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INTERNATIONAL SPORTS LAW PERSPECTIVES

GOVERNANCE OF INTERNATIONAL SPORTS FEDERATIONS THROUGH THE LENS OF GLOBAL ADMINISTRATIVE LAW

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INTRODUCTION

The Olympic Movement is a complex system of multiple private actors structured in a pyramidal manner. It is essentially comprised of the International Olympic Committee (IOC), the National Olympic Committees (NOCs)¹ and the International (Olympic) Federations (IFs).² The IOC and most IFs are based in Switzerland and are structured as “associations” under the private law provisions of the Swiss Civil Code (CC).³ Under the Olympic Charter (OC), the IOC undertakes the role of the guarantor of ethics and good governance in sport for all actors of the Olympic Movement.⁴

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¹ The role of the NOC is to promote the values of the Olympic Charter [hereinafter *OC*] and to participate in the Olympic Games by sending athletes, which they select at national level. *Id.* at art. 27, ¶¶ 1, 2.1, 2.3.

² IFs’ role is to develop their respective sport throughout the world and to control and direct their sport at the Olympic Games. *See OC, supra* note 1, at art. 26 ¶¶ 1.2, 1.5. They are in turn comprised of all NFs that control and direct their sport at the national level. *See Id.* at art. 29.

³ SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] [CIVIL CODE] Dec. 10, 1907, SR 210, RS 210, art. 52(1)(2) (Switz.) [hereinafter *CC*] As of 2023, approximately ¾ of all IFs are based in Switzerland.

⁴ The IOC’s main role is to promote the Olympic values and “*encourage and support the promotion of ethics and good governance in sport.*” *See OC, supra* note 1, at art. 2, ¶ 1 (which is the document of institutional character of the IOC and codifies all fundamental principles of the Olympic Movement).

Notwithstanding the very liberal regime and their extensive autonomy under the Swiss CC, IFs undertake important tasks and responsibilities for all their members (National Federations, NFs) and indirect members (athletes, clubs, supporting personnel, etc.).⁵ As such, they regulate their respective sports at the international level, are responsible for the scheduling and the organization of international competitions and have the power to render decisions regarding a wide variety of issues.⁶

In view of the extensive powers of IFs, improving their governance is becoming more and more important to ensure the legitimacy of their acts, competitions, and rulemaking.⁷ This, in turn, leads to more acceptance by the IFs' principal stakeholders (the athletes), more credibility for external observers (including, but not limited to fans) and, eventually, an increased and steady money flow through marketing and other financial sources. The long-term objective of good governance is to ensure well-deserved autonomy from state scrutiny and, most importantly, to obtain resilience.

This quest for good governance is not merely focused on sports; it stems from a much broader discussion that started several years ago by an influential string of scholarship in transnational law. This scholarship argued that transnational rule-makers exercise quasi-public functions and exert so much influence that they should be subject to principles that typically apply to public authorities.⁸ As makers of transnational law, IFs come within the purview of this framework and should comply with the principles enshrined therein.⁹ This is also in line with the general consensus that sports governance should combine elements of corporate governance, (akin to the commercial organizations) and democratic governance (to the extent it exercises quasi-public functions through rulemaking and event organizing).¹⁰

⁵ The legal framework of IFs is further explained below (under II). On the concept of sports autonomy – and its recognition by public authorities. See JEAN-LOUP CHAPPELET, *AUTONOMY OF SPORT IN EUROPE*, SPORTS POLICY AND PRACTICE SERIES 12-14 (2010).

⁶ International Olympic sport has thus evolved into a *de facto* autonomous transnational legal order. See Ken Foster, *Global Sports Law Revisited*, 17 ENT. & SPORTS L. J. 1, 4 (2019).

⁷ See also Michaël Mrkonjic, *A Review of Good Governance Principles and Indicators in Sport*, INT'L CENTRE FOR SPORTS STUDIES (CIES), Neuchâtel, Switz., Sept. 22, 2016, 4.

⁸ See Marcia B. Nelson, *Stuck Between Interlocking Rings: Efforts to Resolve the Conflicting Demands Placed on Olympic National Governing Bodies*, 26 VAND. J. TRANSNAT'L L. 895, 901 (1993).

⁹ On the transnational private regulation and how it emerges in global sport. See Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, 38 J.L. & SOCI'Y 20, 26 (2011) (Cafaggi explains the inherent limitations in reaching consensus of states acting through international treaties). On the other side, private actors are more efficient and create a *de facto* autonomous transnational legal order. See Foster, *supra* note 6, at 3.

¹⁰ See Jean-Loup Chappelet, *Autonomy and Governance: Necessary Bedfellows in the Fight Against Corruption*, GLOB. CORRUPTION REP.: SPORT 3 (2016).

Even though there is copious literature regarding principles of good governance in sports,¹¹ this paper focuses on good governance through the lens of transparency, judicial review and accountability, all of which are core principles of global administrative law. After exploring the private legal form and the legal framework of IFs under Swiss law, this paper navigates through certain principles of the IOC « *Basic Universal Principles of Good Governance within the Olympic Movement* » (IOC Principles) and other tools of global administrative law¹² that arguably apply to them. The article concludes that an efficient internal dispute resolution system and enhanced accountability are best achieved through a delegation of certain reporting, investigation, prosecution and dispute resolution powers to independent entities external from the IFs. Particularly in ethics and integrity issues, it is argued that the creation of a centralized and independent agency, also in combination with a first-instance tribunal, would ensure higher accountability and independent control.¹³

I. GOVERNANCE AND (GOOD) GOVERNANCE IN SPORTS

The definition of “governance” largely depends on the context. Generally, governance relates to group decision-making and institutional design to address shared problems. At the international level, institutional governance may refer to the management of an international structure through rule making, codes of conduct and other operational regulations, including dispute settlement mechanisms.¹⁴

One definition of “good governance” specifically in sports is “a complex network of policy measures and private regulations used to promote integrity in

¹¹ See Mrkonjic, *supra* note 7, at 6.

¹² The principles of global administrative law are also examined along with the IOC Principles. See International Olympic Committee, *International Olympic Committee Principles*, OLYMPICS (2022).

¹³ It is accepted that CAS is a structurally independent arbitral institution based on the numerous decisions that have confirmed its independence. See Bundesgericht [BGer] [First Court of Civil Law] May 27, 2003, 4P.267/2002 (Switz.); Bundesgericht [BGer] [First Court of Civil Law] Feb. 20, 2018, 4A_260/2017, at 3.2.1 (Switz.); Bundesgericht [BGer] [First Court of Civil Law] Dec. 22, 2022, 4A_232/2022 (Switz.); see also *Adrian Mutu & Claudia Pechstein v. Switz.*, App. No. 40575/10 & 67474/10 (June 6, 2016) (confirming that the CAS is a structurally independent arbitral tribunal which, for cases of “forced” arbitration, should comply with all the guarantees of Article 6 Eur. Ct. H.R.). The present article does not address the independence of the CAS or suggestions for reforms. See Chui Ling Goh & Jack Anderson, *The Credibility of the Court of Arbitration for Sport*, 13 HARV. J. OF SPORTS & ENT. L. 233, 236 (2022); Margareta Baddeley, *La Forme Sociale – Garantie de la Bonne Gouvernance de l’Association Sportive?*, in EMMANUEL BAYLE, LE SYSTÈME OLYMPIQUE. PASSÉ, PRÉSENT ET FUTUR. MÉLANGES EN L’HONNEUR DU PROFESSEUR JEAN-LOUP CHAPPELET 74-75 (Lausanne : Presses Polytechniques et Universitaires Romandes eds., 2019); see also Antoine Duval, *Constitutionalizing the Court of Arbitration for Sport*, VERFASSUNGSBLOG (July 20, 2022), www.verfassungsblog.de.

¹⁴ Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L. J. 1490, 1497 (2006).

the management of the core values of sport such as democratic, ethical, efficient and accountable sports activities.”¹⁵

Baddeley¹⁶ mentions the existence of an adequate regulatory framework and its correct application / implementation, both at the internal and the external level. Improving internal governance is also a means for sports associations to keep their autonomy and avoid scrutiny by the state.¹⁷ The IFs’ legal framework includes both the underlying state law and the private regulations drafted within the limits of their autonomy. Good governance can be found precisely in the balance between the regulations and the discretionary margin in their application, allowing for some flexibility while at the same time preventing the federation’s organs from abuses. Inversely, bad governance emerges through over- or under-regulation and decision-making that goes against the letter or the spirit of the regulation. Decision-making power, along with its subsequent control and accountability, is therefore key for the good governance of IFs.

For instance, one could view under this lens the current efforts led by several stakeholders to fight against corruption in sport, promote human rights and enhance governance.¹⁸ Apart from the long-established WADA (established in 1999), one can also name the International Partnership against Corruption in Sport (IPACS) that was created in 2017 and brings together sports organizations, governments and intergovernmental organizations to combine efforts for the fight against corruption in sport.¹⁹ The Association of Summer Olympic International Federations Governance Task Force (ASOIF GTF) was created in November 2015, and is tasked with helping International Federations promote and ensure a culture of good governance. The ASOIF GTF came up with a set of five principles (transparency, integrity, democracy, sport development and solidarity and control mechanisms), each assessed by ten indicators.²⁰ By now, good governance in sports has become a multi-faceted

¹⁵ EUR. PARL. ASS., *Recommendation Rec of the Committee of Ministers to Member States on the Principles of Good Governance in Sport*, 924th Meeting of the Ministers’ Deputies (2005); see Mrkonjic, *supra* note 7, at 6.

¹⁶ Baddeley, *supra* note 13, at 60-61.

¹⁷ *Id.* at 61; see also Chappelet, *supra* note 10, at 8.

¹⁸ See Chappelet, *supra* note 10, at 18.

¹⁹ See also ABOUT IPACS, INT’L P’SHIP AGAINST CORRUPTION IN SPORT, <https://www.ipacs.sport/about-ipacs> (last visited Dec. 15, 2023). See also Emmanuel Bayle, *Olympic Social Responsibility: A Challenge for the Future*, 16 SPORTS & SOC’Y 752 (2016).

