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# FIFA, Feminism, and Forum: Adjudicatory Authority in Football's International Governance System

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# FIFA, Feminism, and Forum: Adjudicatory Authority in Football's International Governance System

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## Abstract

The economic, political, and social monopoly over the world's most popular sport that football governance organizations, headed by FIFA, collectively possess, has conferred upon the system of international football governance a degree of legitimacy on par with that enjoyed by civil governments. The international system of football governance has used this clout, combined with and bolstered by an extensive internal dispute resolution system, to avoid liability and scrutiny before civil governments.

A doctrinal failure of civil procedure makes remedy a driving force in determining where a dispute will be adjudicated, despite not being a factor in the legal forum selection test. Remedy remains important even to the private dispute resolution infrastructure—which is also subject to political and other extra-legal considerations—that the international system of football governance favors. The international system of football governance must reevaluate its posture towards justice-seekers to preserve the balance between its extra-legal structure and the legitimacy civil governments' accord to it. Improving the causes of action and remedies it offers will benefit both the international system of football governance and the international legal order.

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## Introduction

Bribery charges brought in 2015,[2] ongoing investigations implicating the current FIFA president,[3] and the resignation—mere weeks before the writing of this paper—of the then-Attorney General of Switzerland surrounding allegations of football-related corruption,[4] belie a longer-standing drought of judicial proceedings involving football governance bodies. This is true despite the ubiquity of football activities taking place across the globe.

Football governance organizations' collective monopoly over the world's most popular sport affords the system of international football governance several means to avoid being haled to appear before civil judicial bodies. Once such means is the international system of football governance's own internal branch of dispute resolution mechanisms, dedicated to football-related disputes. This private dispute resolution schema exploits the failure of civil procedure to account fully for factors that fall outside legal tests, and yet may be determinative of how the legal process unfolds. Specifically, civil procedure's forum selection doctrine lacks in its ability to guide parties towards a single optimal forum. This failure encourages adjudication in the forum selected by a plaintiff, who is likely motivated greatly by the potential remedy a forum offers. Football governance's private adjudicatory channels, backed by mandatory arbitration, respond to this failure by designating an arbitral forum *ex ante*.

The scale of football governance's mandatory arbitration scheme is such as to pose a threat to the public legal order alongside which it operates. This is problematic to the extent that this private dispute resolution system potentially compromises the access to justice available to an individual plaintiff with grievances against any international football governance body. However, a recent court case filed by the US Women's National Team against the US Soccer Federation in US federal court reveals that the promise of a

[2] The US Department of Justice recently unsealed a new indictment relating to this same matter. Michael McCann, W*orld Cup TV Rights, Host Vote Bribes Back in Focus in Fresh FIFA Scandal Indictments*, 77 April 2020, available at https://www.si.com/soccer/2020/04/07/fifa-scandal-indictment-world-cup-vote-tv-rights-bribes-fox-qatar-russia.

[3] Tariq Panja, *FIFA President Gianni Infantino Faces Criminal Investigation*, 30 July 2020, available at https://www.nytimes.com/2020/07/30/sports/soccer/fifa-gianni-infantino-investigation.html.

[4] Graham Dunbar, *Swiss attorney general offers to resign in FIFA case fallout*, 24 July 2020, available at https://www.nytimes.com/aponline/2020/07/24/sports/soccer/ap-soc-fifa-investigation-lauber.html.

remedy remains important even in the face of the purportedly mandatory arbitration system operated by the international football governance system.

Football governance's claim to the power of adjudication has held thus far due to the tremendous power and legitimacy conferred by the system's control over any and all structured football activities taking place worldwide. But the political realities that underpin both the right to adjudicate and the right to a remedy jeopardize the international system of football governance's private dispute resolution system as courts, beginning with those in the US, have proven increasingly willing to challenge that system's claim to exclusive adjudication. Football governance's struggle to offer meaningful remedies exacerbates the threat to the legitimacy of its internal dispute resolution systems.

The promise of a remedy contributes greatly to the appeal of a forum and therefore, in light of forum selection's doctrinal weaknesses, which forum ultimately will adjudicate. Given the importance of its internal dispute resolution system to the status of its organizational infrastructure more broadly, the international football governance system is well-advised to improve the causes of action and remedies available through the private channels it prefers.

## I. Internal Private Dispute Resolution as a Strategy to Reduce Civil Liability

The coordinated system of mandatory arbitration international football governance has established (intrinsically backed by national courts, predominantly those of Switzerland) operates on such a scale as to differentiate it even from other, also problematic mandatory arbitration arrangements. Football's corporate governance model and internal dispute resolution system, taken together, form part of a strategy that has helped football governance bodies successfully reduce their exposure to scrutiny before national and supranational courts. This is problematic where football's private adjudicatory system fails to offer access to meaningful remedy.

### A. Concentration of Power through Corporate Governance

Ensuring consistency throughout football governance across the globe concentrates the monopoly, power, and control that football governance bodies collectively wield over the world's most popular sport into a comprehensive system. This

power, combined with the systematic mandatory governing law the federations provide, has historically helped football governance insulate itself from oversight by national and supranational governing bodies, calling the neutrality of its internal dispute resolution channels into question.

### i. Private Adjudicatory Order formed through Corporate Governance

Football governance organizations across the globe are connected into a network by an airtight corporate governance structure. This international system of football governance, (hereinafter ISFG) uses its corporate governance model to maintain a private dispute resolution system that extends the regime's control over not only disputes between its constituents, but also over those in which ISFG bodies are implicated. Viewed as part of a larger strategy to reduce ISFG's exposure before civil governments, ISFG's comprehensive dispute resolution system lacks the degree of neutrality appropriately expected of adjudicatory bodies.

The *Fédération Internationale de Football Association* (FIFA) heads ISFG. FIFA is football's "ultimate administrative authority...[governing]...all facets of the game."[5] FIFA delegates management responsibilities of international football to six regional confederations.[6] 211 member associations, each affiliated with a nation, are required to be members of FIFA, and in most cases their respective regional confederation as well.[7] For example, in the US, as provided by federal statute, the US Soccer Federation (USSF) is the designated body managing the US's representation in international football competitions.[8] This designation gives the USSF authority to oversee all competitive football programming throughout that nation, spanning from youth to adult, amateur to

[5] USSoccer.com, *FIFA – Soccer's World Governing Body* (Accessed 3 May 2020), available at https://www.ussoccer.com/history/organizational-structure/fifa.
[6] FIFA.com, *Associations and Confederations* (Accessed 29 September 2019), available at https://www.fifa.com/associations/.
[7] Art. 11(2), FIFA Statutes June 2019 edition, available at https://resources.fifa.com/image/upload/fifa-statutes-5-august-2019-en.pdf?cloudid=ggyamhxxv8jrdfbekrrm..
[8] *See* 36 U.S.C. §220521(a) (providing for the designation of a "national governing body" for any "sport that is included on the program of the Olympic Games or the Pan-American Games [or as paralympic sports organizations for any sport that is included on the program of the Paralympic Games]"), available at https://uscode.house.gov/view.xhtml?path=/prelim@title36/subtitle2/partB/chapter2205&edition=prelim.

professional.[9] Reprising the "member" model relating FIFA to its member associations, organized soccer throughout the US is conducted by USSF "members" that are subject to USSF directives on many aspects of the game, down to the format of youth competitions.[10]

