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Sporting Nationalities

A uniformed approach to Sporting Nationalities in a *Lex Sportiva*

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1 Introduction

As an athlete, one of the highest honors to achieve is to represent your own country in an international sporting competition[1]. As the soldier who fights for the victory of his country, a professional athlete has the nation's pride at stake. Since ancient times, the first Olympic Games, athletes participated on behalf of their respective nation – or city-states (Raschke, *The Archaeology of the Olympics*, 23)

Traditionally a national team, have consisted of nationals from that given country. They are the best of the best, and is used to showcase the best sporting abilities that the country can offer.

When the Olympic Games were revived in the late 19th century, sports were still not of a professional character, in that athletes did not live of being an athlete. They were often amateurs participating on behalf of their nation, for little or no personal gain other than a somewhat dubious fame (ibid, 26). Back then, only amateurs were allowed at the games.

Today this is not the case, some sports have taken a significant leap to become a multi-billion dollar business today, and there is a general tendency to be more professionalized in the sports industry today. This professionalization of the industry, have the consequence that new regulations and legislations today is not limited to influences from the sports itself, but in a great way shaped by business interest. Another factor is the larger influence mass media has on sports today, and how corporate sponsorship in the past decades has shaped the way the sporting industry works (Nafziger, International Sports Law: 504).

For the past decades a trend has happened towards a greater shift in change of nationality. Not only in regards to sports but also due to the huge migration flows across the globe[2]. Looking upon sports, there is a trend that a growing number of athletes change their nationality to be able to participate on a higher level than they could in their original nationality. For instance, some athletes are not drafted to participate on their national team, and thus they change to another country, where they can be drafted.

[1] https://www.irishtimes.com/sport/playing-for-your-country-is-highest-honour-1.585818,

[2] https://www.consilium.europa.eu/en/policies/eu-migration-policy/managing-migration-flows/

Further some nations have incentivized athletes to change nationality by offering lucrative conditions[3], latest example is the football world cup in Qatar where more than a third of the players on the Qatari national team, were not "Qatari" in an original meaning of the term "nationality". Qatar had an obvious economical interest in having a good national team, since they were the host of the world cup.

When sport has become such an industry, as it is today, athletes will utilize any opportunity they have, even if they do not comply with "spirit" of the sport itself. We have seen it, not only in change of nationality, but also with the use of performance enhances drug (doping) and other areas of sports that are today heavily regulated.

It seems that today there is a gap, where an athlete can be allowed to represent a country in which he has no genuine connection to as was the case with world cup in Qatar. This paper will investigate the criteria's for a change in sporting nationality, and investigate if and what can be done about it.

1.1 Research Question

In order to investigate if this really is a problem in public international law today, we need to establish a research question. The research question should revolve around something that is tangible and could be answered in the affirmative.

The research question of this paper will be this:

"Should and could a uniformed sporting nationality be part of an international lex sportiva?".

Not only does the research question, attempt to answer whether there should be a uniformed sporting nationality or not. It further wishes to establish which legal regime this principle should belong to. This will be further elaborated upon through this paper.

[3] https://footballcollective.org.uk/rules/can-a-country-give-a-footballer-national-citizenship-so-they-can-play-for-them/

1.2 Delimitation

In order to proceed with this paper, we first need to establish what is meant by some of the core vocabulary. Some of the central terms for this paper is both *sport* and *nationality*.

1.2.1 Sport

A central element of this paper is sports. Sports, as defined by the English dictionary (Stevenson, *Oxford Dictionary of English)*, must be positively defined as an activity that

a) is conducted for fun or pleasure,
b) involves physical effort or skill, *and*
c) is done in a special area or according to fixed rules.

In this paper we will not delve on the characteristics of sports itself and discuss whether different activities can or cannot be considered a sport unless it has some fundamental basis for this paper.

One could argue that sport today is not necessarily fun or for the sake of pleasure, in accordance with criteria *a)* today when so many different interests are involved. Further tournaments like the world cup are billion dollar industries, as well as athletes being paid millions to participate, so there are a lot more than just fun or pleasure at stake.

This however would be a wrong interpretation. The conclusion must be drawn upon the purpose of the game itself, thus being of a leisurely character, even though it might be played professionally. Thus a football match however much is at stake for the individual has no meaningful purpose other than being for leisure.

Looking upon criteria *b)* this is fairly broad it thus encompasses both physical sports such as football, tennis and skiing, but according to this definition also chess and e-sports would be encompassed, since it requires skill.

Criteria *c)* also gives room for a broad interpretation of what can be a sport and what cannot. This criterion is the reason not all creative processes would be considered sport, for instance painting or cooking, though one could argue that for instance Masterchef would be fulfilling the criterion and thus it would be for the purpose of this paper be considered a sport.

New areas of sports always keeps appearing, and since according to the above definition certainly most games would be considered sports, the area of sport will always be dynamic. New sports can arise in many ways. For instance new boardgames arises that could be considered sports, or even from fiction such as Quidditch from Harry Potter (represented by the International Quidditch Association) that today has its own international federation, or sports could be derived from technologic advancements such as E-Sports (represented by the International E-Sport Federation).

In conclusion, for the understanding of this paper, a broad definition will be applied, to the characterizations of sports, which encompasses most sporty activities.

1.2.2 Nationality

Nationality is in a traditional sense synonymous with *citizenship,* in this paper however we are investigating the area of Sporting Nationality. For this purpose a further differentiation has to be made.

We will differentiate between *sporting nationality* and *political nationality.* Political nationality is synonomous with ones citizenship. This is the country in which you can obtain and enjoy your political rights, and this is the country in which you can be drafted and have obligations as well. You can obtain and hold multiple citizenship or *political nationalities* at the same time.

A sporting nationality, is the one for which you can participate in international competetions and for which country you can represent the national team. You can only hold one sporting nationality, at a time. This will be further elaborated upon later in this paper. A persons sporting nationality is almost exclusively linked to be identical to one of that persons citizenship. In other words, in other to have a sporting nationality, one would normally be required to be a citizen of that country. This is not without exceptions however, a stateless person can have a

sporting nationality, without being a citizen of that country (there is a requirement of residency as will also be elaborated upon later in this paper).

This paper will seek to analyze the ground for sporting nationalities, and give a *de lege ferenda* perspective on sporting nationalities, and a more uniformed approach to this.

1.3 Why is this relevant for Public International Law?

Public international law, is the international regime aimed at regulating the interactions between state-actors in contrast to private international law that aims at regulating the interaction between natural or legal persons at an international level (Evans, *International law 5th edition*, 89).

Looking upon the regulation of international sport tournaments and competitions these are mostly of a private international character. The regulation is based on national sports federations that most often are regulated by an international sport federations of which they have member status. Examples are World Aquatic (Formerly FINA) which is the international federation aquatic sports, of which national federations such as Dansk Svømmeunion (Denmark), Federação Angolana de Natação (Angola), and Federazione Sammarinese Nuoto (San Marino) are members of[4].

Speaking of sports law in an international context, there is a debate going on whether this actually exists as a distinctive area of law, or not (the debate about the so called *lex sportiva*). This will be dealt further under Subsection 2.5 where the different theories will be elaborated upon.

One could argue that since the main regulation of sports law is of a private character, whether national or international, it has no bearings discussing it from a public international law point of view. This however would be flawed, today the area of sport is so entangled with the dealings between nations that one cannot simply ignore the public international law input that exists.

[4] A complete list of member federeations can be found here https://www.worldaquatics.com/members/national-federations?region=all&country=

Sports is used as a tool to encourage cooperation between states, and to ensure armistices and peace mostly notably keeping with the Olympic truce. This has been a concept used for centuries, and has a great impact on public international law (Raschke, *The Archaeology of the Olympics*, 52).

Further we have seen through the past century that certain areas of sports have been regulated most effectively through public international law mechanism, most significantly the area of doping control (see subsection 2.7) in these cases both hard and soft law have been instituted.

As mentioned in above, sports is today a big business, and many different interests are at stake. When this is the case, there is a need for international regulation as well, not just on a private level. Looking upon the European Union, as early as, 1974 in the case of Walrave and Koch, the European Union court of Justice acknowledged that sports was an *economic interest* in the sense of the European Union treaties (Weatherhill, *Is there such a thing as EU sports law?*, 300).

There seems to be a consensus as well, that some sports principles or regulations are of an international customary nature today, and thus part of the Public International Law regime. This is something that will be further explored later in the paper. Most of the international legislation on sports, have strings to both private- and public international law. One cannot understand sports only from one of the perspectives. Later in this paper, some principles will be drawn from bodies that are normally of a private international law character such as CAS, but have a significance in the public international law sphere as well. The question becomes whether "Sporting nationality" can be said to be part of public international law itself, but to understand international sports law, one must certainly deal with public international law as well.

1.4 Methodology

When looking upon the methodology of the present paper, it will be an examination and analyzing of the case law on the subject. The paper will first conduct a thorough review of current legal theory on the subject and afterwards, a review of the case law as well. Conclusions and perspectives will be drawn upon both.