²⁰ On the ASOIF GTF and the Governance Support Monitoring Unit (GSMU). See *ASOIF Governance Task Force (GTF) Report Approved by ASOIF General Assembly 2016*, ASOIF, available at https://www.asoif.com/sites/default/files/download/asoif_governance_task_force_report.pdf (last visited Dec. 15, 2023). See also JEAN-LOUP CHAPPELET ET AL., GOVERNANCE OF INTERNATIONAL SPORTS FEDERATIONS, in ROUTLEDGE HANDBOOK OF SPORT GOVERNANCE 198 (D. Shilbury & L. Ferkins eds., 2019).

concept that permeates and informs debates about institutional reform.²¹ Furthermore, the IOC has announced USD 10 million fund to strengthen safe sport, creating a working group to coordinate the safeguarding efforts of the entire Olympic Movement.²²

As seen above, it is argued that some tools of global administrative law apply to IFs notwithstanding their private law character, to the extent that they exercise a quasi-public function.²³ Global administrative law is defined as the mechanisms, principles and practices that promote and impact the accountability of global administrative bodies, including intergovernmental regulatory bodies, networks, hybrid public-private regulatory bodies or private regulatory bodies²⁴ exercising transnational governance functions of public character.

Global administrative law therefore includes series of principles / tools that are advisable to ensure the good governance of private rule-makers at the international level, including IFs. Similarly, the principle of “institutional governance” enshrined in the IOC Principles also foresees several from the aforementioned standards and includes further recommendations for IFs. These IOC Principles were enacted based on Paragraph 5 of the Fundamental Principles of Olympism in the Olympic Charter, which provides for the political neutrality and the autonomy of its actors, in particular the IFs. Such autonomy covers the drafting and enforcing of the sporting rules, the structure of the IFs’ governance, and the self-control of IFs who must ensure “*that principles of good governance be applied*” and are further presented below (III. C).²⁵ In this respect, the IOC Principles can be seen as a specific expression of global administrative law in the field of Olympic sport.

²¹ See *Fourth Review of International Federation Governance*, ASOIF GOVERNANCE TASKFORCE (June 2022) https://www.asoif.com/sites/default/files/download/fourth_review_of_international_federation_governance.pdf. See also Lukas Handschin, *Good Governance: Lessons for Sport Organizations?*, INT’L SPORTS L. & JURIS. OF THE CAS. BERN S. 117, 121 (2014).

²² *IOC Announces USD 10 Million Fund to Strengthen Safe Sport and Creates Working Group to Coordinate Olympic Movement Safeguarding Efforts*, INT’L OLYMPIC COMM. (Mar. 31, 2023), <https://olympics.com/ioc/news/ioc-announces-usd-10-million-fund-to-strengthen-safe-sport>.

²³ Armin Von Bongdandy et al., *From Public International to International Public Law: Translating World Public Opinion into International Public Authority*, 28 EUR. J. OF INT’L L. 115, 136 (2017); see Lorenzo Casini, *Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)*, 6 INT’L ORG. L. REV. 421, 430 (2009).

²⁴ See Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 17 (2005).

²⁵ The IOC Principles were first approved in 2009 and updated in the framework of Recommendation 14 of Olympic Agenda 2020 “*Strengthen the Olympic Movement through good governance.*” See *Olympic Charter: Fundamental Principles of Olympism*, INT’L OLYMPIC COMM. (July 17, 2020), <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf>.

II. INTERNATIONAL SPORTS FEDERATIONS IN SWITZERLAND: LEGAL FRAMEWORK

A. Associations under Swiss Law

Switzerland—and particularly the Lausanne region—is the hub of most IFs; they are structured in the form of “associations” under Swiss law and are regulated by Articles 60-79 Swiss Civil Code (CC). The legal framework of associations under Swiss law includes only a few mandatory provisions²⁶ aiming at safeguarding minimum democratic standards in terms of members’ rights. Apart from the mandatory provisions expressly stipulated as such in Articles 60-79 CC, there are some principles that also imperatively apply, such as the non-excessive restriction of the right of self-determination of the association, the general assembly as the supreme body of the association²⁷ and the protection of the purpose of the association.²⁸ For the rest, each association has extensive rights of self-regulation.

This core legal framework has remained unchanged since the beginning of last century and the CC provisions include only limited requirements, such as the creation of the association in writing, its purpose and resources.²⁹ It must be noted that, traditionally, an association under Swiss law referred to small groups under a democratic umbrella sharing resources to achieve a common ideal purpose. Applied in the field of sports, this grouping is appropriate mostly for small clubs or small associations in which volunteering and financing through private donations constitute the major financial sources.³⁰

Each association must describe the social purpose which will also determine the framework within which such association will be able to develop its activities and use its resources. Generally, the social purpose of a sports association should be the promotion of the sporting activity among its direct and indirect members.³¹ While the purpose cannot be commercial (it must be non-

²⁶ CC, *supra* note 3, at art. 63. These provisions include in particular *Id.* at art. 64, ¶ 3, art. 65, ¶ 3, art. 68, art. 70, ¶ 2, art. 75. *See also* Denis Oswald, *Swiss Law of Association and its Particularities*, 2 CAS BULLETIN 27, 30 (2022).

²⁷ CC, *supra* note 3, at art. 64, ¶ 1.

²⁸ *Id.* at art. 74.

²⁹ *Id.* at art. 60, ¶ 2.

³⁰ Baddeley, *supra* note 13, at 63. According to Baddeley, this legal framework is also appropriate for large associations, even though there is a limited verification mechanism.

³¹ It is not necessary to add “association” to the IF’s name even though most federations include this (*see, e.g., Procedural Rules Governing the Football Tribunal*, FIFA, (Oct. 2022); *What UEFA Does*, UEFA, <https://www.uefa.com/insideuefa/about-uefa/what-uefa-does/> (Jan. 22, 2019); etc.). If the association does not indicate the seat, then this is the seat of the administration. Urs Scherrer & Benjamin Brägger, *in* Basler Kommentar Zivilgesetzbuch I, Art. 60 (22) (23), 7 VORBEMERKUNGEN ZU (2022).

profit), it is possible to engage in commercial activities in order to pursue the non-profit social purpose of the association.³² This explains how very large associations (e.g., the IOC and FIFA) engage in significant commercial activities and obtain important revenues similar to commercial companies from advertisement, broadcasting rights, sponsorships, etc.³³ It is also possible for an association to establish separate entities in another form for specific activities.³⁴

International federations may also pursue commercial purposes in order to ensure financial advantages for their members, to the extent members are also associations and pursue a primarily non-profit purpose.³⁵ The rationale is that such revenues return, in a very large percentage, to the sport itself (e.g., FIFA, UEFA or the IOC redistribute their revenues to their NFs and NOCs, respectively).³⁶ In turn, these associations may also have commercial companies for specific aspects of the organization, which is also acceptable under certain conditions.³⁷

B. Organs and Accountability

Generally, the association must have at least a General Assembly (GA), the supreme organ of the association that renders important decisions, and a board of directors, which is the executive organ overseeing the association.³⁸ The GA, comprised of all members of the association, has the rule-making (i.e. legislative) power of the association and usually meets once per year. It adopts or modifies the statutes, creates commissions and appoints and controls the board of directors.³⁹ Apart from some minimal bookkeeping and auditing / liability requirements, federations in Switzerland have significant flexibility to

³² Scherrer & Brägger, *supra* note 31, at art. 60, ¶¶ 7-12; see Bundesgericht [BGer] [Civil Law Court] Nov. 2, 2021, 4A_216/2021, at 6.1.2 (Switz.).

³³ *2021 Financials in Review*, FIFA, <https://publications.fifa.com/en/annual-report-2021/2021-financials-and-2023-budget/2021-financials-in-review/> (last visited Dec. 15, 2023). According to this report, FIFA's current assets amount to USD 3,877 million.

³⁴ See *IOC Television & Marketing Services SA*, INT'L OLYMPIC COMM. (July 1, 2005), <https://olympics.com/ioc/news/ioc-television-and-marketing-services-sa>; see Oswald, *supra* note 26, at 27.

³⁵ See Scherrer & Brägger, *supra* note 31, art. 60, ¶ 9. (This however does not apply to indirect members of the association that are structured as Sociétés Anonymes (SA), e.g. in professional leagues in football or ice hockey).

³⁶ IOC distributes 90% of its revenues to sport and athlete development across the world; what is more, 50% of WADA's budget comes directly from the IOC. See also Oswald, *supra* note 26, at 30.

³⁷ See Baddeley, *supra* note 13, at 64; on the difference between commercial companies and sports federations. See also Handschin, *supra* note 21, at 120-21.

³⁸ See CC, *supra* note 3, at art. 69(a); On the composition of the executive committees, electoral system and the General Assembly of sports federations. See also Handschin, *supra* note 21, at 124-25.

³⁹ See CC, *supra* note 3, at art. 64, ¶ 1 (This provision is also mandatory law even though it is not explicitly mentioned in the CC); see also Scherrer & Brägger, *supra* note 31, art. 64, ¶ 16.

establish their organizational framework. Moreover, so long as an association is conducting a commercial activity, it must be registered with the Cantonal Commercial Register, which reviews its internal statutes to ensure that all necessary elements are present.⁴⁰ Most large IFs are also registered with the Commercial Register and have an external audit mechanism if they meet the applicable threshold.⁴¹ According to the new Anti-Money Laundering Act that entered into force on January 1, 2023, in Switzerland, there is a mandatory registration with the commercial registry as an additional criterion for sports federations.⁴²

The organs and legal requirements are comparable to most legal entities under Swiss law. Generally, the organs are accountable to the GA, which differs from corporate entities, where the administrators are accountable to the company associates and shareholders for any violation of their duties.⁴³ While the GA is the supreme body of the association, the principle of separation of powers also applies to associations.⁴⁴ IFs have in their majority developed a more elaborate legal framework with several rules on the rights and obligations of their members, internal tribunals, applicable sanctions and (compulsory) references to other organizations and rules, such as the WADA and the Court of Arbitration for Sport (CAS).