Extending organizational control to disputes in which ISFG is implicated, by virtue of either its "parent" or quasi-subsidiary entities, plays an essential role in furthering ISFG bodies' insulation from scrutiny or liability before national courts. ISFG enforces consistency by requiring regional confederations not only to comply with all FIFA statutes, but also to transpose the obligations codified in FIFA statutes into their own governance statutes.[11] This transposition schema underpins ISFG's mandatory dispute resolution regime. Under the ISFG rules promulgated by FIFA, participants in the multifarious football-related activities it oversees must accept the primacy of ISFG-approved private dispute resolution channels over those otherwise available in civil legal systems.[12] Article 59§1 of the FIFA Statutes prohibits "recourse to ordinary courts of law" for "members, affiliated players, and officials."[13] All parties to a dispute arising in ISFG channels are required to recognize the Court of Arbitration for Sport (CAS) as the competent appeals body for such disputes, and to be bound by CAS decisions.[14] The FIFA Statutes require individual associations to "[stipulate] that it is prohibited to take disputes in the association or disputes affecting leagues, members of leagues, clubs, members of clubs, players, officials and other association officials to ordinary courts of law."[15] Article

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[9] *See* Bylaw 102, Bylaws of the United States Soccer Federation, Inc. (2019-2020), available at https://cdn.ussoccer.com/-/media/project/ussf/governance/2019/bylaws/2019-20-bylaw-book-20190530.ashx?la=en-us&rev=ea5d5feb6fd0410493cf9fea063a3de2&hash=07C07E87102EB6FA160198B34C72726A (identifying the federation's purpose as, *inter alia*, "to promote, govern, coordinate, and administer the growth and development of soccer in *all* its recognized forms in the United States for *all* persons of *all* ages and abilities, including national teams and international games and tournaments" (emphasis added)).

[10] *See, e.g.* USYouthSoccer.org, *A New Game is Afoot – Talking USSF Mandates* (Accessed 3 May 2020), available at https://www.usyouthsoccer.org/a new game is afoot - talking ussf mandates/. US Youth Soccer is one of five youth association members of USSF, with "55 State Associations and more than 5,000 clubs." *Id*.

[11] FIFA Statutes *supra* n.__ at Art. 22(3); Art. 14.

[12] *See Id*. at Art. 14.

[13] *Id*. at Art. 59(1)-(2).

[14] *See id*. at Art. 14, 15, 23, and 59. Like FIFA, CAS is an international governance institution registered under Swiss law. *See* Louise Reilly, *Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes, An Symposium*, 2012 J. Disp. Resol, 69 n.26 (2012), available at: https://scholarship.law.missouri.edu/jdr/vol2012/iss1/5 (listing other International Federations registered in Swizterland).

[15] FIFA Statutes *supra n.*__ at Art. 59(3).

23 governing confederations' statutes specifically requires, "The confederations' statutes must...in particular contain, at a minimum, provisions [that]...all relevant stakeholders must agree to recognise the jurisdiction and authority of CAS and give priority to arbitration as a means of dispute resolution."[16] Articles 23 and 59 thus preference the adjudication channels contained within or approved by FIFA and ISFG affiliates, with CAS as the competent authority to review appeals from ISFG adjudicatory bodies, throughout the entirety of the international football governance system.[17]

At the head of ISFG, FIFA possesses a high level of "operational" control over its "members" with respect to business policy and decision-making.[18] However, the "member" relationship between FIFA and other ISFG affiliates, including regional confederations, national associations, and individuals (e.g., players, coaches, officials), helps to shield FIFA from legal liability for the conduct of other ISFG affiliates.[19] When challenged in court, FIFA, as parent companies often do, may deny jurisdiction on the basis that the challenged activities were conducted by its affiliates rather than itself.[20] Despite the pervasiveness of football activities worldwide, FIFA's jurisdictional exposure

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[16] *Id*. at Art. 23.

[17] It is true that the FIFA Statutes acknowledge that some valid instances of recourse to civil court may be possible. Since 2001, Article 59 of the FIFA Statutes, prohibiting recourse to civil court, has contained a single qualification: "unless the FIFA regulations or binding legal provisions specifically provide for or stipulate recourse to ordinary courts of law." FIFA Statutes *supra n.* __ at Art. 59(1)-(2). No current FIFA regulations provide for recourse to ordinary courts of law. In the single reference to ordinary courts of law, Article 22 of the FIFA Regulations on the Status and Transfer of Players acknowledges the possibility of recourse thereto only as follows: "Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear [certain disputes]." Art. 22, FIFA Regulations on the Status and Transfer of Players (Accessed 25 Oct 2019), available at https://resources.fifa.com/image/upload/regulations-on-the-status-and-transfer-of-players-2018-2925437.pdf?cloudid=c83ynehmkp62h5vgwg9g. Apart from Article 22's sole reference, the right to recourse to ordinary courts of law is otherwise *not* made explicit in the FIFA Regulations. The Regulations on the Status and Transfer of Players, furthermore, are only applicable to a specific subset of disputes. *See id*. at Art. 1 (Scope). The right to recourse to ordinary courts of law thus remains governed by the FIFA Statutes' Article 59 qualification requiring associations to implement "binding legal provisions" prohibiting it, except where national or international law requires access to such courts.

[18] *See Craig v. Lake Asbestos of Quebec, Ltd.*, 845 F.2d 145, 148-50 (3d Cir. 1998) (discussing the requisite involvement of a parent company in a subsidiary's "policy and business practice...[not only finances])" for a finding that piercing the corporate veil may be permitted.

[19] *See id*. at 151 (on the importance of financial control, not at issue on the basis of the membership relationship between FIFA and member affiliates. Although FIFA distributes prize money to affiliates, this would fall far short of the "high standard" required to establish domination. *Id*. at 152).

[20] Doug McIntyre, *World Cup turf war suit heads to mediation*, 7 Nov 2014, available at https://www.espn.com/espnw/news-commentary/story/ /id/11837028/women-soccer-stars-court-mediation-resolve-canada-world-cup-artificial-turf-suit.

is thus minimized. Operated to maintain a robust private dispute-resolution system, ISFG's cohesive internal governance—rather than increase the organization's exposure—imparts more control to the organization to protect itself from oversight by national or international governing bodies by resolving disputes internally.

### ii. Complementary Elements of a Strategy to Avoid Exposure before Civil Adjudicatory Bodies

ISFG's adjudicatory regime can be seen alongside other activities in which the organization engages as part of a strategy to reduce its own exposure before civil (including both national and supranational) courts. Made possible by a consistent and uniform governance model that concentrates football's international power into a cohesive organizational structure, the size and scale of ISFG allow FIFA, the multi-billion dollar-generating body that sits at its head, and other affiliates to engage in diplomacy and other sovereign-like behaviour with civil governments, at both a national and supranational level.[21] The high-level diplomacy in which ISFG engages serves as a sword helping protect ISFG affiliates from liability both through favorable representation and by helping the organization navigate complex legal and regulatory schema, perhaps crafting out formal or de facto exceptions.[22] ISFG affiliates' ability to negotiate with government oversight bodies facilitates the organizations' compliance with—or even the applicability of—regulation, thus reducing the incidence of ISFG affiliates being haled into court.[23]

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[21] Though in theory, supranational governing bodies—such as the EU—should not be subject to the same political pressures that give ISFG's non-intervention policy its effectiveness with respect to nation-states, the soccer establishment in Europe is strong and the effectiveness of ISFG's diplomatic practices carried out by FIFA and the Union of European Football Associations (UEFA), Europe's regional confederation, have been particularly pronounced in this region. *See e.g.* European Parliament: Briefing, *Good Governance in Sport* (2017), available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/595904/EPRS_BRI(2017)595904_EN.pdf (describing the "partnership between public authorities and sports stakeholder" and the "cooperation-based approach" the EU holds towards sports governance bodies including FIFA and UEFA).

