<sup>119</sup> As a consequence, there is an ever-increasing demand for expertise in transnational regulation.<sup>120</sup>

However, technical advancement and complex cross-border economic interaction require detailed rules to regulate these processes. In many cases, it is only specialists who have the necessary knowledge to draft, and implement, rules that properly address the relevant technical details. The necessity of technical knowledge gives those who possess it a significant amount of power. For instance, in technical standard setting, there are many disputes by domestic stakeholders over the preferred technology. A decision towards one end or the other implies significant switching costs for the defeated party.<sup>121</sup> This means that these standards do not only reflect the state of the art in a technical area but also include political decisions with possibly significant economic consequences. The increase of expert-driven transnational governance is particularly prevailing in organizations such as the ISO or the International Electrotechnical Commission,<sup>122</sup> yet it also exists in sport regulation. Thus, during the London Olympics, the London Organising Committee of the Olympic and Paralympic Games set out standards for sustainable events management, leading to the ISO 20121 standard. ISO 20121, however, was not only drafted for managing sports events. In fact, it was also deliberately designed for 'any type of event or event-related activity', including small-scale events.<sup>123</sup>

The ISO's website specifies that the standard is intended to benefit a whole range of actors, including 'event organizers, event owners, the workforce, supply chain (such as caterers, stand constructors, transport companies), participants and attendees'.<sup>124</sup> The ISO furthermore stresses that it sees 'regulators who have health, safety, environmental and other responsibilities related to events' as well as 'local communities' and 'nongovernmental organizations which may have concerns about an event' as another set of beneficiaries.<sup>125</sup> The London Olympics in 2012 were both the initiation point for ISO 20121 as well as the new standard's first test. In the aftermath of the Olympics and the 'codification' of the 'rules' as an ISO standard, it has been applied in different contexts ranging from the 2013 Eurovision song contest to the Danish presidency of the EU Council.<sup>126</sup> As mentioned, the standard was also applied in the preparation of subsequent Olympics such as the Games in Rio in 2016.

<sup>119</sup> Christiano, *supra* note 55, at 3.

<sup>120</sup> See, e.g., N. Jansen, *The Making of Legal Authority: Non-Legislative Codifications in Historical and Comparative Perspective* (2010), who examines legal authority deriving from sources other than 'legally recognized bodies such as courts or legislators. He particularly focuses on academic codifications and their application as authoritative sources.

<sup>121</sup> See Bütthe and Mattli, *supra* note 27, at 11–12.

<sup>122</sup> *Ibid.*, at 29ff.

<sup>123</sup> See ISO 20121 on Event Sustainability Management System, Doc. ISO 20121:2012, para. 1; ISO, Sustainable Events with ISO 20121 (2012), available at [www.iso.org/iso/sustainable\\_events\\_iso\\_2012.pdf](http://www.iso.org/iso/sustainable_events_iso_2012.pdf), at 7.

<sup>124</sup> See ISO, Sustainable Events, *supra* note 123, at 4.

<sup>125</sup> *Ibid.*, at 7.

<sup>126</sup> See ISO, Event Sustainability Management: ISO 20121 Passes 2012 Olympic Games Test (2013), available at [www.iso.org/iso/home/news\\_index/news\\_archive/news.htm?Refid=Ref1690](http://www.iso.org/iso/home/news_index/news_archive/news.htm?Refid=Ref1690).

The Rio Sustainability Management Plan, however, not only foresees the use of ISO 20121 for its organizing committee but also aims furthermore at promoting sustainable events management in the broader Brazilian events sector.<sup>127</sup> What can be observed here is the integration of environmental (and other forms of sustainable) regulation and the technical standardization sector in the context of (sport) event management. To be fair, management standards such as ISO 20121 are distinct from core technical standardization in that they do often address public policy issues,<sup>128</sup> yet it still points to increased integration between the traditional political and expert-driven forms of authority.

However, as this also shows, expert-driven authority is not simply replacing political authority. Rather, political and epistemic authorities are becoming more and more intertwined. Expertise not only extends to technical knowledge but also might involve forms of political and legal expertise, which are not necessarily only concentrated with private actors.<sup>129</sup> Kenneth Abbott and Duncan Snidal mention ‘normative, business, political and auditing expertise’, which are all relevant for regulatory processes.<sup>130</sup> As such, an actor with crucial technical expertise might be able to develop rules that cover certain technical processes, but it may lack the knowledge of how to implement this in a legally sound and politically feasible way. This issue was also reflected in the case study here. The IOC had little to no in-house environmental expertise in contrast to UNEP. In a fragmented global realm, specific knowledge regarding individual issue areas is necessary to govern them. As such, when it comes to the ability to implement standards, an outside regulator needs to have not only the normative power to enforce implementation but also the necessary knowledge of how to do so. UNEP lacked the ability to implement and enforce environmental regulation within the sports sector, yet the IOC had the expertise and competence necessary to do so. Thus, through the IOC’s facilitation, environmental standards, which were co-drafted by UNEP, became mandatory for the entire Olympic Movement, extending even to local municipalities and states hosting the Olympic Games. In other words, when the lines between political and epistemic authority are blurring, it may be necessary to have actors from different ‘sectors’ and backgrounds providing their specific expertise for a regulatory process to succeed.