In practice, IFs typically have their most important rules regarding their respective organs, members' rights and obligations enshrined in their "Statutes", which can generally be amended upon (qualified) majority of their direct

⁴⁰ The lack of registration does not invalidate their existence or operations. See Margareta Baddeley, *The Extraordinary Autonomy of Sports Bodies under Swiss Law: Lessons to be Drawn*, 20 THE INT'L SPORTS L. J. 3, 4 (2020); Also, the pursuing of commercial activities is not incompatible with the ideal purpose of the association. See Bundesgericht [BGer] [Civil Law Court] Nov. 2, 2021, 4A_216/2021, at 2 (Switz.); see also Scherrer & Brägger, *supra* note 31, at art. 61, ¶ 1.

⁴¹ IOC Code of Ethics art. 4.5. See CC, *supra* note 3, at art. 69(b); The FIFA Governance, Audit and Compliance Committee is one of FIFA's four independent committees, see FIFA STATUTES art. 39-46 (2022). FIFA has also PwC as external auditor; IOC has an Audit Committee (which reports to the IOC Executive Board and the IOC President), while Deloitte will be the external auditor as of the Paris 2024 Olympics. PwC is also the IOC external auditor.

⁴² See David Ginolin & Vincent Jäggi, *2023 Swiss Law Update For International Sports Federations – Anti-Money Laundering Requirements & General Meetings*, LAWINSPO (Apr. 28, 2023), <https://www.lawinsport.com/topics/item/2023-swiss-law-update-for-international-sports-federations-anti-money-laundering-requirements-general-meetings?highlight=WzIwMjMsInN3aXNzIiwibGF3IiwidXBkYXRlIiwZm9yIiwiaW50ZXJuYXRpb25hbCIsInNwb3J0cyIsImZlZGVyYXRpb25zIl0=>. In order to improve their transparency, registered associations must also keep a list of their members.

⁴³ Baddeley, *supra* note 13, at 69.

⁴⁴ Scherrer & Brägger, *supra* note 31, at art. 65, ¶ 15.

members' votes, which in most cases are NFs.⁴⁵ Other regulations may govern specific aspects of the IFs' operations. Even though there is no hierarchy of norms provided in the Swiss CC, the statutes cannot go against binding laws and generally have precedence over the association's regulations and internal decrees.⁴⁶

IFs should not only draft their rules but also ensure the application of these rules, not only by the direct members but also by the indirect members in the pyramidal structure of Olympic sport, as will be shown in more detail below.⁴⁷ The only control of legality arises upon a challenge of its rules / decisions by its members as per Article 75 CC. Such challenges must be brought before an independent state court (or arbitral tribunal) and will be further examined below.

C. Consistency through the "Olympic Movement"

IFs are legal persons and as such, are entitled to own or be part of other legal entities and / or sign contracts with third parties.⁴⁸ A major particularity of IFs is that they are comprised of other – national – associations, other legal entities or individuals.⁴⁹ The members of national federations are then considered as indirect members.⁵⁰ IFs are therefore most often "associations of associations."⁵¹

Indirect members of IFs may be persons, for instance athletes, or entities, such as clubs; these are members of an NF, which in turn is a member of an IF. It is possible for both associations to provide that the statutes of the IF shall also apply to the indirect members (double-anchoring in the articles of association). It is accepted that indirect members are subject to a fiduciary duty and can be sanctioned by the IF based on the applicable rules. However, they are also entitled to challenge the IF decisions.⁵²

While there is an extremely wide degree of autonomy in the way IFs may draft their rules, there is still some consistency and common obligations throughout the Olympic Movement. As seen above, the Olympic Movement is

⁴⁵ See FIFA STATUTES art. 29, ¶ 3 (2022) (which requires an absolute majority of associations having the right to vote); see also WORLD ATHLETICS STAT. art. 82.1 (2019) (requires a qualified majority (2/3 of votes)).

⁴⁶ Scherrer & Brägger, *supra* note 31, art. 63, ¶ 3; Bundegericht [BGer] [Federal Supreme Court] ATF 97 II 108, at 2 (A.f).

⁴⁷ Baddeley, *supra* note 13, at 62.

⁴⁸ Baddeley, *supra* note 40, at 5.

⁴⁹ *Id.* at 4. On the operation of the members of International Sports Federations and their obligations. See also Scherrer & Brägger, *supra* note 31, at art. 64, ¶ 8.

⁵⁰ *Id.* at art. 64, ¶15(a).

⁵¹ Oswald, *supra* note 26, at 27-28; see CHAPPELET ET AL., *supra* note 20, at 197.

⁵² Scherrer & Brägger, *supra* note 31, at art. 70, ¶13(a).

structured in a pyramidal manner and essentially comprises the IOC, the NOCs and the IFs.⁵³ The IOC is the core entity of the Olympic Movement and is also structured as an association under Swiss law.⁵⁴ IFs can be recognized as “Olympic Federations” and enjoy all the accompanying benefits, including financial aid and the possibility to participate in the Olympic Games if they comply with the basic requirements of Article 25 of the Olympic Charter. The latter includes the recognition of the CAS and the adoption of the Olympic Movement Code on the Prevention of the Manipulation of Competitions and the WADA Code in the IFs’ rules.⁵⁵ Moreover, the same obligation is had for all NOCs.⁵⁶ Therefore, all Olympic Federations have certain common provisions and references to the CAS and the WADA Code, with their international-level disputes brought before the CAS in Lausanne.⁵⁷ Furthermore, the IOC has enacted a “toolbox” of IOC Principles that will be further examined below.⁵⁸

On the other hand, major IFs such as FIFA provide for detailed rules on the contracts of employment, e.g., of professional football players with their clubs, and include arbitration clauses for the final adjudication of these disputes by the CAS.⁵⁹

In view of the important rulemaking and their extensive impact at the international level, IFs should go above the minimum requirements under Swiss law to enhance their governance mechanisms. For instance, IFs should have effective mechanisms to tackle doping, match fixing and corruption, but also to protect their members from abuses through safeguarding mechanisms and human rights violations. The above presupposes both an adequate investigation and results management mechanism as well as an efficient dispute resolution system. As will be shown in more detail below, while the IOC has imposed the ratification of the WADA Code and the Olympic Movement Code on the Prevention of Manipulation of Competitions upon its members, IFs still have an

⁵³ *OC*, *supra* note 1, at art. 1, ¶ 2.

⁵⁴ *See also* Oswald, *supra* note 26, at 27. The IOC has the role of a norm entrepreneur for the entire Olympic Movement which was reinforced by UN resolution 69/11 of 16 October 2014, which recognized the autonomy of sport and the mission of the IOC. *See* Foster, *supra* note 6, at 4.

⁵⁵ *See OC*, *supra* note 1, at art. 25.

⁵⁶ *See id.* at art. 27, ¶ 2.6.

⁵⁷ *See* Cafaggi, *supra* note 9, at 37. According to Cafaggi, WADA is an example of a « hybrid » organization exercising rule-making power at transnational level and to which administrative law principles should apply. *See* Foster, *supra* note 6, at 1.

⁵⁸ The IOC Code of Ethics Preamble states that “*all members of the Olympic Movement shall adopt these Basic Universal Principles of Good Governance and reflect these standards in their respective rules, regulations, policies and operations.*” However, there seems to be no direct control mechanism by the IOC for IFs which do not comply with these principles and the only control comes through *CC*, *supra* note 3, at art. 75.

⁵⁹ FIFA STATUTES, art. 53, ¶ 3 (2022).

excessive level of autonomy regarding the investigations and prosecution, but also the dispute resolution channels within the federation.

D. Power of IFs to Issue Sanctions over their Members

Within the limits of their autonomy, IFs may impose private law penalties and sanctions on their members.⁶⁰ This power is inherent to the autonomy of the IF to draft their own regulations and ensure that such regulations are correctly applied. The sanctions can only be imposed on the IFs' members based on the statutory subordination, i.e. based on the membership relationship between the IF and its members. As seen above, the IFs have their rules enshrined in their statutes or regulations (e.g. disciplinary or ethics codes, etc.). This applies to both direct and indirect members.⁶¹ However, non-members can also accept to be subordinated to the statutes, through a contractual relationship.⁶²

Notwithstanding the private law character, some criminal law principles may be applied by analogy. These principles include the principle of good faith, the right to a fair trial, the presumption of innocence or the principle of *nulla poena sine lege*.⁶³ In any event, the sanctions imposed by sports federations must be provided in the rules in accordance with the principle of legality⁶⁴ and should not violate the law (particularly public policy and the personality rights).⁶⁵ In practice, sanctions are imposed and enforced through an internal

⁶⁰ Bundesgericht [BGer] [First Civil Law Court] Mar. 27, 2014, 4A_448/2013, at 3.3 (Switz.). Such sanctions can, e.g., take the form of a fine (Bundesgericht [BGer] [Civil Law Department] Mar. 26, 2012, 5A_73/2012, at (A.c) (Switz.)), a suspension of membership rights, voting, participation in events, or exclusion (*see* Bundesgericht [BGer] [Civil Law Division] Jan. 16, 2012, 5A_634/2011, at (B), (C) (Switz.)). *See* Scherrer & Brägger, *supra* note 31, at art. 70, ¶ 18. *See also* CC, *supra* note 3, at art. 70, ¶ 18.

⁶¹ As will be seen below, direct / indirect members and other individuals that have contractually agreed to be subject to the jurisdiction of the federation can challenge its decisions, *see* Bundesgericht [BGer] [First Civil Law Court] Feb. 28, 2018, 144 III 120, at 1.2.2 (Switz.); Bundesgericht [BGer] [First Civil Law Court] May 28, 2018, 4A_314/2017, at 2.3.2.2 (Switz.).

