NATIONALITY AND NATURALIZATIONS IN INTERNATIONAL SPORTS LAW: SPORTS FEDERATIONS AS GATEKEEPERS

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ABSTRACT

The institutional rules of International Sports Federations ("IFs") and the International Olympic Committee ("IOC") concerning nationality and its transfer therein are regulated by the Nottebohm safeguard, which requires the conferral of nationality under domestic laws to be consistent with international law for the conferral to be valid in the international legal sphere. The international sporting arenas qualify as international legal space, but the compatibility of naturalization laws with this legal space is regulated and enforced not by states, but by non-state entities, namely IFs and the IOC. These institutional rules possess a normative character because the pertinent stakeholders consent to them by contract, which in turn provides for the jurisdiction of internal quasi-judicial determination and ultimately gives rise to arbitral awards (as a form of ultimate appeal) to the Court of Arbitration for Sport ("CAS"). The key provision is Rule 41 of the Olympic Charter and its interpretative Bye-Laws, which provide that an athlete may switch sporting nationality provided that three years have elapsed from their last participation for the country they previously represented. This general rule may be supplemented by the institutional rules of IFs, the majority of which operate nationality review panels for this purpose. This Article selectively examines the rules and institutions of two IFs other than the IOC, namely the Fédération Internationale de Basketball (International Basketball Federation) ("FIBA") and the World Athletics Federation ("WAF"). Each struggle with different objectives and nationality transfers, chiefly naturalizations, gives rise to a number of problems and

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concerns that are resolved through the observance and enforcement of varying internal nationality rules. This Article suggests that a set of five questions sets the standard for a human rights impact assessment of all naturalizations in the sport domain.

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I. INTRODUCTION

Although the conferral of nationality (or citizenship) is a fundamental element inherent in the sovereignty of states,[1] it is not without limits. The granting of nationality produces effects at the domestic level, though the validity of such unilateral act at the international level is subject to the dictates of international law. This is sensible since states could otherwise confer nationality on aliens without their consent,[2] or do so in a manner that violates the laws of other states, whether intentionally or unintentionally. Moreover, states are prohibited from rendering their own nationals stateless, particularly by stripping them of their nationality or forbidding them from returning.[3] States can, of course, deny nationality or entry to persons with

1 Richard Perruchoud, *State Sovereignty and Freedom of Movement*, *in* FOUNDATIONS OF INTERNATIONAL MIGRATION LAW 123, 124 (Brian Opeskin, Richard Perruchoud & Jillyanne Redpath-Cross eds., 2012).

2 *See, e.g.*, CONSTITUCIÓN DE 1981 [1981 CONSTITUTION] Sept. 21, 1981, art. 25 (Belize) (suggesting that a person born outside of Belize before its independence in 1981 and whose parents or grandparents are Belizean nationals is automatically conferred the nationality of Belize).

3 As a result, Article 1 of the 1961 Convention on the Reduction of Statelessness applies the *jus soli* principle to persons that would otherwise find themselves stateless. *See* Ilias Bantekas, *Repatriation as a Human Right Under International Law and the Case of Bosnia*, 7 J. INT'L L. & PRAC. 53, 54 (1998).

ancestral links, or even strip persons of their nationality as long as the person holds dual nationality.[4] This explains to some degree the vast divergence among developed nations in their employment of the *jus solis* and *jus sanguinis* principles.[5] Equally, states are prohibited from forcing their nationals to abandon their home country and rendering them long-term refugees or stateless.[6] The rationale here is twofold; on the one hand, stripping one's nationality deprives them of the protection afforded by the state under international human rights law, while on the other hand, such a situation overwhelmingly burdens states receiving stateless persons.[7]

The International Court of Justice ("ICJ") affirmed the doctrine of effective nationality in the *Nottebohm* case in 1955, when the politics of nationality were highly contentious in international affairs. The ICJ ruled in the *Nottebohm* case that although states are free to confer their nationality on any person, the legal effects of such conferral can only be assessed by reference to international law.[8] This effective nationality has gone through several phases of transformation and has been further hardened by the growth of international foreign investment and transnational law as will be explained more extensively below. In particular, it has been bypassed by transnational corporate entities or foreign investors in their personal capacity that engage in bilateral investment treaty ("BIT")[9] shopping with a view to acquiring as many investor guarantees as possible.[10] This process has effectively decreased the significance of diplomatic protection that was prevalent

4 *See* Begum v. Sec'y of State for the Home Dep't [2021] UKSC 7, [129]-[130] (deciding that it was lawful to strip a dual national of her citizenship by reason of the fact that she had joined ISIS).

5 Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws*, *in* CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES 17, 17 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001).

6 Bantekas, *supra* note 3, at 55-60.

7 Laura Van Waas, *The Children of Irregular Migrants: A Stateless Generation?*, 25 NETH. Q. HUM. RTS. 437, 439 (2007).

8 Nottebohm Case (Liech. v. Guat.), Judgment, 1955 I.C.J. Rep. 4, 17 (Apr. 6).

9 BITs have mushroomed because of the impossibility of achieving a global multilateral treaty and also because powerful industrialized states have been able to use BITs as an incentive for more investments in developing states. *See, e.g.*, Kenneth J. Vandevelde, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT'L L.J. 469, 499 (2000) (arguing that BITs "seriously restrict the ability of host States to regulates foreign investment").

10 *See generally* ANIL YILMAZ VASTARDIS, THE NATIONALITY OF CORPORATE INVESTORS UNDER INTERNATIONAL INVESTMENT LAW (2022).

until the mid-1950s,[11] and has rendered nationality a little more fluid. Investment tribunals have shown reluctance to apply the *Nottebohm* test (albeit intimating that such a test may be relevant in exceptional circumstances) involving a person's genuine link to a state for two reasons; firstly, because it was originally adopted to deal with diplomatic protection and secondly, because it is not required in the ICSID Convention,[12] nor indeed in most BITs.[13] In *Champion Trading v. Egypt*, three of the claimants possessed dual Egyptian and U.S. citizenship. The tribunal was disinclined to be drawn into a discussion regarding the effectiveness of the claimants' U.S. nationality, emphasizing that such a criterion was not required under the ICSID framework.[14] In general, investment tribunals faced with investors enjoying dual nationality have not resorted to prioritizing one over the other on the basis of an effective nationality or dominance test, as the ICJ did in the *Nottebohm* case.[15] Rather, they are content to accept both nationalities as effective and apply the one encompassed under the BIT invoked by the claimant.[16] Such a stance has been followed by tribunals even in situations where the claimant does not reside (habitually or ordinarily) in their country of nationality.[17] These decisions

11 *See, e.g.*, Mavrommatis Palestine Concessions (Greece v. Gr. Brit.), Judgment, 1924 P.C.I.J. (ser. B) No. 3, ¶ 12 (Aug. 30); Panevezys-Saldutiskis Railway (Est. v. Lith.), Judgment, 1939 P.C.I.J. (ser. A/B) No. 76, at 16 (Feb. 28); Barcelona Traction, Light and Power Co. Ltd., (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3, ¶ 79 (Feb. 5).

12 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 160 [hereinafter ICSID Convention].

13 In the U.S. BIT practice, as is the case with Article I of the U.S.-Bolivia BIT, the determination of nationality is based on the law of each state. In the Letter of Submittal to Congress it was further explained that "[u]nder U.S. law, the term 'national' is broader than the term 'citizen.' For example, a native of American Samoa is a national of the United States, but not a citizen." U.S.-Bolivia Treaty, Bol.-U.S., art. I, Apr. 17, 1998, S. TREATY DOC. No. 106-25 (2000).

14 Champion Trading v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, Decision on Jurisdiction, 16-17 (Oct. 21, 2003).

15 *Id.*

16 *See* Olguin v. Republic of Para., ICSID Case No. ARB/98/5, Award, ¶¶ 60-62 (July 26, 2001).

17 *See, e.g.*, Feldman Karpa v. United Mex. States, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, ¶ 30 (Dec. 6, 2000); Micula v. Rom., ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, ¶ 103 (Sept. 24, 2008). It should be noted that habitual residence as opposed to nationality is the sole jurisdictional requirement in other conflict of laws instruments. *See, e.g.*, Council Regulation 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation

demonstrate clear deference to the sovereign power of states to confer nationality.[18] Yet, the ICJ has held that under general international law, at least, a shareholder's country of nationality cannot exercise diplomatic protection on a shareholder's behalf in respect of a company incorporated in a different country.[19] As will be shown in other sections of this Article, this deference is no different from the nationality rules and processes between the IOC and its member International Sports Federations ("IFs").

The unilateral act of granting nationality, while fundamentally state-centric,[20] is equally the product of regional integration politics, where the right of residence produces the same rights and privileges as nationality *per se*. The classical model is the in-depth inter-state socio-economic integration of the type encountered in the European Union, which has given rise to a distinct supranational citizenship, at least in terms of rights and duties, not so much in form. This European citizenship allows persons of various nationalities to freely travel and seek work, healthcare, schooling, and residence, among others things, in any country within the European Union.[21] Such entitlements are typically conferred upon a state's own nationals,[22] and hence European citizenship—a notion that in legal terms should be distinguished from nationality, which is only conferred by the state—is constructed

(EC) No 1347/2000, 2003 O.J. (L 338), at 1-29 (EC) [hereinafter Brussels II Regulation].

18 States may prescribe the method/principle by which nationality is assumed, that is by either *jus sanguinis* or *jus solis*, or a mix of the two. This is a matter of state practice that is not circumscribed or regulated by international law, but rather by constitutional law. See the classical work of James Brown Scott, *Nationality:* Jus Soli *or* Jus Sanguinis, 24 AM. J. INT'L L. 58 (1930).

19 The ICJ made this clear in *Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo)*, Judgment (Preliminary Objections), 2007 ICJ Rep 582, ¶¶ 61, 87ff (May 24).

20 Empires must certainly be distinguished because they must necessarily find a threat that is common to all their subjects. The Romans, for example, distinguished between the law applicable to Roman citizens (which was conferrable) and that which was applicable between non-Romans or between non-Romans and Romans, namely the *jus gentium*. This is not dissimilar to the legal arrangements found in the non-metropolitan territories of nineteenth century empires, particularly the British. *See* EMMA DENCH, ROMULUS' ASYLUM: ROMAN IDENTITIES FROM THE AGE OF ALEXANDER TO THE AGE OF HADRIAN 93-151 (2005).