The paper will give *de lege ferenda* points on how a uniformed sporting nationality could and should be constructed, without narrowing too much.

The paper will not be confined to a single theoretical methodology, but will draw experience from a multiplex of different theortical approaches (Deplano and Tsagoruias, *Research Methods in International law,* 4-6).

2 Theory

2.1 Sovereignty

Sovereignty is a core value of every state, and one of the fundamental principles of a nation is the right to decide who its subjects is, and thus who to grant citizenship. Even though each nation can establish its own criteria's of the granting and withdrawal of citizenship there are international regulation for this as well. This is part of public international law.

There are rules today that prohibits states from making individuals stateless[5], and there are rules concerning the criteria for granting citizenship in the European Union for instance. Overall this area of law is still very much in hands of each state.

In order to fully understand the problem, we need to examine the role of nationality. A nation is comprised of nationals who can have obtained this status in different ways. T. H. Marshall (Spiro, "A New International law of citizenship, 698) defined citizenship as 'full membership of a community'.

Most individuals are nationals of a given state by birth *jus soli* (ibid) but there are several other ways to achieve citizenship. Naturalized citizens is a person who was not born or originally of this nationality, but who is granted citizenship or *naturalized* to become a citizen of that country. A naturalized citizen enjoys the same protections and meets the same obligations as a natural born person in that country. This means they have to serve in the army, do jury services

[5] For instance the United Nations convention on statelessness, or the Universal Declaration on Human Rights article 15

etc. as all other people. On the other hand this person can also be elected to parliament etc. and vote for elections.

When speaking of the concept of nations buying individuals to play for their country, we are talking about naturalizing individuals. Naturalizing can happen as – also in a sports context – a legitimate tool, when for instance an persons ancestor origin from that given nation, or the individual have been living in that country for many years. It can however also happen merely for the purpose of gaining an effective advantage when it comes to sport. A new concept, is people buying a citizenship, this can be used to gain access to an area of interest for that particular person, such as the European Union. Thus one can enjoy the benefits from this.

Looking upon the case of Qatari football, the composition of the Qatari National team led to few people resembling it with a Qatarian football team. More than a third of the team were professional football players from other countries than Qatar.

Qatar started to comprise their national team when they had "won" the right to host would cup. They had an obvious benefit in improving their ranking in the upcoming tournament. Previously it was even worse, and it was partly the reason FIFA tightened the rules in 2004[6].

Speaking of a sporting nationality, regulations in this area obviously does not affect each states capability of granting citizenship. Even if a person who has been naturalized in a given state is not eligible to participate for that state in an international competition this does not mean he cannot enjoy being a citizen of that nation. One could argue that this is no different than any other eligibility criteria to participate in a certain sport, if you are male you cannot participate in female competitions, if you are disabled you cannot participate in paraolympic games, but matter of fact is there is a certain interference in a states right of self-determination.

2.2 Public International Law

In Public International law, sources of law are determined primarily through the Statute of the International Court of Justice Article 38 (Evans, *International law 5th edition*, 89). These

[6] http://news.bbc.co.uk/sport1/hi/football/africa/3523266.stm

sources are treaties, customary international law and general principles of law. As seen in practice, courts and international tribunals puts different weight on different sources of law, some of which is not easily identified through the Statute (ibid). These sources of law mentioned in the statute are so called examples of *hard law* in international law (or sometimes referred to as traditional law).

In interpreting international law, one also has to take into account *soft law* (ibid) sources, these are sources that are not legally binding *per se* such as recommendations and guidelines, but are nonetheless necessary to take into perspective when interpreting the legality of a given norm for instance.

2.2.1 International Customary Law

When looking upon the regulations of sports a distinction have to be drawn between the laws and rules *in a sport* and the laws and rules that work *on the outside of sports*. While each sport has its own particular workings and rules, which makes it special, there are often similar laws and considerations between sports when talking about the outside sphere.

For instance comparing football and chess, the two does not have lot of the same regulations in the game, football consists of two-eleven men teams working a large grass field kicking around a ball, whereas chess is a board game played by two opponents indoor. But looking on the outside a lot of the same rules apply, for instance there is a prohibition against the use of doping in both sports.

The rules of the game are often as old as the game itself, and altercations to these rules are definitely not a job for public international law. Rules of the game are altered through the relevant international sporting federations, by their relevant charters, and not by legislative organs or regular courts.

That being said, public international law, has a lot of impact upon different areas or regulations *outside* the game. In particular access to sports have been challenged both in national courts, and international courts alike as will be seen in chapter 3 under this paper examining of case law.

This paper will not offer an in-depth analysis of the jurisdictional issues of international sports law, but it is worth noting that in general, courts have found themselves competent to rule on areas that are not specific to a given sport.

For instance the European Union court of justice, in Walrave and Koch from 1974, noted that sport was an economic interest as understood by the treaty of the European Union, but also noted that discrimination was the cornerstone of sports as an activity[7].

Walrave and Koch were involved in cycling as pacers, and had previously been able to work for both the Dutch national team as well as other teams simultaneously. But the international cycling union (UCI) prohibited this, and Walrave and Koch found they were discriminated against on a basis of their nationality (Evald, Boesen, Clausen, Halgreen, Hilliger, Jakobsen and Olesen, *Dansk og International sportsret*, 317). The court found that an activity fell under EU law if it were of an economical interest, but found further that the composition of a national team were a matter sport and not the economic activity, and thus found no violation of EU law.

By this, it was meant the functioning of a sport was on a distinctive basis, because the very nature of sports competitions and tournaments was, that someone would always be excluded from participating.

Looking upon EU regulation, it is evident today that sports law is a part of and recognized as EU law. It is however important to note that sports in the EU regime is not an effort to harmonize regulations, nor is sports in a EU regime done on a legislative basis, but merely a case by case adjudication of facts. This is to say that the European Union Parliament does not enact legislation with a direct bearing on sports per se, but the court of the european union does determine whether European union law have been breached in connection with sports regulations on a case by case basis. This validates the legitimacy of the statement that european union sports law does in fact exist, but it is not of a harmonization character.

Looking upon customary law, a set of rules have been developed primarily through CAS arbitration and dispute resolution, that gives almost its own set of rules to sport law, kind a similar

[7] Walrave and Koch, Case C36/74

to those of Lex Mercatoria (Siekmann and Soek, *Lex Sportiva*, 224). These are general principles of law, applicable even though the sports federations themselves do not have them in their constitutions. These principles of general international law, are of a procedural character.

Looking upon those principles of international law in sports, two of them are of particular interest. First is the principle of *fair play*, and second the principle of sporting nationality (Panagiotopoulos, "General Principles of Law", 343).

According to Panagiotopoulo, on the basis of CAS rulings, a sporting nationality is a distinct concept from legal citizenship he concludes. He draws the conclusion that there exists a complete separate private law, vs. public law framework, where a sporting nationality is the work of private sports regulations, and have no influence on ones legal citizenship status. While this in essence must be correct, one could argue that to completely separate those are not plausible.

Whatever private legal framework the sporting nationality has its grounds in it will nonetheless be affected by that of public international law. Let's say a sports club, in accordance with the relevant sport federations rules, wanted to grant sporting nationality to a person from a given country so that person could participate in international competitions, that would only be plausible if the conditions in public international law, regarding legality of stay in that country, access to the work market, respect of discrimination clauses etc. were fulfilled.

So when Panagiotopoulo say they are two different systems of law, that is correct but they are highly correlated at least.

Historically there have always been issues when looking upon sports. The substance abused problems (doping), increased in the 1960's and looking at the 1990's one of the larger issues were the growing commercialization of the sports arena (Nafziger, International Sports Law: 504). Contracts on larger and larger rights were sold, and one author even argued that there was a sort of cartel established under the international Olympic foundation (ibid). Today one of those larger issues in international sports law, is the growing significance of change in nationality, to get a new sporting nationality.

The term *fair play* is often used in connection with sports, and have an often almost interchangeably link to the term *the spirit of the sport*. Fair play, has in contrast to the spirit, an actual

binding in law. Fair play can be categorized as a norm in most sports, it is something that the individual organizations as well as players, strive to play by, and it is even written into the charter of the Olympic games. But not only is it something that is paramount in the conduction of a sports match, but it is a binding legal norm outside the game as well.

There is evidence to support, that fair play of a game is today a norm of customary international law. Obviously the norm does not ascribe a certain action in a particular football match, but it does set some ground rules for behavior that cannot be tolerated. For instance the effort against doping today, and how almost all nations aspire to prohibit it, this effort would as a matter of fair play, be recognized as a norm of customary international law (Siekmann and Soek, *Lex Sportiva*, 43.

The basis of fair play, is to give everyone the same ground for performing their best. Allowing doping would give some participants in a match an unfair advantage compared to their competitors.