⁶² This is called « contractual » subordination, OC, *supra* note 1, at art. 1, ¶¶ 3, 4; *see* Bundesgericht [BGer] [Federal Supreme Court] Feb. 7, 2001, 4P.230/2000, at 2(a) (Switz.). *See* Scherrer & Brägger, *supra* note 31, at art. 70, ¶ 19. *See also* Bundesgericht [BGer] [Civil Law Department] Jan. 5, 2007, 4P.240/2006, at 4.2 (Switz.).

⁶³ The BGer has left open the question whether the principle of *ne bis in idem* applies in disciplinary proceedings, Bundesgericht [BGer] [First Civil Law Court] July 29, 2020, 4A_462/2019, at 5.1 (Switz.); *see also* Bundesgericht [BGer] [First Civil Law Court] Oct. 16, 2014, 4A_324/2014, at 6.2.3 (Switz.); Bundesgericht [BGer] [First Civil Law Court] Jan. 3, 2011, 4A_386/2010, at 9.3.2 (Switz.). *See* Björn Hessert, *Cooperation and Reporting Obligations in Sports Investigations*, INT'L SPORTS L. J., 150-52 (2020).

⁶⁴ Bundesgericht [BGer] [Second Civil Law Division] May 4, 2015, 5A_787/2014, at 5.3 (Switz.).

⁶⁵ CC, *supra* note 3, at art. 27. *See* Bundesgericht [BGer] [First Civil Law Court] Mar. 27, 2012, 138 III 322, at 4.3.1 (Switz.).

decision-making mechanism, which is particularly developed in large federations such as FIFA.⁶⁶

E. Challenge of Decisions under Article 75 CC

The challenge of the IFs' decisions is foreseen in Article 75 CC. This is an imperative provision that cannot be waived by the association.⁶⁷ Article 75 CC provides that “[a]ny member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such resolution in court within one month of learning thereof.” This provision is the counterbalance to the extensive autonomy of the association, guaranteeing a minimum of independent control to its members.⁶⁸ Any direct or indirect member of the association can therefore attack the decision before the state courts of the seat (to the extent that most IFs have their seat in Lausanne or in Switzerland, the competent courts are the ones of the respective canton).

The Federal Supreme Court has also accepted that such challenge may be brought before an independent arbitral institution such as the CAS, so long as there is a valid arbitration agreement between the parties (also in the form of a statutory arbitration clause). Members of the association do not need to explicitly agree on the arbitration clause if they have agreed to be bound by the statutes / regulations providing for such clause.⁶⁹ The CAS has been well established as an external tribunal that replaces the state court provided for in Article 75 CC. Particularly for doping-related disputes based on the WADA Code, there is a wide number of cases that can only be submitted to the CAS as a last instance.⁷⁰ This is therefore a control mechanism that exists based on imperative Swiss law and sports federations cannot waive its application.

⁶⁶ FIFA's judicial bodies are the Disciplinary Committee, the Ethics Committee (consisting of the Investigatory and Adjudicatory chambers) and the Appeals Committee, *see FIFA Governance Regulations*, art. 38, ¶ 1 (2020). FIFA also has the “FIFA Tribunal” that resolves contractual disputes consisting of the Dispute Resolution Chamber (DRC), the Players' Status Chamber (PSC) and the recently established Agents Chamber (AC).

⁶⁷ *See* SR 272 Art. 353, SR 291, art. 176; *see also Mutu & Pechstein*, App. No. 40575/10 & 67474/10, at 31; Scherrer & Brägger, *supra* note 31, at art. 70, ¶ 30.

⁶⁸ Bundesgericht [BGer] [Federal Supreme Court], June 6, 2006, 132 III 503, at 3.1 (Switz.); Bundesgericht [BGer] [Federal Supreme Court] Jan. 21, 1982, 108 II 15, at 2 (Switz.). The control is still extremely limited, *see Baddeley*, *supra* note 40, at 4.

⁶⁹ Bundesgericht [BGer] [Federal Supreme Court] Feb. 25, 2016, 142 III 220, at 3.4.1 (Switz.).

⁷⁰ This is also enshrined in the IOC Principles, *Basic Universal Principles of Good Governance Within the Olympic Movement*, art. 2(18), ¶ 2.8 [hereinafter IOC Principles]. CAS awards can eventually be challenged before the Swiss Federal Supreme Court Bundesgericht [BGer] [Federal Supreme Court] which however can only annul the CAS award and does not act as an appellatory court. *See* SR 291 art. 190, ¶ 2. *See also* Foster, *supra* note 6, at 3 (this is a *de facto* autonomous transnational legal order).

The court (or arbitral tribunal) generally has full cognition when reviewing a decision of an association, apart from the exclusion decisions where the association has extensive powers and discretion.⁷¹ In such cases, the control should be limited in the correctness of the internal procedure rather than a *de novo* review. The CAS has an expressly stipulated full power of review anchored in Article R57 CAS Code, but should still exercise restraint in these circumstances in accordance with the law.⁷² On the other hand, based on the full power of review of the CAS, the parties may submit new evidence and arguments for the first time before the CAS, and therefore the Panel may have additional elements to its disposal when determining the outcome of the challenge.

It must also be noted that “rules of the game” are not open to review to the extent that they protect the game and the competition. They can only be reviewed under the limited scope of violation of personality rights, or if the decision was issued in bad faith.⁷³

Article 75 CC requires a decision that violates the law or the articles of the association. Such violation includes not only the statutes, but also other regulations enacted by the federation. If the IF’s statutes or other rules grant extensive powers of the federation, then the review of its decisions can only be challenged based on the violation of imperative law / general principles of law (good faith, abuse of rights, personality rights, etc.).⁷⁴ Furthermore, a member of a national federation (which in turn is a member of an international federation) cannot invoke a violation of the international federation’s rules unless such rules have been integrated into the national federation’s regulations through reference.⁷⁵ This is the case of IOC members under the oath they pronounce when becoming members.

As demonstrated below, all IFs have their own internal decision-making tribunals. The Federal Supreme Court has held that these entities – irrespective of their title – do not qualify as independent arbitral institutions, but are the

⁷¹ Scherrer & Brägger, *supra* note 31, at art. 70, ¶ 24, Bundesgericht [BGer] [Federal Supreme Court] Aug. 23, 2007, 134 III 193, at 4.4 (Switz.). This is because the association has the right to exclude a member without giving reasons based on CC, *supra* note 3, at art. 72, ¶ 2. The exclusion from a sports association with a monopoly position may constitute a violation of the member’s personality rights, *see* Bundesgericht [BGer] [Federal Supreme Court] Dec. 9, 2004, 131 III 97, at 2.1 (Switz.), Bundesgericht [BGer] [Federal Supreme Court] Mar. 14, 1997, 123 III 193, at 2c.bb (Switz.). *See also* Oswald, *supra* note 26, at 34.

⁷² Scherrer & Brägger, *supra* note 31, at art. 70, ¶ 26. *See* Oswald, *supra* note 26, at 40-41.

⁷³ *See* FIFA STATUTES art. 57, ¶ 3(a) (2022); *see also* Bundesgericht [BGer] [Federal Supreme Court] Mar. 27, 2012, 138 III 322, at 4.1, 4.3.3 (Switz.); *see also* Bundesgericht [BGer] [Federal Supreme Court] Aug. 23, 2007, 5C.248/2006, at 3, 4.1 (Switz.).

⁷⁴ Bundesgericht [BGer] [Federal Supreme Court] Feb. 2, 2021, 5A_878/2020, at 6.2 (Switz.).

⁷⁵ Scherrer & Brägger, *supra* note 31, at art. 75, ¶ 14.

expression of the association's will.⁷⁶ In accordance with the IOC Principles that will be further presented below, all IFs should have internal decision-making mechanisms and avoid conflicts of interest, even though this is quite difficult in practice.⁷⁷ In turn, the decisions of such bodies can be challenged either to state courts or to an independent arbitral tribunal, which in most cases is the CAS.⁷⁸

III. TOOLS OF GLOBAL ADMINISTRATIVE LAW AND RELEVANCE TO IFs

A. Particularities of IFs vis-à-vis other Transnational Private Bodies

IFs are only subject to the sparse legal framework of their country of seat and to the limited binding law provisions at the international level. Apart from the restrictions imposed by mandatory EU law, there is little international law applying to IFs, for instance in sports events spectator violence (Council of Europe 1985), integrated safety (Council of Europe 2016), the Anti-Doping Convention (UNESCO 2005), match-fixing (Council of Europe 2014) and public and private corruption (United Nations 2003).⁷⁹ This leads to IFs being traditionally and largely self-regulated.⁸⁰ In recent times, and in plain view of the emerging commercialization and mediatization of elite sports and headline-grabbing scandals,⁸¹ major IFs face increasing criticism over their (mis)management, their regulatory drafting and other strategic decision-making (e.g., regarding the organization of mega events in countries that do not respect human rights). All of which has an impact on the credibility of sports, generally.⁸²

In view of the above, some tools of global administrative law should apply to IFs notwithstanding their private law character, to the extent that they

⁷⁶ See Bundesgericht [BGer] [Federal Supreme Court] Jan. 13, 2022, 4A_346/2021 at 5.2 (Switz.); see also Bundesgericht [BGer] [Federal Supreme Court] Dec. 22, 2022, 4A_232/2022, at 5.9.3 (Switz.).

⁷⁷ IOC Principles, *supra* note 70, at art. 3.4. “The members of any decision-making body should be independent in their decisions; therefore, members facing an actual or perceived conflict of interest must be excluded from the decision-making process.”

⁷⁸ OC, *supra* note 1, at art. 61, ¶¶ 1-2.

⁷⁹ See Jean-Loup Chappelet, *Beyond Governance: The Need to Improve the Regulation of International Sport*, 21 SPORT IN SOC'Y 724, 731 (2017).

⁸⁰ See Baddeley, *supra* note 40, at 3-17.

⁸¹ See CHAPPELET ET AL., *supra* note 20, at 198.

