

DETAILED ANALYSIS
Proposals for the ISU 50th Ordinary Congress 2004
Amendments to the Constitution and the General Regulations

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III. Proposal 52 -- Revising the Dispute Resolution Process
(see separate Introduction)

This Proposal represents a complete re-write of existing Articles 22 and 23 and a complete change in the procedures established for resolution of disputes within the ISU family. It should be accompanied by a detailed description of how the new provisions of the Proposal would change the existing procedures for dispute resolution, but it is not. Indeed, it does not even comply with the minimal requirements of Section A para 2.b) of the Procedural Provisions of the Constitution concerning the requirement for inclusion of a budget.

As noted by the Legal Advisors in their report to the 48th Congress in 2000, the purpose of the dispute resolution process of the ISU should be “to insure that decisions involving skating expertise and judgment are made by skating experts, not by outsiders.” The report of the Legal Advisors to the 48th Congress also included the following assertion: “Arbitrary conduct by any ISU official or organ may be addressed by political action at the next-following ordinary or extraordinary Congress.” In summary, the view expressed at that time was that (1) appeals outside of the ISU should be minimised, even if (2) “arbitrary conduct” would thus not be subject to corrective authority until the next following Congress. Even for Members, that can be a long time to endure the injustice of misconduct by any ISU official or body. For individuals who are the subject of such “arbitrary conduct,” the chance of achieving justice through that route is an illusion as they do not have direct access to the proceedings of Congress and will not have any access (even indirect) except out of the kindness of a Member.

In reality, the Constitution does not contemplate that the Congress would become a usual part of the dispute resolution process. If there are appropriate dispute resolution procedures in place, it would never have to be. Indeed, the provision upon which the assertion of the Legal Advisors is based simply reserves to the Congress the supreme authority to override any decision made by any ISU official or body, whether or not it was “arbitrary.” Moreover, there are avenues of dispute resolution which are completely outside of the ISU and completely apart from any provisions of the Constitution. Those include the courts of Switzerland and the Swiss Ministry of Justice which supervises the enforcement of Part I Title II Chapter II of the Swiss Civil Code to which the ISU is subject, the International Olympic Committee in its determination of whether the ISU “statutes, practices and activities ... [are] ... in conformity with the Olympic Charter”, and other judicial or quasi-judicial bodies.

If the goal of the Members is to keep the dispute resolution process within the organisation, it is imperative that the procedures specified in the Constitution are effective in protecting the rights of the Members and the rights of persons claiming standing as participants in the

activities and/or positions of the ISU. Proposal No. 52 should serve as an opportunity for the Members to determine the actual purpose for the dispute resolution process should serve and only then decide whether any changes should be made and, if so, what.

In that context, the Members should consider the following factors and questions:

- 1 The Members and persons claiming such right of standing should only be willing to forego outside dispute resolution if the internal resolution procedures are clear.
 - ▶ ***The structures set forth in Proposal No. 52 are confusing and complex. They are not as clear in the protection provided to them as the current provisions of Articles 22 and 23, and actually much less.***
- 2 The Members and persons claiming such right of standing should only be willing to forego outside dispute resolution if the internal resolution procedures are clearly designed to protect the rights of persons who do not control the lever of power within the ISU.
 - ▶ ***The structures set forth in Proposal No. 52 are less likely to do that than the current provisions of Articles 22 and 23.***
- 3 The Members and persons claiming such right of standing should only be willing to forego outside dispute resolution if the internal resolution procedures clearly cover all instances in which arbitrary conduct by any ISU official or organ can be remedied promptly and fairly.
 - ▶ ***The provisions of Proposal No. 52 do not achieve that because they are limited to instances of alleged “disciplinary or ethical offences”.***
 - ▶ ***There is no protection inside the ISU against “arbitrary conduct by an ISU official or organ” which does not fall within the category of “disciplinary or ethical offence”, even if it violates the Constitution or Regulations. The only remedies are to bring legal action in outside procedures or to achieve sufficient publicity of the “arbitrary conduct” to shame the “ISU official or organ” to correct the injustice.***
 - ▶ ***The Disciplinary Commission does not have jurisdiction over “complaints involving disputes among Members,” even if they involve disciplinary or ethical offences.***
 - ▶ ***Performance evaluations are automatically outside the jurisdiction of the Disciplinary Commission, even if they reflect “arbitrary conduct” by the official or body making that evaluation.***
 - ▶ ***The Appeals Commission has jurisdiction over appeals from certain decisions taken by the Council. That jurisdiction is limited to actions taken by it against Members (not individuals claiming such right of standing), and only if such action results in a “penalty or suspension of membership”.***

