

Lima, July 19, 2018

Peruvian Basketball Sports Federation

Lima

Ref.: Report on the autonomy of the Federation before the Peruvian Sports Institute

Dear Sirs:

We are writing in order to send to you the requested Legal Report regarding the exhortation from FIBA for the withdrawal of the title registration applications before Public Records. For this purpose, in order to achieve a better legal understanding of the problem, we shall analyze the autonomy of the leadership of the Peruvian Basketball Sports Federation (hereinafter, the FEDERATION) with respect to the actions carried out by the Peruvian Sport Institute (Instituto Peruano del Deporte - IPD), through the Work Group designated by it.

In this sense, we are sending this report, which analyzes the issues raised by you, taking into account the background, the applicable legal framework (regarding constitutional, civil and registration matters), the relevant legal doctrine and jurisprudence.

I. FEDERATION INCORPORATION

1. The Peruvian Basketball Sports Federation was created by means of a private document of the Establishment Session dated August 26, 1926.¹
2. However, by means of Public Deed dated July 23, 2001, granted by the Notary Public Dr. César Torres Kruger, it was incorporated into a non-profit civil association,² whose purpose is to promote, support, develop and lead Basketball, subject to the international sport regulations that govern this sports discipline.³

¹ **Civil Code of 1984.**

Regime of the de facto association

Article 124.- The internal order and administration of the association, that has not been incorporated by a registered public deed, is regulated by the agreements of its members, and the rules established in Articles 80 to 98 are applied, as pertinent.

Said association may appear in a trial represented by the chairman of the board of directors or by the person acting in his stead.

² **Civil Code of 1984.**

Concept

“Article 80.- The association is a solid organization of natural or legal persons, or both, that pursues a non-profit objective by means of a common activity.”

³ **Civil Code of 1984.**

3. After the registration in Entry No. 11315033 of the Book of Associations, of the Registry for Legal Entities in the Registry Office of Lima and Callao⁴, they acquired a legal status.⁵
4. In the aforementioned Entry, it is recorded that the purpose of the FEDERATION is “to promote, support, develop and lead the sport discipline of Basketball, subject to the International Sports Regulations that govern it, complying with the provisions of this Bylaws and in accordance with the Sports Policy guidelines formulated by the Peruvian Sport Institute.” (number 1 of article 4 of the Bylaws).
5. The legal doctrine defines the Bylaws as a legal business (agreement of several respondents) of an organizational nature; and that, when the legal entity is

Association Bylaws

Article 81.- The articles must be recorded by public deed, unless otherwise required by law.

If the association is a religious one, its internal regime shall be regulated according to the articles approved by the corresponding ecclesiastical authority.

⁴ **Civil Code of 1984.**

Title that supports the registration

"Article 2010.- Registration is made by virtue of a title that is recorded in a public instrument, unless otherwise provided."

Rogatory principle

Article 2011.- Registrars assess the legality of the documents by virtue of which the registration, the capacity of the grantors and the validity of the act are requested, and what results from them, their background and the entries in public records.

"The provisions set forth in the previous paragraph do not apply, under the responsibility of the Registrar, when a court order requesting the registration is contained. If this is the case, the Registrar may request the Judge to provide clarifications or additional information that may be necessary, or require proof of payment of the applicable taxes, without prejudice to the priority of entry in the Registry." (*)

⁵ **Civil Code of 1984.**

Start of the legal entity

Article 77°.- The existence of the legal entity under private law begins on the day of its registration in the corresponding registry, unless otherwise provided by law. The effectiveness of the acts executed in the name of the legal entity before its registration is subordinated to this requirement and its ratification within three months after being registered. If the legal entity is not incorporated or the acts carried out in its name are not ratified, those who have executed them are unlimited and jointly and severally liable towards third parties.

Books that make up the Registry of Legal Entities

"Article 2024.- This registry consists of the following books:

- 1.- Associations.
- 2.- Incorporations.

(...)"

Registrations in the books of legal entities

Article 2025.- The data required in articles 82, 101 and 113 is recorded in the books of associations, incorporations and committees. In the Civil Society Book, registration is made in compliance with the law on the matter. Likewise, the following is also recorded:

- 1.- Amendments to the deed or the bylaws.
- 2.- The appointment, faculties and cessation of administrators and representatives.
- 3.- The dissolution and liquidation.

established, it is defined as a set of regulations that govern the associations, among these and the associates, and among the associates.

6. The relationship established with each of the normative instruments considered in the Bylaws should be noted. Clearly, a “concordance relationship with the guidelines of the Sports Policy formulated by the Peruvian Sport Institute” is established. There is no expression of subjection or constraint.
7. On the other hand, according to the Dictionary of the Spanish Language of the Royal Spanish Academy, “concordance” is defined as “correspondence or compliance of one thing with another”. In other words, the actions of the FEDERATION must correspond to the guidelines of the IPD’s Sports Policy. In no way was the intervention of the IPD established, even less within the management bodies of the FEDERATION.