⁸² See Chappelet, *supra* note 10, at 2 (suggesting that sport needs international regulation (in the form of an intergovernmental treaty) for a long-term solution); see Cafaggi, *supra* note 9, at 27-28 (discussing the limitations of intergovernmental treaties).

exercise a quasi-public function.⁸³ Global administrative law includes the mechanisms, principles and practices that promote the accountability of global administrative bodies, including private regulatory bodies that exercise transnational governance functions of public character. The goal is to ensure that such bodies comply with certain “standards of transparency, participation, reasoned decision, and legality and by providing effective review of the rules and decisions they make.”⁸⁴

Global administrative law therefore includes a series of principles / tools that are advisable to ensure the good governance of private rule-makers at the international level, including IFs. Similarly, the principle of “institutional governance” enshrined in the IOC Principles also foresees several from the aforementioned standards and includes further recommendations for IFs.

IFs have repeatedly been recognized as purely international private bodies by the Federal Supreme Court, notwithstanding their size, monolithic regulatory functions, and extensive power over their direct and indirect members throughout the world.⁸⁵ Unlike private bodies in purely national systems, where administrative law standards may apply to entities exercising public power by delegation,⁸⁶ IFs—also due to the lack of international law to this end—enjoy greater power and importance and are essentially only accountable to their own internal organs. As such, IFs enact detailed rules on issues related to their members’ operations, competitions, governance and dispute-resolution mechanisms with a world-wide effect.⁸⁷

The international sports governance system has certain particularities that warrant a separate balancing analysis, as there seems to be no immediate transposition of theoretical debates as to the function of transnational private bodies. The particularities also show the increased importance of the IFs’

⁸³ Armin Von Bongdandy et al., *From Public International to International Public Law: Translating World Public Opinion into International Public Authority*, 28 EUR. J. OF INT’L L. 115, 136-37, 140 (2017); see Casini, *supra* note 23, at 432; see K. Foster, *Lex Sportiva & Lex Ludica: The Court of Arbitration for Sport’s Jurisprudence*, in LEX SPORTIVA: WHAT IS SPORTS LAW? 123, 124-48 (R. Siekmann & J. Soek eds., 2012).

⁸⁴ Kingsbury et al., *supra* note 24, at 17.

⁸⁵ Bundesgericht [BGer] [Federal Supreme Court] Aug. 20, 2020, 4A_248/2019 & 4A_398/2019, at 5.2.4, 9.4 (Switz.) The only area where the Federal Supreme Court seems to differentiate between small and large IFs is in the interpretation of the arbitration agreement under Swiss law; see, e.g., Bundesgericht [BGer] [Federal Supreme Court] May 28, 2018, 4A_314/2017, at 2.3.2.1 (Switz.); see also Bundesgericht [BGer] [Federal Supreme Court] June 29, 2017, 4A_600/2016, at 3.3.4.1 (Switz.). This approach may however change in the future following the recent judgment *Semenya v. Switz.*, Eur. Ct. H.R., App. No. 10934/21, at 239 (2023), which held that such limited control of credible discrimination allegations in cases of forced arbitration can lead to a violation of Art. 13 ECHR (access to effective remedies).

⁸⁶ See BENEDICT KINGSBURY & MEGAN DONALDSON, *GLOBAL ADMINISTRATIVE LAW 5* (Oxford University Press, ed., 2015).

⁸⁷ See *Meca-Medina v. Comm’n of the Eur. Cmty.’s*, Case C-519/04, E.C.R. I-0699, 7019-20 (2008); see also *MOTOE v. Dimosio*, Case C-49/07, ¶¶ 21-24 (2008).

rulemaking and decision-making and the interaction with international, public and EU law.

First, an important element is that sports disputes are typically finally resolved through arbitration, whereby the requirement of consent (which forms part of the essential characteristics of arbitration) is missing in many disputes of disciplinary nature. This occurs, for example, in doping-related cases, whereby the IFs must transpose the WADA Code – and the compulsory referral to CAS arbitration – into their own rules. The athletes and other individuals falling within the jurisdiction of a specific IF are therefore required to have recourse to arbitration. Without rendering the arbitration agreement or the entire procedure invalid, the European Court of Human Rights (ECHR) has highlighted some essential principles that must be met in case of “forced” arbitration in sports disputes⁸⁸ or in cases where there is no judicial review foreseen.⁸⁹ This equates the procedural guarantees required in forced arbitration proceedings to the ones required by state courts.

The aforementioned “quasi-judicial bodies” such as the CAS play a key role in the resolution of sports-related disputes, particularly in appeals against decisions rendered by the internal tribunals of the IFs. Unlike other transnational models, such as the *lex mercatoria*, disciplinary and ethics-related matters involve the application of tools borrowed from both administrative- and criminal law.⁹⁰

There is one major difference between other global regulatory regimes and the ones established by IFs: while global regimes do not shape a unitary legal order and are largely fragmented,⁹¹ IFs have a common legal framework since the vast majority of IFs are based in Switzerland and are, therefore, subject to Swiss law. Moreover, as seen above, the IOC, by means of its Olympic Charter, imposes certain obligations on all the members of the Olympic Movement and on IFs. The IOC has therefore an increased task as the purveyor of good governance and ethics in Olympic sport anchored in the OC.⁹²

⁸⁸ See *MUTU & Pechstein v. Switz.*, Eur. Ct. H.R., App. Nos. 40575/10 & 67474/10 ¶¶ 94-96 (2018). The “forced arbitration” arguments developed in this judgment can be used by analogy to corroborate the argument on the need for an enhanced scrutiny of IFs notwithstanding their private character.

⁸⁹ *Riza et al. v. Turk.*, Eur. Ct. H.R., App. No. 30226/10, ¶ 18 (2020) (noting that the European Convention on Human Rights (ECHR) applies fully to CAS arbitration and to the IFs based in Switzerland because the latter is a signatory to the ECHR).

⁹⁰ See *Casini*, *supra* note 23, at 441-42 (discussing the principle of good faith, the right to a fair trial, the presumption of innocence, the principle of *nulla poena sine lege*).

⁹¹ See *SABINO CASSESE ET AL.*, *GLOBAL ADMINISTRATIVE LAW: THE CASEBOOK XXIII-XXIV* (Institute for International Law & Justice et al. eds., 3rd ed. 2012).

⁹² See *Mission and Role of the IOC*, OC art. 2, ¶ 1.

An additional particularity is that IFs act as the regulatory bodies of their sport, enjoy a monopoly position in the organization of international competitions, and at the same time, may issue sanctions over members who participate in events not recognized by such IFs. While other transnational bodies also cite both regulatory- and disciplinary powers, IFs have a monopoly position (i.e. one IF per country) and a powerful enforcement mechanism (e.g. through exclusion from professional sport). This double power was scrutinized by the Court of Justice of the European Union (CJEU). While the latter has jurisdiction over athletes and NFs established in the EU territory, its rulings have an extraterritorial reach when it comes to EU competition law. The CJEU has thus held that IFs who organize and authorize sporting events (entering into sponsorship, advertising, and insurance contracts) are undertakings and fall within the scrutiny of EU law.⁹³ As such, IFs can potentially infringe EU competition law if they provide for severe penalties for athletes that participate in events that are not recognized by such IFs.⁹⁴

The above characteristics render the application of certain global administrative law tools by IFs essential; in the following pages we will examine how these principles find—or should find—their expression in the governance of IFs.

B. General Tools of Global Administrative Law employed by IFs

1. Participation and Consultation prior to Rulemaking of IFs

Foster lists several principles of global administrative law that are of relevance for IFs.⁹⁵ The first is the principle of participation / consultation of all interest groups in the process of rulemaking.⁹⁶ This is of particular importance to the extent that IFs draft rules that are also generally transposed into the NFs' own rules and have an effect over the indirect members. In the last years, it seems that participation of stakeholders and consultation are respected, particularly by large IFs.⁹⁷ FIFA is one such example since it has proceeded to

⁹³ See *Meca-Medina*, Case C-519/04, E.C.R. I-0699, 7019-20 at ¶ 47. See also Panagiotis Delimatsis, *The Resilience of Private Authority in Times of Crisis*, in *THE EVOLUTION OF TRANSNATIONAL PRIVATE RULEMAKERS THROUGH CRISIS* 28 (P. Delimatsis et al. eds., Cambridge Univ. Press 2023).

⁹⁴ *Int'l Skating Union v. Comm'n*, (T-93/18) Opinion of the Advocate General (AG), Dec. 15, 2022. In his recent opinion, AG Rantos held that the IFs provisions do not infringe EU competition law if they are legitimate and proportionate to achieve their objectives.

⁹⁵ See Foster, *supra* note 6, at 10. These principles are not “binding law” but rather best practices.

⁹⁶ *KINGSBURY & DONALDSON*, *supra* note 86, at 8.

⁹⁷ E.g., athletes' groups, clubs and supporters' representatives, etc. Athletes' participation in the decision-making processes is also listed as a separate IOC Principle. See *IOC Principles*, *supra* note 70, at art. 1(5), ¶ 2.

extensive stakeholders' participation prior to enacting its various regulations.⁹⁸ Apart from the IFs, an example where consultation and stakeholder participation is extremely important is WADA. Specifically, the WADA Code must be accepted and transposed into all Olympic IFs' rules "without substantive change"⁹⁹ and each amendment goes through a wide consultation process.¹⁰⁰ The participation of athletes and athletes' commissions in the decision-making processes of IFs is also an element that is generally foreseen by the IOC Principles.¹⁰¹

2. Transparency of the Organization and the Decision-Making of IFs

A fundamental principle in the context of IFs is transparency of the IFs' decisions and explanation of the rationale behind the decision-making. This is coupled with a system of internal review and an independent external appeals procedure mechanism (which is already foreseen in CC 75). In the context of IFs, transparency is viewed as a corollary of accountability and requires among others the publication of the IFs' regulations, decisions, organizational structure, financial statements and other important documents.¹⁰² A principle paired with transparency is the duty to give reasons, both at the rulemaking and at the decision-making stage.¹⁰³

3. Fairness, Due Process and Principles of Natural Justice

Furthermore, the IF's decision-making at all levels should respect due process.¹⁰⁴ Notwithstanding the important discretion of IFs in matters related to membership exclusion, all decisions should respect the principles of legality and proportionality.¹⁰⁵

In particular for potential breaches of ethics and integrity rules, it is important to ensure a proper reporting of breaches, notification of charges and

⁹⁸ See Press Release, FIFA Publishes Report on the Achievements of the Transfer System Reform (Jan. 19, 2023), <https://www.fifa.com/legal/media-releases/fifa-publishes-report-on-the-achievements-of-the-transfer-system-reform>.