[22] *See, e.g.* Commission Decision 37/398 of 23 July 2003 (granting an exemption to Article 81 of the EC Treaty and Article 53 of the EEA Agreement permitting UEFA's joint selling of the commercial rights of the UEFA Champions League).

[23] Compare the EC proceedings against UEFA that were withdrawn after the latter revised its agent regulations following the CJEU upholding COMP 37.124, 16 April 2006 in *Piau v. Commission* (2006) with the EU's withdrawal of COMP 39.177, an anti-competition provision related to the use of preferential credit card treatment around the 2006 German World Cup, subsequent to negotiations between UEFA and the EC.

Scholars have also identified the reinforcing effects of ISFG's "non-intervention" policy, which functions as a shield complementing its diplomacy sword to reduce the system's exposure to liability.[24] Under the FIFA Statutes, "[e]ach member association shall manage its affairs independently and without undue influence from third parties."[25] This "non-intervention" policy has been used to discourage national governments from exercising regulatory or judicial oversight over the football activities ISFG oversees.[26] As with ISFG's corporate governance model, the non-intervention policy can be seen as a potential explanation for the proportionately low exposure to liability that ISFG enjoys, despite the extensive reach of the soccer activities over which it is the ultimate authority in jurisdictions throughout the globe.[27] By operating as a uniform, streamlined entity, ISFG commands the power to demand recognition from civil governments as a legitimate governance body, thereby reducing the exposure of the diverse organizations that comprise it to scrutiny or liability before civil governments.

### B. Costs to the International Public Order Imposed by Football's Internal Dispute Resolution Regime

The unique scale of football governance's mandatory arbitration schema is so great as to jeopardize the equilibrium between sovereign governments established by international law.[28] This system gives rise to larger access to justice problems, threatening to make public governance bodies complicit in a system that does not always demonstrate the availability of justice.

#### i. The Sovereign Equilibrium Problem

Because of its scale, ISFG threatens to disturb the balance between sovereigns protected by international law. The delicate internal equilibrium calibrated between legal

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[24] *See generally*, J. Gordon Hylton. *How FIFA Used the Principle of Autonomy of Sport to Shield Corruption in the Sepp Blatter Era*. 32 Md. J. Int'l L. 134 (2017).
[25] FIFA Statutes *supra* n.__ at Art. 19.
[26] Hylton, *Sepp Blatter Era supra* n. __ at 151; *see also id.* at 142-51 (on the use of non-intervention principles since the 1990s to threaten or in fact suspend countries including Brasil, Yugoslavia, Greece, Paraguay, and several others to "aggressively enforce" compliance by national governments with "FIFA's demands"), *and* at 140 (on the development of the non-intervention articles culminating in their codification in 2009).
[27] *Id*. at 137. FIFA's non-intervention policy has frequently been justified by the principle of *lex sportiva*, discussed further *infra*. *Id*. at 141.
[28] ISFG's extensive arbitration schema is arguably peerless, apart from other sports arbitration regimes, such as that promulgated by the International Olympic Committee.

doctrine and extra-legal, political considerations, is jeopardized by the entry of an extensive private governance system into the public international order. Because the appeals bodies that ISFG recognizes are themselves appealable to sovereign courts of the nation in which they are located, ISFG's basis of a claim to adjudicate in subject matter authority, rather than traditional principles of sovereignty or territoriality, results in the undue influence of sovereign courts where such private fora are located. By recognizing—and requiring all of its affiliates to recognize—CAS as the competent appeals body for football-related disputes, ISFG in effect establishes and demands acceptance of a single dominant forum worldwide to which all actors in football-related activities are answerable.

The foundation of ISFG's power in subject matter, rather than the traditional basis of territory, creates a concentration of powerful, sports-specific private adjudicatory chambers in certain countries or regions. Such bodies' claim to adjudicatory authority is predicated on the shared interests of stakeholders in an international football governance structure that can promote consistency of the game throughout the world and facilitate international competitions,[29] consistent with principles of *lex sportiva* (the law of sport).[30] *Lex sportiva* supports the idea that sovereign government is too blunt or ill-suited to be appropriately applied to sports, whose regulation demands different considerations from those common across other industries, for example, relating to anti-trust or employment.[31] *Lex sportiva* has found some degree of acceptance across

[29] *See, e.g.*, ECtHR, Joined Cases – *Mutu and Pechstein v. Switzerland*, Appl. no. 40575/10 and no. 67474/10), Judgment of 2 Oct 2018, available at http://hudoc.echr.coe.int/eng?i=001-186828, at P.98 (holding that, "[i]n the specific case of sports arbitration, the Court takes the view that it is certainly of interest for the settlement of disputes arising in a professional sports context, especially those with an international dimension, to refer them to a specialised body which is able to give a ruling swiftly and inexpensively... Recourse to a single and specialised international arbitral tribunal facilitates a certain procedural uniformity and strengthens legal certainty; all the more so where the awards of that tribunal may be appealed against before the supreme court of a single country, in this case the Swiss Federal Court, whose ruling is final").

[30] *See Lex Sportiva*, 3 Int'l Sports L. Journal 3 (2016), available at https://www.asser.nl/media/2070/islj_2010-3-4.pdf (for an overview of "lex sportiva." Lex sportiva is understood to apply to other forms of sports governance beyond football).

[31] *See e.g.*, Leah Farzin, *On the Antitrust Exemption for Professional Sports in the United States and Europe*, 22 Jeffrey S. Moorad Sports L.J. 75, 78 (2015), available at https://digitalcommons.law.villanova.edu/mslj/vol22/iss1/2 (analyzing the tension between the need to "maintain competitive balance between teams" requiring "economic cooperation between clubs [for] the purpose of maintaining athletically balanced competition between them," and economic competition).

governments globally.[32] Where, as in Europe and other regions, conflicts arise between private and public adjudicatory channels, such conflicts are potentially exacerbated by the different causes of action and remedies recognized by the respective channels.[33]

The US Women's National Team (USWNT) dispute discussed *infra*, dealing with a US cause of action filed by US plaintiffs against US defendants, highlights the unique disruption to sovereign equilibrium that ISFG's private channels pose by recognizing CAS as the competent appeals body for football-related disputes arising throughout the world. The USWNT case involves a gender discrimination claim codified in US federal statute.[34] The case was filed in California, and any appeals will occur through the US federal court system. It may seem obvious that Switzerland's claim to adjudication of the USWNT dispute, which concerns only US parties for activity occurring predominately within the United States, is tenuous. However, Switzerland, not only the country in which FIFA is located, is the seat of CAS and therefore the jurisdiction to which CAS decisions are ultimately appealable.[35] Had the USWNT sued USSF on a gender equality cause of action under FIFA statutes through private arbitration instead of civil court[36]—as required by a