II. COMPETITION FOR THE CONTROL OF THE MANAGEMENT BODY OF THE FEDERATION

1. On October 23, 2016, at the Ordinary Base Assembly, the FEDERATION appointed the Electoral Committee and set the date of the Elections to be on November 27, 2016.
2. Once the Elections were carried out, and with the supervision of the IPD by means of a Supervisor, the new Board of Directors to lead the FEDERATION for the 2017-2020 period was elected at the Base Assembly.⁶
3. Following the procedure indicated by the Law of Promotion and Development of Sport (Law No. 28036)⁷, in accordance with Directive No. 004-2013-IPD/DINADAF⁸, and by Official Letter No. 2000-FDPB-2016 dated December 5,

⁶ Law on Promotion and Development of Sports (Law No. 28036)

Powers of the General Assembly

Article 86.- The General Assembly elects people that make up the board of directors, approves the accounts and balance sheets, decides on the amendment of the bylaws, the dissolution of the association and other matters that are not the scope of other bodies.

⁷ Law on promotion and development of sports (Law No. 28036)

Article 11.- Duties of the Board of Directors

The duties of the Board of Directors of the Peruvian Sport Institute (IPD) include the following:

(...)

7. Issue resolutions of recognition of the elected boards of sports federations as a prerequisite for their registration in Public Records and, subsequently, in the National Sport Registry (Registro Nacional del Deporte - RENADE).

(...)”

⁸ Directive No. 004-2013-IPD/DINADAF

“7.2.3 DOCUMENTS TO BE SUBMITTED TO THE PERUVIAN SPORT INSTITUTE - IPD, TO OBTAIN THE RECOGNITION OF THE ELECTED BOARD OF DIRECTORS

The FDN requesting the recognition or new incorporation of its Board of Directors must submit the following documentation:

- a) *Request by the retiring President of the Board of Directors or the person empowered with the recognition of the elected Board of Directors.*

2016, the FEDERATION requested the Presidency of the IPD to acknowledge the Board of Directors elected for the 2017-2020 period (an essential requirement for the registration in Public Records); for which it attached the certified copy of the Minutes of the Base Assembly in which the election happened and the documentation supporting the fulfillment of the requirements by the elected candidates.

4. The request was sent to the National Directorate of Affiliated Sports (Dirección Nacional de Deporte Afiliado - DINADAF) to issue the corresponding report. This organization, by Official Letter No. 217-2017-IPD/DINADAF dated January 17, 2017, made 10 observations and granted us until January 20, 2017 to amend them.
5. By means of a letter dated January 20, 2017, the FEDERATION complied with and amended each of the observations. However, by Official Letter No. 385-2017-IPD/DINADAF dated February 1, 2017, DINADAF was not satisfied with the corrections and expressed the INADMISSIBILITY of the request (recognition of the Board of Directors).
6. Without a resolution from the IPD Board of Directors to resolve said request, by Resolution of the Presidency of the Board of Directors No. 041-2017-IPD-P/CD, the Peruvian Sport Institute appointed a Work Group from the Peruvian Basketball Sports Federation, which acted immediately.
7. In summary, the IPD (a government agency) considers that the elected Board of Directors lacks legitimacy and does not exercise any representation, imposing a Work Group that, if registered in Public Records, would exercise the representation of the FEDERATION.

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- b)** *Copy of the minutes of the Base Assembly that recorded the election's result.*
 - c)** *Uncertified copy of the bylaws and its amendments.*
 - d)** *Copy of the Registry Entry issued within no more than 30 days, in which the validity, term of office, members and positions exercised of the last Board of Directors elected is accredited.*
 - e)** *Documents certifying, concerning the elected President and Vice-President, the following:*

° Candidates shall demonstrate their status as base sports leaders through a document issued by the organization to which they belong, indicating the date of cessation of activities as a member of the Board of Directors, or

They must have been or had the status of high level athlete, accredited by a certificate issued by the competent officer of the IPD.

° Demonstrate higher education at university or at a technical level, by means of original or certified copies, issued by the Center of Studies of origin.

° They must not have been sanctioned by the sports justice of their federation or by the CSJDHD, which shall be demonstrated by means of a certificate issued by the aforementioned body.

° They must not have been sanctioned in criminal proceedings for willful crime, which shall be validated by means of a Sworn Statement.

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The above-mentioned documents may be subject to further scrutiny by the Peruvian Sport Institute - IPD."

8. According to the Law of Promotion and Development of Sports (Law No. 28036), this Work Group is entitled to be registered in Public Records, and then to call for new elections.⁹ However, in practice, it has decided that this Work Group should use all the powers of representation of the FEDERATION. Indeed, it should be noted that currently the IPD not only has extended the temporary validity of the Work Group; but the most serious issue is that even though this Work Group is not registered in Public Records (and therefore is not opposable to third parties), it assumes the representation of the FEDERATION, interferes with the activities of the elected Board of Directors, etc.
9. Such action by the Work Group violates registration principles included in the Civil Code, such as the rogatory, disclosure and legitimacy principles.¹⁰

⁹ **Law on Promotion and Development of Sports, Law No. 28036:**

Article 11.- Duties of the Board of Directors

The duties of the Board of Directors of the Peruvian Sport Institute (IPD) include the following:

(...)

