

SYMPOSIUM ON THE OLYMPICS AND INTERNATIONAL LAW

THE MUTUALITY OF NATIONAL AND INTERNATIONAL IDENTITIES IN INTERNATIONAL SPORTS LAW

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The network of institutions that comprise the Olympic Movement include several whose authoritative scope now extends far beyond the mere staging of the Olympic and Paralympic Games to govern some important aspects of virtually all major regional and global competition and to foster the development of a comprehensive body of international sports law. The issues include nationality, which is the focus of this essay. More broadly, the proper resolution of nationality issues in the sports arena offers a limited model for reconciling tensions between national and international interests in the progressive development of international law.

The Olympic Charter Framework

Rule 6(1) of the Olympic Charter begins by providing that “[t]he Olympic Games are competitions between athletes in individual or team events and not between countries.”¹ This is the basis for the abiding aspiration to maximize opportunities for athletes in their individual interests and as role models while minimizing geopolitical interference in the sports arena. As such, this core provision underscores one of the five Fundamental Principles of Olympism: that “[the] practice of sport is a human right . . . without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play.” Unfortunately, Rule 6(1) is sometimes misinterpreted so as to question any functional participation of “countries” in the organization of the Olympics. Such misinterpretation can lead to confusion about the national structure of the Olympic Movement.² The remainder of Rule 6(1), however, clearly confirms that structure by designating National Olympic Committees (NOCs) to manage national participation in the Games and to select eligible athletes subject to their acceptance by the International Olympic Committee and the technical direction of the pertinent International Federation (IF) governing each athlete’s particular sport. Nearly all NOCs are government-supported, many operating under the direct supervision of a national ministry of sport or in close association with it. This national structure of core activity in the Olympic Movement is not only necessary as an organizational principle but, as will be suggested, as a matter of institutional sustainability. Rule 6(1) thus establishes the essential role of “countries” in vindicating the right of qualified athletes to practice sport within the Olympic Movement. As the Charter subsequently provides in detail, governing national and international institutions are symbiotic.

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¹ Rule 30, as amended in 1996, defines a “country” entitled to establish a National Olympic Committee (NOC) as “an independent state recognized by the international community.” Several NOCs of non-state entities (e.g., Puerto Rico) were recognized before 1996.

² See generally James A.R. Nafziger, *Rights and Wrongs of and About Nationality in Sports Competition*, in *FUNDAMENTAL RIGHTS IN INTERNATIONAL AND EUROPEAN LAW* 309, 310 (Christophe Paulssen et al. eds., 2016).

Even so, the controversial question remains whether nationality should be required for all members of a national team. Rule 41 of the Charter might seem to answer that question definitively by providing that “[a]ny competitor in the Olympic Games must be a national of the country of the NOC which is entering such competitor.” But should the term “national” be defined by national laws with all of their variations and uncertainties, by a concept of sport nationality or by both criteria? Must a genuine link, in a strict if not legal sense, exist between a “national” under Article 41 and the country of the NOC? More fundamentally, does Rule 41 conflict with Rule 6(1)’s premise of competition between individuals, arguably without regard to their nationality, however essential “countries” may be in the structure of competition? Indeed, is Rule 41 a good idea at all in today’s world of globalization? Why not scrap it in the interest of maximizing opportunities for individual athletes freed of the shackles of nationality and thereby better ensure the highest-quality of performance? Responses to these questions are split but generally take insufficient account of a necessary mutuality between national and international identities in fulfilling the spirit of friendship, solidarity, and fair play in the practice of sport.

Accelerated Naturalization

The issue of nationality in sports competition flared up in recent years because of what was feared to be a growing practice of accelerated naturalization by governments to acquire top-level athletes for national fame and fortune.³ Growing acceptance of dual citizenship and the diminishing significance of citizenship as a whole aided and abetted what came to be known variously as, for example, “country swapping,” “quickie citizenship,” or the deployment on the soccer field of “plastic Brits,” all intimating temporary and artificial links between states and talented foreigners sharing a quest for gold medals and resulting prestige. The integrity of the Olympic structure was thought to be in jeopardy.