⁹⁹ *OC*, *supra* note 1, at art. 25; see also WADA Code art. 23.2 (2021).

¹⁰⁰ Press Release, WADA Launches Stakeholder Consultation Process Not Only for the WADA Code but also for the International Standards that Form Part of the WADA Code (June 6, 2022), <https://www.wada-ama.org/en/news/wada-launches-stakeholder-consultation-process-three-international-standards>.

¹⁰¹ IOC Principles, *supra* note 70, at art. 2, ¶ 2.3.

¹⁰² *Id.* at art. 2, ¶ 2.4.

¹⁰³ See Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 20 EUR. J. OF INT'L L. 23, 33 (2009).

¹⁰⁴ See Foster, *supra* note 6, at 10.

¹⁰⁵ *Id.* at 10.

a timely handling of the case. It is precisely in this framework that an enhanced and independent from the association entity that manages reporting, investigations and prosecution becomes important as will be further examined below. In fact, even when IFs appoint independent members on their ethics commissions,¹⁰⁶ the proper monitoring, reporting and investigations procedure will largely determine the extent to which the rules and procedures will be complied with.¹⁰⁷

4. Accountability

Accountability seems to be the link to all the principles mentioned above and is the biggest concern for IFs that traditionally have only been accountable to their own internal procedures.¹⁰⁸ Accountability is defined as the “process in which one actor is justifying its own conduct to another actor, or a group of actors, with the possibility of bearing sanctions for this conduct.”¹⁰⁹ As seen above, the application of domestic administrative law to these private actors seems to be problematic from a Swiss law perspective. IFs are considered as purely private institutions and as such they are not subject to domestic administrative law standards. What is more, the Federal Supreme Court has repeatedly confirmed the private law character of IFs, no matter their size and regulatory power.¹¹⁰ On the other side, general global administrative law standards allow for a wider scrutiny over the internal review of IFs’ rules and decisions. Again, it is in this context that a proper reporting, investigation and prosecution mechanism could ensure a greater accountability on behalf of the IFs’ executive and board.

C. The IOC Principle on Institutional Governance

The IOC Principles (2022) were enacted based on Paragraph 5 of the Fundamental Principles of Olympism in the Olympic Charter, which provides for the political neutrality and the autonomy of its actors, in particular the IFs. Such autonomy covers the drafting and enforcing of the sporting rules, the structure of the IFs’ governance and the self-control of IFs who must ensure

¹⁰⁶ IOC Principles, *supra* note 70, at art. 3, ¶ 3.2.

¹⁰⁷ *Id.* at art. 3 ¶¶ 3.1, 3.2. According to this provision, the implementation of the ethical principles should be monitored by an individual within the organization. Such individual should be able to forward irregularities to an independent agency for proper investigation as the need may be.

¹⁰⁸ Foster, *supra* note 6, at 10.

¹⁰⁹ Slobodan Tomic & Rebecca Schmidt, *The Accountability Response of the Global Anti-doping Regime to the Russian Doping Scandal (2015-2020)*, in *THE EVOLUTION OF TRANSNATIONAL RULE-MAKERS THROUGH CRISES 221-22* (Panagiotis Delimatsis et al., eds., Cambridge Univ. Press 2023).

¹¹⁰ *Semenya v. Switz.*, Eur. Ct. H.R., App. No. 10934/21, at 239 (2023).

“that principles of good governance be applied.”¹¹¹ The IOC Principles essentially reflect the internationally recognized standards of corporate governance tailored to the particularities of sport and the Olympic Movement.¹¹² The IOC Principles are therefore a specific expression of global administrative law in the field of Olympic sport. They provide that the IFs should adopt these principles and “reflect these standards in their respective rules, regulations, policies and operations.”¹¹³ It is therefore not a document that must be transposed into the internal legal framework of the IFs as is the case with the WADA Code.¹¹⁴

Essentially, Principle 2 provides for the clear organizational structure and regulatory framework of IFs.¹¹⁵ Such framework must include, among other items, provisions on financial transparency, clear provisions on event awarding – and event organizing, election procedures, dispute resolution mechanisms and disciplinary procedures in respect of due process. After exhaustion of all internal remedies at the internal level of an IF, the IOC Principles provide that the party adversely affected by such decision should have the right to submit an appeal to the CAS.¹¹⁶

The IOC Principles further dictate the separation of powers within the IFs and the possibility to create standing or ad hoc committees, eligibility criteria and gender athletes’ representation.¹¹⁷ The separation of powers (legislative, executive and judiciary) of IFs is also foreseen in very general terms in the Swiss CC, through the requirement of having an executive board (as the executive organ), a GA (the legislative organ) and, as the need may be, a review of the decision-making by an independent state or arbitral tribunal.

Another principle is the accountability of governing bodies, who must issue an annual activity report. Accountability has two notions, i.e. accountability “as a virtue” (normative dimension) and accountability as a “mechanism” (legal dimension through accountability provisions).¹¹⁸ Transparency is also enshrined in the IOC principles and requires IFs to have an updated website that includes

¹¹¹ The IOC Principles were first approved in 2009 and updated in the framework of Recommendation 14 of Olympic Agenda 2020+5 – “*Strengthen the Olympic Movement through good governance*”. See IOC Principles, *supra* note 70, at 1 (2022).

¹¹² See Chappelet, *supra* note 10, at 2.

¹¹³ IOC Principles, *supra* note 70, at 1.

¹¹⁴ *OC*, *supra* note 1, at art. 25.

¹¹⁵ IOC Principles, *supra* note 70, at art. 2, ¶ 2.2.

¹¹⁶ *Id.* at art. 2, ¶ 2.8. Through the establishment and the increasing role of the CAS, international sport has developed a sophisticated “truly global sport justice.” SABINO CASSESE ET AL., GLOBAL ADMINISTRATIVE LAW: AN ITALIAN PERSPECTIVE 73 (Robert Schuman Centre for Advanced Stud. ed., 2012).

¹¹⁷ IOC Principles, *supra* note 70, at art. 2, ¶ 2.3.

¹¹⁸ Tomic & Schmidt, *supra* note 109, at 220.

all pertinent rules and regulations, financial statements, as well as their management and elected officials. Overall, the IOC Principles seem to repeat and concretize, but also enrich, the content of the general provisions on associations of the Swiss CC in line with the general principles of global administrative law.¹¹⁹

Some IFs have successfully established detached or, to some extent, independent authorities to oversee and prosecute potential integrity breaches, exposing failures and proposing improvements.¹²⁰ The International Tennis Integrity Agency (ITIA) of the Tennis Integrity Unit and the Athletics Integrity Unit (AIU) of World Athletics are interesting examples of agencies that have been detached from the IFs and could serve as a model for the creation of a similar body for all IFs who wish to delegate these powers to an independent body. This solution could also improve the accountability of IFs. The particularities of these bodies will be further discussed below (IV. C).

IV. INTEGRITY BREACHES AND INTERNAL DISPUTE RESOLUTION THROUGH THE LENS OF GLOBAL ADMINISTRATIVE LAW AND THE IOC PRINCIPLES

A. Integrity Breaches and Internal Dispute Resolution of IFs

The principles of global administrative law and, more specifically, the IOC Principles, generally provide for proper internal dispute resolution mechanisms, avoidance of conflicts of interest, transparent legal framework, disciplinary procedures and accountability of all Olympic IFs. The jurisdictional power of the IFs is a corollary of their regulatory power, to the extent that the IFs internal tribunals control the correct application of the IFs legal framework and sporting rules.¹²¹ In line with both the CC and the IOC Principles, such tribunals must respect the fundamental principles of law and their own rules.¹²²

The IOC Principles also generally provide for “Ethical and integrity standards.”¹²³ It goes without saying that a proper substantive legal framework is the first requirement to ensure a proper functioning of the sports

¹¹⁹ “The executive body must report to the General Assembly.” IOC Principles, *supra* note 70, at art. 2, ¶ 2.4; On the democratic processes that repeats the obligation of holding a General Assembly and the rights of members in line with the CC. *See also* IOC Principles, *supra* note 70, at art. 2, ¶¶ 2.5, 2.6.

¹²⁰ *See Foster, supra* note 6, at 11.

¹²¹ *See Oswald, supra* note 26, at 39.

¹²² CC, *supra* note 3, at art. 75.

¹²³ IOC Principles, *supra* note 70, at art. 3.

federations.¹²⁴ However, for such legal framework to be properly applied, all internal tribunals—and particularly the investigation mechanism for potential breaches—must be impartial and independent of the IFs’ executive. The Federal Supreme Court has held that these internal tribunals do not qualify as independent arbitral tribunals, but constitute simple expressions of the will of the association.¹²⁵ Accordingly, Article 75 CC provides that all decisions rendered by the adjudicating organs of IFs should be challengeable before a state court or the CAS.¹²⁶

B. Independent Investigation Mechanism and First-Instance Tribunal as a Tool of Good Governance

While the IOC Principles refer to due process and procedural guarantees for the internal proceedings,¹²⁷ they merely refer to a “*confidential internal reporting mechanism*” for breaches of the regulations.¹²⁸ However, apart from the proper reporting mechanism, it is essential to have a proper (detached from the IF) investigation and prosecution system. An efficient and independent investigation system is even more important in integrity breaches as this will eventually weigh on the determination of the outcome of the case.¹²⁹ It is to be noted that the only area where the IOC Principles explicitly impose the existence of an independent body and independent laboratories, and “encourage” the

¹²⁴ For the purposes of this article, we will not focus on the legal framework on the substantive ethical / integrity violations but the procedural steps on reporting, investigations and prosecution of alleged breaches before a first instance tribunal and, subsequently, to the CAS.