12. Dictate, implement and disseminate the policy of prevention and education of young athletes on the consumption of doping substances and drugs, because of their negative impact on their health and sporting careers. Media outreach is the duty of the members of the National Sports System (SISDEN).

13. Appoint, when deemed appropriate, **work groups** in national sports federations, in such a way that it does not interfere with the normal development of the corresponding sport discipline.

The appointment is to be made in the following cases:

a) When there is an electoral process observed or contested before the Judiciary that, in the opinion of the IPD's Board of Directors, merits such appointment.

b) Lack of representation registered in the Public Records.

c) In case they can not continue operating or the legal provisions or provisions of the IPD are breached, and in other cases it considers pertinent.

d) Lack of representation, which could be caused by abandonment of office, removal or simply because there is some irregularity in the electoral process that prevents its registration in Public Records. In the latter case, since there are no legal representatives validly registered, the legal entity would not have the capacity to exercise its position, thus the cause of dissolution foreseen in the bylaws or in article 94 of the Civil Code could be applied.

e) In case of disregard to the Law of Promotion and Development of Sport or to the dispositions of the governing body of the National Sports System, that is, the IPD, to which the national sports federations belong.

The work groups are composed of three (3) to five (5) members and their basic role is to restore the legality of the sports federation, as well as to regulate its operation, refine the electoral list and **call elections**, for which it has the powers of the Board of Directors plus those stated in articles 45 and 46.

The members of the work groups can not be members of the board of directors of the national sports federations in which they are involved.

14. Approve proposals of assignment for use of IPD assets proposed by its president."

"15. Appoint the Sports Safety Director of the Peruvian Sport Institute."(*)

(*) Subparagraph incorporated by the Second Amending Complementary Provision of Law No. 30037, published on June 07, 2013, which came into force (90) days after its publication.

"16. Resolve, in the second instance, the appeals filed against the sanctions issued by the Sports Safety Director of the Peruvian Sport Institute."(*)

(*) Subparagraph incorporated by the Second Amending Complementary Provision of Law No. 30037, published on June 07, 2013, which came into force (90) days after its publication.

¹⁰ **Civil Code**
Rogatory principle

III. INTERVENTIONISM AND CONSTITUTIONAL BREACHES

1. According to the Law of Promotion and Development of Sport, the elected Board of Directors can only be registered in Public Records if it is previously recognized by the IPD.
2. And indeed, that is what happens, the Registrar rejects the application for registration submitted by the new Board of Directors elected, because it lacks such recognition from the IPD.
3. And as it is not enough for the IPD to deny this recognition in the RENADE, it also appoints a Work Group. The result is a clear government interventionism that seizes the administration and management of the FEDERATION, which results in it being administrated by people totally alien to the FEDERATION, and probably with very different interests to those determined by its members.
4. The legal interventionism is so evident that article 11 of the Law of Promotion and Development of Sport establishes that one of the roles of the Board of Directors of the Peruvian Sport Institute (IPD) is to “approve the bylaws, their amendments and the annual work plans of the sports federations before their registration in Public Records.”¹¹

Article 2011.- Registrars assess the legality of the documents by virtue of which the registration is requested, the capacity of the grantors and the validity of the act, and what results from them, their background and the entries in public records.

"The provisions set forth in the previous paragraph do not apply, under the responsibility of the Registrar, when a court order requesting the registration is contained. If this is the case, the Registrar may request the Judge to provide clarifications or additional information that may be necessary, or require proof of payment of the applicable taxes, without prejudice to the priority of entry in the Registry." (*)

(*) Paragraph added by the First Amending Order of the Single Revised Text of the Code of Civil Procedure, approved by Ministerial Resolution No. 010-93-JUS, published on April 22, 1993.

Principle of Disclosure

Article 2012.- It is considered, without admitting proof to the contrary, that every person has knowledge of the content of the registrations.

Principle of Legitimacy

Article 2013. The content of the registration entry is presumed to be true and produces all its effects, as long as it is not rectified by the registration authorities or is declared invalid by the judicial or arbitration body by means of a resolution or final award.

The registration entry must be canceled at the administrative office when identity impersonation or documentary falsification is proved and the case shall be established in accordance with the provisions in force.

The registration does not validate the acts that are null or voidable according to the provisions in force.

¹¹ **Law on Promotion and Development of Sports, Law No. 28036:**
Article 11.- Duties of the Board of Directors

5. From a Constitutional perspective, it is unusual that the lack of administrative recognition (administrative record) entails the loss of the FEDERATION's representation capacity. It should be noted that other legal entities only require going to Public Records, and the registrar is the one who makes the observations. In the case of Peruvian sports, there is the absurd step of prior administrative control (which often means political control). A situation in which administrative recognition simply would not fit, because certain conditions are not met, becomes a "government-controlled" national sports system.
6. The struggle for control of the National Federations exercised by the IPD is more evident in the case of Peruvian football. IPD has sought to take control of the Peruvian Football Federation for years, but has not been successful. The popularity of football, the resistance of its directors, the support of CONMEBOL and FIFA, prevented the IPD from taking control.¹²
7. In this context, bills that would allow to legitimize the intervention of the IPD on the national body of the most popular sport were proposed. The most recent scandalous case occurred last year when congresswoman Paloma Noceda proposed for the Peruvian Football Federation to be controlled by the IPD.¹³ However, the recent positive results of the national football team had an effect

