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Procedural Fairness in the International Tennis Federation's Disciplinary Regime

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This article examines the International Tennis Federation's disciplinary regime as it applies to on- and off-court indiscipline, in order to assess the extent to which it complies with well-accepted requirements of procedural fairness. In so doing, it draws on two recent appellate decisions of the ITF-appointed Independent Tribunal in the cases of Ilie Năstase and Marcelo Rios, both former elite professional players who were at the time of their respective transgressions appointed to positions within the Romanian Fed Cup and Chilean Davis Cup teams, respectively.

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Introduction

Examples of on- and off-court indiscipline are not difficult to find in professional tennis, with recent high-profile instances including verbal abuse of the umpire (Mitchell 2017), unauthorised on-court coaching (Smale 2018), inappropriate racial and sexual remarks (*Năstase v ITF Appeal*, Independent Tribunal SR, Andrew de Lotbinière McDougall, Susan Ahern and Despina Mavromati, Case No 913 of 2017, 6 February 2018) and verbal abuse of members of the media (*Federación de Tenis de Chile & Rios v ITF Appeal*, Independent Tribunal SR, David Casement QC, Case No 48 of 2018, 28 March 2018). Depending on the nature of the offence, tennis authorities have used their disciplinary powers to impose a range of punishments for this behaviour, extending from in-match 'point penalties', to fines and participation bans. The imposition of such penalties has itself proven controversial recently, with punishments imposed as a result of a well-publicised incident involving player Serena Williams and chair umpire Carlos Ramos during the final of the 2018 US Open, leading to accusations of partiality and even sexism and racism (van Pelt 2018).

This article examines the International Tennis Federation's disciplinary regime as it applies to on- and off-court indiscipline (excluding doping and corruption, which are beyond the scope of the present piece), in order to assess the extent to which it complies with well-accepted requirements of procedural fairness ('procedural fairness' is preferred to the older and arguably broader, term 'natural justice'). The ITF's disciplinary process in these matters is similar to many other sports, in that actions are usually commenced by way of an internal hearing. From here, it is possible to appeal to a purportedly independent tribunal and ultimately to the Court of Arbitration for Sport (CAS); the putative 'world supreme court of sport' (McClaren 2010).

The article draws on two recent appellate decisions of the ITF-appointed Independent Tribunal in the cases of Ilie Năstase and Marcelo Rios, both former elite professional tennis players who were at the time of their respective transgressions appointed to positions within the Romanian Fed Cup and Chilean Davis Cup teams, respectively (*ITF v Năstase* paragraph [1.1]; *Rios v ITF* paragraph [1]). An examination of these cases and the applicable rules and processes raises questions that are reminiscent of those asked of the CAS, regarding structural independence and secrecy (Vaitiekunas 2014, Duval 2017). As a result, the ITF's disciplinary regime is susceptible to criticisms around the safeguarding of procedural fairness, but whether these concerns are justified is difficult to assess because of the attendant confidentiality and lack of transparency. It is therefore suggested that the disciplinary process would benefit from the public scrutiny that would result from increased transparency.

The ITF and the Code

The registered office of ITF Limited is situated in the Bahamas, but the International Tennis Federation (ITF) is governed by the law of England and Wales. Its role in tennis comprises the organisation of international competitions and the structuring, development and promotion of the sport (ITF 2018b). Although the governance of tennis is complicated by the existence and significance of other national and international governing bodies (principally the Association of

Tennis Players and the Women's Tennis Association), the ITF legitimately describes itself as the 'world governing body of tennis' (ITF 2017a) and is recognised as such by the International Olympic Committee. The ITF controls the prestigious Davis Cup and Fed Cup competitions and also plays a role in the organisation of tennis at the Olympic Games and of the four annual Grand Slam tournaments: the Australian Open, French Open (Roland Garros), Wimbledon and the US Open. This prominence means that the ITF's disciplinary mechanisms are of fundamental importance for players and others involved in professional tennis and more broadly for those with an interest in the sport.

The maintenance of standards of conduct on the part of those involved in professional tennis is an integral part of the ITF's administrative and regulatory role and this is governed by the *ITF Pro Circuit Code of Conduct* (ITF 2018a) (the 'Code'). The purpose of the Code is set out as follows:

The International Tennis Federation promulgates this Code of Conduct ... in order to maintain fair and reasonable standards of conduct by players, Related Persons and the organisers of ITF Pro Circuit Tournaments and to protect their respective rights, the rights of the public and the integrity of the Sport of Tennis (ITF 2018a, pp. 97–137).

Deviation from the disciplinary requirements set out in the Code (and its integrated Welfare Policy) is deemed to be 'the exclusive basis for disciplinary action against any player, Related Person or tournament in ITF sanctioned Pro Circuit Tournaments' (anti-doping and anti-corruption have their own disciplinary regimes). Article XIII of the Code (the Welfare Policy) addresses the question of what is meant by 'Related Persons'.

For the purposes of Article XIII, players and 'Related Persons' are ultimately both recognised as 'Covered Persons', defined as a 'Player Support Team Member', player and 'Credentialed Person', who shall conduct himself/herself in a professional manner at all times. Moreover, Article XIII provides expanded definitions of 'Player Support Team Member' and 'Credentialed Person'. First, a 'Player Support Team Member' is defined as 'any coach, trainer, manager, agent, medical or para-medical personnel and/or family member, tournament guest, or other similar associate of any player'. Secondly, a 'Credentialed Person' is defined as 'any player and any tournament personnel, such as an official, tournament director, staff, volunteer, sponsor, health care provider, ITF staff member and members of the media'.

Notwithstanding the variations between the lists and therefore the respective coverage of the Code and its included Welfare Policy, there is a high degree of similarity and overlap in terms of the persons to whom they will apply; this is particularly so when considering the types of disciplinary offences that are the present focus. As such, the Code encapsulates and applies to players and 'Related Persons' including officials such as Carlos Ramos (Ingle 2018), Fed Cup Captains like Ilie Năstase (*ITF v Năstase* paragraph [1.1]) and Davis Cup team members such as Marcelo Rios (*Rios v ITF* paragraph [1]). For the purposes of this article therefore, the category of persons covered by the Code (including the Welfare Policy) will be referred to as 'participants'.

