

Poland at the Gates of EURO 2012

– Global Sport Governance and the Limits of the State’s Autonomy

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Abstract

International football federations are composed of national associations that have an independent character from their governments. FIFA and UEFA actively defend the autonomy of national associations, including the use of far-reaching “punitive” measures. At the same time, international sports federations require the significant involvement of national governments in the preparation of football championships, which often becomes a crucial factor during the selection process of the championship’s host states. Nevertheless, states that are highly affected by such decisions do not have at their disposal many effective tools of control. The existing model also raises questions regarding sovereignty and democratic legitimacy when governments are forced to take decisions at the behest of international federations. The present article, based mainly on the Polish experience, is a reflection on the tensions between the necessary autonomy of sports associations/federations, their accountability in the fulfillment of public tasks and the transparency of the decision-making processes.

¹ My most sincere thanks are due to Christopher Reeves for his comments on the previous drafts of this paper. I am also grateful to Wojciech Burek, Aleksandra Jurewicz, Paula Olearnik, Mansal Denton and Matuesz Filary for sharing their insights with me. Comments are welcomed at piotr.szwedo@uj.edu.pl.

I. Introduction – sport as a field of international governance

Competition in sport requires clear rules and a clear purpose. For that reason the different branches of sport founded national associations and international federations. As a consequence, sports are usually governed by bodies that have a monopolistic character,² which unify the rules of competition at the national and international levels. This is certainly the case with football, which is considered to be the most popular sport in the world.³

The framework of global governance in football may serve as a model of international sports management in various sports disciplines. It is run globally by the International Federation of Association Football (hereinafter FIFA) and regionally in Europe by the Union of European Football Associations (hereinafter UEFA). They are both associations of Swiss law, and have a great deal of influence, which is restricted not only to their formal members (Part II), but also to other subjects (i.e., the states and their governments). Federations are composed of national football associations, which act as self-governing bodies. Nevertheless, the development of national sport remains their public responsibility; therefore they are subject to varying degrees of control by particular public organs. The example of the Polish Football Association (*Polski Związek Piłki Nożnej*, hereinafter PFA), serves as a good illustration of the said phenomenon (Part III).

Global governance is often effectuated through instruments of a legal nature. This is certainly the case with sport, including football. The emergence of global administrative law led to clarification of certain standards, inspired by domestic administrative law. As the decisions reached by international sports federations concern not just the subjects, which are their formal addressees; the question of procedural participation and transparency also needs to be raised. This is a particularly important question in the selection process of the

² This is not always the case. In boxing several federations confer titles (e.g. the World Boxing Association, the World Boxing Council and the World Boxing Organization).

³ ERIC DUNNING, *SPORT MATTERS: SOCIOLOGICAL STUDIES OF SPORT, VIOLENCE AND CIVILISATION* 103 (2001) (“During the twentieth century, soccer emerged as the world’s most popular team sport.”).

championship's host state, where governmental guarantees condition participation in the procedure (Part IV.1). However, states are deprived of the possibility of influencing the management of various sports in the name of the associations' autonomy. The way in which UEFA effectively overturned the decision of the Polish government raises another question regarding the state's sovereignty. This problem is also linked with the problem of democratic legitimacy as decisions were taken at the behest of FIFA and UEFA which Polish society did not support (Part IV.2).

The decision-making process requires review mechanisms, which is in the hands of the Court of Arbitration for Sports (hereinafter CAS) and the Federal Supreme Court of Switzerland (hereinafter FSCS). The broad scope of subjects directly and indirectly affected by the federations' decision raises other questions regarding who should have standing before those courts (Part V.1) and what should be the role of a domestic tribunal in the supervision of global sports governance (Part V.2). Under the applicable standards of review shaped by the jurisprudence of the FSCS, the power of international federations to discipline their members under the Swiss law has been confirmed.

II. The legal nature of international sports governing bodies – FIFA and UEFA

The intergovernmental or non-governmental characters of international organizations depend mainly on the legal character of their members and the legal source of their creation. An IGO is “an association of States established by and based upon a treaty, which pursues common aims and which has its own special organs to fulfill particular functions within the

organization.”⁴ Neither FIFA nor UEFA is an “association of states;” it is composed of “national football associations.”

Both organizations are registered in the Swiss Commercial Register according to Article 60 of the Swiss civil code.⁵ Therefore they are the subjects of Swiss domestic law. Both FIFA and UEFA are composed of members which are national football associations.⁶ A subject of Swiss domestic law when acting internationally should be treated as a non-governmental organization, which is an “*organisation d’initiative privée*.”⁷ FIFA and UEFA make far-reaching efforts to strengthen the autonomy of national football associations from government authorities.⁸ In extreme cases it is safeguarded through the threats of suspending the rights of a FIFA member, which leads to the suspension of national representations, clubs and referees and to the loss of their matches by a walkover.⁹ However, the classification of sports federations as private in nature should not be done so unequivocally. The analysis of positions taken in the domestic legal systems of national associations, which involve FIFA and UEFA members and governmental authorities in the events prepared by the international football federation, leads to a situation where it could be argued that these organizations have taken on a dual, and not exclusively non-governmental, character.

⁴ Rudolf L. Bindschedler, *International Organizations, General Aspects*, 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW. 1289, (Rudolf Bernhardt ed., 1992)

⁵ See FIFA Statutes, art. 1 (2009) available at http://www.fifa.com/mm/document/affederation/federation/01/24/fifastatuten2009_e.pdf; Statutes of UEFA, Art. 1 (2010), available at http://www.uefa.com/MultimediaFiles/Download/Regulations/uefaorg/General/01/47/69/97/1476997_DOWNLOAD.OAD.pdf.

⁶ See FIFA Statutes, Definitions 2 & 9; Statutes of UEFA, Definition 3.