The duties of the Board of Directors of the Peruvian Sport Institute (IPD) include the following:

1. Establish the policies and institutional guidelines, evaluate them permanently and supervise their due compliance.
2. Propose the Organization and Duties Regulations of the Peruvian Sport Institute (IPD), which is approved by supreme decree, with the approving vote of the Council of Ministers.
3. Propose the annual budget of the Peruvian Sport Institute (IPD).
4. Approve the balance sheet and the annual report of the Peruvian Sport Institute (IPD) and has the responsibility to publish it on the institutional website, as provided in the regulations of this Law.
5. Arrange, if applicable, investigations, audits, inspections and corrective measures to supervise the correct use of the assigned public resources, informing any irregularities to the Comptroller General of the Republic and the pertinent authorities.
6. **Approve the bylaws, its amendments** and the annual work plans of the sports federations **before their registration in Public Records**, following a favorable legal opinion from the National Sports Directorate of the Peruvian Sport Institute (IPD), in accordance with this Law and its regulations, and provide its recording in the National Sports Register (RENADE).

¹² <http://www.americatv.com.pe/noticias/actualidad/noceda-propone-que-ipd-control-e-federacion-peruana-futbol-n300102>: A Congresswoman from the Fujimorist party proposes that IPD control the Peruvian Football Federation

<https://peru.com/futbol/internacional/fifa-impone-su-voluntad-proyecto-ley-peruano-fue-abortado-noticia-546179>: FIFA imposes its will: the proposal was not approved

<https://panamericana.pe/24horas/politica/236330-congresistas-opinan-proyecto-ley-daria-ipd-fpf>

<http://pasedeldesprecio.com/la-politica-nos-quiso-meter-autogol/>

<http://www2.congreso.gob.pe/Sicr/Prensa/heraldo.nsf/CNtitulares2/2B15E0613168EDC80525750D00042D36/?OpenDocument>

¹³ <https://diariocorreo.pe/politica/paloma-noceda-fpf-controlada-ipd-787328/>

on the opinion of the legislator¹⁴, who acknowledged by means of Law No. 30727, Law of Strengthening of the Peruvian National Football Federation, published on February 1, 2018, what was already evident: full autonomy and independence in sports, administrative, economic, financial, organizational and dispute resolution matters regarding its competence, according to the bylaws, regulations and decisions of FIFA and CONMEBOL. It was specified that the National Peruvian Sports Federation maintains a communication link with the Peruvian Sport Institute, to which it informs about its calendar of activities. In the same way, it was specified that the elections shall be carried out after the bylaws of the Peruvian National Football Federation are adapted to the regulations, decisions and recommendations of the International Federation of Association Football (FIFA) and the South American Football Confederation (CONMEBOL).¹⁵

¹⁴<https://larepublica.pe/politica/1150031-paloma-noceda-retirara-cuestionado-proyecto-de-ley-sobre-la-fpf>

¹⁵ **Law No. 30727, Law of Strengthening of the Peruvian National Football Federation**

“Article 1. Incorporation

The Peruvian National Football Federation, also known as the Peruvian Football Federation (Federación Peruana de Fútbol - FPF), is the governing body regarding football at the national level, in its different categories and levels. The Peruvian National Football Federation **is governed by its bylaws** and this law, as well as the bylaws, regulations and decisions of the International Federation of Association Football (Federación Internacional de Fútbol Asociado - FIFA) and the South American Football Confederation (Confederación Sudamericana de Fútbol - CONMEBOL), which take precedence over any other regulations.

Article 2. Autonomy

The National Peruvian Sports Federation is a private legal entity, which has **full autonomy and independence in sports, administrative, economic, financial, organizational and dispute resolution matters** within its competence, according to the bylaws, regulations and decisions of FIFA and CONMEBOL.

Article 3. Resources

The resources of the Peruvian National Football Federation are private resources.

Article 4. Annual Report

At the end of the fiscal year, the Board of Directors of the Peruvian National Sports Federation prepares the institutional report and the respective financial statements, which shall be brought to the attention of the Base Assembly within the first hundred and twenty days of the year. The financial statements are prepared and submitted in accordance with the legal provisions on the subject and the accounting principles generally accepted in the country, and must be reviewed by external auditors.

Article 5. Relationship with the IPD

The National Peruvian Sports Federation maintains a **communication link** with the Peruvian Sport Institute, to which it informs about its calendar of activities.