The relevant offences designated by the Code are arranged into three categories that are relevant for the present purposes: 'on-site offences', 'major offences' and those which breach the included 'Welfare Policy' ('Welfare Offences'). Further offence categories relate to those which contravene anti-corruption rules (Article V), doping rules (Article VII) and those which are committed by tournament organisers (Article VIII), but these are not relevant for the present purposes. On-site offences are listed under Article IV of the Code and are determined by the 'ITF Supervisor' at the relevant competition, who also decides upon the punishment to be imposed (Article IV(U)). On-site offences include audible or visible obscenities, verbal or physical abuse, dress or equipment infringements or being 'coached' during play. The available punishments range from 'point penalties' or 'defaults' (neither of which are appellable), to a 'fine and/or other punishment' (appellable within the limits of and according to the procedures set out in Article IV(W) of the Code).

The category of 'major offences' is listed under Article VI. As the name suggests, these offences proscribe more serious instances of indiscipline, according to the sub-categories of 'aggravated behaviour' and 'conduct contrary to the integrity of the game'. Aggravated behaviour occurs where an on-site offence is committed '[i]n circumstances that are flagrant and particularly injurious to the success of a tournament, or are singularly egregious' (Article VI(A)1–2); or where there is the commission of two or more violations of the Code, which 'when viewed together establish a pattern of behaviour that is collectively egregious and is detrimental or injurious to the ITF Pro Circuit Tournaments' (Article VI(A)3). 'Conduct contrary to the integrity of the game' also constitutes a major offence. It applies when a participant 'is convicted of the violation of a criminal or civil law of any country', or where a participant has 'at any time behaved in a manner severely damaging to the reputation of the sport' (Article VI(B)). The potentially broad, and indeterminate, reach of this offence is immediately apparent and its adjudication necessarily involves a high degree of discretionary judgement. The implications of this are addressed below.

Alleged major offences are adjudicated at first instance by an internal panel, which has the power to impose a range of punishments: a caution, a fine, the payment of compensation, disqualification or expulsion from competitions and/or events or a specified period of ineligibility from participating in any aspect of tennis or in any activities controlled or sanctioned by the ITF. In addition to these listed penalties, a wide discretion allows the imposition of 'such other sanction(s) as the Panel deems appropriate' (ITF 2017c, p.5). This confers the power to impose penalties that could

involve serious financial, and other, implications for those concerned. Decisions made by the internal tribunal in relation to major offences are appellable firstly to an Independent Tribunal and then to the CAS.

The Welfare Policy set out under Article XIII details behavioural expectations and concomitant offences that will apply where these are not met. Alongside provisions aimed at safeguarding vulnerable individuals under the care of the ITF, there is a range of offences that involve a degree of crossover with those listed under the previous two categories. In addition to these, there is a broad, catch-all provision pertaining to 'Conduct in General'. Under Article XIII(a)(vii), the Code states the following:

Covered Persons shall not conduct himself or herself in a manner that will reflect unfavourably on the ITF, any tournament, event or circuit owned or sanctioned by the ITF (the 'ITF Tournaments'), any player, official or the game of tennis.

As with the major offences set out above, there is an inevitable ambiguity and reliance on interpretation and discretion when it comes to such offences. As with the major offences, alleged breaches of the Welfare Policy are adjudicated at first instance by an internal panel, with its findings appellable firstly to an Independent Tribunal and then to the CAS.

The Code provisions detailed above are those promulgated by the ITF. Although constituted according to rules devised and overseen by the ITF, it should be noted that the Davis Cup and Fed Cup have their own Codes of Conduct, which are contained within their respective, competition-specific regulations (ITF 2019b; ITF 2019c). These differ in minor and substantially insignificant ways from the ITF Code of Conduct. As an example, the internal disciplinary hearing is referred to in the ITF Code of Conduct as submission to the Review Board; in the Fed Cup and Davis Cup, the equivalent body is known as the Internal Adjudication Panel. The latter is constituted as 'a standing committee of the Board of Directors of ITF Limited' (ITF 2017c, p.1). The extent to which the processes may differ is unclear, but both are internal disciplinary mechanisms, with the possibility of appeal to the Independent Tribunal. Because of this, they are treated as functional equivalents. This article therefore proceeds on the basis that the ITF, Fed Cup and Davis Cup Codes of Conduct are for the present purposes functionally identical in their treatment of disciplinary matters.

Năstase and Rios

High-profile former elite professional tennis players Ilie Năstase and Marcelo Rios were found guilty of offences arising out of separate incidents of indiscipline demonstrated in their capacities as the Romanian Fed Cup captain (Năstase) and assistant to the Chilean Davis Cup team (Rios) (*ITF v Năstase* paragraph [1.1]; *Rios v ITF* paragraph [1]). The offences amounted to contraventions of the Welfare Policies of the Fed Cup and Davis Cup, respectively, and the cases against the two men were brought by the ITF, with the respective appeals heard by the Independent Tribunal. The cases of *Năstase* and *Rios* are both remarkable and unusual insofar as the transcripts of the respective appeal decisions by the Independent Tribunal have been published. Because of this, the cases serve as a useful and rare window into the operation of the offences and procedures outlined above, and an examination of them is a means by which to assess the extent to which the ITF adheres to expected standards of procedural fairness.