21 *See* M.J. van den Brink, *EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?*, 39 LEGAL ISSUES ECON. INTEGRATION 273 (2012).

22 Udo Bux & Mariusz Maciejewski, *The Citizens of the Union and Their Rights*, EUR. PARLIAMENT (Nov. 2023), https://www.europarl.europa.eu/factsheets/en/sheet/145/the-citizens-of-the-union-and-their-rights [https://perma.cc/3MCX-8R3W].

on the basis of a broad range of rights, minus the formal conferral of nationality. Nonetheless, the rights bestowed on nationals are equal to those conferred on non-nationals.[23]

From the perspective of international sports law, or the *lex sportiva*, nationality raises more pressing questions.[24] States have a direct interest in reaping the investment sowed on their home-grown athletes and avoiding nationalities of convenience for pure financial gain. Equally, national, regional, and international sports leagues, as well as international tournaments (such as the FIFA World Cup) risk being distorted by the unchecked conferral of nationality by states in order to enhance their clubs and national teams with foreign players.[25] A question therefore arises as to whether international sports federations can impose nationality requirements that restrict the number and types of nationality transfers or naturalizations in a manner that deviates from the dictates of domestic nationality laws. While international sports federations cannot confer nationality in the sense described in Part 2 of this Article, they can nonetheless offer a sports nationality, which for professional athletes may well be the lifeline to further their professional careers and their livelihood. States do not intervene in this process since they cannot force a private organization to accept persons that it rejected. Exceptionally, states, whether acting alone, on the basis of a binding decision of an inter-governmental organization, or following the judgment of an international court, may be forced to impose nationality requirements on IFs. To the knowledge of this author, this has only occurred once, namely in the aftermath of the *Bosman* judgment,[26] where the Court of Justice of the European Union

23 *See generally* RUTH DONNER, THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW (2d ed. 1994).

24 *See* Antoine Duval, *Transnational Sports Law: The Living Lex Sportiva*, *in* THE OXFORD HANDBOOK OF TRANSNATIONAL LAW 493 (Peer Zumbansen ed., 2021); *see also* Lorenzo Casini, *The Making of a Lex Sportiva by the Court of Arbitration for Sport*, 12 GERMAN L.J. 1317 (2011) Both works emphasize that the particular status of the institutions forming the international sports order renders its regulatory ambit transnational in nature, albeit in synergy with national laws.

25 *See* Ayelet Shachar, *Picking Winners: Olympic Citizenship and the Global Race for Talent*, 120 YALE L.J. 2088, 2088 (2011) (arguing that "Olympic citizenship dynamic highlights the growing influence of the economic language of human capital accretion in shaping targeted recruitment policies that are designed to attract top performers").

26 The *Bosman* case was a landmark case in European professional sports and EU law because it extended the right of movement and work in national leagues among all EU member states to footballers–and by extension other sportsmen and women–and also allowed EU players to move to any club of their choice in the EU upon

("CJEU") determined that the nationality restrictions imposed by national football leagues and the Union of European Football Associations ("UEFA") violated the principle of freedom of movement of persons within the European Union in the professional sports context.[27] In every other sense, however, it is clear that the institutional rules of international sports federations are supreme. Such institutional nationality eligibility rules and any disputes arising from them find their way to quasi-judicial or arbitral mechanisms within the federations and ultimately to the Court of Arbitration for Sport ("CAS") as a matter of last resort. Because nationality laws cannot override these institutional rules, sports federations serve as the sort of gatekeepers envisaged in the *Nottebohm* judgment, whereby the processes and mechanisms of international sports law validate the number and type of naturalizations made under national law.[28]

This Article examines the complex status of nationality in the context of the IOC Charter.[29] However, given that Rule 41 of this

expiration of their contract. *See generally* Case C-415/93, Union Royale Belge des Sociétés de Football Ass'n ASBL v. Bosman, 1995 E.C.R. I-04921.

27 *See* JAN EXNER, SPORTING NATIONALITY IN THE CONTEXT OF THE EUROPEAN UNION: SEEKING A BALANCE BETWEEN SPORTING BODIES' INTERESTS AND ATHLETES' RIGHTS 2 (2019) (arguing that while the *Bosman* judgment satisfies the freedom of movement under EU law hampers the growth of local athletes and forces many to migrate).

28 As a matter of principle, the European Council recognized the independence of sport governing bodies and their right to organize themselves through appropriate associative structures in the way they see fit. Declaration on the Specific Characteristics of Sport and Its Social Function in Europe, of Which Account Should Be Taken in Implementing Common Policies, No. 13948/00, Annex IV to the Conclusions of the Presidency, Nice European Counsel (2000), https://www.europarl.europa.eu/summits/nice2_en.htm [https://perma.cc/UJ42-J7US].

29 The nationality rule in the IOC Charter should be read in light of IOC human rights commitments. Article 2 of the Olympic Charter, which sets out the mission and role of the IOC, does not specifically mention human rights as a goal or policy objective. INT'L OLYMPIC COMM., OLYMPIC CHARTER 12-13 (2023) [hereinafter OLYMPIC CHARTER]. The IOC website suggests that principles 1, 2, 4, and 6 of its Fundamental Principles and Article 2 of the IOC Charter enshrine human rights; this author suggests that this is hardly the case. *But see* INT'L OLYMPIC COMM., OLYMPIC AGENDA 2020+5: 15 RECOMMENDATIONS 30 (2023) [OLYMPIC AGENDA 2020+5], https://stillmedab.olympic.org/media/Document%20Library/OlympicOrg/IOC/What-We-Do/Olympic-agenda/Olympic-Agenda-2020-5-15-recommendations.pdf [https://perma.cc/33KA-4ZDS] (recommending to adopt an overarching IOC human rights strategic framework with specific action plans for each of the IOC's three different spheres of responsibility; link the overarching IOC human rights strategic framework to various existing or forthcoming IOC strategies; amend the Olympic Charter and the "Basic Universal Principles of Good Governance" of the Olympic and Sports Movement to better articulate human rights

Charter defers to the more elaborate nationality rules in the institutional instruments of IFs—all of which are IOC members[30]—it is clear that there is no single rule, but a plethora of specific rules in accordance with the needs and aspirations of each federation and its national members. Given the large number of IFs, this Article limits its scope of examination to two in particular; one dealing with individual competitions, namely the World Athletics Federation ("WAF") and its predecessor, the International Association of Athletics Federations ("IAAF"), and another concerned with a team sport, the Fédération Internationale de Basketball ("FIBA"). Other IFs will also be mentioned in brief, where necessary. In order to fully conceptualize the modern notion of nationality and distinguish it from residency (which may be used as a basis for naturalization or other forms of future nationality claims), the Article offers an elaborate section on nationality and residence under international law, not only in respect of natural persons, but also legal persons.

II. THE REGULATION OF NATIONALITY AND RESIDENCE UNDER INTERNATIONAL LAW

As has already been stated, the conferral of nationality lies in the exclusive domain of the state and its organs. By conferral we refer to persons who already possess a distinct nationality from that of the conferring state (otherwise known as naturalization), given that Article 15 of the Universal Declaration of Human Rights already guarantees the right of all persons to a nationality.[31] It would, no doubt, be irrational to *demand* that states confer their nationality on aliens, as every state would then be under the same compulsion, leading to a vicious cycle.[32] Hence, the granting of nationality upon aliens is an entitlement of the state and subject to its exclusive discretion.[33] The nationality of natural

responsibilities; and enable the newly created IOC Human Rights unit to develop the IOC's internal capacity with regard to human rights).

30 *See* OLYMPIC CHARTER, *supra* note 29, at 80-81. The International Tennis Federation ("ITF") administers the Olympic tennis tournament on behalf of the IOC, in accordance with ITF Bye-Laws Article 2.2(2)(a), annexed to the ITF Constitution. INT'L TENNIS FED'N, THE CONSTITUTION OF ITF LIMITED 2024, at 39 (2024), https://www.itftennis.com/media/2431/the-constitution-of-the-itf-2024.pdf [https://perma.cc/5FGP-V5Y8].

31 G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 15 (Dec. 10, 1948).

32 *See generally* H. F. VAN PANHUYS, THE ROLE OF NATIONALITY IN INTERNATIONAL LAW: AN OUTLINE (1959).

33 Ian Brownlie, *The Relations of Nationality in Public International Law*, 39 BRIT. Y.B. INT'L L. 284, 308 (1963).

persons is no longer a contentious issue in international affairs. Other than in the sports context, developed states are reluctant to offer nationality to aliens and only sparingly offer residence to those with assets, investment potential, or unique skills.

Since the early 1990s, the nationality of legal persons (or corporations) has attracted far more attention, given the traversal of capital and resources from one country to another.[34] The nationality of the shareholders of such legal persons is of equal interest. In its *Diallo* judgment the ICJ relied only on Congolese corporate law and the International Covenant on Civil and Political Rights, as well as the African Charter on Human and Peoples' Rights, in the absence of a pertinent BIT, in order to assess a violation of investment guarantees.[35] This has given rise to questions about the nationality of an investment on the sole basis of its shareholders' citizenship.[36] The limitation in the *Diallo* judgment does not exist in international investment law, however, because of the mechanism of "foreign control," as identified in Article 25(2)(b) of the ICSID Convention and also because many BITs and IIAs explicitly provide for an independent right of action on the part of minority and majority shareholders. In such situations, as Rudolf Dolzer and Cristoph Schreuer point out, it is not the locally incorporated company that is treated as an investor but individual membership thereto (i.e., shareholding).[37] Most contemporary BITs broadly define investments as also encompassing shares, stocks, or other interests in a company.[38] As a result, it was not a far leap for an ICSID panel in *CMS v. Argentina* to dismiss the respondent's claim that CMS, as a minority shareholder to an investment in Argentina, did not possess *locus standi* under the U.S.-Argentina BIT.[39] This

34 *See* Ben Juratowitch, *Diplomatic Protection of Shareholders*, 81 BRIT. Y.B. INT'L L. 281 (2011).

35 Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Preliminary Objections, 2007 I.C.J. Rep. 582, ¶ 160 (May 24).

36 *See* Juratowitch, *supra* note 34.

37 RUDOLF DOLZER & CRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 57 (2d ed., 2012).

38 *See*, *e.g.*, U.S. TRADE REPRESENTATIVE, 2012 U.S. MODEL BILATERAL INVESTMENT TREATY 2 (2012) (providing a very broad blueprint for defining an investment, encompassing tangible and non-tangible assets, which is now standard in the vast majority of BITs).