SINGLE FINAL SUPPLEMENTARY

PROVISION. Election process

The election process for the Peruvian National Sports Federation shall be carried out at the end of the Olympic cycle, keeping the mandate of its current Board of Directors in force up to that time. The aforementioned elections shall be carried out after the bylaws of the Peruvian National Football Federation have been adapted to the regulations, decisions and recommendations of the International Federation of Association Football (FIFA) and the South American Football Confederation

8. In Law, there is a legal principle that puts “all equals” on an equal footing (those who face the same situation or regulation) so that they may exercise their rights as any of their peers would: “Same reason, equal right.” Thus, the rights recognized in favor of the Peruvian Football Federation should be extended to the other National Federations.
9. Our Constitution recognizes the freedom of association. Accordingly, the Constitutional Court has held that the right of association is recognized for the development of various cultural, sports, economic, ideological, work, political, religious, social, or any other kind of activities, carried out by both natural and legal persons in society. Similarly, it has held that this right has a twofold dimension:

“a. A positive dimension encompassing all the powers to form associations (right to form associations), to join existing organizations, and to remain associated, as long as bylaws are not breached.

The power to form organizations includes the possibility of structuring, organizing, and operationalizing the association (principle of self-organization), which is embodied in the bylaws that shall at least establish behavioral rules mandatory for the associates and the workload imposed on them, as well as the rights they can exercise and, of course, the way associates can terminate their relationship with the association, and the way the association can exclude associates.

In this context, it may be noted that the exercise of the right of association involves a plural number of persons who agree in an autonomous, free, and spontaneous way to create a body through which they shall execute a collective, shared, peaceful, and licit project of interest, purposes, ideas or goals.

From this perspective, this Court considers that the right of association is reflected in the existence of legal persons, who are free and able to exercise rights and assume obligations, in order to respond autonomously for their social development, in order to achieve the satisfaction of a common interest or objective, not always profit-motivated.

b. In its negative dimension, it encompasses the power of any person to refuse to be a member of a particular association, as well as the right not to be forced to join an association, or the right not to remain associated against will, or to withdraw at any time.

(CONMEBOL), which consider the participation of representatives of the various actors involved in football, such as players, referees and coaches in the Base Assembly.”

<https://busquedas.elperuano.pe/download/url/ley-de-fortalecimiento-de-la-federacion-deportiva-nacional-p-ley-n-30727-1612558-1>

This negative statement is recognized in paragraph 2) of article 20 of the Universal Declaration of Human Rights, which states that “No one may be compelled to belong to an association.”

Therefore, the regulations contained in the bylaws that prevent the exercise of the right of association in its negative statement, not only contravene the Constitution but also the Universal Declaration of Human Rights. For this reason, no association may deny any withdrawal, resignation or disaffiliation request submitted by its associates.

In this connection, it may be concluded that the right of association guarantees that no one is prevented or prohibited from becoming an associate, as long as it is for lawful purposes, and that no person is forced or compelled to associate”.¹⁶

10. In parallel, the Constitution also recognizes the freedom of contract (article 2, paragraph 13, of the Constitution). The Constitutional Court already had the opportunity to highlight that the right to freedom of contract, recognized in articles 2, paragraph 14, and 62 of the Constitution, is based on the principle of autonomy of will, which, at the same time, is twofold:

“a. Freedom of contract, also known as freedom to conclude, is the right to decide how, when and with whom a contract is concluded; and b. Contractual freedom –which is part of the so-called economic freedoms that make up the economic regime of the constitution (cf. STC 01405-2010-PA/TC, principle 12)–, also known as freedom of internal structuring, is the ability to decide, by mutual agreement, the content of the contract” [SSTC 00026-2008-PI/TC and 00028-2008-PI/TC (accrued), principle 52; STC 2185-2002-AA/TC, principle 2]. From this perspective, according to this Court, “the right to freedom of contract is construed as the agreement or convention of wills between two or more natural and/or legal persons to create, regulate, modify or terminate a legal relationship of patrimonial nature. This relationship -resulting from the agreement of wills- shall concern assets or interests that have economic value, lawful purposes, and do not violate public order laws” (STC 7339-2006-PA/TC, principle 47).¹⁷

11. In this sense, the basic or core content of the right to freedom of contract consists of the following guarantees:

¹⁶ <http://www.tc.gob.pe/jurisprudencia/2011/02243-2010-AA%20Resolucion.html>

¹⁷ <http://tc.gob.pe/jurisprudencia/2012/02175-2011-AA.html>

- Self-determination to decide the conclusion of a contract, as well as the authority to choose the other party.
- Self-determination to decide, by mutual agreement [in other words, by common consent], the subject matter of contractual regulation (...).¹⁸

12. In that line of reasoning, the Constitutional Court was clear about the limits that the Government shall have in relation to the management of sport activities:

*“19. In the opinion of this Court, the promotion of sports is a paramount task of the social and democratic rule of Law, set out in article 44 of the Constitution. Hence, the Government's duty regarding sports is embodied in three aspects: (...) Thirdly, **the Government also assumes the responsibility not to promote events or activities that, while related to sporting events, may challenge**, on one hand, fundamental rights such as the right to effective jurisdictional protection (article 139, paragraph 3, of the Constitution), **the right of association** (article 2, paragraph 13, of the Constitution), among others.*

(...)