Ilie Năstase

Of the two, the case of Năstase is both more complex and more serious and thus engenders a longer and more complex judgment. Năstase was punished for a series of behaviours that took place in the build-up to and during a Fed Cup home tie against Great Britain in April 2017 in Constanta, Romania (ITF 2017b). In July 2017, an ITF Internal Adjudication Panel (IAP) convened to hear the allegations against Năstase (*ITF v Năstase*). Five separate charges were alleged; these were primarily categorised according to a series of aberrant behaviours rather than the sections of the Code they were alleged to have breached. The charges related to the following behaviours on Năstase's part (*ITF v Năstase* paragraph [5]; *Năstase v ITF* paragraphs [35]–[116]):

a comment made in relation to Serena Williams's pregnancy that the ITF alleged was 'unethical, unprofessional, unacceptable, offensive, derogatory, and may be interpreted as racist' (the IAP termed this 'the Serena Williams Charge');

repeated and unwelcome sexual advances towards Great Britain team captain Anne Keothavong ('the Anne Keothavong Charge');

shortly before play began in the Fed Cup tie, Năstase walked into the designated GB players' lounge while talking on a mobile phone, sat down, waved at some of the GB players and then left ('the GB Lounge Charge');

on a number of occasions during the competition, Năstase abused members of the media ('the Press Charge'); and

during play, Năstase repeatedly accused the match umpire of bias in favour of the GB team and used abusive language at both the umpire and the GB team ('the On-Court Charge').

Each of these was deemed by the ITF to be a breach of various parts of the Fed Cup Welfare Policy, which reproduces in identical language the behavioural standards set out in the ITF Code of Conduct's Welfare Policy, detailed above. The provisions of the Welfare Policy that were deemed to have been breached related to 'unfair and/or discriminatory conduct' (contrary to Article XIII(a)(ii)(a)); 'abuse of authority' (Article XIII(a)(iii)(a)); 'abusive conduct' (Article XIII(a)(iii)(b)); 'sexual harassment' (Article XIII(a)(iv)(c)); and behaving 'in a manner that will reflect unfavourably on the ITF, any tournament, event or circuit owned or sanctioned by the ITF..., any player, official or the game of tennis' (Article XIII(a)(v)(b)). The comment relating to Serena Williams's pregnancy was also deemed to be contrary to Năstase's obligation under the Welfare Code to conduct himself 'in a professional manner at all times' (*Năstase v ITF* paragraph [35]). Taken together, the ITF argued that the cumulative effect of these transgressions amounted to a further charge ('the Overall Conduct Charge').

The factual bases of these charges were not contested by Năstase, but he submitted that he was not guilty of several of the offences. Specifically, Năstase denied breaching Article a.ii.a of the Welfare Policy on the grounds that what he said was not racist; Article a.iii.a on the grounds that he had not intentionally entered the GB Lounge; and Article a.iv.c on the grounds that his remarks to Ms Keothavong did not constitute sexual innuendo and were intended as a joke. Năstase effectively admitted liability under Articles a.iii.b and a.v.b, conceding that the comments addressed to the 'Chair Umpire, Referee, GB Captain and GB players' and the remarks made to the press, were 'inappropriate' (*ITF v Năstase* paragraphs [52]–[54]).

In relation to these admissions, Năstase also submitted a number of factors in mitigation. It was claimed that the on-court comments 'were precipitated by unequal treatment of the two teams' (*ITF v Năstase* paragraph [54]), and the remarks to the press 'were made in frustration and at a time of vulnerability, in response to a biased and exaggerated media coverage that was more interested in non-tennis events and following a tense discussion with the Referee and the on-court incidents' (*ITF v Năstase* paragraph [52]). Năstase also pointed to his expressions of remorse and attempts to apologise on a number of occasions and suggested that his behaviour was 'indicative of his well-known unconventional humour and impulsive character rather than any wrongful intent' (*ITF v Năstase* paragraph [56]).

At first instance, the IAP found Năstase guilty of four of the five substantive charges. The IAP found no liability for the GB Lounge Charge, since it was accepted that Năstase could have entered the lounge by mistake and that he had not engaged in any deliberately disruptive conduct during the short time he was in the lounge. The IAP also refused to accept that the cumulative effect of the separate charges should be grounds for further substantive liability, though it was conceded that it 'may have some bearing on the penalty imposed' (*ITF v Năstase* paragraph [84]). The mitigating factors put forward by Năstase appear to have had limited effect, with the IAP acknowledging only his initial attempts to apologise (*ITF v Năstase* paragraphs [93]–[95]).

Notwithstanding these minor concessions, the IAP held that taken together the offences were 'very serious' and imposed both a suspension and a fine. The suspension comprised two parts, each of which retrospectively commenced on the day of the imposition of Năstase's provisional suspension (23 April 2017). The first part of the suspension applied to Năstase's attendance at ITF events and was for one year and eight months. The second part of his suspension related more narrowly to his 'acting in an official capacity' at ITF-sanctioned events and was for the longer duration of three years and eight months. The fine imposed was for the sum of US\$ 10,000 (*ITF v Năstase* paragraph [97]).

Năstase appealed the decision of the IAP to the Independent Tribunal, which upheld the original decision but altered the penalty. The fine was doubled (from US\$ 10,000 to US\$ 20,000), but both periods of suspension were reduced by around eight months, to one year and three years, respectively.

Marcelo Rios

The offence for which Marcelo Rios was punished was altogether more trivial and straightforward: a single instance of verbal abuse. Rios's offence was committed against the Davis Cup rules; since the competition falls under the auspices of the ITF, the action against Rios was brought by the ITF. Rios was held by the Davis Cup Referee, who also acts as the ITF Supervisor (*ITF* 2019a), to have committed a breach of Article 11.0 of the Davis Cup Regulations. This offence prohibits 'verbal abuse' and reproduces an equivalent offence found in the ITF's Code of Conduct. On 31 January 2018, Rios had volunteered to speak to journalists at a press conference arranged in advance of a Davis Cup match between Chile and Ecuador, which was due to take place on 2 February. The Referee's report of the incident was presented on 2 February and described what had happened in the following terms:

Marcelo answered to the press officer he would like to go [to speak to the Press] and after hearing the first question about how he sees the good ranking of the Chilean players he said: 'as my personal friend Diego Armando (Maradona) used to say, suck it. I do not talk with journalists.' Then he said: 'questions?' and another question was made regarding the visit of a Sports Minister the night before at the hotel to meet the team and his answer was: 'keep on sucking it' and then he left. Both answers were not to a single person but for the whole group (*Rios v ITF* paragraph [4]).