⁷ See Les conditions d’attribution d’un statut international à des associations d’initiative privée, Résolution d’Institut de Droit international, Session de Bath 1950 [Conditions for granting international status to private led associations, Resolution of the Institute of International Law, 1950 Session of Bath] (Fr.), available at http://www.idi-iil.org/idiF/resolutionsF/1950_bath_02_fr.pdf.

⁸ See UEFA Statutes, Art. 7^{bis}(2).

⁹ There are several examples of such threats: *Nigeria Facing Possible Suspension*, ESPNSOCCERNET.COM (Jul. 2, 2010), http://soccernet.espn.go.com/world-cup/story/_/id/804807/ce/uk/&cc=5739?ver=global; *Fifa Chief Warns French President*, BBC (June 29, 2010), http://news.bbc.co.uk/sport2/hi/football/world_cup_2010/8771693.stm; *Ethiopian Football Federation Suspended*, FIFA.COM (July 29, 2008), <http://www.fifa.com/associations/association=eth/media/newsid=835129.html>; *Iraq Suspended by FIFA*, ESPNSOCCERNET.COM (Nov. 21, 2009), <http://soccernet.espn.go.com/news/story?id=701468&sec=global&cc=5901>.

III. The legal nature of the national football association – the example of the PFA

Even if Poland is not a football superpower, soccer is the most popular sport in this country. The Polish Football Association was founded in 1919, only a year after the restoration of the Polish state.

The PFA has a legal personality.¹⁰ It is composed of members, which are Regional Football Associations and football clubs.¹¹ According to its statute, it is the only representative of Polish football at home and abroad.¹² It is a member of FIFA and UEFA, therefore it

absolutely commits itself to respect ... the rules and decisions of FIFA and UEFA, recognizes the jurisdiction of Court of Arbitration for Sport in Lausanne in cases of international football disputes, according to the relevant rules of FIFA and UEFA; to direct the domestic disputes in the last instance resulted from the application of the statute or the PFA's rules ... to an independent and impartial arbitration court acting on the basis of Polish law, with the exclusion of the ordinary courts.¹³

A similar obligation is also spread over the Association's members.¹⁴ The Association is solely competent to take any decision related to football, which is not expressly restricted to governmental administration.¹⁵

The PFA has a dual nature. On the one hand it is organized according to the Polish Law on associations.¹⁶ At the same time it is subject to the regulations of the Law on Sports.¹⁷ This regulation replaced the criticized¹⁸ Law on Competitive Sports¹⁹, which led to

¹⁰ Statute of the Polish Football Association (2009), art. 3 § 1 (Pol.), available at <http://www.pzpn.pl/index.php/pol/content/download/850/7096/file/Statut%20PZPN%2027062009.pdf>.

¹¹ *Id.* (See Definitions).

¹² *Id.* art. 4 § 1.

¹³ *Id.* art. 4 § 2.

¹⁴ *Id.* art. 18 § 1(1).

¹⁵ *Id.* art. 12 § 3.

¹⁶ *Ustawa prawo o stowarzyszeniach* [*Law on Associations*], 79 DZIENNIK USTAW 855 (2001) (Pol.) [hereinafter *Law on Associations*].

¹⁷ *Ustawa o sporcie* [*Law on Sport*], 127 DZIENNIK USTAW 857 (2010) (Pol.) [hereinafter *Law on Sport*].

¹⁸ See *infra* note 29.

a crisis in Polish football which is described in Part IV.2. “Competitive sport” was a kind of human activity related to a sports competition organized by a Polish sports association (e.g., PFA) or a body acting on its behalf.²⁰ A club willing to participate in a “competitive sport” had to obtain a license issued by a Polish sports association.²¹ Decisions on the granting or refusing of a license were subject to the control of the Polish administrative courts.²²

The Law on Competitive Sports gave the Minister of Sport a certain amount of control over the Polish sports associations. She should refuse the granting of approval for the establishment of a sports association when there was already one acting in a given discipline.²³ Therefore in each sports domain there was only one Polish active association.²⁴ Certain categories of contracts involving the management of association’s assets, when the association realized tasks financed by public funds, required the approval of the Minister.²⁵ When activities of a Polish sports association breached the law, its statute or by-laws, the Minister of Sport, as a supervising organ, could cancel the association’s resolution, suspend the authorities of the association, withdraw its consent for the creation of an association or file a motion for a resolution of an association to a relevant Polish court.²⁶

The new Law on Sports abandoned the distinction between competitive and amateur sport, but the creation of a Polish sports association, which has the exclusive right to represent the international federations, requires the acceptance of the Minister of Sport.²⁷ The Minister’s authority to control the associations was considerably reduced. She still has to accept all changes in the statutes of the associations, may stop the fulfillment of or cancel a

¹⁹ *Ustawa o sporcie kwalifikowanym [Law on Competitive Sports]*, 155 DZIENNIK USTAW 1298 (2005) (Pol.) [hereinafter *Law on Competitive Sports*].

²⁰ *See id.* art. 3(3).

²¹ *Id.* art. 6(1).

²² *Id.* art. 6(7).

²³ *Id.* art. 8(3).

²⁴ *See id.* art. 11.

²⁵ *See id.* art. 13(3).

²⁶ *Id.* art. 23(1), 24(1).

²⁷ *Law on Sport, supra* note 17, arts. 7, 13.

decision of an association which she deems to be unlawful, but she has lost the power to independently suspend the organs, which now should be exercised by a common court on her motion (Part IV.2 *infra*).²⁸

The dependency of the PFA on the Minister of Sport is no exception in the Polish system of sport governance. This situation was already the object of a broader critique.