- 4 Members and persons claiming such right of standing should only be willing to forego outside dispute resolution if the internal resolution procedures guarantee rights of fundamental fairness.
- ▶ *The provisions of proposed Article 22 and Article 23 grant to the Disciplinary Commission and to the Appeals Commission complete discretion as to whether to afford the opportunity of the party to have a hearing. In other words, such hearing is not a right but only a gift.*
 - ▶ *The jurisdiction of the Appeals Commission is limited solely to appeals of (1) a decision against jurisdiction of the Disciplinary Commission, which appeal may be brought by any of the parties, (2) a decision of the Council imposing a penalty or suspension of membership against any Member, which appeal may be brought by the Member, and (3) a decision by the Disciplinary Commission against a party accused of a “disciplinary or ethical offence”, which appeal may be brought by the party thus found to have committed such offence. A proceeding against the Council or a member of it for an “ethical offence” is thus not subject to appeal if the Disciplinary Commission rules in favour of the Council.*
 - ▶ *The Council has authority to define and re-define what an “ethical offence” is, through adoption and modification of the Code of Ethics. If a matter involving the Council is pending before either Commission, the Council thus might have the ability to cancel the proceeding by changing the Code of Ethics and define its own conduct as not being an “ethical offence”.*
- 5 The Disciplinary Commission and the Appeals Commission are each identified in the Proposal as being an “independent ISU body elected by the Congress.”
- ▶ *That is not achieved where the Council has the authority to approve or disapprove the procedures and rules of both of those Commissions. Only the Congress can do that without reducing the independence of those Commissions, not the Council or any other “official or organ” which might be subject to the jurisdiction of those Commissions.*
 - ▶ *That is not achieved where the Secretariat serves in an administrative capacity for each of the Commissions. Actual “independence” of both Commissions cannot be achieved unless each has staff support which is OUTSIDE the chain of authority of the Council, direct or indirect.*
 - ▶ *That is not achieved where the Council has jurisdiction over charges of a “disciplinary or ethical offence” which are lodged against any member of the Disciplinary Commission.*
 - ▶ *The Commissions must have sources of funds to conduct their operations, or they will they be dependent on the Council for receipt of funding. In either case, the Members must be informed of the economic impact, but that is not stated in the Proposal as required by Article A. para 2.b) of the Procedural Provisions.*

6 The provisions of Articles 22 and 23 serve as the “agreement” for arbitration required by the Court of Arbitration for Sport in order for it to accept jurisdiction over disputes arising under the ISU Constitution and General Regulations.

- ▶ *The provisions of proposed Articles 24 and 25 in Proposal No. 52 do not provide adequate protection of the Members, their affiliated clubs, their individual members and/or any other person claiming standing as a participant in the activities of the Member or of the ISU.*

Adoption of Proposal No. 52 would have a serious, detrimental impact on the rights of the Members, and of the individuals associated with the Members who participate in ISU events. The result will limit Members and those individuals to outside avenues in protecting those rights. For most (if not all) Members, the costs associated with such outside procedures would be prohibitive. Thus, only the well-funded Members would have a real ability to protect their rights and/or the rights of persons associated with them. The complexity, confusion, and limitations on the scope of dispute resolution procedures are a stark contrast with Proposals No. 53, 54, 56 and 57 which actually do clarify and solidify rights of Members and associated individuals in the dispute resolution process. Proposal No. 52 should be **REJECTED**.