<sup>127</sup> Rio 2016 Sustainability Management Plan: Rio 2016 Olympic and Paralympic Games (version 1), March 2013, particularly para. 7.2.4 stating that ‘[t]he certification of the Rio 2016 Organising Committee for the ABNT NBR ISO 20121 standard is designed to give strength and credibility to the process of implementing sustainability criteria during the entire cycle of the Rio 2016 Games, based on the adoption of the nationally and internationally recognised rules for the sustainable management of events. A sustainability management system (SMS) will be created following the guidelines of ISO 20121, and shall be adopted by all RIO 2016 functional areas. The SMS will also make it possible to follow up the progress obtained in the implementation of the organizing committee’s Sustainability Management Plan.’

<sup>128</sup> Bütthe and Mattli, *supra* note 27, at 39ff; Diller, *supra* note 84, at 483ff.

<sup>129</sup> Abbott and Snidal, *supra* note 107, at 64.

<sup>130</sup> *Ibid.*

## 4 Cooperation as a Venue for Understanding Public–Private Interactions in International Law

The last section depicted in detail the ways in which cooperation functions as a venue for the exchange of regulatory resources between different types of regulators. Both UNEP and the IOC depended on each other to execute their regulatory projects. As stated in the introduction, this case is just one example of many that are representative of a common practice of regulatory interactions among transnational regulators. These findings lead us to the second central issue of this article – the treatment of public–private regulatory interactions within international law scholarship. Two inter-related aspects are of importance – a structural one and a normative one. Structurally, the question emerges how we understand the (international) legal order in a context where private authority is of such importance. Normatively, it asks how to channel private authority and how to safeguard public policy interests in this context. These questions cannot be answered within the framework of one article, yet it is suggested here that through the integration of the concept of regulatory cooperation into international legal scholarship, we could enhance the understanding for regulatory interactions between public (international organizations and states) and private actors and consequently create a framework within which future research can address these questions. Cooperation is well established in international law<sup>131</sup> as well as in international regulation.<sup>132</sup> The integration of regulatory cooperation makes room for a formal recognition of the role of private actors and regulatory interactions with them. Rather than considering private regulators and their activities as a phenomenon outside of international legal practice, regulatory cooperation formalizes relationships and helps bring forward analyses of the risks and benefits involved in it. In this way, international law scholarship would only follow up on existing practices by international organizations of engaging in formalized interactions with private actors.<sup>133</sup> The remaining sections will sketch the aspects of such integration by providing a definition of regulatory cooperation and delimitating it from other approaches.

Cooperation, as it is understood here, consists of the following features: mutual responsiveness, commitment to a joint activity and mutual support.<sup>134</sup> Concretely, this means that each participant in a corporative endeavour is ‘responsive to the intentions and actions of the other’; both are committed to the joint activity and both support each other in their individual roles.<sup>135</sup> Translated into the realm of interactions between different (political) authorities, cooperation has been defined as entailing ‘an intention held by two or more agents to work together towards common goals, either through the pursuit of a single shared activity or different but complementary

<sup>131</sup> E.g., Wolfrum, ‘International Law of Cooperation’, in *Max Planck Encyclopedia of Public International Law* (2010), available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1427?rskey=NJDRt0&result=1&prd=EPIL>.

<sup>132</sup> See OECD, *International Regulatory Co-operation: Addressing Global Challenges* (2013).

<sup>133</sup> See note 5 above.

<sup>134</sup> Bratman, ‘Shared Cooperative Activity’, 101 *Philosophical Review* (1992) 327, at 328.

<sup>135</sup> *Ibid.*

activities that are part of a shared plan of “joint action”.<sup>136</sup> This definition stresses less the aspect of ‘mutual support’ than the previous account did<sup>137</sup> and, therefore, makes room for the individual benefit that actors can receive through cooperating.

Thus, by acting jointly, regulators can improve their own position and increase their individual abilities. This is the ‘commutative’ part of cooperation. The term ‘commutative’ is chosen here in a loose analogy to the philosophical concept (commutative justice) to refer to the transactional aspects of regulatory cooperation. At the core is the exchange of regulatory resources governed by the cooperative relationship between two (or several) regulators.<sup>138</sup> In sum, cooperation can very roughly be understood as any joint activity between two or more parties that is voluntarily and intentionally entered in pursuit of a common goal as well as individual benefits and that is characterized by at least a minimum degree of mutual responsiveness and support. The term joint activity should therefore be understood in a broad sense, including any kind of interaction whether it is a common project that is initiated and executed by the parties together or, simply, the aligning of individual projects to avoid conflicts and to create synergies.<sup>139</sup>

This understanding is particularly important when considering some common objections and challenges often raised when addressing transnational regulatory interactions. The first category of critique emphasizes that mutual regulation is not actually cooperative but, rather, the result of a strategic exercise of power of one actor over another.<sup>140</sup> The previous sections, however, have demonstrated that this notion is too simplistic. There are obviously power dynamics between authorities in place amounting in some cases to hegemonic structures. However, we are not confronted with an archaic strongmen scenario of transnational regulatory interactions. Rather, these interactions take place in such complex environments that cooperation becomes necessary (even for the powerful hegemon) because all actors at one point need to access regulatory resources, which they can only obtain through cooperation. Cooperative relationships, though fragile in many cases, nonetheless create integrated structures, procedural and normative meta frameworks across regimes and, therefore, the opportunity to spread public policy interests within privately originating regulation.