The Polish elite sports system is strongly interventionist, centralized, bureaucratic, intensely formalized but unstable. The key role of state structures in managing elite sport in Poland stands in contrast to European sport policies described by the Council of Europe in the ‘European model of sport’, as well as to one of the key principles of European Union policy – the subsidiary principle.²⁹

However, the independence of elite sport from government authorities is always a question of degree. For example, the French law guarantees the independence and monopolistic status of sports federations, but puts them under the control of a minister, who may also take part in the definition and implementation of federations’ goals and public tasks.³⁰ The Minister of Sport may also in a case of “serious doubts regarding legality” launch a procedure of suspension of the relevant act.³¹

FIFA and UEFA used to point out the inadequacy of domestic law with their statutes and intervened actively in a case of the application of provisions permitting the intervention of government authorities in the process of self-governance. The sole existence of inadequate provisions does not prejudice their application; it does, however, make a potential breach easier and more likely. On the other hand, in many states the lack of a domestic legal foundation does not preclude the possibility of governmental intervention.

²⁸ *Id.*, arts. 21-23.

²⁹ JOLANTA ŻYŚKO, *COMPARATIVE ELITE SPORT DEVELOPMENT: SYSTEMS, STRUCTURES AND PUBLIC POLICY* 190-91 (Barrie Houlihan & Mick Green eds., 2008).

³⁰ CODE DU SPORT [Code of Sports] art. L111-1(II), L131-14 (2008) (Fr.).

³¹ *Id.* art. L-131-20.

IV. Procedural participation and the transparency of the decision-making process in

FIFA and UEFA

Global administrative law requires that decisions taken by the global administrative bodies reflect some important principles stemming mainly from domestic administrative law. These are procedural participation and transparency, which require that the individuals affected have their views and relevant information considered before the decisions are taken.³² The decisions should also be adequately reasoned. In the field of *lex sportiva* such a requirement already exists in the anti-doping regime, which thanks to the World Anti-Doping Code, have acquired many of the principles of global administrative law.³³ A decision should potentially be subject to review according to the prescribed standards.

The party's right to be heard in a procedure is reflected in a Roman maxim: *audiatur et altera pars*. This principle has been applied more widely to subjects that do not officially possess the status of a party in a process, but can potentially be affected by the outcome of the procedure. A third party may also be interested in expressing its view, because the result of procedure has the capacity to determine the case law that might in the future be potentially applicable to the subject concerned.

The preparation of the games is impossible without the active role of governments. Therefore they are also highly affected by the decisions of FIFA and UEFA. Consequently, their decisions affect not only their formal members – the national football associations – but also the states themselves.

The Polish example (see Part III *supra*) shows that the associations are legally linked with the governmental authorities through domestic law. The supervision and control powers are justified by the associations' monopolistic character in the representation of football at

³² Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 37 (2005).

³³ See World Anti-Doping Agency, *World Anti-Doping Code* (2009), http://www.wada-ama.org/rtecontent/document/code_v2009_En.pdf.

home and abroad.³⁴ Secondly, the preparation of international games requires the economic and legal involvement of governments, which engage themselves in the preparation of the necessary infrastructure. The decisions of FIFA and UEFA also affect the individuals and economic operators involved in the preparation process. Therefore the aforementioned decisions may be treated as instruments of global administration or – as a result of their binding character – of global administrative law.

IV.1. The bidding procedure

According to the UEFA Statutes, “UEFA shall have the sole jurisdiction to organise or abolish international competitions in Europe in which Member Associations and/or their clubs participate . . . The Executive Committee shall decide whether to create or take over other competitions, as well as whether to abolish current competitions.”³⁵ Similarly, in the case of FIFA, “[t]he Executive Committee shall decide the venue for the final competitions organised by FIFA.”³⁶

The selection process is addressed to national associations. Requirements for the FIFA World Cup consisted of an infrastructure capable of welcoming a large number of football fans. In the 2018 and 2022 World Championship bidding process, a candidate had to provide about 12 stadiums capable of holding at least 40,000 fans and with one stadium of at least 80,000, which would stage the opening match and the final. In addition, the very highest standards of TV broadcasting, information and telecommunications technology, transport and accommodation were deemed to be essential.³⁷ In order to participate in the next stage of the bidding procedures, an interested national association had to sign Bidding Agreements and

³⁴ See Statute of the Polish Football Association.

³⁵ UEFA Statutes, art. 49(1)(a), (2)(c).

³⁶ FIFA Statutes, art. 76(1).

³⁷ Letter from Jérôme Valcke, FIFA Secretary General, to the Member Associations of FIFA Eligible to Bid for the 2018 and/or 2022 FIFA World Cup™ (Jan. 15 2010), *available at* <http://www.fifa.com/mm/document/affederation/administration/99/74/80/20182022invitationtobidcirculare.pdf>.

submit a Bid Book and a Hosting Agreement. Before the final decision of the FIFA Executive Committee, a round of inspection tours took place in order to verify the accuracy of information provided by the candidates in their bidding documentation. Moreover, in order to ensure more transparency, FIFA established an Ethics Committee, which, *inter alia*, aimed to monitor the contacts between bidding candidates and the members of the Executive Committee.³⁸ Both Member Associations and the Bid Committee agreed to comply with FIFA's Code of Ethics.³⁹ They also formally agreed to refrain from providing

any monetary gifts; any kind of personal advantage that could give even the impression of exerting influence, or a conflict of interest, either directly or indirectly, in connection with the Bidding Process . . .; any benefit, opportunity, promise, remuneration, or service to any of such individuals, in connection with the Bidding Process.⁴⁰

However, the introduction of additional procedural guarantees of transparency did not shelter the decision-making process from corruption probes which overshadowed the selection of the 2018 and 2022 World Cup host states.⁴¹

Whereas formal obligations are made by the bidding committees, the arrangements in the bidding process and in the organization of a championship tournament require far-reaching cooperation with their governments. The tournament will be organized by “member associations;” however, the candidatures were also supported by their governments who provided necessary banking guarantees for investments in infrastructure. As the example of Indonesia's bid to host the 2022 World Cup demonstrates, failure to provide government

³⁸ Letter from Jérôme Valcke, FIFA Secretary General, to the Member Associations of FIFA/Bid Committees Who Have Expressed an Interest Regarding the Hosting and Staging of the 2018 and/or 2022 FIFA World Cup™ (July 7, 2010), available at

<http://www.fifa.com/mm/document/affederation/administration/01/27/43/08/bidcircularno.3.pdf>.