The exact range of the norm is not clear in practice, but it is evident though that both arbitrational courts such as CAS, national courts and international courts have relied upon the principle in their judgements. As a norm of customary international law, it does effectively have an impact on regulations that are being made by the relevant International sporting federations and National sporting federations. It is worth noting that the principle of fair play as a customary international law norm, applies both in connection with the dealings of the internal aspects of the game and on the outside the game.

2.3 Sport and the European Union

Even though the first sports cases had been decided in the 1970's it was the case of Bosman in 1995 that really laid the foundation for sport adjudications in the European Union. Over the next 25 years, this was exacerbated and especially by the fact that before the Lisbon treaty in 2008, sport had not been mentioned in any EU treaties.

There have always been a special considerations taken to sports, even though the EU court of justice have been very aware to safeguard its own principles, and in particularity the principle of free movement (Siekmann and Soek, "*Lex Sportiva*", 310).

Since 2008, much clarity have been granted on the area since the passing of article 165 in the Lisbon treaty, and the conclusions of some cases on the competitive area (ibid, 311).

In the EU area there is a significant amount soft law being produced, law that has no legal binding, but none the less are an expression of the political/legal landscape in the european union in reference to sport (ibid). When dwelling on this point, it is important to understand that in particular the European Union, acknowledges sport as an integral part of the economical, cultural, social and educational buildingstone, but still need to respect the autonomi of the free movement. This is shown in particular by the passing of article 165 in the Lisbon treaty.

The Adonius paper from 1985 were the first report to mention sports in an EU context. Over the next decade several reports came but it was not until the Bosman case[8] that a particular focus came on sport in EU, with the shockwave initiated by the Bosman verdict.

Bosman were seen as an unnecessary involvement in the self-determination of sport. In the aftermath many sports federations and the International Olympic Committee wanted to make an exceptional rule to the EU system, where EU would not interfere in matters of sports, and the decision making were put on the relevant sports federations, due to the special nature of sport. In reality, a lot of the pressure were also due to the fact, that federations did not want Bruxelles to intervene in commercial activities in reference to sport, and they wanted to safe-guard their interests (ibid, 312). As a compromise an act of soft-law were incorporated into the Treaty of Amsterdam in 1997 as an appendix where they declared to respect the autonomy of sport. They declared that the bodies of the European Union would listen to relevant sport associations when important questions of sport were at issue. Still there were no basis to give sports any positive consideration. In 2007 a "white-book" was instituted collecting all the different efforts and initiatives that the EU have taken after the Bosman Case.

Article 165 of the treaty on the function of the European Union, is primarily about education, it is not the "carte blanche" that many wanted after Bosman, and it is safe to say that even though the article is quoted in almost all sports related decisions today it has no significant individual meaning, primarily due to not having a horizontal effect.

[8] C-415/93

After Walrave and Koch, the Dona case came a few years later. It also dealt with a foreigner-clauses compatibility with EU law. In the verdict the European Court of Justice concluded that a rule prohibiting foreigners from playing in a sports club were incompatible with EU law, unless it was a rule only in reference to the sport and not of economic reasons. In the next twenty year different rules were instituted to determine how many foreign players could legally be on a team (ibid, 319). In the latter case it is worth noting, that it was on a club basis and not national teams.

2.3.1 The Bosman Case[9]

In the Bosman case a Belgian football club and a French football club had negotiated an agreement of transfer of the football player Bosman. The deal were to go through if there were issued a specific transfer document before a deadline. The Belgian club RC Liege, intentionally neglected to do so, perhaps because they doubted the monetarily funds available at the French club. The deal did not go through, and Bosman were excluded from playing the entire football season. He put forward a claim for compensation at the football club RC Liege, and were initially granted this by the Cour d'appel Liege. The court did ask the EU court of justice, two preliminary questions, which became the famous Bosman case.

The court concluded that the transfer rules could be legitimate, but in this case they were a hindering to the free movement of labor, and they could only be justified if there adamant reasons for society that were present, and also that the measures were effective and did not go further than necessary as well (premise 104 of the verdict).

The arguments put forward by the national federations and RC Liege, were that transfer rules were necessary to ensure an economical and sports equilibrium in the outcome of sport events and between clubs (premise 105 of the verdict). Further, they were necessary to ensure an incentive for clubs to train younger players and ensure a payout later on by the release of transfer sums.

[9] C-415/93

The court rejected both these arguments, and also noticed, as observed the General Advocate, that there were other methods that were at least as effective in preserving these two objectives.

Again the court in reference to the foreigner clause, noted that any obstacles sport federations put in place to ensure that foreign players have a harder time participating in sport, than nationals were in violation of EU law. The clause in question were not prohibiting foreigners from working in the clubs but merely, participating in matches. But the court concluded that since a participation in matches were the primary activity, that were still a violation. Thus the clause were in violation with Article 48, further the court noted there were time limit to the application this rule, "*since noone could be in doubt whether such a clause were in violation of Article 48 after Walrave and koch and Duna case"* (Siekmann and Soek, "*Lex Sportiva*", 324).

2.4 Private International Law

Private International Law is in contrast to Public International law, the area that defines the legal structures between international non-state actors, in particular international organisations.

When dealing with sports law on an international level we are primarily looking at contract law as well as dispute resolution through international arbitration. Sports law is peculiar in the way, that most of the regulation is a given to a specific discipline of sport, but that general tendencies can be extrapolated and have a binding in either the doctrine of international private law, or public international law.

Looking at the workings of international sports law, we first need to establish the organizational system.

As mentioned previously sport is primarily regulated through sports federations. These federations are National Federations (NF) who represent the sport in each nation, and then again International Federations (IF), who are the international superior federation for that given sport. Some sports, do also have regional federation, that covers e.g. Europe, or North America.

Regulations concerning the *inside of a sport* are regulated by the International Federations who give out rules and guidelines. The organizations of these federations are not identical in

each sport, but the most common construction is that the international federation have a committee, where members of the national federations are represented, and the committee give out rules and establish guidelines. A newer example is the International Badminton Federation who ruled out a new "superserve" as illegal[10].

When concerning dispute resolution it is somewhat manifold as well. Disputes relating to a given match, such as whether a particular rule have been violated, is left to the referee or official without the possibility of appeal (Siekmann and Soek, *Lex Sportiva*, 128). This in accordance with the integrity of the sport, given that an appeal would make it impossible to conduct a match. These rules and rulings are thus not subject to either national involvement or the jurisdictions of national courts.

Decisions concerning *the outside* of a match, rulings that are not specific to a given match are issued by the national or international federations depending on whether it is a national or international match. These ruling can have the character of either disciplinary or procedural rulings, and these are subject to appeal in given circumstances. So a ruling issued by a National Federations for instance in reference to a sanction, it can often be subject to appeal at the International Federation.

Dispute resolution on an international basis are often referred to the Court of Arbitration for Sports (CAS). This is an arbitrational court, and as such the participants in the proceedings have to agree on the referral to this court. There are some conditions where mandatory arbitration is applied, but that will not be further examined in this paper.

Further the opportunities of appeals in the respective international federations have to have been exhausted. Both national-, International federations and individuals have legal standing in this arbitrational court. CAS will be further dealt with in chapter 3.

2.4.1 National- and International Olympic Committees

The International Olympic Committee (IOC), is the supreme body of the Olympic Games, they are the *guardian* (as they refer themselves) and the motivator for the Olympic Games. They deal with questions relating to participation in the Olympic Games as well as all other questions

[10] https://www.archysport.com/2023/05/it-goes-against-everything-i-thought-was-cool-about-badminton-danish-super-serve-is-banned-shortly-before-the-wc/

arising in connection with games. Matters of determination of eligibility to participate in the games are determined by the IOC Executive Board (Olympic Charter rule 41). IOC recognizes CAS and are subject to dispute resolutions through this (they are signatory to the Paris Convention).

The personality of the International Olympic Committee has been questioned. They see themselves as the supremre body of the Olympic Games and see themselves as having some sort of legal authority. Arguably they must be seen as having some legal personality, since they are able to engage in legal obligations on a state level (Siekmann and Soek, *Lex Sportiva,* 48) which normal organizations cannot.

National Olympic Committee (NOC) are the national committee responsible for the Olympic Games in each nation. Rulings made by the NOC are subject to appeal at IOC, who again are subject to dispute resolution through CAS.

2.4.2 Olympic Charter[11]

The Olympic Charter was first published in 1908. It contains the rules and the by-laws for the Olympic Games. It contains the fundamental principles of the Olympic Games, amongst which is the principles of peace and solidarity. Is was last changed in 2020, and the official languages are English and French.

2.4.3 Change of Nationality

As we touched upon a bit earlier, the change of sporting nationality is subject to regulation through the International Federations. Analyzing the different sports, it becomes evident that each International Federation have different rules for the eligibility of change in sporting nationality.