*24. Thus, the legislator's mandate to integrate a policy on sports involving public and private aspects, is brought to light. (...) **But this sports declaration, as well as of public interest, does not cover all scenarios that may occur in the sporting world, since legal relationships originated within the federations or clubs, continue to fall within the scope of private Law and are regulated by their own bylaws.**”¹⁹*

13. Seen this way, the Law of Promotion and Development of Sport, which covers the actions of the IPD, infringes the constitutional rights listed above.
14. IPD not only violates its own 2011-2030 National Sports Plan²⁰, but also the International Olympic Charter²¹, in which this same plan is based on, and

¹⁸ <http://tc.gob.pe/jurisprudencia/2012/02175-2011-AA.html>

¹⁹ <http://www.tc.gob.pe/jurisprudencia/2008/03574-2007-AA.html>

²⁰ 2011-2030 National Sports Plan

II. LEGAL STANDARDS AND INTERNATIONAL FRAMEWORK FOR SPORTS.

2.2 International Framework for Sports

²¹ International Olympic Charter

Art. 4 “4. *The practice of sport is a human right. Every individual must have the possibility of practicing sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play. The organization, administration and management of sports shall **be controlled by independent sport organizations.**”*

which constitutes its own legal framework, and which states that “the organization, administration, and management of sport shall be controlled by independent sport organizations.”

15. When reading the Bylaws, it is evident that these do not provide for any form of intervention by the IPD, not even as a possible sanction. With some interpretive effort, it could be accepted that an administrative sanction may exclude the FEDERATION from the National Sport Registry, but it is unconstitutional to intervene the FEDERATION's management, as this contravenes the above-mentioned constitutional principle of self-organization.
16. A clear example can be seen in 2010 and 2011 Registration Forms. The 2010 form evidences the cancellation of the FEDERATION's registration in the National Sport Registry (RENADE). The 2011 form, after the FEDERATION's lawsuit, which went all the way to the last instance (cassation), shows that the Judiciary ordered the FEDERATION's reinstatement to RENADE.

IV. APPEALS FILED BEFORE THE SUNARP

1. After reading the Registry Entries, we evidence at least three appeals against the refusal of registration from the elected Board of Directors, which may hinder the registration of the Work Group as a member of the association's governing body.
2. The filing of appeals results from the exercise of the right to plurality of instances. It is the registrar's responsibility to examine the legality of the appeal content. Questioning the filing of these, leads to questioning the constitutionally recognized right to defense and due process.²² The filing of any appeal is subject to compliance with admissibility requirements; if these are met, the merits of the challenge shall be analyzed. As has been noted, no legal breach took place.
3. It is likely that the existence of an abuse of right may be alleged; however, even in that case, such a statement is for the authority to make (which, from our point of view, would be the Judiciary). And so far no one has made such a

²² **Political Constitution of Peru, 1993**

“Article 139.- Principles and rights of the jurisdictional function:

(...)

3. The observance of due process and jurisdictional protection.

No person shall be diverted from the jurisdiction predetermined by law, nor shall anyone be subjected to proceedings other than those previously established, or be tried by exceptional jurisdictional bodies or special commissions created for that purpose, whatever the official title.

(...)

6. The plurality of the jurisdictional level.

(...)

8. The principle of never failing to administrate justice, despite loopholes or deficiencies in the law.

In such case, the general principles of law and customary law must be applied.

(...)”

statement. Moreover, it is contradictory to allege an abuse of right when the admissibility requirements are precisely being met.

4. If the participation of FIBA contributes to the commitment of those involved in calling for new elections, there is no point in worrying about the appeals filed. Similarly, there is no point in insisting on the registration of the IPD's Work Group. If there is indeed such commitment, whether the registered Board of Directors remains or the Work Group is registered, the result is the same: new elections.
5. It is a fallacy to argue that IPD is the only one entitled to call for "valid" elections through the Work Group. First of all, the Directive No. 004-2013-IPD/DINADAF calls for the fulfillment of requirements by the elected Board of Directors. If the FEDERATION (or the elected Board) meets these requirements, its registration in RENADE shall proceed.

"7.2.3 DOCUMENTS TO BE SUBMITTED TO THE PERUVIAN SPORT INSTITUTE – IPD, TO OBTAIN THE RECOGNITION OF THE ELECTED BOARD OF DIRECTORS"

The FDN requesting the recognition or new incorporation of its Board of Directors must submit the following documentation:

- a) *Request by the retiring President of the Board of Directors or the person empowered with the recognition of the elected Board of Directors.*
- b) *Copy of the minutes of the Base Assembly that recorded the election's result.*
- c) *Uncertified copy of the bylaws and its amendments.*
- d) *Copy of the Registry Entry issued within no more than 30 days, in which the validity, term of office, members and positions exercised of the last Board of Directors elected is accredited.*
- e) *Documents certifying, concerning the elected President and Vice-President, the following:*
 - *Candidates shall prove their status as base sports leaders by means of a document issued by the base body to which they belong, indicating the date of cessation of activities as member of the Board of Directors, or have been or have the status of high-level athlete, accredited by a certificate issued by the competent officer of the IPD.*
 - *Proof of higher education, whether university or technical, by an original certificate or certified copies thereof, issued by the Educational Institution of origin.*
 - *Not having been sanctioned by the relevant federation's sport justice or by the Supreme Council of Sports Justice and Sports Honors (CSJDHD), which shall be accredited by a certificate issued by the aforementioned entity.*
 - *Not having been sanctioned in criminal proceedings for intentional crimes, which shall be accredited by Sworn Statement.*
 - *Not having been sanctioned in criminal proceedings for intentional crimes, which shall be accredited by Sworn Statement.*