The punishment imposed was a fine of US\$ 2,500, to be paid by the Chilean Davis Cup team.

Rios ostensibly appealed the penalty to the Independent Tribunal, though it was noted by the Independent Tribunal that he was in fact also disputing the commission of the offence. The appeal therefore addressed both matters. It was

dealt with 'on the papers' and without an oral hearing, and the judgment of the Independent Tribunal was straightforward and short; it is for these reasons that the appeal offers less of a window into the ITF's disciplinary process and less scope for analysis than that of Năstase. The Independent Tribunal upheld the Referee's finding of guilt and the penalty of US\$2,500. In terms of the personal cost to Rios, the Independent Tribunal stated: 'It is a matter for the Chilean national team to ask Mr Rios to reimburse it for the fine' (*Rios v ITF* paragraph [22]).

Tensions between Participant Rights and the Integrity of the Game

As noted above, the stated purpose of the ITF's Code of Conduct is 'to maintain fair and reasonable standards of conduct ... and to protect [participants'] rights, the rights of the public and the integrity of the Sport of Tennis' (Article 1(A)). In many respects, these are concordant aims, as all might be said to benefit from the maintenance of fair and reasonable standards of conduct in the sport. Ensuring such standards protects the interests of those involved in tournaments and also enhances the profile and perception of the sport at all levels. It is clear, for example, that Ilie Năstase's conduct was, for the most part, contrary to the interests of other participants and the sport of tennis more broadly and that a disciplinary process that properly punishes and deters such conduct is entirely justifiable in the interests of all stakeholders.

One reason for this convergence of interests in maintaining the integrity of a sport is in order to uphold its public image and thereby increase its popularity. Each sport competes for attention with other sports and with alternative forms of entertainment and leisure pursuits in the public marketplace. As a result, there is an understandable desire on the part of those involved in the administration of a sport to promote interest, in order to encourage greater participation and increase commercial income through ticket sales, merchandise, sponsorship and broadcast rights. All of these depend upon maintaining and increasing public interest, and confidence in the integrity and fairness of the administration of a sport may be a major factor in this. The withdrawal of endorsement deals from athletes such as Maria Sharapova who are banned following positive doping tests supports this idea, although a number of studies suggest that the effect of this has been overstated (Kornbeck and Kayser 2018).

Leaving aside such overarching shared interests, however, it is also clear that the adjudication and punishment of disciplinary matters may involve inherent tensions when it comes to upholding participants' rights on the one hand and protecting the integrity of a sport on the other. This means that there may be situations in which a governing body's desire to ensure the expedient resolution of disciplinary matters conflicts with a participant's interests in ensuring a fair hearing and outcome. For instance, a governing body will want to take strong action in order to punish particularly abhorrent behaviour (consider, for example, the charge of racism that was levelled at Năstase), both to deter others and in order to protect its own standing. In such a case, the governing body is likely to be sensitive to popular opinion, as viewed through the lens of media characterisations and representations, which can be a significant spur to decisive action. This may lead to calls for greater punishment, including on the basis of a participant's past conduct and reputation. A recent comparison between the relative treatment of Australian professional players Nick Kyrgios and Daria Gavrilova suggested that 'crowd favourite' Gavrilova received considerably less opprobrium than Kyrgios for more serious disciplinary infractions (Di Lonardo 2018).

A further situation in which a conflict between the interests – or rights – of a governing body and participant may exist is where there is a perceived need to resolve a dispute in order to maintain the continuity, and thus integrity, of a competition. Peter Sagan's disqualification from the 2017 Tour de France by cycling's governing body Union Cycliste Internationale (UCI) exemplifies the desire for swift and conclusive disciplinary action on the part of the governing body. Sagan was disqualified as a result of a crash that resulted in injury to fellow rider Mark Cavendish. Whether or not the disqualification was justified was intensely debated, but Sagan's immediate appeal to the Court of Arbitration for Sport (CAS) was unsuccessful (CAS 2017). Sagan suggested that he had been denied an opportunity to be heard, in contravention of the UCI regulations, (Pretot 2017) and that he was not afforded fair and reasonable consideration. Several months after the event, and on the eve of a further appeal to CAS, it was announced that Sagan and the UCI had come to an agreement (UCI 2017, Bora-Hansgrohe 2017, Elton-Walters 2017). The UCI absolved Sagan of any blame for the crash, but the effect of the disqualification was irreversible. The exigencies of competition meant that the original decision had to be taken quickly and it was one that was effectively impossible to revisit afterwards. It is unclear from the statements released by the UCI and by Sagan's team Bora-Hansgrohe whether any compensation was also paid.

It is easy to conceive how these tensions can lead to an overly punitive approach, or at least a disregard for participant rights, in the manner alleged by Sagan. However, the inverse is also possible: the popularity and commercial appeal of some athletes may encourage the governing bodies to treat them with undue leniency. A putative example of this can be found from within tennis in the alleged response of the Association of Tennis Professionals (ATP) to Andre Agassi's positive test for the drug crystal methamphetamine in 1997. In his autobiography, Agassi described the willingness of ATP officials to accept his version of events without corroboration, a version that was contained in a letter written by Agassi 'filled with lies interwoven with bits of truth' (Agassi 2009) and which resulted in no disciplinary action being taken against Agassi (Walsh 2009).