First, looking upon the Olympic Charter, the current By-law to rule 41, gives the criteria of change in sporting nationality. The athlete must be a national of the country, of the NOC that enters the games. The By-law to rule 41, number 1) further states that *if* an athlete have to or

[11] https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf

more nationalities, he may elect which nation to represent. But if he have previously represented another country in either the Olympic Games, international, regional or continental games recognized by the relevant IF, he can only represent a the new nation if the criteria's in subsection 2) are met.

The criterias in subsection 2) are simple, if an athlete has achieved or changed his nationality (*political*), he may represent the new nation, if 3 years have surpassed since his last representation of the former country. This waiting period, can be reduced or even waived by the IOC Executive Board, if the relevant NOC and IF consent to it.

The span and merit of this by-law is central to this paper, and it is something that has been the matter of extensive arbitrations at CAS as will be elaborated upon later. Subsection 4) to rule 41, gives further elements that can prove essential for determination of who can be allowed to change sporting nationality after subsection 2). These elements are not necessarily of a private international character, but instead more often of a public international law character, given the necessity of establishing ones connection to a given in reference to political nationality.

These conditions for a change of sporting nationality, as given by the IOC Charter, are generally thought to be a minimum standard (see subsection 3.3.9. - CAS 2001 / A / 357), such that the IF can give more strict conditions if they wish to do so. Further the charter, only applies in reference to the Olympic Games, an athlete cannot claim these rules when eligibility have to be determined in reference to i.e. a world championship.

2.4.3.1 Examples of change in sporting nationality

Each International Federation have rules regarding change in sporting nationality. Some are strict, and some are very loose.

Looking upon football (European) the IF – *FIFA* – have guidelines for the eligibility to participate in an international match. These rules are given in *"Regulations Governing the application of statutes" (FIFA*, Legal Handbook, 74).

The rules specifies in Article 5 – 9 (ibid, 76 – 82) the specific circumstances in which you can represent a nation in an international match. Article 6, gives the eligibility when a player holds

two or more nationalities, in which country to represent. The bottom line however is, that according to Article 5 subsection 3, a player who has already represented one country in an international match, can only change sporting nationality, if he fulfills the criteria set in Article 9. If a person changes nationality, without having represented the former, he needs to fulfill criterias set in Article 7, and a player no matter needs to have a genuine residence in the country according to article 6, subsection 4.

Article 9, subsection 1, states that a change can only happen once. Subsection 2, letter a) to e) holds five different scenarios for change, where the conditions in at least one of them have to be met. The five scenarios will not be elaborated in detail upon in this paper, but it is worth noting, that in contrast to other sports, these rules does not contain a waiting period before the player can represent the new country.

World Aquatics (Formerly FINA), is the IF representative of a lot aquatic sports including swimming, artistic diving and many more. In their competition[12], rules article 3.3. they give the exact rules for change of sporting nationality. An athlete who have represented another country, can change sporting nationality if they are national of the new country (either by birth or naturalization), they have waited 3 years since last representing the former country, and last that they have either stayed uninterrupted at the territory of the new country for the past three years, or they have a genuine, established and close link to the new country.

The rules now states that an athlete must have been a national of the given country for at least three according to article 3.1.1., this is recently changed from the previous requirement of one year.

We will not go in detail with other IF's but for instance it seems that neither ITF (Tennis)[13] nor FIDE (Chess)[14] have any particular rules concerning the change of nationality in the sport, except for what follows from the international competitions itself e.g. Olympic Games as clarified above.

[12] https://www.worldaquatics.com/

[13] https://www.itftennis.com/en/about-us/governance/rules-and-regulations/?type=constitution

[14] https://handbook.fide.com/files/handbook/FIDECharter2020.pdf

2.5 International or global sports law – Lex Sportiva

There is much debate across scholars and practitioners alike whether the legal regime around sports, can be classified as its own legal discipline a so called *lex sportiva*, or whether it is merely a part of other disciplines, with a special feature in sports relation (Siekmann and Soek, *Lex Sportiva*, 35), for instance contract-, tort-, or immigration law. Whether the distinction is important or not, is also a matter of discussion, but there is no doubt that sports related litigation is increasing in nature, and thus the importance of a lex sportiva and practitioners who are well established in this field becomes more apparent. Foster argues that there is a difference between international sports law, and global sports law (ibid).

This paper will not go in depth with this discussion, but some important distinctions and observations have to be made.

Global sports law is of a contractual private obligation between parties, whereas International sports law, is of a character where international law comes into play (ibid, 43). As such International sports law is subject to regulation by national courts, and the principles of international sports law is of a customary law nature, and as such is underlined with universal jurisdiction and should be enforced whenever possible whereas global sports law is not. Global sports law, and the development of this, would be sponsored by corporations and has ambiguous national ties whereas international sports law would be regulated and subsided by nations themselves (ibid).

A lex sportiva would according Foster (ibid, 43-44) be of a global sports law character and would imply that national courts do not have jurisdiction to interfere in these matters, making international sporting federations unaccountable to courts except by arbitration systems created and validated by those federations themselves. He categorizes the rules and regulations of sports into four different categories, *"rules of the game, ethical rules (spirit), international and global rules".*

Some scholars argue there are a transnational sports law (Duval, *Lex Sportiva*, 823 – 824). In this case is meant the implication that states and private entities such as sporting federations, engage in a collective effort to create legal regulation. For instance the whole doping effort, as is further elaborated upon in subsection 2.7 In this case, the whole creation of WADA and anti

doping codes as the UNESCO convention against doping, only resembles any practical meaning because it is created in cooperation with the sporting federations themselves, and are incorporated into their charters (Siemann and Soek, *Lex Sportiva*, 279 – 280).

Whether one agree to the argument that a lex sportiva exists or not, the fact remains that there is a set of principles of customary international law, that regulates not only the private arbitrational system of sports law in CAS, but also the public international law regime.

2.6 Court of Arbitration for Sports (CAS)

As the name suggest this is not an international court per se, but an arbitrational instrument. Even though one could draw conclusions on the applicability of certain rules when analyzing case law from CAS, the cases does not officially have any binding character as precedent.

Foster warns that there is a power differential between federations and players at CAS. He argues that in their application of lex sportiva, they applies the general principles of good governance and procedural fairness. He further warns, that mandatory arbitration is dangerous, primarily due to the way arbitrators are found and selected (ibid, 147).

2.7 The fight against doping

Throughout history "doping" has been used to enhance an athlete's ability to win in competitions (Kumar, *Competing against doping*). This has been the case since ancient times where natural remedies such as specific herbs and diets were construed that gained the individual an advantage compared to his competitors.

The area of combatting doping, is a prime example of an effort turning from the individual federations regulation, to turn into an effort turned on by the international community as well.

Use of doping is very old, and in 1928, IAAF the first international sport federation, issued a prohibition of doping. It was not very effective though, since no real method of testing had yet been developed. Back in the beginning of 1900, doping was mostly used with illegal drugs in horses during chariot races (ibid).

During the Winter Olympic Games in 1968, the IOC had implemented the first drug tests. In the previous years, some cyclists such as Tom Simpons and Knud Jensen had died after fatally doping themselves with a cocktail of amphetamine and alcohol. In the succeeding years, most international sports federations started testing mostly for amphetamines.

In 1999, after a large raid at the Olympic Games, WADA was created to coordinate the effort to combat doping. The first job for WADA was to investigate and streamline all the different initiatives to combat doping, from all the different sports organizations. They needed to create one singular instrument, the WADC that should be enforceable in all sports across all platforms. By 2003, the second world conference on doping were held in Copenhagen, where agreement were reached on WADC. At the same conference, national representatives, reached a consensus on creating a convention to combat doping under the auspices of UNESCO.

Since WADC is under Swiss law, states could not be bound by it, since it would be in violation of the principle of sovereignty. Instead in 2005 the convention, which holds the nations accountable to WADC, were unanimously concluded by the 191 countries. The countries would then ratify the convention obliging them to abide by the rules in WADC. More than 600 organizations are today member of WADC, though some larger organizations are not[15].

Looking upon violations of WADA, the first accusations against Russian state sponsored doping came in 2014 from a German television station. After a thorough investigation, IAAF banned the Russian athletic organization (RUSAF) from all international competitions. Shortly afterwards the first cases against Russian individual athletes appeared before CAS.

The International Olympic Committee established the World Anti Doping Agency in 1999 in the after wake of the massive doping scandal in cycling. The Agency has widespread powers to conduct doping tests and to decide which substances are illegal in sports and which are not. The need for a harmonized and global effort to combat doping was evident.

Today the World Anti Doping Code is the core document to harmonize doping regulations. It is a document that is changed regularly and it is not meant to be static.

[15] https://www.wada-ama.org/en/what-we-do/world-anti-doping-code

In 1989 the Council of Europe passed the Anti-Doping Convention. The aim as elaborated in article 1, is to reduce and eventually eliminate doping in sports. Each party to the conventions obliges to take the necessary precautions to comply with this.[16] All 47 states in Europe have ratified the convention, and five non-members of the European council (Evald, Boesen, Clausen, Halgreen, Hilliger, Jakobsen and Olesen, *Dansk og International sportsret,* 317).