39 CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, ¶ 48 (July 17, 2003) (concerning the suspension by Argentina of a tariff adjustment formula for gas transportation against an enterprise in whch the claimant was an investor).

principle has also been extended to cases of indirect shareholding through intermediary companies.[40]

Nationality is inferior in some situations, or at least produces far fewer legal effects, than residence or habitual residence. By way of illustration, jurisdiction in transnational matrimonial disputes in the European Union under Article 3 of the Brussels II*bis* Regulation, which concerns jurisdiction and recognition of enforcement of judgments in matrimonial matters, is determined by reference to the habitual residence of the respondent.[41] Habitual residence provides a number of privileges, including residence rights,[42] choice of jurisdiction for legal proceedings, and others. As courts have correctly accepted, a person may be habitually resident in one country and simultaneously resident in several other jurisdictions. In this case, there can only be one habitual residence for the purpose of matrimonial jurisdiction under the Brussels II*bis* Regulation.[43] For the purposes of Brussels II, residence need only be habitual, not permanent.[44] English courts have developed a two-tier test for assessing habitual residence, namely a substantive strand and a subjective strand. The first is not easy to

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40 *See, e.g.*, Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, ¶¶ 42-57 (Jan. 14, 2004) (concerning tax assessments by certain Argentinian provinces against a gas transportation company in which the claimants were investors); Cemex Caracas Invs. B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/08/15, Decision on Jurisdiction, ¶¶ 149-53, 157-58 (Dec. 30, 2010) (concerning the nationalization of a Venezuelan company in which the claimants held an indirect ownership interest).

41 Council Regulation 2019/1111 of 25 June 2019, Jurisdiction, the Recognition and Enforcement of Decisions in Matrimonial Matters and the Matters of Parental Responsibility, and on International Child Abduction (Recast), 2019 O.J. (L 178) (providing definitions of habitual residence) [hereinafter Brussels II*bis* Regulation].

42 So-called golden visas are offered by many states around the world as an enticement for persons who invest over a certain amount (usually through the purchase of real estate) in the host state. Residence under such schemes is indefinite and hence encompasses the majority of privileges (but certainly not all) associated with nationality. *See* Kristin Surak & Yusuke Tsuzuki, *Are Golden Visas a Golden Opportunity? Assessing the Economic Origins and Outcomes of Residence by Investment Programmes in the EU*, 47 J. ETHNIC & MIGRATION STUDS. 3367 (2021).

43 Marinos v. Marinos [2007] EWHC (Fam) 2047 [41]; V v. V [2011] EWHC (Fam) 1190 [50]. There are of course other sub-classifications, such as habitual residence and "mere temporary presence" in the case of children under Arts 8 and 10 of Brussels II*bis*. *See* Mercredi v. Chaffe [2011] EWCA (Civ) 272. Prior to the passing of Brussels II*bis* multiple habitual residence was possible under English law, where a person divided his or her time between two or more countries and lived in all with a settled purpose. *See* Ikimi v. Ikimi [2001] EWCA (Civ) 873; Armstrong v. Armstrong [2003] EWHC (Fam) 777.

44 L-K v. K [2006] EWHC (Fam) 153 (Singer J). This has been confirmed in Art. 3 of Brussels II*bis* Regulation, *supra* note 41.

quantify, as it is premised on the "centre of someone's interests" whereupon "one [must have] regard to the context."[45] The second strand of the test concerns the true intention of the person in establishing his center of interest in such a way that it may be characterized as habitual. The subjective test was not arbitrarily imported by English courts but has long been sustained by the CJEU's jurisprudence.[46]

Multiculturalism's association with immigration is quintessentially predicated on human rights and international law. International law does not obligate states to embrace multiculturalism or at least to admit aliens and force their integration against local sentiment. States are certainly under an obligation to protect the rights of all persons on their territory, whether nationals or aliens.[47] To the extent that multiculturalism requires positive or negative measures for the wellbeing of all persons in a given country, the state concerned is required to take such measures.[48] However, there exists absolutely no compulsion to integrate or assimilate, and assimilation is often viewed as being tantamount to a cultural genocide or stripping peoples from their distinct characteristics.[49]

It is queried whether the principle of non-discrimination, a fundamental human rights norm, can be applied to the nationality-granting discretion of states. Ordinarily, on the basis of general treaties such as the European Convention on Human Rights ("ECHR"), the International Covenant on Civil and Political Rights ("ICCPR"), or more specific treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination, states are obliged to treat all persons equally.[50] Article 14 of the ECHR (the treaty's general non-

45 *Marinos*, [2007] EWHC 2047 [34].

46 Swaddling v. Adjudication Officer, Case C-90/97, [1999] 2 FLR 184 [29].

47 Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle over Autonomy Regimes for Minorities*, 66 NOTRE DAME L. REV. 1539, 1548 (1991).

48 *See generally* Alexandra Xanthaki, *Multiculturalism and International Law: Discussing Universal Standards*, 32 HUM. RTS. Q. 21 (2010). Other authors have contended that the pursuit of cultural diversity, although in principle valuable, risks applying diversity in substitution of justiciable rights and principles of human rights law such as equality and non-discrimination. *See* Eleni Polymenopoulou, "*Cultural Diversity" from the Perspective of Human Rights, Media, and Trade Law: Cross-Fertilization or Conflict?*, 7 SANTANDER ART & CULTURE L. REV. 123, 142 (2021).

49 LAWRENCE DAVIDSON, CULTURAL GENOCIDE 66 (2012) (although here the author does not contemplate assimilation policies in the broad sense, but only those where the aim is to forcibly sever ties with a culture in order to eliminate all memory of that culture, as was the case with Australian policies in the early twentieth century to sterilize its aboriginal population).

50 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; International Covenant on Civil and Political

discrimination provision), has not given rise to significant litigation given that the European Court of Human Rights ("ECtHR") views the provision as entailing formal equality.[51] Nonetheless, the ECtHR has highlighted the position that different situations must be treated differently, thus endorsing positive action under such circumstances.[52] On the other hand, the UN Human Rights Committee clearly favors not only positive non-discrimination policies as such,[53] but also endorses compulsory positive action through Article 26 of the ICCPR.[54] Such bodies and treaties do not suggest, however, that the non-discrimination principle applies where a state chooses to confer nationality to a non-national in one case but not to another in a similar case. Any suggestions to the contrary would defeat the essence of the sovereign nature of nationality and remove the policy/political dimension of states' discretion regarding immigration.[55] Thus, the state's right to confer

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Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Convention on Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

51 Rory O'Connell, *Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR*, 29 LEGAL STUD. 211, 211 (2009).

52 Thlimmenos v. Greece, 31 Eur. Ct. H.R. 411, ¶¶ 39-49 (2001). This is a recurring theme in human rights law. It is generally accepted that equality under the law means not only formal equality but more importantly substantial equality. Formal equality may well give rise to indirect forms of discrimination. Indirect discrimination "occurs when a practice, rule, or requirement that is outwardly '*neutral*' . . . has a disproportionate impact on particular groups . . . ." 2 EQUALITY AND NON-DISCRIMINATION UNDER INTERNATIONAL LAW 61 (Stephanie Farrior ed., 2016); *see, e.g.*, Singh Bhinder v. Canada, CCPR/C/37/D/208/1986, U.N. Hum. Rts. Comm., Views Adopted by the Committee Under Art. 5(4) of the Optional Protocol at its 37th Session (Nov. 9, 1989); Althammer v. Austria, CCPR/C/78/D/998/2001, U.N. Hum. Rts. Comm., Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights at iIs 78th session (Sept. 22, 2003); Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, CERD/C/60/CO/12, Comm. on the Elimination of Racial Discrimination (May 21, 2002) (Concluding Observations of the Solomon Islands).

53 *See* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, General Comment No. 4, ¶¶ 2-3, U.N. Doc. HRI/GEN/1/Rev.1, Hum. Rts. Comm. (July 29, 1994).

54 *See* ICCPR, *supra* note 50, art. 26.

55 The UN Human Rights Committee, for example, has accepted that national security is a valid ground for denying an application for nationality. Borzov v. Est., CCPR/C/81/D/1136/2002, U.N. Hum. Rts. Comm., Views of the Human Rights Committee Under the Optional Protocol to the International Covenant on Civil and Political Rights at Its 81st Session (Aug. 25, 2004).

nationality to aliens trumps the general equality and non-discrimination principle.[56]

This conflict returns us to the discussion of multiculturalism. The United States, for example, which entrenched the *jus soli* rule as a constitutional principle in its Fourteenth Amendment, has taken distinctive measures to prevent the children of illegal immigrants from being naturalized and has imposed burdens on fathers transmitting their U.S. nationality to children born abroad and out of wedlock.[57] It is thus evident beyond any doubt, irrespective of one's theoretical stance on the matter, that there is no obligation on states to foster or enhance multiculturalism—other than by respecting all civil, political, socio-economic, and cultural rights of persons on their territory—and it is accepted that states are free to develop immigration policies based on ethnic or cultural homogeneity. Australia, for example, only admits immigrants that are more than likely to embrace the Australian way of life, thus consciously excluding persons of particular religions and convictions.[58]

III. The General Rule on Nationality in the IOC Olympic Charter

In the Olympic Games, unlike other international competitions, such as competitions organized by the International Tennis Federations ("ITF"), Association of Tennis Professionals ("ATP"), and Women's Tennis Association ("WTA"), athletes principally represent their country of nationality.[59] Nationality requirements are therefore

56 Michelle Foster & Timnah Rachel Baker, *Racial Discrimination in Nationality Laws: A Doctrinal Blind Spot of International Law?*, 11 COLUM. J. RACE & L. 83, 87 (2021).

57 *See, e.g.*, U.S. v. Flores-Villar, 536 F.3d 990, 997 (9th. Cir. 2008).

58 *See Australian Citizenship Act 2007* (Cth) § 12 (Austl.) (providing that a child born in Australia to aliens obtains nationality only following ten years of continuous residence); *id.* pmbl. (requiring persons conferred Australian citizenship to "pledg[e] loyalty to Australia" and "shar[e] their democratic beliefs"); *cf.* ANTJE ELLERMANN, THE COMPARATIVE POLITICS OF IMMIGRATION: POLICY CHOICES IN GERMANY, CANADA, SWITZERLAND, AND THE UNITED STATES 84-85 (2021) (explaining the Swiss Three Circles Policy as codified in 2008 and, more recently, the Mass Immigration Initiative by way of referendum).