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[32] For example, a 2009 revision to the Treaty on the Functioning of the European Union expressly addresses—and distinguishes—the realm of sport in EU governance. Treaty on the Functioning of the European Union art. 165.2, 2008, Official J. 115, 0120. *See also* Case C-22/18, *TopFit e.V. Daniele Biffi v. Deutscher Leichtathletikverband e.V.*, P.19 (2019), available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=214943&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7772731 ("observ[ing] that EU law does now explicitly refer to sport in Article 165 TFEU"). *See also* Hylton, *Sepp Blatter Era supra* n. __ at 153 (describing the "general movement toward the embrace of the idea that autonomy of the private sports industry was generaly [sic] a good idea").
UEFA's published stance on the 2009 revision, Article 165, states, "Article 165 now requires that the specific nature of sport must be recognised. In other words, while sport is not 'above the law,' there is now a provision in the Treaty itself recognising that sport cannot simply be treated as another 'business,' without reference to its specific characteristics (the 'specificity of sport')." uefa.com, *UEFA's position on Article 165 of the Lisbon Treaty* (Accessed 25 September 2019), available at https://www.uefa.com/MultimediaFiles/Download/uefaorg/EuropeanUnion/01/57/91/67/1579167_DOWNLOAD.pdf. UEFA's memo also understands Art. 165 as "expressly exclud[ing] any harmonising legislation" [such as that...], referring to the EU's role as one of "supporting competence in the field of sport." *Id*. at 1.
[33] *See infra* at Part II.B.ii n.68.
[34] *See infra* at Part II.B.ii n.64.
[35] Because CAS is a Swiss institution, its decisions are appealable to Swiss Federal Court. (Article 191.2, *Bundesgesetz über das Internationale Privatrecht*). Switzerland has historically been exceedingly deferential to CAS decisions, and the Court may review them only on a narrow set of grounds enumerated in Article 190.2 *Bundesgesetz über das Internationale Privatrecht*.
[36] For example, Art. 4 of the FIFA statutes prohibits "discrimination of any kind...on account of," *inter alia*, gender.

strict textual interpretation of USSF bylaws[37]—appeals would flow through CAS. In that event, Switzerland is the sovereign that would hold ultimate review. Ceding judicial appellate authority to Switzerland over a dispute still between two US plaintiffs concerning activity occurring within the United States disrupts the equilibrium between sovereigns that international law seeks to preserve. Not only due to the tenuousness of Switzerland's claim to be the football expert of the world, it is questionable that the dispute's mere foundation in football-related matters sufficiently justifies this disruption. Appealable to the national courts in which they are located, private sports adjudication bodies contravene the careful equilibrium established by international law.

### ii. The Access to Justice Problem

The extensiveness of ISFG's mandatory arbitration regime crystallizes the justice concerns arbitration poses. ISFG establishes mandatory arbitration through a corporate governance requirement that permeates all levels of its international organizational hierarchy. Mandatory arbitration depends upon civil governments to recognize and back its legitimacy. This is true both as a political matter and a legal one. As a legal matter, the legitimacy of ISFG's dispute resolution channels requires backing by civil government to enforce both the foundational arbitration arrangements upon which the dispute resolution regime is based, as well as the awards granted by ISFG's adjudicatory chambers.[38] Such intertwined political and legal considerations are not specific to ISFG's brand of sports arbitration, but apply more broadly to arbitration in general,[39] and

[37] *See* USSF Bylaws *supra* n.__ at Bylaw 706 §3. Bylaw 706§3 holds, "Organization Members must adopt bylaws or policies requiring their members to condition membership on compliance with this Bylaw."

[38] *See* Robert B. von Mehren, *Enforcement of Arbitral Awards Under Conventions and United States Law*, 50 Yale J. of World Pub. Order 343, 343-44 (1983) (explaining, "arbitration awards cannot be enforced by the panels which render them. Arbitrators have no legal authority to compel any particular actions by the losing party"); *and see* Jessica L. Gelander, *Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations*, 80 Marq. L. Rev. 625, 625 (1997), available at: http://scholarship.law.marquette.edu/mulr/vol80/iss2/4 (recognizing, that "'the effectiveness of international commercial arbitration depends on the predictable enforcement of arbitral agreements and awards'").

[39] Arbitration's legitimacy is a function of its recognition by the nation-state in which it operates. As such, the legally binding nature of arbitration is caught up in a balance of political concerns that the state must make in agreeing to recognize an arbitral award. *See* Michael D. Goldhalber, *The Rise of Arbitral Power Over Domestic Courts*, 1 Stan. J. Complex Litig. 373, 394 (referring to (commercial) arbitration as an "order deriving force from an international treaty"). The fact that an effective arbitration regime is fundamentally a political one is evidenced by the fact that international treaty regimes are what confer power upon arbitration.

scholars have critiqued the use of the judicial system's public resources being deployed to enforce private legal orders.[40]

To what extent is it appropriate for public international and domestic law to back a private legal order of this nature? Arbitration is appealing to states, not only to parties.[41] Where arbitration promises potential increased efficiency and expertise to parties,[42] arbitration offers courts relief from administrative/caseload burdens.[43] Furthermore, states may benefit economically from arbitration, as illustrated by treaties like the NY Conv and ICSID.[44] These attractions incentivize states to grant legitimacy to ISFG's private dispute resolution schema. In restricting access to the judicial system, however, arbitration poses a threat to justice.[45]

The very premise of arbitration runs counter to a fundamental legal principle: the due process right to a day in court.[46] Of course, arbitration's advantage comes in the form

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[40] *See, e.g.*, Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 Stan. J. Int'l L. 1, 1 (2002) (referring to "the willingness of nation-states to cede control over the substantive outcomes of international economic disputes while lending their support to the enforcement of arbitral agreements and awards").

[41] The recent resignation of the Swiss Attorney General indicates a degree of intentionality in Switzerland's process of claiming adjudicatory authority over disputes that then linger extensively in its courts. DW News, *World Cup 2006 corruption trial to quietly pass statute of limitations*, 21 April 2020, available at https://www.dw.com/en/world-cup-2006-corruption-trial-to-quietly-pass-statute-of-limitations/a-53201962

[42] *See* Joseph T. McLaughlin and Laurie Genevro, *Enforcement of Arbitral Awards Under the New York Convetion—Practice in U.S. Courts*, 3 Int'l. Tax and Bus. Lawyer 249, 250 (for an overview of arbitration's appeal to parties: "At its best, arbitration is less expensive, less time-consuming, and more efficient than litigation. Arbitrators can be selected because of a special skill or knowledge of the subject matter in dispute, a choice which is not normally available in the traditional court system. Moreover, arbitral proceedings are confidential and are not open to public scrutiny").

[43] *See* Vicki Zick, *Reshaping the Constitution to Meet the Practical Needs of the Day: The Judicial Preference for Binding Arbitration*, 82 Marq. L. Rev. 247, 247-48 (1998), available at: http://scholarship.law.marquette.edu/mulr/vol82/iss1/7 (attributing the rise of arbitration in the United States to "the federal courts, attempting to clear their own crowded court dockets," and arguing that by giving their "blessing," "federal courts have been the moving force that has transformed [alternative dispute resolution] into a court-sanctioned dispute resolution mechanism that now parallels the civil justice system").