There is a clear nexus between the rules and their enforcement and the popularity and thus commercial success of the game. After Serena Williams was punished for receiving on-court coaching, her coach Patrick Mouratoglou (who had admitted making hand gestures to Williams during the course of the match) suggested that the officially proscribed practice is endemic and that lifting the ban would help to popularise the sport, stating: 'Seeing and hearing the coaches and players talking to each other personalises the sport and brings out their characters' (Lovett 2018). Although

governing bodies and the public may purport to desire sport that is free from indiscipline in all its many forms, sport must be engaging in order to appeal to its audience; some forms of indiscipline may add to the allure of a sport and heighten its value as entertainment. Whether or not it affected the tennis governing bodies' responses to him, John McEnroe's on-court indiscipline was an integral part of his 'superbrat' persona (Atkin 2002) and provided a counterpoint to the contrasting character of Bjorn Borg as part of a celebrated and compelling rivalry (Pedersen dir. 2017).

The examples discussed above suggest fertile ground for disputes between governing bodies and participants when it comes to the adjudication of disciplinary matters. The evolving relationship between governing bodies and participants, and its treatment by the courts, has led to an increasingly legalistic approach to sports governance, and this is evident in the ITF's disciplinary regime. The drafting of the Code is distinctly legalistic, and this is also true of the ITF's procedure and of the written judgments in *Năstase* and *Rios*. This is not unusual among sporting codes and in tribunal decisions, and in his consideration of *Morris & Little*, Ken Foster (2005) has pointed to an increasing tendency towards 'greater formality and adherence to basic principles of due process in disciplinary procedures' as stemming from 'an increasing propensity by aggrieved sportsmen to embark upon litigation' (Włodarczak 2019). In *McClevery v Australian Karting Association* [2015] QSC 32, the appellant adopted the language of the criminal sentencing courts in arguing that the imposition of a 10-year suspension was 'manifestly excessive'.

This article is concerned with procedural fairness rather than the fairness of the substantive rules themselves (that is, the range of conduct to which they apply). Before considering this in more depth, however, it is worth noting that there are instances where the distinction is not easily maintained. Beyond strictly procedural concerns, Paul McCutcheon (1999) also suggests that the substantive rules themselves should be sufficiently precise, intelligible and accessible. A prominent example of this is where the offences are described in terms that are broad or ambiguous, since procedural fairness is directly implicated where offences confer high and inherently unpredictable levels of discretion. Of such offences, McCutcheon (1999, 41; see also Kosla 2001) writes:

A disciplinary code that contains loosely drafted and inaccessible provisions should be subject to the same criticisms that a similarly drafted criminal code would attract. It must be a matter of concern that sports codes contain broadly drafted offences such as 'bringing the game into disrepute' that are sufficiently expansive to include a disparate array of conduct and that confer an unduly wide margin of discretion on decision-makers.

As noted above, a number of Code provisions are vulnerable to such criticisms, such as the major offence of 'conduct contrary to the integrity of the game'. This applies *inter alia* where a participant has 'at any time behaved in a manner severely damaging to the reputation of the sport' (Article VI(b)). The Welfare Offence pertaining to 'Conduct in General' and set out in Article XIII(a)(vii), is similarly broad and thus also open to criticism. From this point of view, it is perhaps significant that *Năstase* did not seek to contest the charge of committing the equivalent offence found in the Fed Cup Welfare Policy (Article XIII(a)(v)(b)).

The Importance of Procedural Fairness

As private bodies, sports governing bodies are free to devise their own disciplinary regimes, but this does not render them immune from the interference of the courts should they fall short of obligations that are shaped by the legal relationship between sports participants and governing bodies. A detailed discussion of the nature of this complex and often contested relationship (Boyes 2017) and the attendant duties and responsibilities it entails, is beyond the scope of this article. For the present purposes, it suffices to say that all those who participate under the auspices of the ITF must agree to be bound by the rules and regulations of the organisation (ITF 2019d) and the obligations of participants that are imposed as a result of the codes of conduct described above are typically considered as arising through a contractual or quasi-contractual relationship (*Modahl v British Athletics Federation (No 2)* [2002] 1 WLR 1192; Sullivan 2010). According to this, the participant agrees to obey the rules of the sport – including its disciplinary provisions – and the governing body agrees to treat the participant fairly according to its procedures; in *Korda v ITF Ltd, The Times* (4 February 1999), the Court of Appeal held that express submission to the anti-doping programme in place for the Wimbledon tournament substantiated the inference of a contractual relationship between player and governing body.

Although these arrangements are usually construed as consensual and contractual, the rules and disciplinary mechanisms of sports governing bodies have been characterised as 'adhesionary, take-it-or-leave-it arrangements presented by a monopolist' (Boyes 2017, 370). This applies to the internal disciplinary rules and processes and to the appeals process: under Article 8 of the IT Procedural Rules, it is stated that the CAS will serve as the final avenue of appeal. It has been suggested that such 'mandatory arbitration agreements' as a condition of membership of a sporting association go against the ostensibly consensual nature of engagement in arbitration (Hülskötter 2017).

The legal consequences of these arrangements have been noted on a number of occasions by the courts. In *Breen v Amalgamated Engineering Union* [1971] 2 QB 175, Master of the Rolls Lord Denning stated that sporting rules are more 'like a legislative code laid down to be obeyed by their members and so should be subject to control by courts like any code laid down by Parliament' [paragraph 4]. The power imbalance this suggests, and the potentially serious implications of disciplinary action taken against a participant, have meant that the courts have long insisted that disciplinary tribunals must afford an accused person procedural fairness; an absence of this may mean that the courts will intervene (*Ridge v Baldwin* [1964] AC 40).