59 *See* Press Release, Int'l Olympic Comm. [IOC], Statement on Solidarity with Ukraine, Sanctions Against Russia and Belarus, and the Status of Athletes from These Countries, (Jan. 25, 2023), https://olympics.com/ioc/news/statement-on-solidarity-with-ukraine-sanctions-against-russia-and-belarus-and-the-status-of-athletes [https://perma.cc/B5EG-EHH4] (following the February 2022 invasion of Ukraine by Russia, the IOC decided to allow Russian and Belarus athletes to participate in events under its aegis, including the 2024 Paris Olympics, provided that they did not

imperative, and are spelled out in Rule 41 of the IOC Charter, which states:

> 1. Any competitor in the Olympic Games must be a national of the country of the NOC [National Olympic Committee] which is entering such competitor.
> 2. All matters relating to the determination of the country which a competitor may represent in the Olympic Games shall be resolved by the IOC Executive Board.[60]

Rule 41 does not specify the concept of nationality and does not distinguish between the conferral of several nationalities or how such nationality was obtained. In equal measure, it is silent as to whether an athlete may alter their nationality to compete for a country other than the one they originally competed for. It is clear, however, that the athlete's NOC is determinative of their nationality. This vagueness is clarified in the Bye-Law to Rule 41. Paragraph 1 of Rule 41 addresses the issue of dual or multiple nationality:

> A competitor who is a national of two or more countries at the same time may represent either one of them, as he may elect. However, after having represented one country in the Olympic Games, in continental or regional games or in world or regional championships recognised by the relevant IF, he may not represent another country unless he meets the conditions set forth in paragraph 2 below that apply to persons who have changed their nationality or acquired a new nationality.[61]

This provision gives an athlete the right to choose their "sports nationality" and provides that, as a general rule, this choice cannot be altered after the athlete participates in a major competition under the

represent their countries); *see also* Letter from Alexandra Xanthaki & E. Tendayi Achiume, Special Rapporteurs on Cultural Rights and on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance to Thomas Bach (Sept. 14, 2022) https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=27552 [https://perma.cc/MJ84-KL4N] (advising that any ban would constitute discrimination against athletes on the basis of nationality and expressing serious concern "about the recommendation to ban Russian and Belarusian athletes and officials such as judges from international competitions, based solely on their nationality, as a matter of principle. This raises serious issues of non-discrimination.").

60 OLYMPIC CHARTER, *supra* note 29, at 80.

61 *Id.*

aegis of the relevant IF. By implication, athletes that have competed under the banner of a national team in non-major tournaments are allowed to change their nationality. This general rule is subject to the exception listed in Paragraph 2 of the IOC Olympic Charter's Bye-Laws to Rule 41:

> A competitor who has represented one country in the Olympic Games, in continental or regional games or in world or regional championships recognised by the relevant IF, and who has changed his nationality or acquired a new nationality, may participate in the Olympic Games to represent his new country provided that at least three years have passed since the competitor last represented his former country. This period may be reduced or even cancelled, with the agreement of the NOCs and IF concerned, by the IOC Executive Board, which takes into account the circumstances of each case.[62]

This exception, although narrowly crafted, provides significant latitude to both athletes and NOCs/IFs, which are effectively granted the right to confer sports nationality in the same manner as states *mutatis mutandis*. Although in theory the three-year waiting period represents a serious deterrent for changing one's sporting nationality, the pertinent NOCs and IF in question possess absolute power to waive or cancel such a period, subject to the approval of the IOC Executive Board.[63] It is not at all clear what the "circumstances of each case" means, but the joint decision of the NOCs and IF does not need to rely on any particular circumstances, dire or otherwise.[64] An athlete may just as well desire a decent living or financial benefits, which may be

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62 *Id.* at 80-81.

63 The IOC Executive Board publishes its approval of nationality changes without, however, discussing how many applications were made, how many were successful, as well as the grounds for exceptionally exempting successful applications from the three-year waiting period. Its more recent decision concerned two athletes for the Olympic Games in Paris. *See IOC Executive Board Approves Two Changes of Nationality*, INT'L OLYMPIC COMM. (June 21, 2023), https://olympics.com/ioc/news/ioc-executive-board-approves-two-changes-of-nationality-2 [https://perma.cc/U64N-TQ9F]; *see also IOC EB Receives Updates on the Activities of NOCs; Approves Three Changes of Nationality in View of Paris 2024*, INT'L OLYMPIC COMM. (Mar. 29, 2023), https://olympics.com/ioc/news/ioc-eb-receives-updates-on-the-activities-of-nocs [https://perma.cc/WD96-7XGZ].

64 *See* Matthew Impelli, *As Naomi Osaka Gives Up US Citizenship to Play for Japan, Here Are Other Olympians That Have Competed for Different Countries*, NEWSWEEK (Oct. 10, 2019, 12:18 PM), https://www.newsweek.com/naomi-osaka-gives-us-citizenship-play-japan-here-are-other-olympians-that-have-competed-1464421 [https://perma.cc/H2AL-M8EX].

just as good a reason for granting nationality as the granting of asylum in a country where no further persecution is inflicted, but financial gain cannot be the sole reason for a nationality transfer.[65] This wide discretion may of course culminate in the refusal to change an athlete's sports nationality, even where the underlying reasons are pressing, as in the case of refugees.

While NOCs and international sports federations may approve a nationality change by mutual agreement, that agreement is valid in tournaments held by those sporting entities, but are not necessarily valid in the Olympic Games. Paragraph 4 of the Olympic Charter's Bye-Laws to Rule 41 emphasizes that even if it has been agreed that an athlete may change their nationality, it is ultimately the "IOC Executive Board [that is competent] may take all decisions of a general or individual nature with regard to issues resulting from nationality, citizenship, domicile or residence of any competitor, including the duration of any waiting period."[66] This provision suggests that the consensus reached among NOCs and IFs is anything but binding on the IOC and that factors such as residence and domicile are crucial to the determination of the IOC Executive Board. In practice, the Board defers to the better judgment of the NOCs/IF and refrains from any particular challenge, presuming that, given the contentious nature of nationality, the entities in question have given the matter serious attention.[67]

IV. NATIONALITY EXCEPTIONS IN SELECT INTERNATIONAL SPORTS FEDERATIONS

The acquisition of new and overriding sports nationalities constitutes a vexing problem for all international sports federations. In the context of individual sports and athletics in particular, national and international federations, as well as the IOC, are content with athletes switching nationality in order to enhance their standard of living and

65 *See* WORLD ATHLETICS, TRANSFER OF ALLEGIANCE REGULATIONS, rules 2.10.6-2.10.9 (2022) (These rules require countries willing to confer their nationality on a foreign athlete to demonstrate and be transparent about all financial considerations. This suggests that World Athletics is aware that the prospect of a better life free from financial woes is a key consideration for many athletes desirous of a new sport nationality).

66 OLYMPIC CHARTER, *supra* note 29, at 81.

67 This presumption is purely anecdotal since the IOC Executive Board has never declined or challenged a nationality transfer undertaken by one of its member sporting federations and in equal measure has not made any such claims in the limited nationality cases before CAS.

compete at the highest level, which is in the interest of the IF and sport in general. This is generally disfavored in team sports, however.[68] The rationale against nationality transfers in team sports has already been sketched out in the introduction to this Article. It suffices to reiterate here that while NOCs and national sports federations favor the naturalization of athletes, with the aim of enhancing their national leagues or national teams,[69] this must not only be consistent with the laws of the NOC, but it must also meet the approval of the IF in question. The consent of the IF is determinative of the naturalization and, as the IOC Charter's Bye-Laws to Rule 41 indicate, the IOC defers to the judgment of the NOCs and IF on this matter. Effectively, the IF's determination overrides the NOCs'. This Part will explore the stances of FIBA and WAF with a view to ascertaining their particular mechanisms, as well as their balancing of competing interests.

A. WAF Nationality-Related Eligibility Criteria

Although it is generally thought that the WAF ascribes fully and unconditionally to Paragraph 2 of the IOC Olympic Charter's Bye-Laws to Rule 41, this is hardly the case. In fact, the 2022 WAF Eligibility Rules emphasize that sports nationality (otherwise known as transfer of allegiance) may be conferred only under a specific set of circumstances, which may be narrower than the nationality laws of

68 It has been reported that until the early 2000s in Italian football, a staggering 2,273 foreign players over the age of sixteen were effectively imported through illicit channels, with their paperwork straightened out upon arrival. *See* Wladimir Andreff, *The Taxation of Player Moves from Developing Countries*, *in* INTERNATIONAL SPORTS ECONOMICS COMPARISONS 87, 93 (Rodney Ford & John Fizel eds., 2004).

69 Qatar, the United Arab Emirates ("UAE") and Bahrain, while otherwise maintaining strict nationality laws, have adopted a liberal stance towards sports-related naturalizations in several sports. *See, e.g.*, James Ellingworth, *Qatar Worlds Highlight Track's Many Nationality Switches*, AP, https://apnews.com/195c2ffd442d4277963563535f211e6a [https://perma.cc/YU5R-7T3A] (Oct. 1, 2019, 9:16 AM) (showing that Qatar adopted a liberate stance towards naturalizations for athletes in the track and field); GEN. SECRETARIAT FOR DEV. PLAN., QATAR NATIONAL VISION 2030 (2008), https://www.psa.gov.qa/en/qnv1/Documents/QNV2030_English_v2.pdf [https://perma.cc/Z98H-DZWX]. It is instructive that on the basis of Law No 13 of 2008 on the Contribution by Certain Companies towards Social and Sports Activities, all listed companies in the Qatari stock exchange are obliged to offer 2.5% of their profits (so-called sports levy) to sporting and cultural activities. Law No 13 of 2008 on the Contribution by Certain Companies towards Social and Sports Activities 13/2008, art. 1 (Qatar). A special fund has been established to distribute and manage these assets. The Qatari National Vision, as indeed all other Visions in the GCC, do not directly or indirectly discuss the conferral of sporting nationality to foreign athletes.

particular states.[70] Rule 4.2 suggests that citizenship must be derived from the athlete's bloodline (parent or grandparent born in the country or territory); residence for a period of at least three years; refugee status or asylum (i.e., on humanitarian grounds); or marriage.[71] Exceptionally, Rule 4.2.4 emphasizes that both the three-year waiting period and the aforementioned grounds for naturalization may be waived by World Athletics upon:

> a. the Athlete observing a waiting period of three years from the date that the application for approval is made to World Athletics (during which period the Athlete must not represent any Member in National Representative Competition or compete in any Other Relevant Competition); and
>
> b. the Athlete demonstrating that they have a genuine, close, credible, and established link to that Country or Territory (as applicable) and/or will have such a link by the end of the waiting period.[72]

The three-year waiting period is a serious deterrent for the majority of athletes since there is no guarantee that after this absence their form and performance will be the same as before.[73] The only circumstance that can justify this exception other than the four enumerated above is the assumption of both nationality and residence in another country with a view to earning one's livelihood, although this cannot be expressly stated in a policy document, even though it represents a reality for many athletes originating from the developing world. The 2022 WAF Transfer of Allegiance Regulations suggest a two-prong principled approach to transfers of allegiance. Under sub-Rules 1.2.1 and 1.2.2 of these Regulations, athletes must have a "genuine" connection with their adopted country and not serve "for mercenary reasons."[74] Moreover, transfers should encourage investment in talent without fear of losing athletes to other states. On the other hand,

70 WORLD ATHLETICS, ELIGIBILITY RULES, rules 4.4, 4.5 (2022).

71 *Id.* rule 4.2.