[44] The United States, alongside many other nations, avails itself of the economic benefits a pro-arbitration policy offers. *See* Gelander, *Preserving Independence supra* n.__ at 638 (stating, "[t]he United States has a great interest in preserving the viability of arbitration as a method of commercial dispute resolution"). Domestically, the United States also favors arbitration under the FAA. *See* Nico Gurian, *Rethinking Judicial Review of Arbitration*, 50 Columbia L. Rev 507, 508 (2017) (discussing the "expanding...scope and power of the Federal Arbitration Act" and the corresponding "rise in the use of arbitration").

[45] Its advantages must thus be weighed carefully so as not to jeopardize fundamental rights. Art. 6(1) ECHR.

[46] *See* R.D. Rees, *Plaintiff Due Process Rights in Assertions of Personal Jurisdiction*, 78 N.Y.U. L. Rev. 405, 409 (explaining that, in the US, "under current, uncontroverted Supreme Court doctrine, a potential plaintiff has a property right to a cause of action").

of another revered legal principle, freedom of contract.[47] Though other arbitral fora share with ISFG a claim to authority based in subject-matter expertise, the overarching and top-down nature of ISFG arbitration requirements distinguish it from other forms of arbitration. Other arbitration agreements, even if only questionably consensual, occur between two parties, whereas in the football governance context, the requirement that two parties arbitrate may be mandated by a third-party "parent" entity.[48] Not only is arbitration mandatory in order to participate in all ISFG-governed activities, but, unlike in a private contract between two individual parties, ISFG's systemic arbitration requirements extend even over disputes involving other ISFG members who themselves are not parties to any foundational contract. Furthermore, unlike other arbitral fora, ISFG comes accompanied by its own compulsory governing law—from which mandatory arbitration within its own private dispute resolution channels is inextricable—to which all parties must consent to be bound. Civil governments' delicate approach to these issues in a sporting context is evidenced by jurisprudence that also recognizes the political considerations undergirding courts'—particularly supranational ones'—own challenges to enforcement.[49]

When leveraged into such a comprehensive arbitration scheme as that promulgated by ISFG, the costs of arbitration are catapulted onto an exponentially higher level. Can freedom of contract truly be relied upon as a justification for such an extensive mandatory arbitration scheme, when deployed as part of a top-down model such as that exemplified by ISFG? Are the bases available to courts to decline to enforce an arbitration agreement or award sufficient when confronted by an entire arbitration regime extending far beyond a discreet contract entered into by individual parties? What is the responsibility of the law, at either a national or international level, to mitigate power and ensure access to justice? Depending how civil courts respond, these questions illustrate

[47] *See* Gurian, *Rethinking Judicial Review supra* n.__ at 508 (noting "Congress's intent in passing the FAA to place arbitration on the same level as contracts").
[48] *See infra* Part III.B.ii n.70.
[49] *See, e.g.* Veronica Fikfak, *Changing State Behaviour: Damages before the European Court of Human Rights*, 29 European J. Int'l Law 1091 (2019) (examining the complex political relationships between nation-states and treaty-based supranational organizations, and to some extent the power dynamics between nation-states themselves, that can lead to challenges to enforcement against nation-states parties to the ECHR who are persistent violators of the ECtHR's human rights decisions).

the challenges that the pervasive sports arbitration system poses to a just international legal system.

Because of its scale, ISFG's private dispute resolution system poses normative problems in excess of those normally generated by mandatory arbitration required by contracts between individual parties. The system operates on such a scale as to threaten the equilibrium between sovereigns that international law establishes. Civil governments' willingness to entertain ISFG's legitimacy, potentially at the expense of access to justice raises questions of power and accountability, and merits further consideration.

## II. Driving Force of Remedy in both Public and Private Dispute Resolution Systems

Football governance has successfully minimized its organizations' exposure to liability before civil courts, especially considered in light of the extensive activities occurring within the purview of its infrastructure. However, beginning in 2015, ISFG has seemed to face an increasing number of high-profile proceedings in civil courts. Corruption charges filed in the Eastern District of New York in 2015 found several top officials of CONMEBOL and CONCACAF (the respective ISFG regional confederations for South, North, Central America and the Caribbean) guilty.[50] These proceedings led to the resignation of then-FIFA president Sepp Blatter.[51] Gianni Infantino, Blatter's replacement, currently faces criminal charges in Swiss court,[52] and the top Swiss prosecutor recently resigned,[53] following allegations of wrongdoing related to these indictments. Meanwhile, ISFG organs have faced two highly public gender discrimination claims surrounding the two most recent Women's World Cups in 2015 and 2019.

Thus far, ISFG has brilliantly deployed its extensive internal dispute resolution mechanisms to reduce football institutions' exposure before civil courts. Where ISFG has historically sought to coerce mandatory arbitration as protective shield, an opportunity is

[50] Associated Press, *US prosecutors allege bribes in 2018, 2022 World Cup votes*, 6 April 2020, available at https://apnews.com/8cb94d455011f8d78dde058cb51ec69e.
[51] Associated Press, *Swiss Prosecutors to Drop 1 Case Against Ex-FIFA President Sepp Blatter*, 13 April 2020, available at https://www.si.com/soccer/2020/04/13/sepp-blatter-fifa-president-scandal-charges.
[52] Peter Hanson, *FIFA president Infantino faces Swiss criminal proceedings*, 30 July 2020, available at https://www.sportingnews.com/ca/soccer/news/fifa-president-infantino-faces-swiss-criminal-proceedings/1iphr4expff4k13sh49500kwx4
[53] *See* Dunbar, *Resignation supra* n.__.

available for the system to encourage use of its arbitration channels by using remedy as a sword. This shift to a plaintiff-friendlier approach would be beneficial both to ISFG, and to the international justice system more broadly.

### A. Remedy in Civil Procedure: the Importance of Extra-Legal Considerations in a Public Law Context

A recent court case filed by the USWNT against the USSF in US federal court reveals that remedy remains important to the legitimacy and use of the purportedly mandatory private dispute resolution channels ISFG favors. US civil procedure leaves a void in forum selection doctrine that makes remedy a central factor—if not a legal one—in what forum is selected. Forum selection doctrine does not provide an exclusive, affirmative answer to the all-important question: where can a legal dispute be adjudicated? Rather, through a combination of jurisdictional thresholds—that may differ from one country to another—and preclusion rules, civil procedure doctrine is better-suited to determine conclusively where a dispute may *not* be adjudicated. The result is a system that leaves much deference to a plaintiff to select a forum.[54]

Like the jurisdictional stalwarts minimum contacts and purposeful availment, *forum non conveniens*, the governing forum selection mechanism in the US under which a forum may declare itself incompetent to hear a matter, is formulated as a negative threshold question. *Forum non conveneins* allows a sitting forum to declare itself comparatively insufficient and dismiss a case on the basis that a more convenient forum exists.[55] Via *forum non conveniens*, civil procedure does not provide a definitive legal answer to the affirmative question: what is the *most* superior forum?[56]

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[54] The potential uncertainty that ensues for a future defendant contributes greatly to arbitration's appeal. *See* Gelander, *Preserving Independence supra* n.__ at 625 (stating, "arbitration agreements allay many of the concerns relating to international business by ensuring a degree of organization and predictability in the process through which disputes are resolved," and noting that especially "in an international market" "parties...consent to arbitration for the purpose of ensuring predictability in the resolution of potential disputes and to avoid the unfamiliar porcedures and laws of a foreign legal system").