Procedural Fairness in the ITF disciplinary regime

The requirements of procedural fairness 'are not engraved on tablets of stone' (*Lloyd v McMahon* [1987] AC 625 at p.702 per Lord Bridge), but the central elements are easily stated as comprising two rules: the 'rule against bias' and the 'fair hearing rule' (McCutcheon 1999; Foster 2005; Serby 2017; Rao 2006). In what follows, each of these is considered in relation to the ITF's Code of Conduct and its operation in the Internal Adjudication Panel (additionally governed by procedures set out in the *Procedural Rules for an Internal Adjudication Panel Convened Under ITF Rules* (2017c) (hereinafter 'the IAP Procedural Rules')) and the Independent Tribunal (appointed under a contract with Sport Resolutions and additionally governed by the *Procedural Rules Governing Proceedings Before an Independent Tribunal Convened Under ITF Rules* (ITF 2016) (hereinafter 'the IT Procedural Rules')) and as exemplified in *Rios* and *Năstase*.

The Fair Hearing Rule

There is no definitive list of requirements that must be present for a disciplinary body to satisfy the requirement of a 'fair hearing', and expectations may differ according to the context in which a tribunal operates. In relation to sports disciplinary mechanisms, commentators such as Ken Foster (2005, 37) and Paul McCutcheon (1999, 1) have offered criteria by which the fairness of a hearing may be judged. McCutcheon (1999, 40) posits fulfillment of the following demands as characteristic of 'well-regulated sports': 'independent representation, prior notification of the charges he or she faces, the right to confront witnesses and the right to present his or her case in defence or in mitigation'.

Notice

An examination of the substantive rules and processes and their operation in *Năstase* and *Rios* suggest that the question of notice is taken seriously by the ITF. According to the Code, an accused participant must be told in writing of the charges against them, whether these relate to on-site offences, major offences or breaches of the Welfare Policy. The Code provisions set out the form the notice must take and the information it must contain, including the potential consequences for the participant and the options available to them; see, for example, Article XIII(b)(iv), which sets out the requirements in relation to an alleged Welfare Offence. Various notice periods are stipulated in order for such a person to be able to respond; for instance, Article IV(W) mandates that an appeal against an on-site offence must be lodged within 14 days of notification of the violation by the ITF. Provisions contained in rule 3.7 of the IT Procedural Rules facilitate disclosure in relation to both sides.

The respective appeal judgments make explicit reference to the notice given to *Năstase* and *Rios*. In *Năstase's* case, both the Internal Appeals Panel and the Independent Tribunal judgments set out a full procedural history of the course of proceedings (*Năstase v ITF* paragraphs [2]–[9]). The *Rios* judgment similarly indicates that the stipulated timelines were followed. In each case, the respondent was given extensions of time where these were necessary or requested (*ITF v Năstase* paragraph [7]).

The Hearing: the Opportunity to be Heard; to be Represented; to Question Witnesses; and the Burden of Proof

The expectations of procedural fairness mean that the disciplinary hearing – whether first instance or on appeal – must itself conform to certain standards. The Code makes it clear that a participant accused of a major offence or welfare offence, or who wishes to appeal an on-site offence, is entitled to a hearing on the matter, the course of which is guided by the relevant Procedural Rules.

Marcelo Rios chose not to appear in person before the Independent Tribunal; by agreement, the appeal was dealt with 'on the papers and without an oral hearing' (*Rios v ITF* paragraph [2]). *Năstase's* hearing at first instance before the Internal Adjudication Panel was also 'decided on the sole basis of written submissions, since there was no material factual dispute between the parties' (*ITF v Năstase* paragraph [13]). However, *Năstase* did appear in person at his appeal before the Independent Tribunal and was also represented at the hearing by four members of Counsel, including one QC. Rule 3.4 of the IT Procedural Rules explicitly allows for all parties to be represented 'by legal counsel and/or any other representative(s) in all proceedings before an Independent Tribunal'. Given the legalism of the rules and the procedure pointed to above, this is an important provision, though a lack of funding may deny those who are less financially secure from benefitting. Any representation, advice or expert assistance will be engaged at the party's expense; rule 7.4 of the IT Procedural Rules allows the Independent Tribunal to award costs against a party, but only where that party's argument is 'frivolous or entirely without merit'. It should be noted that Sport Resolutions offers a *pro bono* service for unrepresented individuals who appear before sports tribunals (Sport Resolutions 2019).

The transcript in the *Năstase* case indicates that three witnesses attended and gave testimony in person (one for the ITF and two on behalf of *Năstase*) and that other witness testimony was submitted in writing. It is not clear to what extent there was an opportunity to cross-examine the witnesses, but the IT Procedural Rules suggest there would be such an opportunity. The procedure to be followed in relation to the conduct of the hearing is set out as follows in rule 4.3:

The procedure to be followed at the hearing will be at the discretion of the Tribunal Chairman, provided always that the hearing must be conducted in a fair manner, with a reasonable opportunity provided for each party to present evidence (including the right to call and to question witnesses/experts), and present his case to the Independent Tribunal. The Independent Tribunal will have discretion as to whether to receive evidence from

witnesses/experts in person, by telephone, by video conference, or in writing, and may question a witness/expert and control the questioning of a witness/expert by a party.

As was noted in *McLelland v Burning Palms Surf Life Club* [2002] NSWSC 470 at paragraph [135], the requirements of natural justice do not mean that a sporting tribunal such as that utilised by the ITF must meet the (more rigorous) 'fair trial' standards of the criminal process. It need not adhere to the criminal standard of proof, nor to criminal rules of evidence. Regarding the burden and standard of proof, rule 5.1 of the IT Procedural Rules states: 'Unless otherwise specified in the applicable ITF Rules, burden of proof shall be on the party asserting the claim or fact in issue, and the standard of proof to be met shall be the balance of probabilities'. Although this is the accepted civil standard, it is not unusual for sports disciplinary tribunals to employ a flexible approach, whereby the standard of proof is tailored to the seriousness of the matter being heard (*Football Association v Terry*, FA Regulatory Commission, 4 October 2012). McCutcheon (1999, 40) suggests that the burden and standard of proof should properly reflect the gravity of the matter, 'with the standard in serious disciplinary cases approaching that of proof beyond reasonable doubt'.