- *The above-mentioned documents may be subject to further scrutiny by the Peruvian Sport Institute - IPD."*

6. The Directive does not specify the cases in which the Work Group should be appointed, but the Law of Promotion and Development of Sport (Law No. 28036) does. Note that it is absurd to intervene a FEDERATION by means of a Work Group, for the mere fact of not complying with some requirement.

Article 11.- Duties of the Board of Directors

The duties of the Board of Directors of the Peruvian Sport Institute (IPD) include the following:

(...)

12. Dictate, implement and disseminate the policy of prevention and education of young athletes on the consumption of doping substances and drugs, because of their negative impact on their health and sporting careers. Media outreach is the duty of the members of the National Sports System (SISDEN).

*13. Appoint, when deemed appropriate, **work groups** in national sports federations, in such a way that it does not interfere with the normal development of the corresponding sport discipline.*

The appointment is to be made in the following cases:

*a) When there is an electoral process **observed or contested before the Judiciary** that, in the opinion of the IPD's Board of Directors, merits such appointment.*

*b) **Lack of representation registered in the Public Records.***

*c) In case they can not continue operating or the legal provisions or **provisions of the IPD are breached**, and in other cases it considers pertinent.*

*d) **Lack of representation**, which could be caused by abandonment of office, removal or **simply because there is some irregularity in the electoral process that prevents its registration in Public Records**. In the latter case, since there are no legal representatives validly registered, the legal entity would not have the capacity to exercise its position, thus the cause of dissolution foreseen in the bylaws or in article 94 of the Civil Code could be applied.*

*e) **In case of disregard to the Law of Promotion and Development of Sport or to the dispositions of the governing body** of the National Sports System, that is, the IPD, to which the national sports federations belong.*

*The work groups are composed of three (3) to five (5) members and their basic role is to restore the legality of the sports federation, as well as to regulate its operation, refine the electoral list and **call elections**, for which it has the powers of the Board of Directors plus those stated in articles 45 and 46.*

The members of the work groups can not be members of the board of directors of the national sports federations in which they are involved.

(...)"

7. Interestingly, this measure violates another Law: the Civil Code. In fact, the Civil Code (which precisely regulates associations) provides that any agreement violating legal or statutory provisions can be contested by the associates in court. In other words, the only ones entitled to contest are the associates, not the IPD.²³ It should be noted that there are no contestations against the electoral process by any associate, but on the contrary there are multiple minutes, communications, and announcements from them expressing their conformity with the elections held and calling for them to be respected.
8. There is no lack of representation either. Firstly, the legal representatives are those registered in Public Records. Secondly, the associates holding managerial positions are accountable to the association, according to the rules of representation.²⁴ Thirdly, the General Assembly is the association's supreme body²⁵, and it is its duty to appoint the members of the Board.
9. One could argue that the IPD is acting pursuant to the Law of Promotion and Development of Sport (Law No. 28036); however, no regulation may contravene the provisions of our Constitution. Let us remember that the Constitutional Court was clear about the limits that the Government shall have in relation to the management of sport activities:

*“19. In the opinion of this Court, the promotion of sports is a paramount task of the social and democratic rule of Law, set out in article 44 of the Constitution. Hence, the Government's duty regarding sports is embodied in three aspects: (...) Thirdly, **the***

²³ **Civil Code of 1984**

Contestation of agreements in court

Article 92.- Any associate has the right to contest in court any agreement that violates legal or statutory provisions. All contest actions shall be exercised no later than sixty days from the agreement's date. These can be filed by attendees, if they left proof on record of their opposition to the agreement, by non-attending associates, and by those who have been illegitimately prevented from casting their vote. If the agreement is registrable in the registry, the contest can be filed no later than thirty days after the date of registration. Any associate can take part in the proceedings, at his or her own expense, to defend the agreement's validity.

The contest is filed before the Civil Judge of the association's jurisdiction and is handled as an abbreviated process.

²⁴ **Civil Code of 1984**

Managerial Accountability

Article 93.- Associates holding managerial positions are accountable to the association, in accordance with the rules of representation, except for those who have not participated in the act that caused the damage or who placed their opposition on record.

²⁵ **Civil Code of 1984**

General Assembly

Article 84.- The general assembly is the association's supreme body.

Powers of the General Assembly

Article 86°.- The General Assembly elects people that make up the board of directors, approves the accounts and balance sheets, decides on the amendment of the bylaws, the dissolution of the association and other matters that are not the scope of other bodies.