[55] *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 426 (2007). US courts assessing *forum non conveniens* will first answer a threshold question of whether the sitting forum is convenient, then balance private and public interests to determine whether an alternative forum would be *more* convenient. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 265-55 (1981) (holding, "a strong presumption in favor of the plaintiff's choice of forum...may be overcome when the private and public interest factors clearly point towards trial in the alternative forum").

[56] *See Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co.*, 436 F.3d 349, 353 (3d Cir. 2006) (reversing and describing the District Court's difficulty applying the *forum non conveniens* factors to cognize parties' interests), itself rev'd by *Sinochem II* 549 U.S. *supra* n.__. The fact that every subsequent court reversed

Without a systematic approach that gives proper weight to the adjudication rights of interested sovereigns, defendants' due process rights, and plaintiffs' access to remedy to ensure fair selection of a forum, forum selection doctrine is limited in its ability to cognize any of these interests. Forum selection doctrine recognizes a sovereign's interest in adjudicating a matter, protecting the forum state's right to "[call] the defendant to account there."[57] Forum selection doctrine also considers a defendant's right against unnecessary infringement on liberty,[58] as well as what some consider its ultimate function, serving justice for a plaintiff who has been harmed.[59] In the event that multiple jurisdictionally adequate fora exist, forum selection mechanisms available to courts are ill-equipped to weigh these distinct and divergent interests.[60] In one sense, the very mechanics of *forum non conveniens*, which is designed to facilitate outright dismissal of a plaintiff's claim in the event that another forum—probably one urged by the defendant—provides a more appropriate or convenient forum for adjudication, are favorable to the urging defendant. However, a plaintiff's justice interest often weighs side by side in favor of a forum's interest in deferring to plaintiff's forum choice—itself.[61]

Although forum selection doctrine recognizes a sovereignty interest in adjudication, forum selection doctrine does not impose a corresponding obligation upon any sovereign to adjudicate, nor to ensure access to a remedy, if determined a more appropriate forum by another forum dismissing under *forum non conveniens*.[62] Rather,

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the prior court's *forum non conveniens* holding on this case could itself serve to illustrate the judicial struggle presented by the doctrine.

[57] *See, e.g.*, Geoffrey P. Miller, *In Search of the Most Adequate Forum: State Court Personal Jurisdiction*. 1 Stanford J. Complex Litig. 1, 19 (2018) (citing to *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) and stating, "Few activities of government are more fundamental to sovereignty than the power of a state to resolve disputes through its courts").

[58] *Id*. at 11.

[59] *See* Tark R. Hansen & Christopher A. Whytock, *The Judgment Enforceability Factor in Forum Non Conveniens Analysis*. 101 Iowa L. Rev. 923 (2016), 930 (stating, "[the forum non conveniens doctrine's] overarching (if sometimes underappreciated) purpose is to promote the ends of justice.").

[60] *See Am. Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994). Delivering the opinion, Justice Scalia states, "to tell the truth, *forum non conveniens* cannot really be *relied* upon in making decisions about secondary conduct—in deciding, for example, where to sue or where one is subject to being sued. The discretionary nature of the doctrine...deserves substantial deference." *and see Sinochem II* 549 U.S. *supra* n.__ at 450 (on the vagueness even of the *forum non conveniens* dismissal test)

[61] Inversely, "the interests of the defendant and those of the forum state move in opposite directions." Miller, *Most Adequate Forum*, *supra n.__* at 8.

[62] *See Piper* 454 U.S. at 250-51 (on the "flexibility" of the test which purposefully lacks "specific circumstances "which will justify or require either grant or denial of remedy").

*forum non conveniens* counters the absence of an obligation on any sovereign to provide remedy by creating favorable odds for the plaintiff's choice of forum, in which remedy will feature centrally. Because the sitting forum that will decide *forum non conveniens* is not only the product of plaintiff's initial forum choice, but also faces incentives working against dismissing under *forum non conveniens*, a sitting forum might decline to exercise its discretionary *forum non conveniens* option, and its sovereignty interest can lead—perhaps not unexpectedly—to its deferring to a plaintiff's forum choice. The US, for example, shows its interest in expressing (and is not always well-regarded for its willingness to exercise) its rights as a forum state by extending jurisdiction over extraterritorial conduct justified by particular behaviours, such as the use of US mails or issuance of securities in a US exchange, and even extending its jurisdiction to enforce measures of US law under long-arm provisions, where applicable.[63] As such, those considerations not clearly accounted for in the legal forum selection test, but essential in plaintiff's initial forum selection—such as the existence and enforceability of a remedy—may appear to exceed the bounds of the legal test and carry undue weight.[64]

### B. Remedy in a Private Adjudication Context: Determinative Influence of Extra-Legal Considerations

A series of cases spearheaded by the USWNT reveals the extent to which the likelihood and availability of remedy play an important role not only with respect to forum selection in a civil context, but also in the political maneuvering that may ultimately determine whether ISFG's internal dispute resolution channels are recognized, ostensible mandatory arbitration requirements notwithstanding. Exploiting a deficiency of US civil procedure's *forum non convenience* doctrine that leaves great deference to plaintiff's forum choice, mandatory arbitration, including that proffered by ISFG, seeks to designate a sole, mandatory forum *ex ante*. Although the international legal system acknowledges the sovereignty interest countries have in adjudication, the lack of a coordinated system of internationally binding and uniform legal regime that identifies a single, most superior

[63] *See, e.g., U.S. v. Webb et al.*, No. 2015-R-00747 (E.D.N.Y. May 20, 2015), at Indictment ¶90 (finding conspirator's "[reliance] on the broader strength and stability of the US financial system, including access to the private equity markets...in addition to the use of the particular financial institutions and wire facilities identified" sufficient on which to base US wire fraud and RICO charges over defendants some of whom had no physical presence in the US at any point in question). *See generally*, F.A. Mann, *The Doctrine of International Jurisdiction Revisited after Twenty Years* (1985).
[64] *See generally* Hansen, *Judgment Enforceability Factor*, *supra* n. __.

forum leaves a vacuum. ISFG's private adjudication requirement fills this void. However, remedy remains an important consideration in how and where a case will be filed and adjudicated. Despite the exacting posture of its statutory language, the grounding in of ISFG's internal dispute resolution channels in mandatory arbitration arrangements in some ways makes extra-legal considerations all the more relevant.

### i. Canada 2015 Case Study: Meaningful Remedy as a Source of Pressure even where ISFG Prevails in the Judicial Process

Litigation in Canada in 2015, which included a jurisdictional dispute as to the court's power to compel FIFA to appear (on which the court ruled affirmatively), shows the lengths to which ISFG will go to avoid civil court procedures. At the same time, the outcome of this case shows that ISFG's sensitivity to the pressures posed by being haled into court elevate the importance of remedy even outside the civil procedure forum selection context.