³⁹ *Process Related to Rules of Conduct*,

<http://www.fifa.com/mm/document/affederation/administration/01/12/41/47/processrelatedtorulesofconduct.pdf> (last visited Feb. 21, 2011).

⁴⁰ FIFA, *Rules of Conduct*,

<http://www.fifa.com/mm/document/affederation/administration/01/12/41/40/rulesofconduct.pdf> (last visited Feb. 21, 2011).

⁴¹ *World Cups 2018/2022 Corruption Claims Widens; FIFA asks for Evidence*, MERCOPRESS (May 12, 2011), <http://en.mercopress.com/2011/05/12/world-cups-2018-2022-corruption-claims-widens-fifa-asks-for-evidence>.

guarantees will end the committee's chances in the bidding process.⁴² The Polish-Ukrainian offer included a series of commitments and guarantees for a wide range of activities, notably when it came to the preparation of adequate sports infrastructure and other utilities. At a later stage, public guarantees were provided in relation to a staging agreement (between UEFA and the PFA and Ukrainian Football Association), host city agreements, a stadium agreement (between UEFA and owners of the stadiums or entities responsible for their construction) and an airport agreement (between UEFA and relevant airports).⁴³ Due to the very wide scope of these commitments and the short period in which they were to be realized, it became necessary to introduce into the Polish legal system a special Act on the preparation of the EURO Finals.⁴⁴ This law allowed the Polish Ministry of Finance to create "purpose companies" to realize goals related to the organization of the 2012 games. The regulations issued by the Polish government made direct reference to the offer previously presented to UEFA.⁴⁵

The inspection materials for the 2014 World Cup reveal that the organization of the games requires various levels of involvement on the part of the host state. Whereas in the preparation of the Euro 2012 games, Poland and Ukraine were involved in the construction of the necessary stadiums, in Brazil the main public financial effort will be allocated towards the basic infrastructure, particularly security, airports, roads and hospitals. The Brazilian model for the 2014 FIFA World Cup gives priority to private finance in the construction and

⁴² *Indonesia's Bid to Host the 2022 World Cup Bid Ends*, BBC (Mar. 19, 2010), <http://news.bbc.co.uk/sport2/hi/football/8577452.stm>.

⁴³ *Polish Guarantees for UEFA*, MINISTERSTWO SPORTU I TURYSTYKI (Apr. 4, 2011), <http://www.2012.org.pl/en/euro-2012/public-authorities/polish-guarantees-for-uefa.html?pl/euro-2012/strona-publiczna/polskie-gwarancje-dla-uefa=>.

⁴⁴ *Ustawa o przygotowaniu finałowego turnieju Mistrzostw Europy w Piłce Nożnej UEFA EURO 2012* [*Law on the Preparation of the Final Tournament of the UEFA European Football Championships EURO 2012*], 173 DZIENNIK USTAW 1219 (2007) (Pol.).

⁴⁵ *Rozporządzenie Rady Ministrów w sprawie wykazu przedsięwzięć Euro 2012* [*Regulation of the Council of Ministers on the List of EURO 2012 Projects*], 192 DZIENNIK USTAW 1385 (2007) (Pol.).

remodeling of the stadiums through long-term concessions and eventually public-private partnerships.⁴⁶

As a consequence of the expected governmental assistance, some of the Bidding Committees are not led by the chairmen of the national football associations, but state officials like Igor Shuvalov, Deputy Prime Minister of Russia or Sheikh Mohammed bin Hamad Al Thani, brother of the Emir of Qatar.⁴⁷ The composition of these committees emphasizes the involvement of the state in the bidding process. Federations' decisions also affect the private sector, *inter alia*, the firms engaged in the preparation of the championships. The construction of necessary infrastructure is facilitated by public funds distributed through government procurement to private entities. The costs of preparations are usually refunded by sports fans who come to see the games. The potential change of the championship's host state and the lack of refund can lead to serious economic difficulties of a multidimensional character.

IV.2. “Punitive decisions” for autonomy violations

The goal of FIFA and UEFA is to organize international competitions and tournaments.⁴⁸ They recognize only one association per country.⁴⁹ As the federations of national organizations of a monopolistic character, FIFA and UEFA have the exclusive right to organize global and regional football games. An important goal is also to ensure the respect of their internal regulations by the national football associations.⁵⁰

⁴⁶ See *Brazil Bid Inspection Report for the 2014 FIFA World Cup™*, FIFA.COM (Oct. 30, 2007), http://www.fifa.com/mm/document/affederation/mission/inspectionreport_e_24841.pdf.

⁴⁷ See *Handover of Official Bids: Reactions*, FIFA.COM (May 14, 2010), <http://www.fifa.com/worldcup/russia2018/news/newsid=1211276/index.html>.

⁴⁸ FIFA Statutes, art. 2(b); UEFA Statutes, art. 2(d).

⁴⁹ See Statute of the Polish Football Association; FIFA Statutes, art. 10, definition 4; UEFA Statutes, art. 69 (explaining that this principle does not apply to the United Kingdom where there are independent associations for England, Scotland, Wales, Northern Ireland, and the Faroe Islands).

⁵⁰ FIFA Statutes, art. 2(d).