Government also assumes the responsibility not to promote events or activities that, while related to sporting events, may challenge, on one hand, fundamental rights such as the right to effective jurisdictional protection (article 139, paragraph 3, of the Constitution), the right of association (article 2, paragraph 13, of the Constitution), among others.

(...)

24. Thus, the legislator's mandate to integrate a policy on sports involving public and private aspects, is brought to light. (...) **But this sports declaration, as well as of public interest, does not cover all scenarios that may occur in the sporting world, since legal relationships originated within the federations or clubs, continue to fall within the scope of private Law and are regulated by their own bylaws.**²⁶

11. The game theory takes shape in this scenario. For the FEDERATION, appeals are likely to be a defense mechanism against the pressures from the IPD, and constitute the sole guarantee that the new elections will actually take place. IPD can have no moral interest left but to hold transparent elections. It could have no other interest. If so, the IPD, the FEDERATION and FIBA may turn to the National Office of Electoral Processes to verify the transparency of elections.²⁷
12. From the perspective of the economic analysis of law, requesting the withdrawal of appeals and/or title registration applications in order to have a Work Group registered, and calling for elections afterwards, is a complex rule with an objective that can be achieved with a simpler agreement or rule. If there is a real commitment, the simplest and most efficient rule is to call for elections, recognize the Board of Directors, register it in RENADE, submit the registration application to the Registry of Legal Entities of SUNARP, and then withdraw from contestations or applications. Applying this formula takes less time than that proposed by FIBA.

“The relevant comparison between simple and complex rules should be conducted not in the language of aspiration, but in the language

²⁶ <http://www.tc.gob.pe/jurisprudencia/2008/03574-2007-AA.html>

²⁷ “The Technical Assistance consists of specialized advice on electoral matters offered by ONPE to the members of electoral committees or electoral processes' organizers from political organizations, public and private institutions, and civil society organizations requesting it, on a permanent basis, free of charge, and nationwide.

(...)

This service may include advising on the planning of the election stages and elaboration of the electoral schedule; the drafting of regulations and electoral roll; registration of candidates; conformation of polling stations and organization of the electoral day; resolution of contestations and announcement of results. In addition, it may provide support in the verification of electoral rolls; ballot boxes and booths lending; ballot, certificates, posters and other electoral documents; and the training of polling stations' members, representatives, and voters.”

Source: <https://www.web.onpe.gob.pe/servicios/asistencia-tecnica/>

of realizable achievement. It is that more humble task are better developed by simple rules, for their relative cost-effectiveness and certainty forestall the vast amounts of intrigue brought into the legal system by the relentless, if naive, pursuit of perfection.”²⁸

14. In that sense, given current circumstances, the only thing necessary is for those involved to set the date for elections. If the FEDERATION fails on its promise, FIBA may impose a “sanction” in case elections are not held on the scheduled dates. Thus, the Board of Directors, registered at the moment of the call, should be the one to call it, as the General Assembly is the one who adopts the agreements.
15. Since the General Assembly is the association's supreme body, its decisions shall rectify any deficiencies or errors made in the past by the Board of Directors. Therefore, the Public Registrar shall not deny the registration if the elections and the General Assembly were carried out in accordance with the Bylaws. Having overcome this aspect, the only reason why the registration could be denied would be the lack of registration in RENADE (administrative registry within the IPD’s scope). But we understand that, as long as the requirements set out by Directive No. 004-2013-IPD/DINADAF are met, the registration in RENADE shall not be denied.

V. CONCLUSIONS

1. The Law of Promotion and Development of Sport (and its amendments) includes interventionist and unconstitutional provisions that violate fundamental rights, such as freedom of association and freedom of contract.
2. From a Constitutional perspective, it is unusual that the lack of administrative recognition (administrative record) entails the loss of the FEDERATION’s representation capacity.

²⁸ EPSTEIN, Richard: Simple Rules for a Complex World. List of titles from the Pontificia Universidad Católica del Perú. Lima. 2005. p. 62.

3. The title registration applications and/or the filing of appeals are subject to compliance with the admissibility requirements, result from the exercise of the right to plurality of instances, and do not breach any legality.
4. If the participation of FIBA contributes to the commitment of those involved in calling for new elections, there is no point in worrying about the appeals filed. Similarly, there is no point in insisting on the registration of the IPD's Work Group. If there is indeed such commitment, whether the registered Board of Directors remains or the Work Group is registered, the result is the same: new elections. However, a simpler, more efficient, and time-effective rule would be that the Board of Directors, registered in Public Records at the time of the call, would call for elections, and the new Board of Directors is afterwards recognized, registered in RENADE, its registration application is filed in the Registry of Legal Entities of SUNARP, and finally withdrawing from contestations.
5. Please note that, since the General Assembly is the association's supreme body, its decisions shall rectify any deficiencies or errors made in the past. Therefore, the Public Registrar shall not deny the registration if the elections and the General Assembly were carried out in accordance with the Bylaws. Having overcome this aspect, the only reason why the registration could be denied would be the lack of registration in RENADE (administrative registry within the IPD's scope). But we understand that, as long as the requirements set out by Directive No. 004-2013-IPD/DINADAF are met, the registration in RENADE shall not be denied.



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