Several months prior to the 2015 Canada World Cup, a class of players alleged that FIFA's decision to host the World Cup on turf fields, in contrast to the grass fields on which men's tournaments are unfailingly played, violated a provision of the Ontario Human Rights Code prohibiting discrimination in, *inter alia*, "goods, services and facilities," on the basis of a number of protected categories, including sex and gender.[65] The suit named both FIFA and the Canadian Soccer Association (CSA), the member association representing that nation, as defendants.[66] To thwart the gender discrimination claim filed in the Ontario Human Rights Tribunal—a rare occurrence in which FIFA was named as a defendant—FIFA used both legal and extra-legal means.[67]

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[65] §1 Human Rights Code, R.S.O. 1990, c. H.19, available at http://www.ohrc.on.ca/en/ontario-human-rights-code. Canada case law holds that soccer matches count as services under this the Ontario Human Rights Code. *Players on National Teams Participating in the FIFA Women's World Cup Canada 2015* v. *Canadian Soccer Association* and *Fédération Internationale de Football Association*, (2015, filed only), Application at Schedule A ¶45, available at http://equalizersoccer.com/wp-content/uploads/2014/10/141001_2_Application-Sec-24-Schedule-A.pdf. The class also pointed out that the stadiums/fields upon which the World Cup would be played are facilities. *Id*. at ¶46.

[66] *Id*. at ¶13-17.

[67] For example, FIFA failed to timely answer plaintiffs' complaint and subsequently denied that it had received proper notice. The court found otherwise. *Abby Wambach and Players on National Teams Participating in the FIFA Women's World Cup Canada 2015 Listed on Schedule "A" (Applicants) and Canadian Soccer Association and Fédération Internationale de Football Association (Respondents)*, No. 2014-18923-I (Ontario Court of Human Rights), Interim Decision 1 ¶5, 31, available at: https://www.canlii.org/en/on/onhrt/doc/2014/2014hrto1760/2014hrto1760.html?searchUrlHash=AAAAAQAERklGQQAAAAAB&resultIndex=2.

FIFA contested jurisdiction.[68] Then, the Ontario Human Rights Tribunal denied plaintiffs' request to expedite the litigation.[69] Subsequent to deliberations between players, national associations, and FIFA, players from Mexico and France withdrew from participation in the suit.[70] These events precluded the possibility of reasonably fulfilling the remedy sought: replacing all turf fields with grass ones as the World Cup competition drew ever-nearer.[71] Ultimately, plaintiffs withdrew the suit after it became clear that the dispute would not be resolved before the commencement of the 2015 World Cup.[72]

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[68] *Wambach* Interim Decision 1 *supra* n.__ at ¶9, FIFA did not publish its legal documents. Haley Amster, *FIFA and CSA Court Case*, (2015), available at https://sites.duke.edu/wcwp/tournament-guides/world-cup-2015-guide/all-about-that-turf/fifa-court-case/.

[69] *See, e.g. Abby Wambach and Players on National Teams Participating in the FIFA Women's World Cup Canada 2015 Listed on Schedule "A" (Applicants) and Canadian Soccer Association and Fédération Internationale de Football Association (Respondents)*, No. 2014-18923-I (Ontario Court of Human Rights), Interim Decision 2, ¶18, available at: https://www.canlii.org/en/on/onhrt/doc/2014/2014hrto1635/2014hrto1635.html?searchUrlHash=AAAAAQAERklGQQAAAAAB&resultIndex=4.

[70] *Players on National Teams Participating in the FIFA Women's World Cup Canada 2015* v. *Canadian Soccer Association* and *Fédération Internationale de Football Association*, (2015, filed only, HRTO 2014-18923-1, Supplementary Filing, available at https://equalizersoccer.com/wp-content/uploads/2014/10/141027_retaliation_claim.pdf. "It was alleged that threats and intimidation by the CSA and FIFA caused 3 players to withdraw from the lawsuit." Amster, *FIFA Court Case supra n.__* (citing to *Wambach* Interim Decision 1 *supra n.__*, ¶4; *see also id*. at ¶7 (granting plaintiff's claim to amend Application to include the reprisal allegations)); *and see* Gordon, *How FIFA supra n.* ___ (applauding "nearly the entire German National Team" for signing onto the lawsuit after the French and Mexican players yielded to asserted threats of suspension, allegedly passed down to the players subsequent to threats made by FIFA to suspend the national associations whose players were named as plaintiffs in the suit).

[71] Aaron Gordon, *How FIFA Killed the Women's World Cup Lawsuit*, 3 February 2015, available at https://www.vice.com/en_us/article/3d9wgk/how-fifa-killed-the-womens-world-cup-lawsuit.

[72] Gordon, *How FIFA supra n.* ___. A question remains as to whether FIFA ultimately would have been held to answer in the Ontario Human Rights Tribunal. According to plaintiffs, Ontario Human Rights Tribunal jurisdiction extended over FIFA because FIFA's National Organizing Committee (NOC) is based in Ottowa, and on account of the "numerous visits" FIFA officials made to Ottowa to plan the World Cup. (*Players* Supplementary Finding *supra* n.59 at 2-4). In accordance with Canadian rules generally with respect to foreign defendants, it is likely that above some threshold FIFA's business, activities, and/or contracts with the province would render it subject to jurisdiction therein. *See* HG.org, *Civil Litigation Procedures in Ontario, Canada*, October 2012, available at https://www.hg.org/legal-articles/civil-litigation-procedures-in-ontario-canada-30229 (explaining, "The presumptive test for assumption of jurisdiction over a foreign defendant turns on whether: i) the defendant is domiciled or resident in the province; ii) the defendant carries on business in the province; iii) the tort was committed in the province; or iv) a contract connected with the dispute was made in the province..." and other considerations affecting the "order, fairness and comity" of private international law). FIFA, which delegates many liabilities to National or Local Organizing Committees, nonetheless retains rights to certain naming and media privileges, which could possibly furnish sufficient grounds for jurisdiction over the organization. (*See, eg.*, City of San Diego Council Docket, *Stadium Agreement Cover* (accessed 24 September 2019), at §1.2, available at http://dockets.sandiego.gov/sirepub/cache/2/dfnzt12b450fhoxi5k01bucd/13997709242019011916319.PDF (This is an unverified document).

From a certain perspective, the ISFG bodies FIFA and the CSA won the 2015 litigation, and, indeed, the 2015 World Cup was played on turf fields (the quality of fields allegedly resulting in at least one competition-precluding injury).[73] Nonetheless, and notwithstanding the absence of further litigation, the 2019 World Cup in France was (and subsequent Women's World Cups foreseeably will be) held on grass fields, effectively granting the remedy sought by the USWNT for future competitions. This outcome illustrates ISFG's sensitivity to, and willingness to make changes in light of, certain pressures. Leading it to furnish remedy even where it has prevailed (or at least not lost) in civil court, ISFG's distaste for the mere possibility of being summoned to appear renders it especially susceptible to the spectre of litigation and other extra-legal pressures.