<sup>136</sup> Roughan, *supra* note 13, at 51.

<sup>137</sup> Though in a footnote she refers to this distinction, stating: ‘A more precise analysis would use Bratman’s distinction between “joint intentional action”, which is cooperative only in the sense of participants intending to act together and “mesh” their sub-plans, and “shared cooperative activity”, in which participants also intend to mutually support one another.’ *Ibid.*, at 51, n. 17.

<sup>138</sup> See furthermore, Aristotle’s *Nicomachean Ethics*, translated by R.C. Bartlett and S.D. Collins (2011), Book V, s. 4, who speaks of rectificatory justice in contrast to distributive justice. See also P. Koslowski, *Principles of Ethical Economy* (2001), ch. 8, at 183.

<sup>139</sup> Compare also the definition provided by Roughan, *supra* note 13, at 51, who refers further to Bratman, *supra* note 134.

<sup>140</sup> Proponents of this view are usually not directly engaged in the nascent area of examining transnational regulatory interactions but base this notion on a more general realist view of international relations and international law.



Second, the cooperative approach provides a new angle to the fragmentation debate. Particularly in international law literature, as well as in scholarship in legal and social theory based on a systems theoretical approach, the narrative of insurmountable fragmentation is still prevalent.<sup>141</sup> Andreas Fischer-Lescano and Gunther Teubner, for instance, stress the 'fundamental, multidimensional fragmentation of global society itself'.<sup>142</sup> Therefore:

global law is necessarily and irreversibly fragmented into different legal regimes that follow different normative logics such as trade, security, environmental protection, and so on. Just like the social systems underlying them, each of these regimes seeks to universalize its *Eigenlogik* at the expense of the others.<sup>143</sup>

Cooperation, however, provides a different narrative. In line with neo-institutionalist approaches and other recent international law literature, the possibility of overcoming fragmentation and the commonness and importance of (regime) interactions is stressed.<sup>144</sup>

Finally, cooperation is sometimes confused with altruism. Thus, only forms of interactions where actors are not pursuing individual goals but are solely contributing to the joint project are said to amount to cooperation. This narrow understanding is rejected here. Instead, as outlined above, the commutative (exchange) aspect pursued in cooperative projects is stressed. Even if the ultimate objective is profit maximization (for example, better sponsorship contracts due to a better environmental record during the Olympics), this does not exclude the cooperative dimension. To the contrary, this article emphasizes the exchange (commutative) level, as it helps understand dynamics between different transnational actors and interest groups and ultimately allows for strategies to foster public interests within such structures.

## 5 Conclusion

Using the lens of the sport and environment case study, this article has shown that traditional understandings of authority that emerge from the nation-state-centred model are less fitting once regulation goes transnational. The argument has been made that in a fragmented, heterarchically structured context, such as the present

<sup>141</sup> E.g., International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission*, UN Doc. A/CN.4/L.682, 13 April 2006.

<sup>142</sup> Fischer-Lescano and Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *MJIL* (2004) 999, at 1004.

<sup>143</sup> Fischer-Lescano *et al.*, 'Contested Collisions: An Introduction', in K. Blome *et al.*, *Contested Regime Collisions: Norm Fragmentation in World Society* (2016) 1, at 3.

<sup>144</sup> Cf. M.A. Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (2011); Gehring and Oberthür, 'The Causal Mechanisms of Interaction between International Institutions', 15 *European Journal of International Relations* (2009) 125; Oberthür, 'Regime-Interplay Management: Lessons from Environmental Policy and Law', in K. Blome *et al.*, *Contested Regime Collisions: Norm Fragmentation in World Society* (2016) 88; M. Andenas and E. Borge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (2015).

global realm, regulators possess incomplete authority. A regulator's authority must be understood in relational terms or, in other words, in terms of the way it is linked to other organizations active in the same or overlapping issue areas. Cooperation functions as a venue to exchange regulatory resources necessary in different governing processes, thus helping overcome authority deficits. Therefore, regulatory interactions between various types of globally operating actors are a common phenomenon. International organizations engage in it, as do private actors. The article then moved forward to propose the integration of the concept of regulatory cooperation into international law scholarship to help recognize and scrutinize this practice. Thereby, two effects can be achieved: first, a formal recognition of the role of private authority within international practices and, second, a debate regarding the framework and the safeguards within which such activities generally, and interactions more specifically, can take place.