To be sure, the examples were often startling: members of the Nigerian women’s bobsled and skeleton teams born and raised in North America; a former investment fund manager and his Italian wife from Staten Island, New York who alone represented Dominica (in cross-country skiing) at the 2014 Winter Games in Sochi, having traded their contributions to charities on that Caribbean island for the opportunity to compete; a gold medalist for Russia in men’s snowboarding who was born, raised, and trained in the United States but married to a Russian national; and the proud bearer of the Marshall Islands flag in the opening ceremony of the 2012 London Games who, though of Marshallese parentage, had never been there. These examples underscore that the practice of accelerated naturalization includes both states already well-endowed with athletic prowess and those in need of talent. The top naturalizing states have been, in order, France, the United States, Spain, Canada, Qatar, and Bahrain. “Muscle drain” is normally not a problem.

Often, accelerated naturalization is not artificial or temporary, but rather a reflection of dual citizenship, marriage to a national of another state, professional relocation there, or parentage as in the case of tennis star Naomi Osaka, a naturalized U.S. citizen, born in Japan of Japanese-Haitian parentage, who opted to join the Japanese team for the Tokyo Olympics. Sometimes humanitarian reasons explain a change of nationality as in the instance of Yamilé Aldama, a world-class triple jumper who participated in three consecutive Olympics as a member of the Cuban, Sudanese, and British teams, respectively. Also, accelerated naturalization may be reasonably viewed as simply a specific instance of normal competition among states, especially immigrant-destination ones, to acquire the best and brightest new citizens, however they are categorized.

Moreover, the practice may often be commendable and perhaps should be encouraged as a means to expand opportunities for athletes who do not make a cut or are otherwise ineligible to compete for a team of their original nationality such as a third-seeded Chinese table tennis player, a Kenyan distance runner or an Austrian skier.

³ See Ayelet Shachar, *Picking Winners: Olympic Citizenship and the Global Race for Talent*, 120 YALE L.J. 2088 (2010-11).

The iconic example is Victor Ahn, the triple gold medalist and also bronze medalist, under his birth name of Ahn Hyun-Soo, on the South Korean short-track speed skating team at the 2006 Winter Games in Turin. As the reigning overall champion in that sport, having won five straight championships, he unfortunately suffered injuries and related absences from international competition that prevented his inclusion on the South Korean team at the 2014 Winter Games in Sochi. Instead, he slavically changed his name; acquired Russian citizenship; again, won three gold medals and a bronze medal, this time for Russia; and went on to become the overall champion at the “Worlds” that year.

In the end, the practice of accelerated naturalization is a non-issue, at least up to the point at which the national integrity of a genuinely competitive national team is materially compromised. There is little evidence of either that or that the practice has bumped many deserving athletes off their national teams. Nor is it a growing problem. At the 2018 Winter Games in PyeongChang, only 6 percent (178) of the athletes competed on teams other than those of their countries of origin,⁴ many of them for creditable reasons. This statistic seems to have remained static over the years. Moreover, international relocation of athletes is a broadly accepted and growing practice in professional sport leagues.⁵ If the practice ever does threaten the national integrity of genuinely competitive national teams, remedies are available. These might include uniform or harmonized rules among IFs to restore integrity regardless of the eccentricities of national citizenship or residence. A UNESCO or other international agreement among states on threshold residence requirements might be another response, albeit a politically problematic one. A third option might be to establish “wild card” slots on each team, to be reserved for non-nationals from excessively well-endowed countries in particular sports.

Sport Nationality: A Genuine Link or No Link?

Although the Olympic Charter leaves the definition of the requisite *legal* nationality under Rule 41 to the discretion of states,⁶ a concept of *sport* (or more narrowly, Olympic) nationality by IFs may further define the eligibility of athletes, including players in non-Olympic professional leagues.⁷ Such requirements beyond those of legal nationality seek to better confirm a genuine link—termed a “meaningful connection” by some IFs—between nationality and a state granting it. Although IF requirements do not function under international law, as do the genuine link requirements of the classic *Nottebohm Case*,⁸ they nevertheless share a concern about the integrity of naturalization measures. The requirements for such a link vary among the IFs and national sports practice. They typically involve residence, stipulated waiting periods, and parentage or grand-parentage. Accordingly, either athletes of a single nationality or those possessing dual nationality can make choices. The requirements also confirm, restrict, or otherwise affect transferability from one national team to another.⁹

The applicable rules of transferability range from a limitation in, for example, basketball, soccer, and ice hockey, of just one change of nationality to more nuanced, movement-friendly rules of other IFs. Treaty provisions and

⁴ See Rob Hodgetts, [Does Switching Nations Make you Less of an Olympian?](#), CNN SPORTS (Feb. 14, 2018).