One of the requirements of the membership in FIFA and UEFA is their autonomous and independent character. The Congresses of FIFA and UEFA have the power to admit, suspend or expel a member association.⁵¹ FIFA Statutes require that “[members] manage their affairs independently and ensure that their own affairs are not influenced by any third parties”.⁵² The violation of this provision may be sanctioned “even if the third-party influence was not the fault of the Member concerned.”⁵³ The decisions on the appointment or election of Members’ bodies shall take place within the association in an independent manner. A breach to this provision may result in a lack of recognition by FIFA.⁵⁴ Similar rules apply to UEFA members, with the obligation to include the necessary provisions into the national associations’ statutes.⁵⁵ A member whose organs were not independently elected may be immediately suspended as an effect of the Executive Committee’s decision, subject to later approval of such a decision by the Congress.⁵⁶

The aforementioned requirement of football associations’ internal autonomy was a crucial point of the dispute concerning the PFA. In 2003 the Polish Penal Code was amended. A new type of offense was introduced – sports bribery.⁵⁷ It aimed to strengthen the fight against corruption in Polish sport, especially the corrupt fixing of results of football matches. From 2004 onwards many corruption scandals were revealed. According to the data provided by the Polish Minister of Justice, until October 2008, 52 football clubs were

⁵¹ FIFA Statutes, art. 9; UEFA Statutes, art. 6, 8(3), 9; *See, e.g., Bosnian-Herzegovinian FA Suspended*, UEFA.COM (Apr. 1, 2011), <http://www.uefa.com/uefa/aboutuefa/news/newsid=1614180.html> (showing how a suspension may also be a result of an Executive Committee’s decision, but this decision has to be subsequently accepted by Congress).

⁵² FIFA Statutes, *supra* note 4, at art. 13(1)(g), 17(1).

⁵³ *Id.* art. 13(3).

⁵⁴ *Id.* art. 17(3).

⁵⁵ UEFA Statutes, art. 7^{bis}(2), (5).

⁵⁶ *Id.* art. 9; see also FIFA Statutes, art. 14.

⁵⁷ *Polish Penal Code*, 88 DZIENNIK USTAW 553 (1997) (Pol.), amended by 111 DZIENNIK USTAW 1061 (2003) (Pol.).

engaged in bribery.⁵⁸ In January 2007, one of the members of the PFA's management board was arrested and accused of corruption.⁵⁹ Consequently, the Minister of Sport, acting on the basis of the Law on Competitive Sport,⁶⁰ suspended the PFA's management board and appointed a curator, who would administer the Association until the election of the next authorities. FIFA and UEFA made a joint statement, in which they denied recognition of the authorities appointed by the Minister and declared that the suspended management board was the only legal PFA representative. In their declaration, the Federations also recalled that Art. 23 of the Polish Law on Competitive Sports contradicted the Statutes of FIFA and UEFA.⁶¹ Consequently, the Polish Minister of Sports decided to terminate the suspension of the Management Board and revoke the curator in March 2007.

The situation in Polish Football did not change much in the following period. In October 2008, a curator once again replaced the PFA's Management Board. As a result of an amendment to the Law on Competitive Sports,⁶² he was appointed by the Polish Olympic Committee's Court of Arbitration for Sports (hereinafter POCCAS) on the motion of the Minister of Sports. The change in the Polish law regarding the power to nominate the curator from the executive to the quasi-judicial branch was the result of pressure from the international federations.⁶³ However, the reactions of FIFA and UEFA were similar to that of the year before. Moreover, the Federations threatened exclusion of Polish representation

⁵⁸ Cwiakalski: *skala korupcji w futbolu bardzo duza; cale rundy ulozone* [Cwiakalski: *The Range of Corruption in Football is Very High*], GAZETA WYBORCZA (Oct. 31, 2008) (Pol.), available at http://wroclaw.gazeta.pl/wroclaw/1,96554,5869866,Cwiakalski_skala_korupcji_w_futbolu_bardzo_duza_.html.

⁵⁹ *Czlonek zarzadu PZPN Wit Zelazko trafil za kratki* [The PFA's Member Wit Zelazko Went to Jail], DZIENNIK (Oct. 12, 2007) (Pol.), available at <http://wiadomosci.dziennik.pl/sport/artykuly/198448,czlonek-zarzadu-pzpn-wit-zelazko-trafil-za-kratki.html>.

⁶⁰ See *Law on Competitive Sports*, supra note 18.

⁶¹ *Informacja dot. Statusu prawnego PZPN w swietle przepisow prawa polskiego oraz FIFA i UEFA* [Information of the PFA's Legal Status in the Light of the Polish and the Regulations of FIFA and UEFA], REPREZENTACJA.COM.PL (Aug. 22, 2006) (Pol.), <http://www.reprezentacja.com.pl/index.php?plik=wstawki/komentuj&news=9470&kat=&nkid=0&nazwa=Komentarz>.

⁶² *Ustaw o zmianie ustawy o sporcie kwalifikowanym oraz niektórych innych ustaw* [Law Amending the Law on Competitive Sports, 2007 as Amended], 171 DZIENNIK USTAW 1208 (2007) (Pol.).

⁶³ Dawid Bunikowski, *Ultimatum FIFA: straszak wladz swiatowej pilki* [FIFA Ultimatum: Scarecrow of the World Football Authorities], RACJONALISTA.PL (Oct. 2, 2008) (Pol.), <http://www.racjonalista.pl/kk.php/s,6117>.

from the World Cup qualifications and Poland would lose its right to co-host the Euro 2012 games.⁶⁴ After a few days, the curator was revoked and the suspension of the PFA's Management Board ceased. The government had to capitulate in the face of pressure from FIFA and revoke its plans for reforming Polish football.

The Polish law changed again in 2010. According to the new Law on Sports, the Minister has no authority to directly introduce the curator or even act through the POCCAS. She only has the power to file a motion to a common court, which may suspend or revoke the organs of a sport association in the case of a breach of law and replace them by a curator until the new elections (which should occur within six months).⁶⁵ A common court, not the Minister or the POCCAS, takes the final decision on the replacement of the organs by a curator. This change seems to meet the expectations of the international football federations, but its importance is limited. A decision taken by the POCCAS on the motion of the Minister of Sports could be appealed to the Supreme Court of Poland.⁶⁶ It guaranteed to respect the rule of law and control of the decision-making process by an independent court. Under the new Law on Sports the control of the Minister's decision is comparable. Under the previous regulation, the Minister could file a motion to the POCCAS, which was supervised by the Supreme Court. Under the new law the decision is taken by the court at the request of the Minister. Moreover, the new Law on Sports does not deprive the Minister of the power to annul the decisions of sports associations in the case of a breach of law.⁶⁷ Such an annulment may be challenged before an administrative court.