Assessing Bias and Structural (In)dependence

Alongside the fair hearing rule, procedural fairness also entails the rule against bias: an expectation that the 'decision-maker' will 'approach a matter with an open mind that is free of prejudgment and prejudice' (Groves 2009). This requirement reaches beyond a need for the absence of bias and demands that there is no risk of bias (*Revie v Football Association* [1979] *The Times*, 14 December 1979). All of the offences detailed above are adjudicated at first instance either by the ITF Supervisor at an event or by an internal adjudication board, and this poses obvious challenges for this principle. On appeal, as in *Rios* and *Năstase*, cases are heard by the Independent Tribunal and an appeal from here will be to the CAS. It is at the appellate stages that a more productive assessment of the question of bias can be undertaken. Certain aspects of the Independent Tribunal (convened by Sport Resolutions) demand attention: the selection and appointment of the adjudicators, the funding of Sport Resolutions and the explicit presumed confidentiality of the process and outcome.

The IT Procedural Rules contain provisions that address the potential for bias on the part of tribunal members by precluding certain persons from adjudicating in cases where this may result in bias or apparent bias. For instance, it is mandated that '[e]ach member of the Independent Tribunal must (a) have had no prior involvement with the matter in question; and (b) act independently and impartially at all times' (ITF 2016). In order to facilitate compliance with these requirements, rule 2.4 of the IT Procedural Rules imposes disclosure duties upon panel members, according to which those who are appointed to an Independent Tribunal must inform Sport Resolutions on an ongoing basis of 'any facts or circumstances known to them that might call into question their impartiality or independence in the matter in the eyes of a well-informed and fair-minded observer'. Under rules 2.5–2.6, provision is made for a party to a case to file an objection to the appointment of a member of the Independent Tribunal, which may lead to that member's removal from the panel for that matter (Brown 2016).

The question of bias on the part of an ostensibly independent sports tribunal was considered in relation to an appeal made by the snooker player Stephen Lee against the World Professional Billiards and Snooker Association (WPBSA). Lee had been found guilty by an Independent Disciplinary Hearing Board, convened by Sport Resolutions, of serious breaches of the WPBSA Members' Rules and Regulations. The offences related to match-fixing and resulted in sanctions that included a suspension of 12 years and the payment of £40,000 towards the costs incurred by the WPBSA. Lee put forward five grounds of appeal; the Appeals Committee chose to address what it referred to as the 'bias issue' as a standalone issue (*Lee v WPBSA Ltd* (Decision on preliminary issue, Appeals Committee, Edwin Glasgow QC, Peter Stockwell, SR/0000540007, 24 February 2014)).

The applicable WPBSA Disciplinary Rules stipulate similar safeguards to those set out above in relation to the ITF: under rule 9.4, a person may not sit on the tribunal where that person has prior involvement or interest in the outcome of the case; and under rule 9.3, it is open to a party to the proceedings to object to the appointment of an adjudicator (*Lee v WPBSA*). The 'bias issue' in this case centred on concerns about potential conflicts of interest on the part of the sole member of the Independent Disciplinary Hearing Board, Adam Lewis QC, and an alleged failure to disclose facts relevant to this in advance of the hearing. The conflict in question was said to arise because Lewis had previously acted as legal counsel for Leyton Orient Football Club, an entity in which Barry Hearn had a financial and controlling interest. At the time of the offences, Hearn was the chairman of the WPBSA, and he retained a significant financial interest in snooker. As a result of these circumstances, it was asserted that Lee 'did not receive a fair hearing by an independent and impartial tribunal' (*Lee v WPBSA* paragraph [8]).

The Appeals Committee considered the case law pertaining to bias and also made reference to the fair trial provisions contained in Article 6 of the European Convention on Human Rights 1950 (ECHR). The Appeals Committee adopted the definition of bias set out by Scott Baker LJ in *Flaherty v National Greyhound Racing Club* [2005] EWCA 1117: 'Bias' means a predisposition or prejudice against one party's case or evidence on an issue for reasons unconnected with the merits of the issue.' The test for whether bias was established drew on Lord Hope's speech in *Porter v Magill* [2002] 2 AC 357: 'The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'. In a judgment that displays a high degree of incredulity at Lee's

version of events, the Appeals Committee held that '[n]o fair minded and informed observer would have considered that there was a real possibility that Mr Lewis was biased' (*Lee v WPBSA* paragraph [70]).

Beyond the individual adjudicators, there is the issue of structural independence, which is a feature of the CAS that has been questioned since its inception in 1984. Although a landmark ruling in *Gundel v FEI/CAS* (1993) 1 Civil Court, Swiss Federal Tribunal, effectively validated the independence of CAS under Swiss law, these questions persist on a number of bases. First, the CAS depends on funding from the very sports governing bodies whose disputes it adjudicates. Second, there are intimate links between sports administrators and the International Council of Arbitration for Sport (ICAS) and the latter has control over the appointment (and potential removal) of CAS arbitrators (Vaitiekunas 2014). Third, increasing concern is being expressed about the operational secrecy of the CAS (Duval 2017, Lenskyj 2018). The protracted litigation arising out of a doping ban imposed on German speed skater Claudia Pechstein was recently the subject of a judgment from the European Court of Human Rights (ECtHR) that highlighted this issue. The ECtHR (*Mutu & Pechstein v Switzerland* (2018) ECHR 324) upheld the impartiality of the CAS, but held that Pechstein's right to a fair trial under Article 6(1) of the ECHR had been infringed insofar as her case had not been afforded a public hearing.