⁵ See Gregor Aisch et al., *Where are the Best Pro Athletes from? Increasingly, from Somewhere Else*, N.Y. TIMES, GLOBAL SPORTS, Jan. 7, 2018, at 6 (including two full pages of sport-by-sport graphs showing the growth since 1960 of foreign-born professionals in several countries).

⁶ This discretion, though not expressed, is a legacy of the Olympic Movement’s acceptance of customary international law. See [Nationality Decrees in Tunis and Morocco](#) (U.K. v. Fr.), Advisory Opinion, 1923 P.C.I.J. (ser. B.) No. 4 (Feb. 7).

⁷ For an in-depth commentary on the rules of one IF applicable to professional sports leagues and teams, see Courtney D. Hall, [Fishing for All-Stars in a Time of Free Agency: Understanding FIFA Eligibility Rules and the Impact on the U.S. Men’s National Team](#), 23 MARQ. SPORTS L. REV. 191 (2012).

⁸ [Nottebohm](#) (Liech. v. Guat.), Second Phase, 1955 ICJ REP. 4 (Apr. 6, 1955).

⁹ See Peter Spiro, *Citizenship and the Olympics: Do Our Athletes Need to Come from Home?*, 16(3) L. & SOC., 3, 4, 5 (2016).

jurisprudence of the European Union involving freedom of movement and competition law add to the complexity. Both the IFs and the Olympic Charter require “cooling-off periods” between national transfers. The Charter, for example, provides that at least three years must pass between national transfers subject to waivers. The waivers themselves must be approved by transferor states. Sometimes they are not, as in two Cuban-refusal cases before the Court of Arbitration for Sport.

To summarize, requirements of so-called sports nationality can compound the problem of variations among national laws of citizenship, both of origin and of naturalization. For example, although most states apply principles of both *jus soli* and *jus sanguinis*, their specific rules and standards vary significantly. Adding on residence or parentage/grand-parentage rules of sports nationality can add further confusion, leading to proposals for unification or harmonization of the requirements. On balance, however, the benefits of efforts within the Olympic Movement, especially by IFs, to strengthen nationality links and avoid questionable naturalization have outweighed the fragmentation of these efforts.

Still, the question remains: why not avoid problems of application altogether by simply eliminating Rule 41’s requirement of nationality? A good argument to that effect begins with the reality that the nationality requirement not only can limit the eligibility of the best athletes through national quotas (e.g., the problem of excessive Chinese talent in table tennis), but also constrains transferability, commodifies citizenship, and defies a global trend away from national barriers to the exercise of individual human rights. Arguably, Rule 41 is a contradiction of Rule 6(1)’s insistence that competition is among athletes and not countries, subject only to the acknowledged necessity of a national structure for organizing sports at the international level.

National and International Identities

Just as the threat to the integrity of international sports competition of accelerated naturalization turns out to be misguided, so would be an attempt to enhance that integrity by scrapping nationality requirements altogether. Public indifference regarding the nationality of players in professional sports at the national level is not only inapposite, but also subject to exceptions such as Canadian disenchantment with multiple foreign nationalities on professional ice hockey teams. To be sure, requirements of both legal nationality and sports nationality theoretically inhibit opportunities to participate in international competition and the overall quality of the competition. But denials of such opportunities, at least any substantially affecting the quality of competition, are even rarer than instances of accelerated naturalization. Marginally deprived athletes are more theoretical than real. Also, it is not at all clear that the global public and sponsors of sports competition, as prime stakeholders in sports, would prefer a disproportionate inclusion of top-notch Chinese table tennis players or Kenyan distance runners on their national teams as opposed to enhancing opportunities for marginally inferior athletes of a team’s national affiliation.

In any event, *national identity* is not the same as *nationalism*. Indeed, the two concepts can be opposites when the national identity interacts with international identity. Nationalism is an ideological expression of an aspiration to power by a single nation whereas national identity is a softer, less strident affection for a nation. Normally, a person’s national identity is neither ideological in a political sense nor purposeful like nationalism, and it can operate nationally, internationally, or, as in the Olympic Movement, mutually. Although nationalism can be consistent with international cooperation and even an engine of, for example, ecological management, it too often expresses a “me-first” approach to international relations.¹⁰ National identity, on the other hand, is more closely associated with normal patriotism.