In doping regulation there is a twofold regulation, first there is the Public International Law regulation, through the European council anti-doping convention from 1989 and UNESCO convention against doping in sport, and national legislation. The European Council act obliges the countries, which is not limited to European member states, to harmonize efforts against doping, and also to do anything in their powers to combat doping as long as it does not violate their constitutions. The instrument itself is not specific, but merely sets the overarching principles of doping control. It further sets standard for how to test for doping, and the procedural mechanisms for prosecuting doping violations. Then there is sport regulation, that is primarily the WADC, which is followed by regulations from the IF, and NFs. Anti-doping rules are part of *lex sportiva*.

As seen by the rulings of CAS, one could argue that WADC is a kind of *lex superior*, since the relevant anti-doping organizations are bound by the WADC and as such, according to part 1 of WADC obliges to keep their member bound by it. This also means that WADC are not directly enforceable by individual athletes, but since their relevant Anti-doping organisations are bound, WADC becomes indirectly applicable. WADC only applies on an international level, their superiority does not have precedence in national matters as evidenced by several CAS rulings (Evald, Boesen, Clausen, Halgreen, Hilliger, Jakobsen and Olesen, *Dansk og International sportsret,* 217-218). There are exceptions, if there is a direct reference to the international sports organizations doping rules in the national sports organizations doping rules, or there is a clause in the national legislation that WADC is applicable.

As seen the effort to combat doping was manifold, first the problem was recognized in the 1960's (even though some initials efforts done many years before), when athletes were dying from the effects of uncontrolled doping. Instruments of Public International law, the UNESCO

[16] https://rm.coe.int/168007b0e0

convention and the EU instruments, to ensure that nations initiated an effort to combat themselves. Further specific legislation, as a matter of private legislation, through each individual international federation or national federation and through WADA enacted the specific kind of doping, and prohibitions that were necessary.

Even further, most countries, as an obligation after, the convention enacted the national legislative act to enforce and strengthen the fight against doping use in each country. At last, many of the drugs used in doping, are specifically prohibited in national penal codes, so even the possession and illegal sale of the drugs can be punished with criminal liability.

In the initiation of the drafting of WADC, there were considerations taken to assure the athletes rights were guaranteed. A look were taken to both the UN convention on civil and political rights, and the European convention on human right article 6 in particular.

This meant that in the process of an investigation of alleged doping use, the athletes had the right to be heard, and had the right to a fair and speedy trial. The international federation are also anti-doping organizations, meaning they are responsible for the doping test, initiation with the judicial organs and ordering of sanctions in the first level. However not all international federation have a judicial organ, and puts it instead back to the national federation. Due to the guarantee of the athlete's rights, there is also appeal opportunities.

2.7.1 Perspective

What to learn from the fight against doping is the fact that the "battle" was and is being fought on several fronts. It is not a singular fight in the private regimes of IF and NF, and there needs to be a singular streamed front against it, both in public international law, and on private regimes, one that is streamlined across different sports platforms, that is the most effective.

As an effective method to combat negative tendencies in international sports on the *outside* of the game, one would need to focus on both the sports federations as well, as ensuring the international forum in the form of instruments in Public International law as well. Lacking one of them, would most certainly result in a lost effort. All this, there needs to be a guarantee of the athletes civil and political rights as well.

3 Case-law

3.1 The International court of Justice

In the case of Nottebohm (Liecthenstein vs. Guatemala[17]), the international court of justice made some interesting points about nationality that are valid also in the discussion of a sporting nationality. The case, which concluded in 1955, had no relation to the area of sport. It revolved around the individual "Nottebohm" who by birth were a German citizen, but who had obtained Lichtenstein Citizenship in 1940 at the outbreak of World War II.

Nottebohm who had been living in Guatamala since 1905, were interred in 1943 as a result of war measures, in that regard Liechtenstein put forward a claim that Guatemala had breached international law, when they treated Nottebohm as an individual from an enemy state (Germany) when he was in fact a national of a neutral state (Liechtenstein).

Guatemala first contested whether the court had juristiction to hear the case at all. In their judgment, the court made some interesting points.

First the court ruled that for a member state to have legality to address claims by an individual such as Nottebohm, that state needs to have legal standing in reference to said individual. The court concluded that it was every country's to decide the granting of citizenship, but for a state to have standing in international law, there have to exist a genuine bond between state and the individual.

The court remarked that in the case of Nottebohm, the sole purpose for his trip to Liechtenstein and his acquisition of citizenship, were merely to avoid internment. And for those reasons there were no genuine link, in this case. The court rendered thus a judgement against Liechtenstein (since individuals does not have legal standing in the international court of justice).

When looking upon the case of a sporting nationality, the assessment is two fold. First is the assessment whether a change in nationality has the required "genuine link" or not, and secondly whether the individual can be allowed to participate in international sporting games on behalf

[17] https://www.icj-cij.org/case/18

of their respective nation. It is worth to keep in mind, this is only in reference to the international court of justice, and legal standing in reference to states.

Looking upon the first criteria when individuals change nationality for the mere purpose of being able to play for that nations team in international competitions one could argue that the genuine link is missing. When football player such as Mohammed Muntari changed nationality from Ghanesian to Qatari in advance of the world cup in football[18], he had never been to Qatar before, and anyone would argue that there were no genuine link between him an Qatar.

The reason for the change, the ability to play football, could however be counted as the genuine link since he is now a member of the football team. Further with the change of nationality, the players at least on a part time basis, relocated to Qatar. This meant that at least after the change of nationality, the genuine link had arisen and were established.

Thus one can most likely not argue the illegality of a change in nationality for the mere purpose playing professional sport on a national team, on the ground that there is no "genuine link".

This argument could also only be put forward by another state against e.g. Qatar for buying players, at the international court of justice. However organizations such as the International Olympic Committee have no legal standing before the international court of justice, only states does.

3.2 National rulings

A peculiar case occured in the Netherlands, Salomon Kalou from the Ivory-Coast were playing for a Dutch football club Feyenoord in 2006[19]. He applied for a fast-track naturalization process due to the upcoming world cup, in which he wished to represent the Netherlands. His application were supported by the national team manager Marco van Basten and several national football icons.

[18] https://www.goal.com/en-gb/news/mohammed-muntari-who-is-ghana-born-star-set-to-represent-qatar-in-world-cup-opener/bltb59efab785ccaadd

[19] http://news.bbc.co.uk/sport2/hi/football/africa/4717494.stm

His application were rejected by the minister of immigration Verdonik, and the courts initially reversed the decision for a lack of specific justification. Verdonik reached the same conclusion later, and his application for fast-track naturalization were denied. Verdonik was afraid that Salomon Kalou would soon change to a bigger foreign club.

The peculiar thing however was that his brother Bonevantura Kalou, played for the same Dutch football club, and he had since 1998 represented the Ivory Coast in international football matches. If Salomon Kalous application had gone through, he would have represented the Netherlands - who had drawn to play the Ivory Coast - at the 2006 world cup and the two brothers would have been the first brothers to represent two different nations in a football world cup. The interesting thing about this, were the Kalou brothers were not in any way affiliated with Netherlands except living there. They had no ancestral basis in the Netherlands.

Eventually Salmon Kalou ended up playing the Ivory Coast national team from 2007 - 2017.

3.3 Case law from CAS

As previously mentioned, when looking upon decisions from CAS it is worth noting, that it is an arbitral tribunal, with arbitrators selected at the procedural stage of each case. Decisions are confidential, unless otherwise agreed upon, and the decisions made public are not reliable in the way they are not authoritive, only the original documents is.

However looking upon the specific non-confidential case law of the CAS, there are 12 decisions concerning "sporting-" or "sportive nationality"[20]. It is worth noting, that when searching for "Doping", 422 cases comes up. Here is a short recap of the case law in reference to sporting nationality.

3.3.1 CAS 2020 / A / 6933[21]

This case concerned a footballer with dual citizenship, both Mexican and Lebanese. He had signed on with a Lebanese football club, and after a short time he sustained a knee injury. The

[20] Found at their online database: https://www.tas-cas.org/en/general-information/index/

[21] https://jurisprudence.tas-cas.org/Shared%20Documents/6933.pdf

arbitration were between the player and his Lebanese football club, it concerned primarily whether he had signed on as a Lebanese or Mexican player, and thus whether his contract were that of an international contract, giving FIFA jurisdiction to hear his plea or not.

Ultimately both FIFA and CAS came to the conclusion that his contract was not of an international character and that FIFA did not have jurisdiction to hear the merit of his case.

What is relevant to the issue sporting nationality in this case, the sole arbitrator of CAS noted (*in premise 65),* that established case law from FIFA, gave "*sportive nationality"* as a decision from a player with dual nationality, to choose which nationality he uses when he signs on a sporting contract.

In this specific case *it was the contractual autonomy* of the club and player that decided he should sign on as a Lebanese player, and thus loose the protection of an international contract.