The insistence of FIFA and UEFA on the self-governance of a national football association determines their position not only on the basis of domestic law, but also directs

⁶⁴ *UEFA: Albo Kurator, Albo EURO 2012* [UEFA: *Either Curator or EURO 2012*], SPORT1.PL (Oct. 3, 2008), <http://www.sport1.pl/UEFA-Albo-kurator-albo-Euro-2012/a65817>.

⁶⁵ *Law on Sports*, *supra* note 17, art. 23.

⁶⁶ *Law on Competitive Sports*, *supra* note 19, arts. 23a, 44.

⁶⁷ *Law on Sports*, *supra* note 17, art. 22.

the international football associations towards a non-governmental category in international public law. The far-reaching influence of the state organs on sports authorities could serve as an argument of their quasi-governmental nature and, due to their membership composition, push FIFA and UEFA towards a semi-IGO status. The formally pure IGO character decisively excludes, in the case of football federations, the regime of responsibility of intergovernmental organizations in the sense prescribed by the United Nations' International Law Commission. The Commentary to Draft Articles on the Responsibility of International Organizations stipulates that the international public law legal regime does not apply to organizations created through instruments of municipal law.⁶⁸ As a consequence, the exclusion of international public law responsibility rules results in the need to redress the accountability deficit.

Moreover, the two-time defeat of the Polish government when attempting to reform Polish football raises questions regarding a state's sovereignty when attempting to carry out its public responsibility. According to the Polish Constitution, one of these is the obligation of public authorities to support the development of physical culture.⁶⁹ This goal may not be properly achieved without correctly functioning sports associations. It is also clear that the federations' position hampered the fight against corruption in Polish football. One could argue the controversy at issue was not one of goals but one of methods. Nevertheless, the high degree of mutual support and corporate solidarity between national football associations and international federations impeded changes in the structures of the PFA. As a

⁶⁸ U.N. International Law Commission, Draft Articles on the Responsibility of International Organizations, 63rd Sess., 26 Apr.-3 June, and 4 July-12, Aug. 2001, A/CN.4/L.778 (May 30, 2011). In different domestic legal regimes, associations are up to a certain point controlled by governmental authorities. For example, public bodies may have the power to file to a court a motion to repeal an illegal resolution. This, however, does not make those associations governmental in character. *See Law on Associations, supra* note 16, arts. 25-30. Similarly, according to the French Law associations, those that violate public order may be dissolved through administrative action. Loi du 10 janvier 1936 sur les groupes de combat et milices privées [Law of January 10, 1936 on the Battle Groups and Private Militias], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan.12, 1936 (Fr.).

⁶⁹ KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION OF THE REPUBLIC OF POLAND] art. 68(5) (amended 1997), available at <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

consequence, a sovereign state with democratically elected authorities had to capitulate in the face of the demands of private associations. Polish public opinion, moreover, was highly supportive of the actions of its government.⁷⁰ This broad political consent was confirmed by the fact that similar proceedings were undertaken in 2007 and 2008 by two antagonistic Polish governments. It raises questions about the democratic justification of a situation, when authorities with democratic legitimacy are blocked when they attempt to take actions supported by the majority of their society because of the opposition of an external private association.

The amendment made to Polish law, which seems to meet the Federations' expectations, does not resolve the problem of the possible arbitrariness of FIFA or UEFA when it comes to their recognition of national sports associations and imposing further sanctions. The impartiality or independence of domestic courts regarding their nominations of executive organs or in their annulments of decisions may also be questioned in different states. National authorities would lack the legal tools to verify the decisions of FIFA or UEFA in the case of an absence of will or the incapacity of national football associations to act. The possible arbitrariness of football federations' decisions is enabled by the lack of clear accountability standards. FIFA or UEFA organs are elected by representatives of national associations.⁷¹ Taking relevant interests into account conditions their reelection. Vice versa, national associations wishing to obtain support from Zurich or Nyon have to promote the interests of federations. This mutual connection may effectively hamper any action of an external subject (e.g., a national government) wishing to disrupt the balance of interest.

⁷⁰ The Minister's decision was supported by 60% of Polish society. See *Spoleczne poparcie dla ministra Tomasza Lipca* [Social Support for the Minister Tomasz Lipiec], ONET (Jan. 30, 2007), <http://wiadomosci.onet.pl/kiosk/kraj/spoleczne-poparcie-dla-ministra-tomasza-lipca,1,3329674,wiadomosc.html>.

⁷¹ FIFA Statutes, art. 30; UEFA Statutes, art. 7.

V. Review mechanisms of FIFA and UEFA decisions

One of the challenges scholars dealing with global administrative law and governance try to address is the accountability deficit of global administrative bodies.⁷² On the one hand, the responsibility standards of intergovernmental organizations are a problem of international public law. It is still the object of deliberations within the United Nations' International Law Commission.⁷³ On the other hand, the accountability of non-governmental organizations is also an emerging problem of civil society.⁷⁴

With the increasingly strong link between sport and capital, the need for an international sports dispute settlement system is becoming more important. The international sports movement tried to remedy this deficiency with the creation of the CAS. Its establishment was also a symptom of the fact that alternative dispute settlement resolution mechanisms were taking over from the judicial control of national courts over the decisions of international sports governance bodies. However, in cases of conflict between an international federation and a national government, the latter is forbidden to stand before the CAS or the FSCS. As a consequence, it deprives states of a tool of legal control over national sports associations and the possibility of challenging those federations' decisions. National associations which have the standing but which are in conflict with their governments do not necessarily have to be interested in being involved in a judicial procedure.

⁷² See Kingsbury et al., *supra* note 31, at 16.

⁷³ See U.N. Int'l Law Comm'n, *Responsibility of International Organizations* (Feb. 12, 2010), http://untreaty.un.org/ilc/summaries/9_11.htm.