¹²⁵ See Bundesgericht [BGer] [Federal Supreme Court] Jan. 13, 2022, 4A_346/2020, at 5.2; see also Bundesgericht [BGer] [Federal Supreme Court] Dec. 22, 2022, 4A_232/2022, at 5.2.3.

¹²⁶ CC, *supra* note 3, at art. 75; IOC Principles, *supra* note 70, at art. 2, ¶ 2.8.

¹²⁷ See IOC Principles, *supra* note 70, at art. 3, ¶ 3.2 on the independence of the Ethics Commission members; *id.* at art. 3.4 on the independence of the members of any decision-making body; *id.* at art. 2.6 on the independence of the electoral commission.

¹²⁸ *Id.* at art. 3, ¶ 3.11. On reporting obligations in sports investigations, see Hessert, *supra* note 63, at 145-47.

¹²⁹ See, e.g., Yves Jean-Bart v. FIFA, TAS 2021/A/7661, Award (2023). This case related to allegations of sexual abuse of the former president of the Haitian Football Federation, supported by the testimonies of numerous anonymous witnesses. The ban initially imposed by the Adjudicatory Chamber of the FIFA Ethics Committee was subsequently lifted by the CAS; in its press release, the CAS held that, even though it reviews both the facts and the law in appeal, the “task of investigating and proving the existence of the facts of the case rests with the parties and not with the Tribunal Even though the CAS has the ability to order certain investigative measures under certain conditions, it remains an adjudicating authority and not an investigating authority”. See Media Release, In the Matter of Yves Jean-Bart v. FIFA, TAS/CAS (Feb. 23, 2023). See also Richard Busch, *Yves Jean-Bart v. FIFA: Observations from a Safeguarding Regulation Perspective*, LAWNSPORT (June 29, 2023), https://www.lawinsport.com/topics/item/yves-jean-bart-v-fifa-observations-from-a-safeguarding-regulation-perspective?__cf_chl_tk=iK.1yMefH4vAb4lyOh_vHRtYd4UUyVvMHJO2sZN00tj8-1700093195-0-gaNycGzNC7s.

delegation to an independent testing and results-management agency, is in doping-related matters through the International Testing Agency (ITA).¹³⁰

The ITA is an independent organization that has the legal form of a not-for-profit foundation under Swiss law.¹³¹ The mission of ITA is to “manage anti-doping programs, independent from sporting or political powers, for International Federations (IFs), Major Event Organizers (MEOs) and all other anti-doping organizations requesting support.”¹³²

It is argued that the existence of an analogous independent agency already at the stage of reporting, investigation and prosecution for ethics and integrity breaches, could help increase accountability and, eventually, the good governance of IFs. The same applies for an independent from the IF first-instance tribunal that could hear potential integrity and / or disciplinary breaches.

The CAS Anti-Doping Division (CAS ADD) was created as a first-instance authority for doping-related matters pursuant to a delegation of powers from the IOC, IFs and any other signatories of the WADA Code.¹³³ Such delegation is currently optional, however several IFs have entered into contractual agreements with ITA to manage their anti-doping operations.¹³⁴ In essence, the CAS ADD operates a division independent of the “regular” CAS Ordinary- and Appeals Arbitration Division, with a different Division President and a separate list of arbitrators.

The Federal Supreme Court has recently rendered a judgment whereby it incidentally confirmed the validity of the CAS ADD when the latter operates as a first-instance tribunal replacing the internal anti-doping tribunal of the IFs.¹³⁵ In fact, the Federal Supreme Court has held that the CAS ADD cannot qualify as an “independent arbitral institution” as, for instance the CAS Appeals Division (CAS AD) can, because it lacks the essential condition of an arbitration agreement, namely, parties’ agreement to have recourse to arbitration by excluding the jurisdiction of state courts. In this case, the CAS ADD simply acted in delegation by the IF as its first-instance anti-doping tribunal in lieu of the IF. Notwithstanding the above finding, it was still found that the CAS ADD

¹³⁰ *IOC Principles*, *supra* note 70, at art. 3, ¶ 3.8.

¹³¹ *See About Us*, INT’L TESTING AGENCY, <https://ita.sport/about-us/> (last visited Dec. 18, 2023).

¹³² *Id.*

¹³³ *Arbitration Rules, CAS Anti-Doping Division [ADD]*, TAS/CAS, at A1, <https://www.tas-cas.org/en/add/arbitration-rules-cas-add.html> (last updated Jan. 1, 2021).

¹³⁴ The International Weightlifting Federation, for example, delegated its testing and results management responsibilities for doping to the ITA. Several IFs have also delegated the adjudication of doping-related matters to the CAS Anti-Doping Division which acts as a first-instance tribunal (with the possibility to file an appeal against such decision to the CAS Appeal Division).

¹³⁵ *See Bundesgericht [BGer] [Federal Supreme Court] Dec. 22, 2022, 4A_232/2022*, at ¶ 5.4.

is independent of the IFs, which is a decisive criterion in terms of good governance. According to the Federal Supreme Court, the fact that the CAS ADD is not a true court of arbitration is not problematic to the extent that the parties have the possibility to appeal such decision to the CAS AD which reviews the case *de novo* and the parties do not have a right to a double degree of jurisdiction (outside the internal review).¹³⁶ Importantly, the Federal Supreme Court found that the coexistence of the CAS ADD and the CAS Appeals Division under the umbrella of the same board is not problematic so long as each division has a separate list of arbitrators.¹³⁷

It is argued that a similar model of an Integrity Division – potentially also as a separate division of the CAS similar to the CAS ADD – could be established for integrity and ethical breaches which could enhance accountability of IFs for all the reasons explained throughout this article.

C. The Paradigm of International Tennis Integrity Agency and the Athletics Integrity Unit

The creation of the ITA and the CAS ADD show a tendency to establish agencies for testing and results management or first-instance tribunals independent from the IFs, to which IFs may delegate part of their anti-doping testing and results management duties.

It must be noted that certain large IFs (for instance, World Athletics and the International Tennis Federation) have already created quasi-independent investigations, results management and prosecution agencies that are detached from the everyday administration of the IF.¹³⁸

¹³⁶ See Bundesgericht [BGer] [Federal Supreme Court] Oct. 4, 2017, 4A_384/2017, at ¶ 4.2.3.

¹³⁷ See Bundesgericht [BGer] [Federal Supreme Court] Dec. 22, 2022, 4A_232/2022, at ¶ 6.7.

¹³⁸ See *About*, INT'L TENNIS INTEGRITY AGENCY [hereinafter ITIA], <https://www.itia.tennis> (last visited Dec. 18, 2023); *Know Us*, ATHLETICS INTEGRITY UNIT, <https://www.athleticsintegrity.org> (last visited Dec. 18, 2023). Another example that exists in Switzerland (albeit only for NFs and national athletes) is the Swiss Sport Integrity. This is a foundation under Swiss law and aims at combating doping, ethical misconduct and wrongdoing in sport. The foundation is guided by international guidelines and the implemented WADA Code at the national level (Doping Statute) and the Statutes on Ethics in Swiss sport. See *Purpose of Swiss Sport Integrity*, SWISS SPORT INTEGRITY (Jan. 1, 2022), <https://www.sportintegrity.ch/en>.

1. The International Tennis Integrity Agency (ITIA)

The ITIA is an independent body established in 2021¹³⁹ and funded by the international governing bodies of tennis.¹⁴⁰ It is tasked to promote and safeguard the integrity of tennis around the world and includes both the Tennis Anti-Doping Program (TADP) and the Tennis Anti-Corruption Program (TACP) which monitor, initiate and prosecute all potential violations of the respective rules. The TADP's role is to implement the WADA Code and protect both the integrity of the sport and the health and rights of the players.¹⁴¹ The ITIA has the doping control and education responsibility and has implemented the mandatory provisions of the WADA Code into its own rules.¹⁴² Importantly, the ITIA distributes the TADP to all national tennis federations, who must ensure compliance with the TADP in their respective jurisdiction.¹⁴³

Importantly, the ITIA has a Tennis Anti-Corruption Program (TACP),¹⁴⁴ that is tasked with protecting the integrity in tennis, fighting against match-fixing and establishing a uniform set of rules for all professional tennis events.¹⁴⁵ All NFs must then ensure that they have rules “at least equivalent to the rules of conduct imposed by the TACP . . .” and extend decisions to their own jurisdiction.¹⁴⁶ ITIA is a successor of the TIU (Tennis Integrity Unit) set up to fight match-fixing in tennis.

In essence, the ITIA has the right to conduct interviews to any individuals falling under its jurisdiction (“covered persons”)¹⁴⁷ and determine potential breaches.¹⁴⁸ If the investigation shows reasonable chances for a commission of

¹³⁹ The ITIA succeeded the Tennis Integrity Unit (TIU) which was operational until 2021. Barbra Wancke, *Independent ITIA Ready to Launch*, TENNIS THREADS (Dec. 16, 2020), <https://tennisthreads.net/independent-itia-ready-to-launch/>.

¹⁴⁰ The ITIA is funded by the International Tennis Federation [hereinafter ITF], the ATP, WTA, Australian Open, French Open, Wimbledon and the US Open. *About*, INT'L TENNIS INTEGRITY AGENCY, <https://www.itia.tennis/about/> (last visited Dec. 18, 2023).

¹⁴¹ Tennis Anti-Doping Programme, ITIA, art. 1, ¶¶ 1.1.1, 1.2 (2023), <https://www.itia.tennis/media/goofzg2o/tadp-2023.pdf>.