72 *Id.* rule 4.2.4.

73 The same three-year rule has worked as a dis-incentive in other sports. *See* Uzb. Cycling Fed'n v. Olympic Council of Asia (OCA), AG 18/09, Award (Ct. Arb. Sports 2018), which demonstrated the cyclist's eagerness to compete in international games, albeit the three-year period had not elapsed.

74 WORLD ATHLETICS, TRANSFER OF ALLEGIANCE REGULATIONS, rule 1.2.1 (2022).

athletes' contractual, constitutional, and human rights must be upheld by their adopted states in exactly the same manner as ordinary nationals.[75]

Concerning athletes with dual or multiple nationalities, Rule 4.4 of the Eligibility Rules points out that an athlete who has already represented a country in a national representative competition or other relevant competition (so-called "first member") is generally ineligible to so represent another member (so-called "second member") except (a) if the first member ceases to exist or is succeeded by another country or does not have an NOC, or (b) following approval by World Athletics, which is conditional upon:

> a. the Athlete observing a waiting period of three years from the date that the application for approval is made to World Athletics (during which period the Athlete must not represent any other Member in National Representative Competition or compete in any Other Relevant Competition); and
>
> b. the Athlete demonstrating that as at the end of the waiting period:
>
> i. they are or will be aged twenty or over; and
>
> ii. they are or will be a Citizen of the Country or of the parent Country of the Territory which the Member represents; and
>
> iii. they have or will have a genuine, close, credible and established link to that Country or Territory (e.g., through Residence there).[76]

There is nothing in this sub-section that departs from the general rule, although it is notable that the Rule does not apply to athletes below the age of twenty. The real caveats to Rule 4, however, which posit a significant exception to the general rule, are sub-Rules 4.6 and 4.7. Sub-Rule 4.6 refers to a quasi-judicial institution in the form of the Nationality Review Panel.[77] This entity possesses authority to review applications for nationality change. Unlike Rule 41 of the IOC Olympic Charter and its Bye-Laws, sub-Rule 4.6 of the WAF Eligibility Rules clarifies that NOCs have no authority to agree on nationality changes among themselves. The Panel possesses discretion to

75 *Id.* rule 1.2.4.

76 WORLD ATHLETICS, ELIGIBILITY RULES, rule 4.4.2 (2022).

77 The authority of the Panel is envisaged in section 2 of the 2022 WAF Transfer of Allegiance Regulations. The misleading term 'allegiance' refers to applications for the change of one's sports nationality. WORLD ATHLETICS, TRANSFER OF ALLEGIANCE REGULATIONS, rule 2 (2022).

waive the eligibility requirements found in the general principle enunciated in Rule 4 of the WAF Eligibility Rules by relying on the following non-exhaustive list of factors:

> a. whether the application is motivated by circumstances outside of the Athlete's control (e.g., war, refugee status) or by personal circumstances (e.g., a family move) that are unconnected to the Athlete's sporting abilities;
>
> b. whether the application is motivated by the First Member being suspended from participation in International Competitions;
>
> c. whether the First Member agrees to the transfer, and what (if anything) the Second Member has offered to the First Member to secure such agreement;
>
> d. what (if anything) the Second Member has offered to the Athlete to induce them to agree to the transfer (i.e., in addition to Citizenship); and/or
>
> e. whether the Second Member can show that the Athlete would actively promote a development programme that the Second Member has in place for home-grown Athletes, and would act as a role model for such Athletes.[78]

It is evident that the WAF Eligibility Rules do not provide for any other exceptional circumstances than the ones enumerated above. It is instructive, however, that in assessing the list of non-exhaustive factors in Rule 4 of the WAF Eligibility Rules, Rules 2.10.6–9 of the WAF Transfer of Allegiance Regulations emphasize financial disclosure to the greatest possible degree. All NOCs concerned, as well as the athletes in question and their agents, are bound to disclose all financial incentives promised and any special privileges associated with the newly adopted nationality.[79] In particular, the names and roles of all agents must be disclosed, including fees and payments made to them. In assessing transfer applications, the Panel is bound to address and enforce the highest possible integrity standards and may even request the assistance of or refer the application to the Athletics Integrity Unit.[80] The decision of the Panel is final, but an aggrieved party may seek further redress by appealing said decision to the Court of

78 WORLD ATHLETICS, ELIGIBILITY RULES, rule 4.7 (2022).

79 WORLD ATHLETICS, TRANSFER OF ALLEGIANCE REGULATIONS, rules 2.10.6–9 (2022).

80 *Id.* rule 2.15.1.

Arbitration for Sport ("CAS"),[81] which shall decide the application by reference to the WAF Eligibility Rules. In practice, the Panel is considerate of all applications and applications tend to make a strong case and strive to fulfil all the aforementioned criteria. The list of successful applications is extensive and is contained in a WAF database.[82]

B. FIBA Nationality Rules

FIBA has always struggled to keep up with and regulate nationality transfers of its member associations in advance, many of which lacked legality but were backed by states and employed by European clubs prior to the 2000s, chiefly granted to naturalized U.S. basketball players. This practice had a ripple effect on the composition of national teams and local clubs,[83] at a time when the *Bosman* ruling had not yet taken effect and naturalizations significantly altered the dynamics of the game in Europe. Chapter VIII of the 2017 FIBA Competition Regulations ("FIBA Regulations") and its predecessors ended arbitrary naturalizations and introduced more requirements than those found in Rule 41 of the IOC Olympic Charter. Despite the fact that the FIBA Regulations impose stricter conditions than the IOC Charter, the basis for ascertaining the existence of one or more nationalities is always the nationality law claimed by players.[84]

Article 88.2 of the FIBA Regulations stipulates that a player possessing two "legal nationalities," whether by birth or subsequent naturalization (or by the right to a future naturalization) may choose at any time (in the form of a formal written declaration) their preferred

81 *Id.* rule 2.23.

82 Press Release, World Athletics Federation, IAAF Nationality Review Panel Clears 10 Athletes to Compete Under New Flags (Dec. 19, 2018), worldathletics.org/news/press-release/transfer-allegiance-decisions-december-2018 [https://perma.cc/3C4W-8MSJ].

83 *See* Clément Martel, *Firepower from Naturalized Players Causes Controversy in EuroBasket Tournament*, LE MONDE (Sept. 17, 2022, 8:00 AM), https://www.lemonde.fr/en/sports/article/2022/09/17/firepower-of-foreign-players-causes-controversy-in-eurobasket-tournament_5997252_9.html [https://perma.cc/PBF4-PEDN].

84 See, for example, *Federación de Baloncesto (FEB) v. Fédération Internationale de Basketball (FIBA)*, which concerned a dispute as to whether a Russian national lost its nationality upon obtaining another nationality, Spanish in the case at hand. After examining the then Russian nationality law, the CAS came to the conclusion that the player (who had played for the Russian national team) had not lost her Russian nationality and was hence ineligible to play for the Spanish national team. Federación de Baloncesto (FEB) v. Fédération Internationale de Basketball (FIBA), CAS 98/209, Award of 6 January 1999 (Ct. Arb. Sports 1999).

national team.[85] When a player with multiple nationalities is summoned by a national team after reaching the age of eighteen, they are obliged to make a firm choice and if they decline the summons, they are presumed eligible for the team that has not summoned.[86] Players that have played for a national team in an official FIBA competition are considered as having chosen the national team of that country.[87] Players that have played in an official FIBA competition after reaching their seventeenth birthday are restricted to that national team.[88] In exceptional circumstances, the FIBA Secretary-General may authorize such a player to play for the national team of their country of origin if they are ineligible to play for such country according to Article 88.2 and if doing so is in the interest of the development of basketball in this country.[89] A player who has transferred as a young athlete according to Article 3-52 of the FIBA Internal Regulations[90] may not choose the national team of any country other than the country from which they have transferred until they have reached the age of twenty-three.[91] Choices made under this article are irrevocable.[92]

The large numbers of naturalizations that many teams have pursued throughout the FIBA stratosphere (effectively "mercenaries"), chiefly through the complicity of state authorities with a view to appeasing fans, have forced FIBA to adopt a wise rule. National teams are only allowed one naturalized player on their roster, "or by any other means after having reached the age of sixteen (16)."[93] This limitation applies equally to players who at birth had the right to acquire a second nationality but failed to claim it before turning sixteen years old.[94] In *Belize Basketball Federation (BBF) v. FIBA*, decided by CAS

85 FIBA EUROPE, COMPETITION REGULATIONS, art 88.2 (2017-18).

86 *Id.*

87 In *FIBA v. W & Brandt Hagen e.V.*, a U.S.-born player of German descent and a dual national of both countries had played club basketball in Germany. Fédération Internationale de Basketball (FIBA) v. W & Brandt Hagen e.V., CAS 94/123, Award of 12 September 1994 (Ct. Arb. Sports 1994). The FIBA rules at the time demanded that a dual national declare his legal nationality for national team selection purposes by the age of nineteen, which the player in question had not done. However, he was never summoned nor did he every play for the U.S. national team, so this was clearly his first and only legal nationality for the purposes of FIBA.

88 FIBA EUROPE, COMPETITION REGULATIONS, art. 88.5 (2017-18).

89 *Id.*

90 FIBA, INTERNAL REGULATIONS, art. 3-52 (2023).

91 *Id.* art. 3-19.a.

92 *Id.* art. 3-18.