⁷⁴ Centre for Applied Studies in International Negotiations, *NGO Accountability: Rights and Responsibilities* (Oct. 19, 2004),

http://www.icomfloripa.org.br/transparencia/wp-content/uploads/2009/06/ngo_accountability_rights_and_responsibilities.pdf.

V.1. Standing before the CAS

Art. R27 of the Statutes of the Bodies for the Settlement of Sport-Related Disputes provides that the CAS may apply its Procedural Rules “whenever the parties have agreed to refer a sports-related dispute to the CAS. Such disputes may . . . involve an appeal against a decision rendered by a federation . . . where the statutes or regulations of such bodies, or a specific agreement provides for an appeal to the CAS.”⁷⁵ The FIFA Statutes provide that, “FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, Clubs, Players, Officials and licensed match agents and players’ agents.”⁷⁶ The FIFA internal regulations provide for the possibility of appeal against its own decisions to the CAS, however *locus standi* is provided only to its Members (i.e., national associations) or other private subjects. In any case, public organs or more generally national governments are not mentioned. Therefore a dispute like the one between the PFA and the Polish Minister of Sports (see Part IV.2 *supra*) could not be resolved before the CAS.

Similarly under UEFA Statutes, “[a]ny decision taken by a UEFA organ may be disputed exclusively before the CAS, in its capacity as an appeals arbitration body.”⁷⁷ The document does not list the subjects having the capacity to bring a claim, but refer only to “parties directly affected by a decision.”⁷⁸ As the CAS has explained,⁷⁹ the term “parties” used in Art. 62(2) should be understood in the light of Art. 28 of the UEFA Disciplinary Regulations, which stipulates: “1. The parties comprise: a) UEFA, b) the accused or the

⁷⁵ Statutes of the Bodies Working for the Settlement of Sport-Related Disputes art. R27 (2010), available at [http://www.tas-cas.org/d2wfiles/document/3923/5048/0/Code%202010%20\(en\).pdf,%20Art.%20R27](http://www.tas-cas.org/d2wfiles/document/3923/5048/0/Code%202010%20(en).pdf,%20Art.%20R27).

⁷⁶ FIFA Statutes, art. 62(1). It is worth mentioning that FIFA envisaged the possibility of creating an independent tribunal for football matters before accepting the jurisdiction of CAS. See Letter from Urs Linsi, Acting General Secretary, FIFA, to the National Associations of FIFA (July 7, 2001), available at http://www.fifa.com/mm/document/affederation/administration/tas_827_en_63.pdf.

⁷⁷ UEFA Statutes, art. 62(1).

⁷⁸ *Id.* art 62(2).

⁷⁹ See generally Arbitrations CAS 2008/A/1583 Sport Lisboa e Benfica Futebol SAD v. UEFA & FC Porto Futebol SAD, CAS 2008/A/1584 Vitória Sport Clube de Guimarães v. UEFA & FC Porto Futebol SAD, award of Jul. 15, 2008, para. 16.

individual/body directly concerned, c) the individual/body entitled to protest and the opponent of the protest. 2. The individual/body directly concerned is the individual/body for whom/which the disciplinary measures have direct consequences.”⁸⁰

This contextual interpretation is confirmed by the functional argument that the very goal of providing the possibility of an appeal against the decisions of sports bodies was to assure control over disciplinary decisions, especially in doping cases.⁸¹ The case law of the CAS does not provide any example of an appeal brought by a public agency or any other subject not being a sports club, federation, Olympic committee or an individual.⁸²

Apart from procedural matters, the UEFA Statutes also do not provide any substantive legal basis to challenge a decision for changing the venue of championships, which was the main threat during the PFA conflict (see Part IV.2 *supra*). “The Executive Committee shall decide whether to create or take over other competitions, as well as whether to abolish current competitions.”⁸³ The quoted provision gives full discretion to the Committee and is taken by vote. As a consequence, the UEFA Statutes provide a very weak legal basis to challenge a decision which cancels international sports football competitions and does not provide standing to public organs.

Besides a decision to call off championships or to move them to another state, the need to challenge the football federation’s decision may appear in the case of an international federation suspending the national association’s rights or lack of recognition. Such a situation may be the result of an undemocratic election of executive organs.⁸⁴ The need for review may become urgent if it is suspected that a suspensory decision was erroneous. It could be

⁸⁰ UEFA Disciplinary Regulations art. 28, 2008, available at http://www.uefa.com/MultimediaFiles/Download/Regulations/uefa/Others/72/95/88/729588_DOWNLOAD.pdf, art. 28.

⁸¹ Matthieu Reeb, *The Role and Functions of the Court of Arbitration for Sport (CAS)*, 2 INT’L SPORTS L.J. 21 (2002).

⁸² See *The Database of CAS Awards*, TAS/CAS, <http://www.tas-cas.org/jurisprudence-archives> (last visited July 5, 2011).

⁸³ UEFA Statutes, art. 49(2)(c).

⁸⁴ UEFA Statutes, art. 9(1^{bis})(d), FIFA Statutes, art. 17.

the result of a breach of substantive standards such as the lack of proportion between sanction and a violation. In some cases, the results of decisions like the loss of matches as a result of a walkover could be irreversible. In any case, the *ius standi* is not possessed by governmental authorities but only by national associations. When the decision is the result of conflict between an association and public organs, it would be hard to imagine such an action being undertaken against FIFA or UFEA.