¹⁴² *Id.* at art. 1, ¶ 1.1.2, 1.1.7. The responsibilities include test distribution planning, testing, whereabouts information, investigations, results management, and the pursuit of alleged Anti-Doping Rule Violations, including first instance hearings and appeals. The ITIA has thus created an independent agency for doping-related testing and results management instead of delegating such powers to the ITA.

¹⁴³ ITF CONST., bylaw 4, ¶ 4.2.2 (2023).

¹⁴⁴ Tennis Anti-Corruption Program (TACP), ITF (Jan. 1, 2023), <https://www.itia.tennis/tacp/rules>. The TACP replaced the older Uniform Tennis Anti-Corruption Program (UTAP), *see, e.g.*, David Savic v. Pro. Tennis Integrity Officers (PTIOs), CAS 2011/A/2621, 1-2 (2012).

¹⁴⁵ ITF CONST., bylaw 5, ¶ 5.1.

¹⁴⁶ *Id.* at bylaw 5, ¶ 5.2.1.

¹⁴⁷ Tennis Anti-Corruption Program (TACP), *supra* note 144, at art. F, ¶ F.2.a.

¹⁴⁸ *Id.*

a corruption offense, the case is referred to an independent from the ITF Anti-Corruption Hearing Officer (AHO).¹⁴⁹ The AHO decision is final, with the sole possibility to appeal to the CAS for specific types of decisions within twenty days from the receipt of the decision and without the appeal having suspensive effect.¹⁵⁰ Before the CAS, the parties to the appeal proceedings are only the ITIA and the covered person.¹⁵¹ Match-fixing cases are the ones that are commonly brought in appeal to the CAS.¹⁵² The ITIA has therefore created an independent entity for corruption-related offenses whereby it initiates investigations, refers the case to an independent officer who acts as a first-instance tribunal, equivalent to the CAS ADD.

2. The Athletics Integrity Unit (AIU)

Similar to the ITF, World Athletics has delegated its authority for the management of its integrity programs to an independent organization that is separated from the IF and has its own Board. The AIU remains fully independent of the IF and oversees its integrity matters, even though it predominantly deals with doping-related matters; it ensures, among others, the testing, compliance, investigations, intelligence, case management and education.¹⁵³ Through its case management, it is tasked with the prosecution of disciplinary cases within its jurisdiction and the enforcement of sanctions in accordance with the relevant rules.¹⁵⁴ The AIU operates through a separate set of rules on reporting, investigation and prosecution and issues a detailed annual report.¹⁵⁵

¹⁴⁹ *Id.* at art. F, ¶ F.4. The ITIA has also the possibility to propose to such covered person to accept the sanction. If such person fails to respond within the given time limit or challenges the alleged breach, then ITIA refers the case to the AHO.

¹⁵⁰ *Id.* at art. I, ¶ I.4.

¹⁵¹ *Id.* at art. I, ¶ I.3. *See, e.g.*, the match-fixing case brought before the CAS in appeal (albeit under the previous regime of the TIU, *Heras v. Tennis Integrity Unit / Pro. Tennis Integrity Officers*, CAS 2018/A/5939, ¶ 5 (Oct. 1, 2019). *See Köllerer v. Ass'n of Tennis Pro.*, CAS 2011/A/2490, 2 (Mar. 23, 2012).

¹⁵² *See, e.g.*, (under the previous regime of the TIU) *Olaso de la Rica v. Tennis Integrity Unit*, CAS 2014/A/3467, ¶¶ 5-6 (Sept. 30, 2014) & *Savic v. Pro. Tennis Integrity Officers*, CAS 2011/A/2621, ¶ 18 (Sept. 5, 2012). For an analysis of the judicial system of the ITF, *see* D. Mavromati, *The ITF Legal System*, in *INT'L & COMPARATIVE SPORTS JUST.* (M. Colucci & M. Coccia eds., forthcoming 2023).

¹⁵³ *See Know Us*, ATHLETICS INTEGRITY UNIT, <https://www.athleticsintegrity.org/know-us> (last visited Dec. 18, 2023).

¹⁵⁴ *See* WORLD ATHLETICS, *Integrity Code of Conduct* art. 2, ¶¶ 2.2, 2.4 (2019).

¹⁵⁵ *See* WORLD ATHLETICS, *Athletics Integrity Unit Reporting, Investigation and Prosecution Rules – Non Doping*, art. 1, ¶ 1.2, art. 4, ¶ 4.1 (2019). *See* ATHLETICS INTEGRITY UNIT, *ANNUAL REPORT* (2021).

The proceedings begin with the reporting of an integrity violation to the AIU,¹⁵⁶ a prima facie assessment, an investigation as the need may be¹⁵⁷ and a notice of charge on the individual concerned.¹⁵⁸ The particularity of the AIU compared to the TACP is that all integrity breaches are brought before an independent Disciplinary Tribunal that is administered by Sport Resolutions,¹⁵⁹ without the possibility to file an appeal to the CAS for non-doping-related matters.

Based on the foregoing analysis of the ITIA and AIU, it becomes evident that the independence of a reporting, investigation and prosecution agency is a crucial element specifically for integrity matters; it leads to more transparency in the way both doping- and anti-corruption programs are managed.¹⁶⁰ While it is acknowledged that not all IFs have the means and size to invest in the creation of these entities, the creation of such an agency (independent from the IFs) could fill this gap without the important investments that this entails.¹⁶¹ It is noted that the ITIA TACP has an agency that combines both the investigations and prosecution and the first-instance proceedings through the decision of the AHO. In case of a creation of an independent entity for integrity breaches (to which IFs can delegate their integrity-related matters), it is preferable to have an independent entity for investigations with a subsequent referral to a separate first-instance tribunal similar to the CAS ADD and a final appeal to the CAS AD (as such review is guaranteed by Article 75 CC). This would allow a further separation of the various steps of the management process of reporting, investigation and first-instance proceedings, but also ensure a proper governance to the IFs that cannot afford investing in the setting up of such integrity entities like the ITIA or the AIU.

¹⁵⁶ WORLD ATHLETICS, Athletics Integrity Unit Reporting, Investigation and Prosecution Rules – Non Doping, at art. 1, ¶ 1.1.

¹⁵⁷ *Id.* at art. 2, ¶ 2.3. Investigations may also begin *ex officio*, *id.* at art. 4.

¹⁵⁸ *Id.* at art. 5, ¶ 5.1.

¹⁵⁹ Sport Resolutions is a not-for-profit independent case management organization based in London. It operates the World Athletics Disciplinary Tribunal with a list of independent members, *see About Sport Resolutions*, SPORT RESOLUTIONS, <https://www.sportresolutions.com/about/sport-resolutions> (last visited Dec. 18, 2023).

¹⁶⁰ *See* Press Release, *Governing Bodies Confirm Integrated Approach to Integrity From 2022*, INT'L TENNIS FED'N (Dec. 29, 2021), <https://www.itftennis.com/en/news-and-media/articles/world-governing-bodies-confirm-integrated-approach-to-integrity-for-tennis-from-2022/>.

¹⁶¹ According to the financial report for 2021, the AIU's annual expenses from January to December 2021 amounted to USD \$8,809,362 (USD \$3,385,186 for staff costs, USD \$516,489 for administration costs, USD \$123,454 for investigations & intelligence, USD \$108,301 for communication and education, USD \$1,205,550 for disciplinary and legal matters, and USD \$3,401,089 for the AIU testing program). *See* ATHLETICS INTEGRITY UNIT, ANNUAL REPORT (2021). As for the ITIA, the ITIA Board has agreed a budget of USD \$15,800,000 for its 2022 operations (both anti-doping and anti-corruption), which makes it the highest-ever investment of an IF, *see* Press Release, *supra* note 160.

CONCLUDING REMARKS

The 82 IFs that are recognized by the IOC are, in their vast majority, based in Switzerland and are subject to the very liberal legal framework of the Swiss CC along with very few international law requirements. As such, IFs are largely self-regulated and accountable to their own judicial bodies, with the sole legality control being the one provided by Article 75 CC (challenge to either a state court or the CAS). While the private law character of IFs is not contested – indeed, it has been confirmed by the Federal Supreme Court and other courts – their unique characteristics, global impact and plenary authority require that the autonomy of these entities be constrained by additional standards and guarantees borrowed from global administrative law. The IOC « *Basic Universal Principles of Good Governance within the Olympic Movement* » have already encapsulated several of these standards and encourage IFs to adopt and implement them into their respective internal governance structures.

The operation of IFs demonstrates several particularities compared to other transnational models as “associations of associations”; IFs act as global regulatory, authorization and decision-making bodies for the sport(s) falling under their jurisdiction and share common characteristics due to their seat in Switzerland. In turn, and through the Olympic Movement, decisions in disciplinary and integrity matters are in most cases brought to arbitration without the consent of athletes and other individuals concerned. Finally, and notwithstanding their private character, disciplinary and ethics-related matters often entail the application of tools borrowed from both administrative- and criminal law.

For the reasons explained in this article, and in order to ensure the proper control mechanism of integrity offenses within the IFs, this article advocates for a delegation of reporting, investigation and prosecution responsibilities to an authority that is external from the IFs. Such delegation would increase transparency and accountability, thereby leading to a better governance through a separation of powers and avoidance of the inherent conflicts when these tasks are managed by organs appointed by – and working for – the IFs. This paper also discusses the delegation of the internal dispute resolution authority related to integrity matters to an independent – from the IFs – tribunal, similar to the CAS ADD. Even if such body does not qualify as an independent arbitral tribunal according to the Swiss Private International Law Act (PILA) and the Federal Supreme Court, the independence from the IF could ensure not only a higher accountability but also more consistency in the decision-making of such centralized authority. Such solution could also enable smaller IFs to implement higher governance standards without investing in the creation of a dedicated independent integrity unit like the ITIA or the AIU. As the custodian of ethics

and good governance in sport, the IOC should ensure that these principles are adopted throughout the Olympic Movement, including by IFs, and impose additional guarantees than the ones enshrined in the Swiss CC.