93 FIBA EUROPE, COMPETITION REGULATIONS, art. 88.3 (2017-18).

94 *Id.*

in 2010 following an appeal from the decision of the FIBA Appeals Tribunal, several U.S. and Canadian nationals with Belizean ancestry were granted formal Belizean nationality after turning twenty years old.[95] Under the FIBA naturalization rule, only one of those players would be eligible to play for the Belizean national team. The respondent BBF argued that sections 23, 25, and 27 of the Belizean Constitution automatically conferred Belizean nationality to foreign nationals with Belizean ancestry so long as their primary country of nationality did not object to a second nationality.[96] Hence, they were not naturalized after the age of sixteen, but upon birth.[97] The fact that they were issued a certificate of Belizean nationality later in life was merely declaratory but not constitutive.[98] The CAS ultimately reversed the FIBA Appeals Tribunal, concluding that it sympathized with FIBA's rationale against mercenary-type naturalizations, but that if FIBA wanted its rules to trump similar constitutional provisions it would have to change its nationality rules.[99]

In exceptional circumstances, the FIBA Secretary-General in their sole discretion may decide that a player who claims the legal nationality of a second state but has no valid passport to prove so, may nonetheless be entitled to play for the national team of that second state. This sole discretion shall be guided by specific criteria—namely, the duration the player has spent there, the number of seasons played in that league, and any other evidence showing a "significant link" between the player and their chosen national team.[100]

Apart from naturalized players, however, as happens in other sports, FIBA recognizes that players with dual nationalities may be driven to a national team at a young age, eager to compete at the highest level, but later realize that their heart lies elsewhere. To this end, Article 88.4 of the FIBA Regulations stipulates that a player who has played with a national team in a main official FIBA competition before reaching their seventeenth birthday may nonetheless switch and play for another national team.[101] Both national member federations must agree to this switch, and in the absence of agreement the FIBA

95 Belize Basketball Federation (BBF) v. Fédération Internationale de Basketball (FIBA), CAS 2009/A/1988, Award of 20 April 2010, at 2 (Ct. Arb. Sport 2010).

96 *Id.* at 3-7.

97 *Id.*

98 *Id.* at 1, 11.

99 *Id.* at 12.

100 FIBA EUROPE, COMPETITION REGULATIONS, art. 88.3 (2017-18).

101 *Id.* art. 88.4.

Secretary-General has sole discretion to decide the case.[102] This is a sensible rule because in many cases the decision concerning which nation to represent is often made by a parent with little or no consultation with the child. Later on, when the player has aged, they realize that they would not have made that choice.

V. THE HUMAN RIGHTS IMPACT OF SPORTS FLAGS OF CONVENIENCE

"Nationalities" of convenience are a reality of modern economic life, from the registration of maritime vessels to foreign investments and international sports federations themselves.[103] Two questions are important in the context of transnational sport from a human rights perspective: first, whether naturalizations are effectively a practice akin to trafficking; and second, whether there is any assurance that athletes' fundamental rights will be respected. These questions are quite different from most issues already discussed in this Article—namely, whether naturalizations distort the nature of sports leagues and the make-up of national teams and whether countries that produce quality athletes ultimately reap the benefits of their work. Previous sections have alluded to certain human rights concerns. For example, WAF Eligibility Rules require athletes, adoptive countries, and sporting agents to reveal payments, fees, salaries, and citizenship rights for naturalized athletes. The primary purpose underlying these transparency requirements is to ascertain that the naturalization is not predicated solely on financial grounds and that there is a genuine connection between the athlete and their adopted country.[104] Even so, this is a far cry from human rights due diligence and many, including the WAF, have expressed concern with many naturalizations.[105] That a naturalization of a poor athlete is not solely the result of a financial transaction that aims at sports-washing for the adoptive country is irrelevant following naturalization. Some countries with a track record of nationality transfers in sports do not recognize a lifetime nationality, or one that encompasses the full gamut of rights and privileges

102 *Id.*

103 *See supra* text accompanying notes 9-13.

104 *See supra* text accompanying notes 79-82.

105 James Ellingworth, *Qatar Worlds Highlight Track's Many Nationality Switches*, AP (Oct. 1, 2019, 9:16 AM), https://apnews.com/195c2ffd442d4277963563535f211e6a [https://perma.cc/DXS2-QE29]; Peter Spiro, *Eliminate Nationality Rules*, N.Y. TIMES (Jan. 3, 2017, 12:58 PM) https://www.nytimes.com/roomfordebate/2012/07/26/which-country-did-you-say-you-were-playing-for-in-the-olympics/eliminate-nationality-rules [https://perma.cc/M94D-JD6M].

otherwise enjoyed by *jus sanguinis* citizenship.[106] Moreover, there is little guarantee that following "unsuccessful" sporting careers, athletes' rights and privileges will not be removed altogether, including residency rights. Finally, given that naturalizations take place with the blessing of national and international sports federations, and by extension the IOC, permitting the transfer is no excuse for the retrogression of human rights in the adoptive country. This may occur, for example, where the naturalized athlete will be forced, directly or indirectly, to convert to a dominant religion, forego important ties with the country of origin, or agree to labor rights that constitute a clear violation of international standards.[107] It would certainly be beneficial to athletes and the legitimacy of international sports federations if a mechanism were instituted to monitor the wellbeing of vulnerable naturalized athletes over a long period of time.

In all such circumstances, it is crucial that this life-changing process in the career of an athlete—an event that will have major repercussions in their life outside of sports—is assessed by all relevant stakeholders for its human rights impact. It might be queried why international sports federations should carry the burden for such impact, particularly since the decision to change nationality rests with the individual applicant and since federations, as non-state entities, do not have human rights obligations.[108] Neither of these assumptions are

106 In August 2023, two U.S. basketball nationals naturalized by Türkiye to play in its national team claimed a variety of injuries to justify their absence from the team's summer commitments of the national team. The Turkish Basketball Federation retorted that it is in the process of revoking their nationality under Article 10.8 of the Turkish Basketball League Regulations. This provision surprisingly gives the right to revoke the nationality of naturalized players that fail to play for the national team. *Larkin ve Wilbekin ligde yabancı statüsünde oynayabilecek*, BASKETFAUL (Aug. 28, 2023), https://basketfaul.com.tr/gundem/larkin-ve-wilbekin-ligde-yabanci-statusunde-oynayabilecek/ [https://perma.cc/5KQH-P5C3].

107 The author does not possess any empirical data, albeit the lack of transparency from both the international sports federations and the states concerned (including confidentiality agreements entered into by athletes) makes it impossible to know whether adopting states grant second class citizenship to some or all athletes. On the other hand, the literature on labor rights in international sporting events is now extensive. *See* Dantam Le, *Leveraging the ILO for Human Rights and Workers' Rights in International Sporting Events*, 42 HASTINGS COMMC'NS & ENT. L.J. 171, 174-75 (2020).

108 See the ongoing case of *Semenya v. Switzerland*, which challenged a CAS award on procedural and substantive grounds. Semenya v. Switz., App. No 10934/21 (July 11, 2023), https://hudoc.echr.coe.int/eng?i=001-225768. The ECtHR found that the applicant had not been afforded sufficient institutional and procedural safeguards in Switzerland to allow her to have her complaints examined effectively, especially since her complaints concerned substantiated and credible claims of

entirely accurate. While it is true that states carry absolute responsibility for both the positive and negative dimension of rights, non-state actors are an inextricable part of the global human rights architecture,[109] in the sense that they are expected, and in many cases even mandated, to avoid actions that culminate in human rights violations.[110] More importantly, the work and operations of non-state actors, corporate or otherwise, are increasingly becoming subject to human rights scrutiny in at least two independent ways.

Many developed states have adopted legislation that prohibits and sanctions several corporate practices, including modern slavery. Chief among them are the United Kingdom's Modern Slavery Act of 2015[111] and the Australian Modern Slavery Act of 2018.[112] Section 54 of the United Kingdom's Act requires commercial entities with a turnover of £36 million, irrespective of their place of incorporation, but which undertake even a part of their business in the United Kingdom, to prepare annual slavery and trafficking audits.[113] In equal measure, the French Corporate Duty of Vigilance Law 2017 (Vigilance Law)[114] imposes a

discrimination. *Id.* ¶ 235. It was immaterial for the Court that the Regulations in question were agreed to by all national track and field federations.

109 *See In re* S. African Apartheid Litig., 15 F. Supp. 3d 454, 462-63 (S.D.N.Y. 2014). Similarly, in *Doe v. Nestle*, the Ninth Circuit Court of Appeals considered a claim alleging that a corporation was aware of child slavery among its supply chain but, motivated by profit, retained these suppliers nonetheless, and should therefore be found liable for "aiding and abetting" child slavery under the Alien Tort Claims Act ("ATCA"). Doe v. Nestle, 766 F.3d 1013, 1016-18 (9th Cir. 2014) (remanded).

110 *See* Björn Fasterling, *Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk*, 2 BUS. & HUM. RTS. J. 225 (2017). For the last decade, the United Nations has intensely discussed the drafting of a multilateral business and human rights treaty, which seeks to address some of the human rights concerns, *mutatis mutandis*, arising from the extra-territorial operations of corporate entities. *See* Ilias Bantekas & Alexander Ezenagu, *Ethical Considerations in Financial (Tax) and Non-Financial Corporate Human Rights Reporting*, 28 U. MIAMI INT'L & COMPAR. L. REV. 267 (2021).

111 Modern Slavery Act 2015, c. 30 (UK).

112 *Modern Slavery Act 2018* (Cth) (Austl.); *see also* MODERN SLAVERY BUSINESS ENGAGEMENT UNIT, COMMONWEALTH MODERN SLAVERY ACT 2018: GUIDANCE FOR REPORTING ENTITIES (2023), https://modernslaveryregister.gov.au/resources/Commonwealth_Modern_Slavery_Act_Guidance_for_Reporting_Entities.pdf.

113 Modern Slavery Act 2015, c. 30, § 54; U.K. Home Office, *Guidance: Publish an Annual Modern Slavery Statement*, GOV.UK, https://www.gov.uk/guidance/publish-an-annual-modern-slavery-statement [https://perma.cc/PNB8-UAA4] (July 28, 2021).