3.3.2 CAS 2019 / A / 6330[22]

The case concerned an artistic skater with dual nationality, the appellant had represented Spain in European Championship in skating, and even though eligible to represent them at World Roller Games 2018, she was not drafted. She requested to have her federation card changed to Brazil where she held citizenship as well. She participated in national championship in Brazil, and were drafted to represent them in the World Roller Games 2019.

World Skate Federation (IF) initially contested her eligibility, based on the Olympic Charter Bye-law 41, and imposed the three years waiting period on her, even though the World Skate regulations did not have such a clause, and even though artistic skating was not an Olympic discipline.

Later they declared they were willing to waive the quarantine period, if both the Brazil and Spanish federations agreed. The Spanish federation declined, and referred to Article 41 of the Olympic charter.

[22] https://jurisprudence.tas-cas.org/Shared%20Documents/6330.pdf

The appellant argued that only those rules in the world skate regulations should be applicable, and since they contained no mention of the IOC charter, or the waiting period in general, they should not apply. Only the general and fundamental principles of the Olympic charter should be applicable (*premise 44).* She further noted that the restriction of a right, must be clearly stated in a rule[23].

The respondent argued that the appellant's citation of the "Official Regulation Artistic - General 2019" were flawed since they were of a technical character and did not contain regulations on matters of nationality (*premise 45)*

The arbitrator found that there were no wording in the World Skate regulations that meant the entire IOC Charter were incorporated into the regulations, and further there were no explicit mention of by-law 41. As a matter of established CAS practice particularly through case law, a restriction of rights on an athlete that can affect their career, must have a clear and precise basis in law[24], be imposed through duly noted authoritative bodies, and should not contradictory or difficult to understand. In the present case the arbitrator thought the principle should be applicable, as it has on previous cases of double nationality issues[25].

The arbitrator found that IOC By-law article 41, were not applicable in the present case. Primarily due to the fact it was not sufficient predictable, and also the by-law stating that federations kept their autonomy, and other IFs had different regulations on waiting period, thus world skate could have instituted their own waiting period, thus meaning by-law 41 were not applicable. Further they noted by-law 41, after their reading were only for meant participation in the Olympic games (Premises 91-93).

The arbritator finally determines whether by-law 41 is applicable as derived from customary law. He finds that both Swiss law, and CAS itself recognizes customary law[26]. The arbitrator gave the respondent the chance to produce evidence of such a practice that By-law 41, had become customary law, (para 102) the respondent failed to do so and remarked that it could not

[23] Citing CAS OG 00/005 Angel Perez v. IOC, the Appellant submits additionally that when a text is ambiguous, the ambiguity must be resolved in favour of the athlete
[24] premise 85, and in particular CAS panel CAS 94/129, para. 34
[25] premise 86, and CAS 2014/A/3621, para. 115
[26] CAS 2004/A/589

because the rule had always been respected (Premise 103). The arbritator thus concluded that there were no such customary law.

It is worth noting, (my remarks), that the arbitrator did not investigate the constitution of *any norm* of customary law in reference to by-law 41, but only that in relation to artistic skating (since the world skate federation were the one obliged to produce the evidence). This method might be flawed since the arbitrator clearly relies on principles case law in reference to other sports, there might have been a general norm of customary law in relation to by-law 41.

The appellant request was thus granted, and she did not need a quarantine period before the change of national team. Further the World Skate federation changed the regulations, and specifically included the wording of olympic charter by-law 41 as well.

3.3.3 CAS 2015 / A / 4181[27]

The case concerned a Waterpolo player (the second appellant), of New Zealand origin, that had acquired Australian citizenship, and had lived in Hungary before moving to Australia. He had previously participated in a match representing the New Zealand national junior team. He wanted to change sport nationality to Australia, but was rejected by FINA (IF), due to the relevant regulation[28] containing a requirement of 12 months residency in the country first, i.e. Australia. FINA found there were no ground to make exceptions from the rule. (Premise 21). The appellants argued that FINAs interpretation had onerous, since the second appellant had been under the jurisdiction of the national federation (the first appellant), for the previous 12 months, which were meant by regulation criteria.

The sole arbitrator goes on in length, to discuss the ambiguity and apparent contradiction in the FINA regulations regarding what is meant by this 12 month period before being able to change sport nationality.

[27] https://jurisprudence.tas-cas.org/Shared%20Documents/4181.pdf

[28] FINA General Rules Article 2.5 - 2.7

For procedural reasons, the case is rejected as inadmissible, after a lengthy clarification of notification time when filing appeals.

3.3.4 CAS 2015 / A / 4028[29]

This case concerned a dispute between an athlete and the National-[30] and International Taekwondo Federation[31]. Contrary to the previous mentioned cases, this arbitration consisted of a panel of arbitrators.

The matter of hand was primarily that of a contractual dispute. The appellant had seeked redress due to unmet contractual obligations from the ATF, and had also filed against WTF for their lack of involvement in the case. The WTF denied jurisdiction saying there was a contractual matter they lacked jurisdiction to deal with. Primarily, and most interesting to our analysis is her claim to have been discriminated against, and the issue of the 3 year waiting period.

The athlete, who was of Turkish origin but resided in Cyprus, had represented the national junior team of Azerbaijan in 2013. Upon initiation of her contract with Azerbaijan, she received a Azerbaijani passport (Premise 45). The ATF argued that there were no breach of contractual obligations, but merely a non-renewal of her contract due to unsatisfying performance (Premise 44). They argued that this was not a form of discrimination neither in the understanding of the WTF Code of ethics or the Olympic Charter. The ATF further argued that she decided to represent a Turkish club in a national championship in 2014, in violation of her contract, and the Olympic charter.

The arbitration panel found in premise 72 -76, that no discrimination were found to have taken place. They relied on the fact that the appellant had failed to demonstrate, that her non selection were due to matters other than her athletic performance, in particular to social, religious, economical or *national* reasons.

[29] https://jurisprudence.tas-cas.org/Shared%20Documents/4018.pdf

[30] Azerbaijan Taekwondo Federation (ATF)

[31] World Taekwondo Federation (WTF)

The appellant further asked for the annulment of the three year waiting period for change of national team as stated in the Olympic charter by law 41, and reiterated in WTF Competitions Rules and Interpretation Article 4 (Premise 79 - 80).

The panel finds, with a short reasoning, that the three year waiting period cannot be waived unless the relevant NOCs agree upon.

All the appellants' filings are thus dismissed.

3.3.5 CAS 2009 / A / 1988[32]

This case concerned a dispute between FIBA[33] and the national basketball federation of Belize[34]. FIBA had questioned the nationality of several players of the Belizan national team, and had eventually found that FIBA Regulation Article H.2.3.3 were applicable to nine of the players on the team. All nine players were born in the U.S. and Canada and held dual nationality. All of them were of Belizian descent.

Article H2.3.3. reads:

"[a] national team participating in an international competition of FIBA may have only one player on its team who has acquired the legal nationality of that country by naturalisation or by any other means after having reached the age of sixteen (16)".

After communications between the NF and FIBA regarding the correct nationality determination of the players, FIBA concluded that they would not contest the eligibility of two of the players, because they had already played for Belize. But rejected the eligibility of the seven other players. Only six of the players were party to these proceedings at CAS.

[32] https://jurisprudence.tas-cas.org/Shared%20Documents/1988.pdf

[33] International basketball federation

[34] BBF

The Panel reversed the appeals body decision insofar it recognized their tie to Belize, and that the certificate of nationality in question were merely of declaratory and not constitutive character (premise 17).

Premise 21 of the case is quite interesting, since it notices the entire core purpose of the need for a sporting nationality. The respondent had underlined that it had a duty to preserve the integrity of the sport, in so far as securing a level playing field. The need to prohibit the "…*undesirable phenomena of professional players acquiring the nationality of another country merely to facilitate to their participation in the national team of that country (and thus to increase their market value).*"

The respondent were further concerned that there would be too much inequality between the national championships and the national team representing the country in international competitions. Finally, they were concerned of a practice where states would facilitate naturalization in the mere process of strengthening their national team.

The panel concluded they were not unsympathetic to the issues raised by the respondent. Further, they fully endorse the objective to hinder "*sporting mercenaries".* They find however that means of restrictions due to nationality criteria's is not the best way to achieve this, as in contrast to criteria's played on a team for instance (Premise 22).

The panel concludes that there are no evidence to suggest abuse in the present case, and all the appellants have sought Belizean nationality unrelated to their sporting career. It finally concludes that if FIBA did not want players in international competitions with past track record, they should have constructed different rules than the present. Thus, the appeal was upheld.

3.3.6 CAS ad hoc division OG 08 / 006[35]

The case was brought before the ad hoc panel by the national swimming federation of Moldova (MNOC), before the Olympics.