¹⁰ See Edith Brown Weiss, *Establishing Norms in a Kaleidoscopic World: General Course in Public International Law*, 396 RECUEIL DES COURS 406 (2018).

Baron Pierre de Coubertin's aspiration in founding the modern Olympic Movement was not simply a romantic or nostalgic one of replicating ancient Games for elitist glory; he wanted to serve broader values of public health and international peace—still an often frustrated work in progress. The Olympics were part of a larger, non-governmental expression of *fin de siècle* idealism that also included, for example, the establishment of the Red Cross, Scouting, and Esperanto.¹¹ All of these international movements have shared a reliance on constituent NGOs to do the heavy lifting for common ends.¹² Typical of the movements' leaders, de Coubertin “came to the conviction that patriotism and internationalism were not only not incompatible, but required one another.”¹³

A paragon of this viewpoint was the eminent French statesman, Jean Jaurès, a contemporary of de Coubertin. For him, patriotism, as a collective expression of national identity, entailed a commitment to universalistic principles in which the patriotic feelings of citizens around the world would be deliberately fused in solidarity at the international level.¹⁴ Jaurès was convinced that this cosmopolitan, almost organic, form of patriotism, by inspiring a transnational workers movement, would prevent the outbreak of war. Tragically, his vision not only failed but led to his assassination on July 31, 1914,¹⁵ the very eve of the Great War, by an extreme French nationalist bearing the unlikely name of Raoul Villain. Jaurès left his mark, however, on the conscience of the Olympics in its quest to mutually catalyze national and international identities. This fusion of national and international identities is crucial not only as an organizational construct of the Olympic Movement, but also for the desired appeal and sustainability of the competition itself.

A chief critic of country swapping, noting that the level of global sports law in action “far exceeds anything that we have witnessed to date in other social realms or legal arenas, including those that involve extensive cross-border activities such as trade or war,” has observed that

international standards were not achieved at the expense of erasing national identities or turning borders into nothing. In fact, the opposite is the case. Part of what sustains the modern Olympic movement is the amalgamation of the focus on pure human achievement [with the patriotic affection of people for athletes and teams of their nationality].¹⁶

An iconic sequence at every Olympics moves from the opening ceremony involving a parade of national teams in alphabetical order (Israel normally follows Iran, for example), through the competition itself, to the closing ceremony, this time featuring a parade of informally commingled athletes without regard to nationality. During the course of the competition, the national media understandably draw the popular attention to national prowess and box scores. But the global public is nevertheless drawn into a cosmopolitan experience. It may, alas, have no direct effect on the cause of peace, but it has a lasting effect on the human conscience and development.

Conclusion

Rules 6(1), 30, and 41 of the Olympic Charter frame the reliance of the Olympic Movement on national organizations and the essential values of the individual athlete and national identity. This mutuality of national and international identities counteracts the common antagonism between nationalism, in its “me-first” sense, and internationalism.

¹¹ See generally John Hoberman, *Toward a Theory of Olympic Internationalism*, 22(1) J. SPORTS HIST. 1 (1995)

¹² In the case of the Esperanto Movement, the effort was fragmented and disputed, however.

¹³ JOHN J. MACALON, *THIS GREAT SYMBOL: PIERRE DE COUBERTIN AND THE ORIGINS OF THE MODERN OLYMPIC GAMES* 112 (1981).

¹⁴ See Geoffrey Kurtz, *Jean Jaurès: A Portrait*, 5(2) LOGOS J. (2006).

¹⁵ See BARBARA W. TUCHMAN, *THE PROUD TOWER*, ch. 8 (The Death of Jaurès), at 541 (Bantam ed. 1971).

¹⁶ Schachar, *supra* note 3, at 2120.

In the end, the mutuality of national and international identities has been beneficial, if not essential to the global popularity and institutional sustainability of the Olympics and other major international competition. This model of international sports law cannot be easily replicated in other contexts of international law, but surely the threat of climate change, trade wars, and national geopolitical rivalries, for example, warrant best efforts to encourage or restore such mutuality of the two identities.