The concerns that have been expressed in relation to the CAS are also pertinent to the operation of tribunals convened by Sport Resolutions. Sport Resolutions is constituted as an independent, not-for-profit organisation, which undertakes a considerable amount of *pro bono* work. However, the majority of its arbitration services are provided to sports governing bodies on a commercial basis, and this arrangement arguably has the potential to influence its decisions. This is not to suggest that the commercial relationship has necessarily led to bias in favour of the governing body that has appointed the arbitrator; courts have accepted that receipt of fees from sports governing bodies for the provision of arbitration services does not necessarily interfere with the independence of the arbitral body (*A & B v IOC and FIS* 4P.267/2002; 4P.268/2002; 4P.269/2002; 4P.270/2002 of 27 May 2003). Indeed, a recently-published Independent Review commissioned by the Lawn Tennis Association (LTA) and undertaken by Sport Resolutions, may stand as evidence to the contrary (LTA 2019). The review examined safeguards in place at Wrexham Tennis Centre following the conviction and imprisonment of former Head Coach Daniel Sanders in July 2017 and was condemnatory in citing a number of failures on the part of the LTA. Nonetheless, there remain legitimate concerns around the structural independence of tribunals convened by Sport Resolutions that are difficult to resolve in the face of the lack of transparency involved in the disciplinary process.

Confidentiality and a Lack of Transparency

The foregoing consideration of the disciplinary process, including the involvement of Sport Resolutions in administering the ITF's Independent Tribunal, has pointed to potential inadequacies in relation to procedural fairness, but it is difficult to know whether or to what extent these are realised. The greatest challenge when it comes to appraising the presence or absence of the potential for bias, and indeed other aspects of procedural fairness, is the lack of transparency engendered by confidentiality provisions. The Code of Conduct and attendant procedural rules are publicly available documents, but there is a high level of confidentiality involved in the ITF's disciplinary process when it comes to particular cases. This pertains throughout the process, up to and including hearings before the Independent Tribunal, and applies to both the conduct of cases and resultant decisions. The approach to confidentiality is exemplified in rule 7.2 of the IT Procedural Rules:

Unless the ITF Rules provide otherwise, the ITF may publish the decision on the ITF's website and/or otherwise as it sees fit, but otherwise the proceedings shall be confidential and no Tribunal member, party, third party observer, witness, or other participant in the proceedings or recipient of the decision may disclose any facts or other information relating to the proceedings.

Similar provisions apply to internal hearings and cover the hearing as well as the decision (IT Procedural Rules, rr.5, 5.2, 5.2.1). Rule 8.5 mandates the same confidentiality requirements in relation to appeals to the CAS. The way in which the confidentiality provisions are framed means that the ITF remains in control of whether information is disclosed publicly, and the effective presumption against disclosure has meant that the publication in full of disciplinary decisions is unusual. This makes the publication of the *Năstase* and *Rios* appeal judgments a relative rarity. It is not yet clear whether their publication is symptomatic of a move to greater transparency, since there are good reasons why the ITF may have chosen to publicise these cases. (Requests to the ITF by the author in relation to this and other questions about the publication of decisions have not yet been answered.) Firstly, in both appeals the ITF was successful. Even though *Năstase* claimed victory following his appeal as a result of a decrease in the length of the bans he faced (Addicott 2018), the Independent Tribunal upheld the decision of the IAP in each of the charges *Năstase* faced and doubled the fine imposed. In *Rios*, the independent tribunal upheld the decision and the penalty. Second, the cases were likely to receive a sympathetic hearing from the media, as the appeal decisions effectively upheld offences against members of the media (one of the charges in *Năstase* and the substance of the whole charge in *Rios*).

Confidentiality clauses are not unusual in the domain of arbitration and can comprise one of the benefits of arbitration over the use of legal avenues, but confidentiality may have a deleterious effect when it comes to procedural fairness; the power differential between participants and governing bodies means that transparency will generally be in

the long-term interests of participants (Lenskyj 2018). The consequences of a lack of transparency are potentially significant for participants, the wider public and even the ITF itself. For participants charged with the commission of offences, the lack of available information may make it difficult to prepare a defence or formulate an appeal, particularly in light of the ambiguity and broad scope of some of the offences. This difficulty could be exacerbated for those unable to find or fund legal representation, due to the legalistic language and structure of the Code and its attendant procedures.

As noted above, the ECtHR (*Mutu & Pechstein v Switzerland*) has held that the CAS has breached Article 6(1) of the ECHR in not affording appellants a public hearing and this may have an effect at all levels of the appeals process. Beyond this direct concern for the rights of alleged transgressors, there are other reasons to embrace transparency. The confidentiality practised by the ITF means that it may be difficult to know about infringements and the disciplinary action that has been taken in respect of them. For instance, an investigation in 2016 by *The Guardian* newspaper exposed the fact that a number of tennis umpires had been banned by the ITF for engaging in corrupt activities related to in-game betting (Ingle 2016). Given the reliance on public and commercial appeal alluded to above, this is potentially detrimental to the interests of the ITF and other stakeholders in professional tennis. There are therefore persuasive arguments that the ITF would be well served in better publicising its disciplinary processes. Greater transparency and disclosure on the part of the ITF could cause some embarrassment to the organisation in the short term, but it could well contribute to a greater degree of trust in disciplinary processes on the part of those subject to it and the broader public. Transparency is at the heart of good sports governance (Hoye and Cuskelly 2007), and this should extend to its disciplinary processes.

Conclusion

Inherent tensions between the often-conflicting priorities of sports governing bodies and participants mean that adherence to principles of procedural fairness in the adjudication of disciplinary matters is vital to ensuring their just resolution. Notwithstanding legitimate concerns around the breadth and concomitant indeterminacy of some of its substantive rules, the ITF's Code of Conduct and attendant Procedural Rules contain provisions that accommodate the requirements of a fair hearing and seek to minimise the potential for bias. The primacy of procedural fairness is borne out in the appellate decisions of *Rios* and *Năstase*, which provide a window into the operation of the ITF's disciplinary process, but the relative rarity of such publication means it is difficult to know whether they are typical of the approach taken. Selective publication problematises assessment of the process and there are no definitive answers to some of the questions and issues raised in this article. On this basis, and in the interests of all those involved, there is a compelling case for the ITF to increase transparency in its disciplinary regime.

Competing Interests

The authors have no competing interests to declare.

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