[35] https://jurisprudence.tas-cas.org/Shared%20Documents/OG%2008-006.pdf

MNOC wished to have Mr. Gutu, be allowed to represent Moldova in the upcoming Olympic Games. He was born in Moldova and held Moldavian as well as Romanian citizenship. He had previously represented Romania in the international competitions in 2007. Allegedly he had represented Moldova in Beijing in 2008, and he had also represented Moldova at the Olympics in 2004. MNOC claimed that they were not aware of his representation for Romania in 2007, and that it was illegal and thus void.

The panel found that their were insufficient documentation clarifying his status in both Moldova and Romania regarding nationality. The Romanian national Swimming federation had not objected to his switch, and Mr. Gutu himself had agreed to waive his title won for Romania in 2007. The panel further noted that FINA had not given their consent to his change, which is required by the Bye-laws to the Olympic charter article 41, and thus dismissed his request.

They noted further, that if this bye-law was not respected, they would create a situation where athletes would move from state to state, in order to find a national team they could represent at different international competitions after their convenience, if they were not selected in their former state (Premise 8).

3.3.7 CAS ad hoc division OG 08 / 002[36]

The case concerned whether a Filipino swimmer with dual citizenship should be allowed to represent the Phillipnes in the upcoming Beijing 2008 Olympic games. The panel concluded that the rules in FINA GR. 2.6 required a waiting period of three years, but that the period could be waived if both NFs and the IF (FINA) agreed. In this case FINA had not given their consent, but the panel found there were genuine reasons for miscommunications and that it would be unfair to enforce FINA GR. 2.6 in this case. The change of sporting nationality was thus granted in this particular case.

3.3.8 CAS 2007 / A / 1377[37]

[36] https://jurisprudence.tas-cas.org/Shared%20Documents/OG%2008-002.pdf
[37] https://jurisprudence.tas-cas.org/Shared%20Documents/1377.pdf

This was another case concerning the interpretation of FINA rules, and the ability to change sporting nationality. The appellant held dual citizenship, and wished to change sporting nationality from Canada to Portugal. She had previously represented Canada in international diving competitions.

The dispute revolved around whether the appellant had had a previous residence in Portugal for 12 months, as understood by FINA GR 2.6. She had never lived in Portugal, and at the time during the change, she had been staying in the U.S. for studies, medical services and training. Further Portugal did not have the training facilities needed for her. She stayed in Portugal twice a year, at her mother's home.

Interestingly her lawyer argued at the arbitration, that FINA must be vigilant of persons who *"who game the system"*, but he further argued that was not the present case, the appellant could easily have bought a house or apartment when she first acquired to change sporting nationality, but that was not needed he argued.

She did have such a long established connection as required. The appellant further argued that the 12 month residency period, were not necessarily the previous 12 months, but cumulative 12 month sometime prior to the date of change, the latter she undisputedly met.

Again the sole arbitrator emphasis the need to ensure that "nation shopping" (premises 54-56) is a non-occurrence. He finds that the 12 month residency period, must mean that the athlete should have lived in the country for a 12 month period immediately prior to the change.

The arbitrator further argues that the FINA rules are clear and compatible, the appellant should have known what the rules were, and if not she should have accessed the legal support she was offered from the Portuguese national federation. She were a victim of her own flawed understanding of the FINA rules (premises 42- 45).

The arbitrator finally dismiss her appeal.

3.3.9 CAS 2001 / A / 357[38]

This case concerned a dispute in Ice Hockey arena and the change of sporting nationality. The appellant had wished to represent Russia at international ice hockey competitions including the Olympic games in Salt Lake City in 2002, but were denied eligibility by the international federation (IHHF). The appellant were born in the Soviet Union, and in 1994 he had represented the Kazakh Ice Hockey team at the world championship.

The rejection in change of sporting nationality by the IHHF Council were based on the IIHF Bylaw 204(1)c that said, if you had previously represented another nation, you could never be eligible for participation at another nation. Only if you were under 18 at the original representation there was a possibility of change, under some given criteria's.

The appellants gave several arguments why Mr. Nabokov should be allowed to change sporting nationality. First they said the rules were implemented after he represented Kazakhstan in 1994, and thus would have retroactive effect if used, secondly they contested whether he was even eligible to play for Kazakhstan in 1994 or whether he was in fact a Russian citizen at the time.

But lastly, and most interestingly, they applied emphasis on the Olympic Charter by-law, and the possibility of changing in sporting nationality in this. They argued that since his eligibility in question were for the Olympics the IIHF should grant the same lenient standard of change in sporting nationality as the Olympic charter does.

In the present case, the arbitrator considered following an injunction from an Austrian national court, where change in sporting nationality would have been allowed, but relucted to do so in the end. He noted that the IIHF rules for change, were hard in nature. (premise 10-12)

Importantly, the panel, find that the Olympic charter sets minimum standards, and gives the International federations space to make their own stricter rules. It was thus not a violation to deny him his change in sporting nationality. Thus the appeal was dismissed.

[38] https://jurisprudence.tas-cas.org/Shared%20Documents/357.pdf

3.3.10 CAS 98 / 215 – Advisory Opinion[39]

The case concerned an appellant who had represented Brazil in an international Baseball tournament at the age of 15, and now wanted to represent Germany. He held dual nationality. The questioned concerned whether the IBA rules allowed him to make the shift in sporting nationality, the relevant NF already agreed to it.

Article 57 of the IBA constitution, referred to the Olympic Charter, by-laws. The arbitrator remarked that dual nationality in sports is an illusion, and athlete can only have one sporting nationality. So there is no reason he should be put more at an disadvantage than those with only one nationality, and thus the interpretation of IBA rules must be conducted in a less stringent way.

Again the arbitrator argues that the three year waiting period is necessary for the protection of athletes shopping around. He argues that it is well established in sports literature (premise 32).

The arbitrator further argues that there is a problem with three year waiting period in the Olympic Charter by-laws. In a literal reading, a person who have dual nationality before entering an athletic career, would be able to change sporting nationality forth and back. In this present case between Germany and Brazil.

The arbitrator concludes that such a literal reading, is not applicable, and deducts that a solution must be that with an athlete who has dual nationality, the waiting period must be calculated *either*

- from the point where he notifies the international federation about his wish to change sporting nationality, *or*
- from the last point where he represented his previous nation in an international competition.

Either one of these can be used (premise 44).

[39] https://jurisprudence.tas-cas.org/Shared%20Documents/215.pdf

The arbitrator concludes further that the exception and reduction in waiting time, if the parties agree to it, Paragraph 2 of the Olympic Charter By-laws only apply in relations to the Olympic games, and not in general to shift of sporting nationalities.

It is up to the IBA to decide if the appellant should be allowed a reduction in waiting time, the CAS arbitrator clarifies he is not at liberty to make this decision, but argues strongly that he sees no consideration be taken to either fairness or integrity in this case, and subtly hints that IBA should allow the shift (premise 53).

3.3.11 CAS 94 / 132[40]

The player were a Puerto Rican and American national, who had never represented Puerto Rico in international, continental, regional or Olympic championship in Baseball. He had played for a club in Puerto Rico, and in 1991, he signed a contract agreeing to represent Puerto Rico in international baseball *if he were called upon*. Ultimately he was not called upon, and his experience were the Puerto Rican team did not show any interest in him.

The Puerto Rican federation claimed that he could not chose to represent the U.S. in international matches, since his sporting nationality were in Puerto Rico. They further argued that since he was born in Puerto Rico and his formative years were there, he could not change.

The matter were initially referred to the IOC executive committee, who denied jurisdiction since the question was not in reference to participation in the Olympic games. Before the dispute was arbitrated, the player became a professional player and the question had become moot, both the player and the claimant wished to have the principle settled and CAS therefore tried the merits of the case.

Puerto Rico is in reference to sports, a "sovereign nation", and it would be unthinkable that the player should play against his own country. Para 5: Sport nationality and political nationality are two separate things, and he can thus not claim to have "American nationality". The claimant further argued that the player did have US citizenship, but were not a U.S. national.

[40] https://jurisprudence.tas-cas.org/Shared%20Documents/132.pdf

The respondent primarily argued that the player had a choice to decide which country to represent in accordance with IOC charter. Further citizenship and nationality are intertwined, and players should not be treated as property.

The panel makes a large statement that Puerto Rico has the same sporting autonomy as any other country, and that this have not in any way altered their decision making process. Interestingly enough, the panel obviously finds that the player has double nationality, but finds that it is not necessary in the context of the IOC charter to distinguish between sporting and political nationality. Since he had not yet participated for any country in international competitions, he was free to elect to play for the U.S. team.

3.3.12 CAS 94 / 123[41]

The dispute concerned whether the appellant could change sport nationality (in the case referred to as "Basketball nationality").