114 Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of March 27, 2017 on the Duty of Vigilance of Parent Companies and Ordering Companies], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE],

duty of care on large French companies (measured by the number of its employees), their subsidiaries, and entities under their control for a wide range of environmental and human rights obligations.[115] A similar initiative was undertaken by India in 2018 through the adoption of its National Guidelines on Responsible Business Conduct.[116] Sporting federations incorporated in countries that have adopted these laws have endeavoured to adapt through the adoption of soft law guidelines.[117]

The second mode through which non-state actors are required, or expected, to incorporate human rights considerations in their operations is through so-called human rights impact assessments ("HRIAs"). HRIAs are either voluntary or otherwise demanded by law or by contract with public authorities. Indeed, HRIAs and due diligence requirements are demanded by contract between private contractors and most international financial institutions ("IFIs"),[118] UN

Mar. 28, 2017, p. 1 (Fr.). For a useful English summary, see EUR. COAL. FOR CORP. JUST. FRENCH CORPORATE DUTY OF VIGILANCE LAW: FREQUENTLY ASKED QUESTIONS (2017), http://corporatejustice.org/wp-content/uploads/2021/04/french-corporate-duty-of-vigilance-law-faq-1.pdf [https://perma.cc/537F-MVEA].

115 In *Sherpa v. Lafarge*, France (unreported, 2021), the French Court of Cassation held that there was enough evidence to suggest that Lafarge had been complicit in crimes against humanity in Syria by making large cash payments to Islamic State (Daesh). The Court held that the company, among others, endangered the lives and fundamental rights of its employees and was further liable for terrorist financing. Tassilo Hummel, *Lafarge Can Be Charged with 'Complicity in Crimes Against Humanity', French Court Says*, REUTERS (Jan 16. 2024, 9:58 AM), https://www.reuters.com/business/lafarge-can-be-charged-with-complicity-crimes-against-humanity-over-syria-plant-2024-01-16/; *Lafarge in Syria: Accusations of Complicity in Grave Human Rights Concerns*, EUR. CTR. FOR CONST. & HUM. RTS., https://www.ecchr.eu/en/case/lafarge-in-syria-accusations-of-complicity-in-grave-human-rights-violations/ [https://perma.cc/2KUW-4MXT] (last visited Apr. 25, 2024).

116 INDIA MINISTRY OF CORP. AFFS., NATIONAL GUIDELINES ON RESPONSIBLE BUSINESS CONDUCT (2018), https://www.mca.gov.in/Ministry/pdf/NationalGuildeline_15032019.pdf.

117 See, for example, the ITF's Modern Slavery and Human Trafficking Statement, which is consistent with the United Kingdom's Modern Slavery Act 2015, to which the ITF is bound given its seat in London. *Modern Slavery: Modern Slavery and Human Trafficking Statement*, INT'L TENNIS FED'N (Mar. 22, 2022), https://www.itftennis.com/en/about-us/modern-slavery/ [https://perma.cc/AU6P-VXYT].

118 U.N., Econ. & Soc. Council, Comm. on Econ., Soc. and Cultural Rts., Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights, ¶¶ 4, 11, U.N. Doc. E/C.12/2016/1 (July, 22 2016); *see also* Rep. of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights on His Mission to Greece, ¶¶

bodies,[119] and the European Union,[120] among others. When a private contractor or entity is involved in a project that directly or indirectly implicates any of these inter-governmental bodies, the HRIA ensures that the project does not produce any adverse human rights impacts in the area of operation or more generally.

By extension of these human rights requirements on non-state actors, this Article suggests that HRIAs and due diligence are integral to all nationality transfers.[121] International sports federations are mainly

81(a), 83(b), U.N. Doc. A/HRC/31/60/Add.2 (Apr. 21, 2016). The World Bank Group has set up quasi-judicial mechanisms, such as the Bank's Inspection Panel and the Multilateral Investment Guarantee Agency ("MIGA") Ombudsman, which are competent to hear complaints concerning violations of the Bank's internal rules, not violations of human rights law, albeit as these arise from violations of assessments incumbent on corporate borrowers. For an overview of the mandate and cases of the Inspection Panel, see THE INSPECTION PANEL, https://www.inspectionpanel.org [https://perma.cc/W2GH-SWDL] (last visited Apr. 26, 2024).

119 *See* Olivier De Schutter (Special Rapporteur on the Right to Food), *Report: Addendum to Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements*, U.N. Doc. A/HRC/19/59/Add.5 (Dec. 19, 2011); Magdalena Sepúlveda Carmona (Special Rapporteur on Extreme Poverty and Human Rights), *Final Draft of the Guiding Principles on Extreme Poverty and Human Rights*, U.N. Doc. A/HRC/21/39 (July 18, 2012); U.N., Econ. & Soc. Council, Comm. on Econ., Soc. and Cultural Rts., General Comment No. 24 on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, ¶¶ 17, 21-22, U.N. Doc. E/C.12/GC/24 (Aug. 10, 2017); U.N., Comm. on the Rts. of the Child, General Comment No. 19 (2016) on Public Budgeting for the Realization of Children's Rights (art. 4), ¶ 47, U.N. Doc. CRC/CG/19 (July 20, 2016).

120 *See* Commission Staff Working Paper, Operational Guidance on Taking Account of Fundamental Rights in Commission Impact Assessments, SEC (2011) 567 final (May 6, 2011). The CJEU has, in fact, emphasized the importance of such HRIAs in the adoption of primary and secondary EU legislation. *See* Case C-92/09, Schecke v. Land Hessen 2011, E.C.R-I-11063 (joined with Case C-93/09, Eifert v. Land Hessen). HRIAs are also required through two EU instruments, namely: the Directive on Public Procurement and the Directive on Non-Financial Information Disclosure. Under the latter, companies with over 500 employees are required to disclose information on policies, risks and results as regards their respect for human rights. NORA HAHNKAMPER-VANDENBULCKE, EUR. PARLIAMENT, IMPLEMENTATION APPRAISAL: NON-FINANCIAL REPORTING DIRECTIVE (2021), https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/654213/EPRS_BRI(2021)654213_EN.pdf.

121 This is not self-evident for all international sports federations despite extensive human rights instruments adopted institutionally. Art 2 of the Olympic Charter, which sets out the mission and role of the IOC, does not specifically mention human rights as a goal or policy objective. The IOC website suggests that principles 1, 2, 4, and 6 of its Fundamental Principles and Art 2 of the IOC Charter enshrine human rights; this author suggests that this is hardly the case. *But see* OLYMPIC AGENDA 2020+5, *supra* note 29 (suggesting adoption of an overarching IOC human rights strategic framework with specific action plans for each of the IOC's three different

corporate entities under the laws of various jurisdictions and even if the pertinent states fail to demand HRIAs, there is no reason why the federations themselves should not undertake this task both voluntarily and as a matter of self-regulation. Voluntary HRIAs are in fact common for the majority of corporate actors,[122] particularly where none are demanded by contract or law and the corporation in question wishes to demonstrate its corporate qualities. HRIA drafting has become a major industry and, despite its shortfalls, there is no reason why international sports federations cannot use HRIAs in matters of such importance for their star "products." A nationality transfer-based HRIA should ask and respond to the following questions:

> (a) Is the transfer agreement between the athlete and the adopting country likely to give rise to some form of trafficking (e.g. because of corruption between officials or because of conditions unknown to the athlete)?
>
> (b) Has the athlete been or likely to be subjected to undue influence or coercion by any stakeholder in the transaction and does the athlete have access to counsel of its choice?
>
> (c) What guarantees are there in place whereby salaries and other privileges will be honored by the adopting state?
>
> (d) What guarantees have been put in place to avoid discrimination, loss of citizenship, and attendant rights once the athlete's career is ending or once the athlete is no longer performing at the highest level?

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spheres of responsibility; linking the overarching IOC human rights strategic framework to various existing or forthcoming IOC strategies; amending the Olympic Charter and the "Basic Universal Principles of Good Governance" of the Olympic and Sports Movement to better articulate human rights responsibilities; and enabling the newly created IOC Human Rights unit to develop the IOC's internal capacity with regard to human rights).

122 *See, e.g.*, GLOB. REPORTING INITIATIVE, GRI 412: HUMAN RIGHTS ASSESSMENT 2016 (2018), https://www.carrotsandsticks.net/media/ml0f0vkg/311_18_gri_2018.pdf [https://perma.cc/9TPR-Y9ES]; CORPORATE REPORTING DIALOGUE, STATEMENT OF COMMON PRINCIPLES OF MATERIALITY OF THE CORPORATE REPORTING DIALOGUE (2016), https://www.carrotsandsticks.net/media/ml0f0vkg/311_18_gri_2018.pdf [https://perma.cc/58RR-E7TZ]; DANISH INST. FOR HUM. RTS., HUMAN RIGHTS IMPACT ASSESSMENT GUIDANCE AND TOOLBOX (2016), https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/hria_toolbox_2020/eng/dihr_hria_guidance_and_toolbox_2020_eng.pdf [https://perma.cc/7TB9-CUS6]; ORG. FOR ECON. COOP. & DEV., OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT (2018), https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf [https://perma.cc/WG6T-XAGD].

> (e) What guarantees exist, including remedies, whereby the athlete enjoys fundamental human rights, even if they are not recognized in the constitutional order of the adopting state?

Some of these demands and guarantees are not self-evident for all states, but they are central to minimum core human rights of all persons, including athletes who choose to transfer nationality. These requirements should be met irrespective of whether the athlete's first country did not confer such rights and privileges itself. These five questions should constitute the benchmark for any nationality transfer and should be undertaken by the international sports federation, national sports federations in question, and the adopting state as a matter of standard practice. Broader questions concerning the loss of talent and profit in the first country of nationality are not necessarily direct human rights questions and need not be addressed in the HRIA, though they are issues of concern to international sports federations as a matter of policy and planning.

VI. Conclusion

Nationality rules in the institutional rules of international sports federations are complex, yet they aim to achieve a rather simple objective; that is, to prevent mercenaryism in sport and in turn allow states with fewer resources to continue investing in local talent. This cannot be achieved by allowing states to confer an additional nationality to foreign athletes with some kind of sensible limitation or strict criteria.[123] International sports federations have enacted relevant eligibility rules with knowledge that their national federation members will their attempt to enhance the level of their leagues and national teams and use processes that fast-track acquisition of nationality or even lobby governments to adopt exceptional nationality procedures for athletes. The eligibility rules of international sports federations are generally reactive and hardly ever proactive.[124] While balancing the

123 In the feeble scholarship on sports nationality there is some confusion concerning the existence and variation of ordinary and sporting nationalities. Hence, some scholars suggest that such distinction be eliminated and, instead of introducing a sporting nationality, they recommend establishing a uniform set of rules that provides athletes with a "sporting license" of the country of which they are nationals. *See* Anna Sabrina Wollmann, Olivier Vonk & Gerard-René de Groot, *Towards a Sporting Nationality?*, 22 MAASTRICHT J. EUR. & COMPAR. L. 305, 307-10 (2015).