V.2. The role of the FSCS

The decision of the CAS does not necessarily always have to be final. According to Switzerland's Federal Private International Law, a decision to award an arbitration tribunal may be subject to appeal to the FSCS on limited grounds.⁸⁵

The authority of the FSCS to review decisions of an international arbitration court is an interesting legal and political construct of global governance. Ultimately, it is the duty of the Swiss court to take decisions concerning global sports matters. It has a transnational effect which is binding upon the sports federations and their members – the national associations and subjects – which are linked with them through domestic legal systems or contractual relationships. Indirectly, they also affect states and their governments (see Part IV.2 *supra*). The FSCS's position towards the CAS and international sports federations reflect features of global administrative law. One of them is a blurring line between the international and domestic legal orders.⁸⁶ The second characteristic is a fading dichotomy

⁸⁵ LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ [Switzerland's Federal Code on International Private Law], Dec. 18, 1987, RS 291, art. 191(1) (Switz.), available at <http://www.tas-cas.org/en/arbitrage.asp/4-3-292-1023-4-1-1/5-0-1023-3-0-0/>. According to art. 190(2), the grounds for an appeal are: irregular constitution of the tribunal, an erroneous decision on its own jurisdiction, ruling on matters beyond the claims, lack of respect for the right to be heard in an adversarial proceedings or an incompatibility with Swiss public policy.

⁸⁶ Sabino Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 37 INT'L LAW & POL. 663, 684 (2006).

between the private and public legal spheres⁸⁷, where tasks of a public nature are fulfilled by private subjects and rules are set by private standard setters.

The FSCS issued several decisions resulting from an appeal of CAS decisions. Some of them effected from proceedings against football federations⁸⁸, but one was particularly related to the federations' autonomy in disciplining their members.⁸⁹ The dispute concerned an unpaid transfer of a player from a Brazilian club to a Spanish club. FIFA not only imposed a fine, but also deducted points and relegated the club to a lower division. The CAS also upheld the decision in an appeal against FIFA's disciplinary measures. The Spanish club maintained that by threatening to deduct points or to impose relegation FIFA was virtually enforcing a financial claim. According to the club, that was a violation of a "public policy" as described in Art. 190(2)(e), as FIFA was presuming to pass sanctions that were solely in the realm of the state.⁹⁰ The SFSC stated that according to the Swiss law on associations, a violation of a member's duties may incur sanctions such as punishments for clubs or associations. An association (FIFA) draws up the rules and regulations to which members are subjects (e.g., a Spanish club or a Spanish football association) to achieve its objectives; therefore it is permissible for a governing body to provide for sanctions that safeguard the member's duties.⁹¹

This SFSC decision reaffirmed that despite the international character of their membership, international sports federations registered in Switzerland remain associations and subjects of Swiss law. This is Switzerland's legal system, which legally governs their

⁸⁷ *Id.* at 669.

⁸⁸ *E.g.*, Tribunal fédéral [TF] [General Federal Court] Feb. 9, 2009, ARRÊTS DU TRIBUNAL FÉDÉRAL SUISSE [ATF] 4A_400/2008 (Switz.). *See also* Hansjörg Stutzer, *Federal Supreme Court Annuls CAS Award for Violation of the Right to be Heard*, ARBITRATION NEWSLETTER SWITZERLAND (Mar. 11, 2009), http://www.thouvenin.com/arbitration/arbitration_newsletter_switzerland54.pdf.

⁸⁹ Tribunal fédéral [TF] [General Federal Court] Jan. 5, 2007, ARRÊTS DU TRIBUNAL FÉDÉRAL SUISSE [ATF] 4P.240/2006 (Switz.).

⁹⁰ Bundesgericht [BGer] [Federal Supreme Court] Jan. 6, 2006, ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] 4P_240/2006 (Switz.).

⁹¹ *Id.* at pt. 4.

functioning. The decision emphasized the autonomous character of FIFA as an association capable of setting out rules and objectives, and to also discipline their members by such measures as financial fines, deduction of a club's points or relegation to a lower division. The FSCS did not declare the measures as non-proportionate, unnecessarily restrictive, or outside of a means-ends rationality standard. Therefore, it is plausible that in the case of a suspension of the rights of a federation member which resulted in the suspension of national representations, clubs and referees would also be categorized by the FSCS as an internal measure admissible under the Swiss law on associations.

VI. Conclusions

International competition in sport and its increasingly strong dependence on capital requires a system of global governance. Sports governing bodies have acquired a monopolistic status in relevant disciplines. Their position is guaranteed by domestic law, of which they are subjects, and by the rules of international sports federations, of which they are members.

Despite their formally non-governmental and independent character, sports associations are quite often endowed with public goals, and thus require a certain degree of administrative control in order for them to be fulfilled. Certain tasks are even impossible to achieve without the active participation of governments. This is certainly true of the organization of international championships. States also have an interest in the bidding procedures for the right to organize the games. The results often depend on different guarantees and obligations, which has to be taken by public authorities. The selection of the 2018 and 2022 World Cup host states revealed the deficiencies of the decision-making process within FIFA, and brought corruption allegations against its representatives. At the

same time, the international sports federations' regulations require the autonomy of national sports associations from their governments.

The independence of national associations results in an accountability deficit, which is the result of international sports federations' rules. Their breach may lead to the suspension of a player's right to take part in championships or the loss of the international game's host-state status. The formally non-governmental nature of sports federations excludes their responsibility on the basis of international public law. This accountability deficit has been somehow reduced by the establishment of the CAS – an institution that is capable of resolving disputes between different subjects of *lex sportiva*. On limited grounds, the decisions of the CAS may be appealed against and referred to the FSCS. Consequently, this domestic court has the final word in resolving disputes of global sports governance. However, access to the CAS or the FSCS is not provided to all subjects potentially affected by decisions of international sports federations. This is certainly true of governmental authorities.

The standards of review of the decisions issued by sports federations stem from the jurisprudence of the CAS and SFCS, which in the latter case are the interpretations of Swiss law. This legal practice confirms the large scope of associations' autonomy, which allows them to impose sanctions on their members. Consequently, the international sports federations incorporated into Switzerland are free to discipline their members, even if as a result it precludes the enforcement of the law of the country, where the associations are incorporated. It also raises another broad question regarding the legitimacy of the domestic court when it comes to setting the rules of judicial review, which then have an impact on global sports governance through international federations. However, this particular subject deserves more analysis in a separate article.