The player in question, had both American and German citizenship. He was born in the U.S. and had represented them in international competitions. He now played in the German Bundesliga, and wanted a change in sporting nationality. According to the FIBA rules (Article 4.3) a change in basketball nationality, could only occur

If a player has more than one legal nationality by virtue of 4.1, he shall be deemed to have the basketball nationality:

- (a) Of the country in which he was born, or
- (b) When he does not have the nationality of the country in which he was born, the next nationality he has according to the order of precedence as set out in 4.1 (a-e), unless
    - i) he surrenders or loses the legal nationality of that country,
    - ii) he makes application to FIBA to register a change of basketball nationality (section 5),
    - iii) he plays basketball in any one of the countries whose legal nationality he holds on or after his nineteenth birthday. In this case he shall be deemed to have

[41] https://jurisprudence.tas-cas.org/Shared%20Documents/123.pdf

> opted for the basketball nationality of this country unless he has previously established an alternative option with FIBA, by virtue of any of the procedures set out in section 5".

The arbitrator considered that since he was born in the U.S. he had not opted to represent the American team as required in point iii). Since he thus chose to play for Germany after his 19th birthday, according to the law, he must have chosen to represent Germany, and his basketball nationality must be that of German. (Premise 21).

4 Proposed Regime

It is clear that there is a lack of uniformity in the change in sporting nationality across different sports. As has been summarized throughout this paper, there is a real and concrete risk to the integrity and fairness of sport when athletes change sporting nationality without a real and genuine link to the new country.

This risk is no longer only a morality issue in the danger of the sport itself. Today, and increasingly, it has become an issue of both political and economic interests as well. The question becomes what could be done to combat the issue.

As was seen with the area of doping, an effort across multiple platforms could have a potential significant impact on the problem. There was an effort on both the private international law plan, in the form of federations themselves pushing an agenda to combat doping, but there was also a large public international law effort in the form of legislation from both the UN and the European Council, as well as state actors themselves criminalizing the use of doping in sports.

The following are some *de lege ferenda* points into the feasibility of a uniformed sporting nationality, made upon the analysis throughout this paper.

First when constructing the disposition of a uniformed sporting nationality, it is imperative to make a disclaimer. A uniformed sporting nationality could not and should not have any impact on the sovereignty of a state actor in matters not relating to sport. By this is meant that the state

actor is still at liberty to grant an individual citizenship (political nationality), at their own discretion.

Second it is important to investigate the legality of this uniformed sporting nationality. The basis for the uniformed sporting nationality, could be either grounded in public international law, or in private international law. Currently the closest to a uniformed sporting nationality, is in the by-laws to rule 41 of the Olympic Charter where a minimum standard is given for participation in the Olympic Games.

Through the analysis of our case-law from CAS, it is evident that the arbitrators take into consideration the effort to avoid "state-shopping". By this collective term, I refer to all the remarks the arbitrators use to refer to individuals who attempt to change nationality in the mere purpose of finding a state they can represent at international games.

The questions is, if the effort to establish some criteria's for change of sporting nationality, becomes so well grounded in the practice from different federations, states and arbitrational tribunals, at what point does it become part of a customary international law.

As explained previously, the creation of customary law, requires that state practice and opinio juris are determined. This means that for a norm to turn into customary international law, enough states should follow and practice this norm, and at the same time they should do it because they were of the impression that they were legally obliged to do so.

The question is, if some part of the sporting nationality has or is on the way to become customary law. First one could argue that some part of the sporting nationality is part of customary international law already today. If we look upon the most basic principle of sporting nationality, the fact that an individual representing a nation at international sport competitions, have to be a citizen of that country, that is well established. It is the most basic rule in national teams that a member should be a representative of that given country, i.e. a national. It further seems that with the creation of new sports, such as e-sport, a norm of citizenship is imposed upon national teams .

It is however not that clear, upon further investigation, there are some exceptions in regard to stateless person who can not legally obtain citizenship in that country, and who does not need

to be a citizen of that country, it is however established they need permeant residency . We can thus conclude there is a norm, that requires citizenship, or primary residency in that country if they are stateless.

We have established that the requirement of citizenship, is of such a character that it is part of customary international law.

The argument for a uniformed sporting nationality, can be extended to the fact that today some part of the by-law to Olympic Charter rule 41, is of a customary international law character. The minimum standards that a three year waiting period is imposed, which can only be waived at the agreement of NOCs and IF, could be argued to be part of customary international law. The argument is not valid though, as clarified previously, many sporting federations have other rules, when not in connection with the Olympic Games, and state actors can hardly see this rule as a general norm of obligated character when dealing with new sports in a non-Olympic regime.

The fact is, hardly any other part of the sporting nationality, is today a norm of customary international law.

Now that is established, the next question will be if a uniformed sporting nationality, could and should be part of public international law. Today there is already a principle of fairness , that is part of both public- and private international law. One could argue that, a uniformed sporting nationality, could find its legal basis in this rule.

Finally, the most realistic *de lege ferenda* point, must be that if a uniformed sporting nationality should be constructed, it must be encouraged through a convention on the basis of United Nations, as well as documents from the European Council . Further the uniformed sporting nationality, must be pushed through the international sports federations. If this is done, and at some point in time, perhaps the uniformed sporting nationality, could be a norm of customary international law.

When looking upon how a uniformed sporting principle should be designed, a few criteria's seems to be evident. When analyzing the case law from CAS, as well as looking upon the regulation of some of the larger international sporting federations, there is some commonalities that could extrapolated.

First, there seems to be a consensus, the individual athlete need to have a real and genuine link to the country for which he wants to participate. It is not enough that the athlete is a national, most of the regulations contain a requirement, that he have lived there for the past 12 months. One could thus argue, that the first criteria would be a criteria of a genuine link to the country. This genuine link criteria, could be constructed such as this requirement of 12 months residency, or for instance inspiration could be taken from the "residence requirement", known from tax law .

This does not however entirely solve the issue of state actors "buying" athletes to participate for their country, they would just move to their new country plenty of time in advance of the international competition. Looking upon the players at Qatar's national football team at the world cup, most of the "bought" players, split their time between the former country and the new one while waiting for the world cup. In order to combat this problem, one could make the criteria of a genuine link even further, by requiring the player to abandon his former citizenship or to make a requirement of a genuine link in the form of ancestral derivation. In this case the individual athletes need to demonstrate, they genuinely believe in the change to their new nationality, or that they have some connection to the country in the first place.

Second criteria, that can seem to be established upon the practice, must be that there is a mandatory waiting period, from last representation of the former country, until the athlete can represent the new country. This could well be established to be the three years, that is already in the Olympic Charter. Some of the sporting federations, however seems to have a stricter rule in this place, for instance hockey, where you cannot change if you have represented another country before.

Finally, it must be determined whether the new uniformed sporting nationality, should be a minimum standard, as known from the Olympic Charter or if it should be a given standard. Sporting federations, if they agreed upon the uniformed sporting nationality, would likely want it to be a minimum standard. It is however preferable to the purpose of a uniformed sporting

nationality, to have clear and concise rules that apply equally across multiple sporting platforms.

5 Conclusion

The research question was put forward in a way that it could be answered in the affirmative or not. After our examination of case law as well as the current theory on the subject the answer cannot be answered in the affirmative.

The first conclusion that can be drawn is that the area of sporting nationality, is one that has its legitimacy, since the question has arisen both before arbitrational tribunals such as CAS as well as regular national and international courts. It is however not on a large scale as the area of doping for instance.

Second, it has been shown that there is a divergence on the design and construction on the rules of sporting nationality in different sports. We have seen that the area of Ice Hockey for instance, is way more stringent than the area of swimming.

At the same time it has been shown that the current existing, in particular arbitrational system, is effective in handling disputes arising in relation to sporting nationalities. Looking upon football, FIFA has tightened their rules in previous years to combat the changes, and in particularity due to Qatars previous conduct.

Third, the need for a uniformed sporting nationality, is imperative if one wants to combat the "nation-shopping" of individuals, as well as states buying a national team. A dual approach where both sporting federations as well as a public international law approach from the United Nations and European Union is desirable. This solution could be designed somewhat similar to the effort on doping.

Fourth, there seems to be consensus on a somewhat distinct regime of rules relating to sport. But whether there is a distinct *lex sportiva* and whether this uniformed sporting nationality should be part of this, seems more dubious.

Currently, the greatest impact on sporting nationality, arises from the unprecedented case law from CAS. The arbitrators keenly remark the real and substantial effort to combat nation shopping. This case law, and the conduct of sporting federations as well as the International Olympic Committee could in time turn in to become a matter of customary international law.

Lastly, this is also where the emphasis should be put. On the current regime, a principle of a uniformed sporting nationality, if developing, will most likely result from a norm of customary international law as part of the principle of *fairness* in sport. As was noted in one CAS case, *it goes against the spirit of the sport*. On the other hand, one could argue, why is this principle of a uniformed sporting nationality, necessary when many other aspects of sport today is not fair.

For instance could be mentioned access to training facilities or equipment which is widely unequal across different nations from rich to poor.

In conclusion, there are no uniformed sporting nationality today, and if such arises it would most likely be out of customary international law, based on state and sporting federations practice, resulting from conduct from e.g. the Court of Arbitration for Sports.

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