124 In *Bajrami v. FIFA*, a footballer holding both Swiss and Albanian nationalities had played for the Swiss national team in "non-A-level" competitions. Bajrami v. Fédération Internationale de Football Association (FIFA), CAS 2021/A/8075,

interests of regional leagues/national teams and investment in sport, federations must also consider the competition between leagues around the world and that many (but certainly not all) top professional athletes are more likely to sign contracts with leagues that impose fewer nationality or naturalization requirements.[125]

Rule 41 of the IOC Charter posits a very simple rule. Athletes are not prevented from choosing any nationality they wish, subject to the nationality laws of the pertinent states.[126] Where such laws permit the acquisition of dual or multiple nationalities and the athlete in question desires to switch their allegiance to a second state, then a period of three years must elapse, during which the athlete is prevented from competing for the first state.[127] This is a serious disincentive for professional athletes given the short lifespan of athletic careers. Exceptionally, the IOC Executive Board may decide to exempt an athlete from this three-year rule, although the process is not particularly transparent, and all decisions suffer from the absence of reasoning. In practice, the IOC Executive Board only decides nationality issues in individual sports and hence avoids passing judgment on nationality applications in team sports.

The vertical structure of international sports governance, at least regarding the relationship between international sports federations and the IOC, entails that Rule 41 and its Bye-Laws apply to nationality requirements for competitions under the IOC aegis—namely, the Olympic Games. The exceptional discretion of the IOC Executive Board applies only for the purposes of the Olympic Games, but not for the purposes of competitions under the authority of international sports federations. Even so, Rule 41 and its Bye-Laws set forth a general rule that allows international sports federations to enact and

Award, ¶¶ 6-7 (Ct. Arb. Sports 2022). At some point the player urged the Albanian Football Association (FA) to submit a change of association request to the FIFA Players' Status Committee ("PSC") in accordance with Article 9.2(a) of FIFA's Eligibility Rules. *See id.* ¶¶ 10-11. According to Article 9.2(a), players have a right to request a change association (i.e. national team) where, at the time of their first official match for their current association, they "already held the nationality of the association" they wish to represent, provided they have not been fielded at the "A" level with their current association. *Id.* ¶ 23. The CAS recognized that the objective of FIFA's Eligibility Rules was, among others, the prevention of nationality shopping, while at the same time avoiding financial hardship. *Id.* ¶ 114.

125 *See American NBA Player Anderson to Represent China at World Cup*, REUTERS (July 24, 2023, 1:06 PM), https://www.reuters.com/sports/basketball/american-nba-player-anderson-gains-chinese-citizenship-cba-2023-07-24/.

126 OLYMPIC CHARTER, *supra* note 29, at 80.

127 *Id.* at 80-81 (Bye-law 2 to Rule 41).

enforce their own nationality rules, all of which are applicable in their own competitions and the Olympic Games, subject to the above-described discretion of the IOC Executive Board. While some international federations are content to follow the general rule set forth in Rule 41 of the IOC Charter,[128] they are otherwise free to institute further conditions and requirements as part of their eligibility rules.[129] Such additional institutional rules are generally acceptable to the IOC—subject to the discretion of the IOC Executive Board—but, more importantly, they are binding upon national sports federations with respect to domestic or international competitions under the aegis of the international sports federation in question.[130]

This Article has suggested the existence of clear synergy between domestic nationality laws and the institutional rules of international sports federations concerning nationality of athletes. The institutional rules of the latter must rely on national laws, which in most cases involve high-level constitutional norms. Institutional rules cannot confer nationality, whether actual or de facto;[131] they can only determine whether a nationality under domestic law actually exists in the event of multiple lawfully obtained nationalities, which qualifies as a sporting nationality for the purposes of the institution's competitions.

128 *See* FÉDÉRATION ÉQUESTRE INTERNATIONALE, FEI GENERAL REGULATIONS, art. 119 (2020), https://inside.fei.org/sites/default/files/FEI%20General%20Regulations%20-Effective%201January2024-%20clean_0.pdf [https://perma.cc/2MG4-XNEZ] (updates effective Jan. 1, 2024).

129 *Id.* art. 119 (2.2.2) (stipulating that in order for an athlete to change nationality and compete with a new national team, they must have had continuous residence in that country for at least two consecutive and uninterrupted years prior to the competition in which they wish to participate, or five non-consecutive years of residence).

130 This is because the rules and regulations of international sport federations are binding on national sport federations, by reason of the latter's membership to the former, which is contractual in nature. *See* LLOYD FREEBURN, REGULATING INTERNATIONAL SPORT: POWER, AUTHORITY AND LEGITIMACY 6 n.12, 6-7 (2018) (noting that "international federations typically adopt a pyramidal form by including national federations as their members").

131 The right to participate in international sporting events in a neutral capacity does not produce the effect of conferring a nationality, whether positive or negative. In the aftermath of the Russian invasion of Ukraine, several international sporting federations assessed the impact of the Russian invasion and went ahead to impose, or at least recommend their own bans or suspensions. On 28 February 2022, the International Olympic Committee (IOC) Executive Board issued a resolution recommending the exclusion of Russian athletes, teams, and officials, from sporting competitions, but with a possibility of competing neutrally without colors, flags, or anthems. International Olympic Committee. *IOC EB Recommends No Participation of Russian and Belarusian Athletes and Officials*, INT'L OLYMPIC COMM. (Feb. 28, 2022), https://olympics.com/ioc/news/ioc-eb-recommends-no-participation-of-russian-and-belarusian-athletes-and-officials [https://perma.cc/GZE8-F3B5].

Sporting nationalities are quintessentially nationalities under one or more domestic laws, and the institutional rules of international sports federations effectively play the role set out in the *Nottebohm* case;[132] that is, to satisfy that the nationality-granting power of states, while unlimited in the domestic legal sphere, must always be compatible with the greater framework of international law. Even so, given the rise of the transnational legal sphere,[133] a good part of otherwise public authority has been openly or tacitly delegated to non-state actors, as is the case with the vast majority (if not all) of the international sports federations that have been incorporated as either non-profit[134] or for-profit[135] entities under the laws of various jurisdictions. It would take a herculean effort from states to adopt uniform nationality rules for every sport and every competition and undertake periodic reviews; hence, states are happy to allow these non-state entities to assume that role.[136] These non-state entities, while deciding their nationality eligibility rules on the basis of nationality laws, are effectively limiting the authority of states to abuse the process of naturalization in favor of their national leagues and national team selections. When the ICJ was deciding the *Nottebohm* case in the 1950s, it could not have imagined

132 Nottebohm Case (Liech. v. Guat.), Judgment, 1955 I.C.J. Rep.4, (Apr. 6).

133 *See* Mathias Reimann, *From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum*, 22 PENN ST. INT'L L. REV. 397, 403-07 (2004) (arguing that transnational law has emerged as a parallel system of private regulation alongside domestic and international law). Karen J. Alter argues that when capitalism was left to its own devices it bred injustice and inequality. Karen J. Alter, *From Colonial to Multilateral International Law: A Global Capitalism and Law Investigation*, 19 INT' J. CONST L. 798, 858 (2021). Alter's article focuses on Chinese capitalism and takes the view that multilateralism led by liberal states is beneficial to international law. *Id.* at 864.

134 Article 15.1 of the Olympic Charter emphasizes that the IOC is a non-profit association under Swiss law. OLYMPIC CHARTER, *supra* note 29, at 30.

135 In accordance with article 10 of the ITF Constitution, the ITF is organized and registered as a limited liability company under the laws of the Commonwealth of the Bahamas. INT'L TENNIS FED'N, *supra* note 30, at 1-2. In equal measure, Article 1 of the FIFA Statute stipulates that it is a commercial company under Swiss law. FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION, FIFA STATUTES, art. 1 (2016), https://www.icsspe.org/system/files/FIFA%20Statutes.pdf [https://perma.cc/9ZXR-9NHE].

136 The author has argued that since multilateral treaty making is an arduous, long-term, and inconclusive process, states have demonstrated a willingness to avoid treaties in favor of more flexible agreement, even if this entails giving up many of their sovereign powers and privileges. *See* Ilias Bantekas, *Informal and Political Agreements as Sources of Obligation? Sketching a Theory of International Political Normativity*, 54 GEO. J. INT'L L. 37 (2023); Ilias Bantekas, *Signature of Multilateral Treaties: Still Meaningful in the Era of Transnational Law?*, 21 SANTA CLARA J. INT'L L. 24 (2022).

that the doctrine it then enunciated would be enforced by non-state actors against state legislative authority seventy years later. This further demonstrates that transnational law is a distinct legal order alongside public international law and domestic legal orders and that international sports entities are in no way neutral observers of law.[137]

International sports federations ought to take heed of the need to secure fundamental human rights of athletes under their protection by demanding that all relevant stakeholders be involved in the production of nationality transfer-based HRIAs. To avoid unnecessary conflicts of interest, such HRIAs should be drafted by independent assessors with data input provided by sports federations and involved states. Most audits are performed largely by for-profit commercial entities that have established themselves as key actors in human rights and environmental audits, including Global Reporting Initiative[138] and KPMG Banarra,[139] among others. If all agree that naturalizations are in the interests of sports and athletes alike, then at the very least this should be reflected in a new era where sports diplomacy delivers human rights.

137 HANS ERIK NÆSS, THE NEUTRALITY PARADOX IN SPORT: GOVERNANCE, POLITICS AND HUMAN RIGHTS AFTER UKRAINE (2022) (arguing that international sporting entities have abandoned their own self-declared neutrality and, following the invasion of Ukraine, have assumed a far more political agenda, evidenced by the bans imposed on Russian teams and athletes).

138 *See Integrating SDGs Into Sustainability Reporting*, GRI, https://www.globalreporting.org/public-policy-partnerships/sustainable-development/integrating-sdgs-into-sustainability-reporting/ [https://perma.cc/37LE-Y7KJ] (last visited Feb. 2, 2024).

139 *Human Rights & Social Impact – Banarra*, KPMG, https://home.kpmg/au/en/home/services/advisory/risk-consulting/climate-change-sustainability-services/human-rights-social-impact.html [https://perma.cc/SPV6-AZVH] (last visited Apr. 14, 2024).