### ii. USWNT v. USSF Case Study: Remedy as Determinative of whether Arbitration is Used

The fact that arbitration can be evaded even in the face of a supposed arbitration requirement shows that remedy continues to be determinative. The internal tension between the mandatory, affirmative language of the FIFA statutes, in contrast to the haphazard formulation of *forum non conveniens* doctrine, and the practical realities of ISFG disputes on the global stage, are on display in a 2019 lawsuit filed by the USWNT (led by many of the same players who spearheaded the Canada 2015 litigation).[74] In March 2019, prior to its undefeated World Cup success, the USWNT filed a case on gender equality in employment grounds against the US Soccer Federation (USSF) in federal court

[73] *See* Laura Vecsey, *Rapinoe injury reignites turf, player safety debate for USWNT*, Foxsports.com, 5 Dec 2015, available at https://www.foxsports.com/soccer/story/megan-rapinoe-uswnt-proclaim-outrage-field-conditions-stadium-training-grounds-hawaii-120515.

[74] *See Morgan, et al v. United States Soccer Fed'n, Inc.* No. 2:19-cv-01717 (C.D. Cal 2019), Complaint, available at https://int.nyt.com/data/documenthelper/653-us-womens-soccer-complaint/f9367608e2eaf10873f4/optimized/full.pdf *and see Players* Application at Schedule A *supra* n.53.

in California.[75] In keeping with ISFG's preference for private arbitration,[76] and, in fact, in concordance with Article 59 of the FIFA Statutes, as incorporated into USSF bylaws, which prohibit recourse to civil court,[77] the USWNT could have pursued its grievances in private channels via the arbitration procedures provided for by USSF's corporate governance structure.[78] However, despite the arguable existence of a cause of action under the FIFA statutes, which since 2004 have "strictly prohibit[ed]" discrimination "on account of...gender"[79]—and perhaps guided by the attitude towards gender equality

[75] The USWNT has alleged willful violation of the Equal Pay Act of 1963 29 U.S.C. § 255(a) (prohibition against differential in pay due only to sex for work that demands equal skill, effort, and ability; similar working conditions), and malicious or recklessly indifferent violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (seeking punitive damages). *Morgan* Complaint, *supra* n. 62 at ¶4-5. USSF employs the USWNT players. In most circumstances, a country's national federation would not be the employer of male and female players for the purposes of club teams, thus divesting grounds for a gender discrimination claim. *See* the exemption to FIFA Regulations Article 22, discussed *supra* n.13.

[76] USSF Bylaws, *supra n.__* at Bylaw 703 §1, 9 (prescribing „exclusive, final, and binding" internal dispute resolution procedures for disputes "filed by an Organization Member against another Organization Member").

[77] *See* USSF Bylaws, *supra n.__* at Bylaw 706§1, stating, "No Organization Member, member of an Organization Member, official, league, club, team, player, coach, administrator or referee *may invoke the aid of the courts in the United States or of any State* if any potential remedy is or was available through any hearing, appeal, or grievances process of any Organization Member or the Federation" (emphasis added). The penalty for a violation of the preceding can consist of "suspension and fines, [liability] to the Federation or the responding party for all expenses incurred by the Federation or the responding party and their officers in defending each court action, including but not limited to [court costs, attorneys' fees, compensation and expenses].

[78] *See* Steven A. Bank. *FIFA, Forced Arbitration, and the U.S. Soccer Lawsuits*. 30 J. Legal Aspects of Sport 1, 14 (2020) (noting that "Bylaw 703 also permits the filing of a grievance by a person against an Organization Member or the Federation, which would appear to cover the lawsuits brought by...the US Women's National Team players"). *See also id*. at 15 (acknowledging "that the plaintiffs in the current cases had the option to pursue their cases in arbitration, but were not required to do so...in the employment discrimination and equal pay claims from the USWNT players"). Often, arbitration is appealing to players for many of the same reasons that it is appealing to institutions: disputes can be resolved expediently with an eye towards upcoming competitions as applicable, and by adjudicators with a background in sports-specific law and practices. In the US, for example, arbitration has been identified as "the preferred tribunal to resolve disputes in the sports industry. Collective bargaining agreements ("CBA") and athlete handbooks commonly provide for an expedited form of dispute resolution." Christian Dennie, *The Benefits of Arbitration: Arbitration in NCAA Student-Athlete Participation and Infractions Matters Provides for Fundamental Fairness*, 46 Univ. Memphis L. Rev. 135, 147 (2015).

[79] Art. 3.FIFA Statutes *supra* n.__. *Cf.* Article 2, 3.1 FIFA Statutes October 2001 edition (accessed 13 January 2020), available at https://resources.fifa.com/image/upload/fifa-statutes-2001.pdf?cloudid=ziirpjxghztmql28x9xo (which provide only against discrimination "for reasons of race, religion or politics"). Although the FIFA Statutes admittedly lack a further specified provision, such as that of "equal pay for equal work," it is not unreasonable to conceptualize the logical progression from barring discrimination to requiring equality, particularly in light of the recently-added references to gender equality in the newest FIFA Statutes, "promoting the development of women's football and the full participation of women at all levels of football governance." Art 2. FIFA Statutes (June 2019 edition *supra* n.__). *See* Commission Directive 2006/54/EC, "Non-discrimination," available at https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/know-your-rights/equality/non-discrimination_en ("providing for equal treatment for men and women in matters of employment and

litigation that FIFA demonstrated in the 2015 Canada World Cup case—the USWNT appears to have chosen the forum that offered a more promising route to a remedy.[80]

Neither party contended directly with the existence of a potentially binding arbitration agreement in its filings. To the extent that US law (unlike parallel EU directives, for example) does not *require* access to civil court for the type of employment claims alleged by the USWNT,[81] the team's filing in US federal court arguably stands in violation of the clear language of USSF's bylaws providing for "exclusive, final, and binding" arbitration.[82] Only USSF's answer to the USWNT's complaint, contending that "plaintiffs' claims are barred, in whole or in part, to the extent that they conflict with the authority granted to USSF by the Ted Stevens Olympic and Amateur Sports Act and/or are within the exclusive jurisdiction of the United States Olympic Committee" may have obliquely referenced a potential basis for arbitration.[83]

An outstanding question thus remains as to why USSF did not press further for private dispute resolution. Certainly, the USWNT case illustrates a shift in the typical balance of power between ISFG and a national government, and between national team players and their national federation. The USWNT, a much more successful entity across a variety of metrics than its male counterpart in the US, banded together unanimously in

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occupation" in fulfillment of the EU's prohibition on discrimination on the basis of sex, *inter alia*). It is, of course, unlikely that FIFA would be eager to formally require equal pay due to the obligation that could follow to provide equal World Cup prize money for the men and women's competitions respectively.

[80] The USWNT thus far has not fared as well in US federal court as it might have hoped to. In an opinion that, unsurprisingly for a lower court, focused extensively on the players' collective bargaining agreement, Judge Klausner of the Central District of California granted USSF's motion for summary judgment on the Equal Pay Act and Title VII claims, the largest of the USWNT's grievances. *Alex Morgan et al v. United States Soccer Fed'n*, No. 2:19-cv-01717-RGK-AGR (C.D. Cal May 1, 2020), available at https://www.courtlistener.com/recap/gov.uscourts.cacd.739234/gov.uscourts.cacd.739234.250.0.pdf. This is the case despite the lower court itself disputing the very material fact of how the USWNT's pay was appropriately calculated. *Id*. The USWNT has indicated full intent to appeal the lower court decision. *USWNT's Request for Final Judgment Denied, Delaying Appeal of Equal Pay Ruling*, 24 Jun 2020, available at https://www.si.com/soccer/2020/06/24/uswnt-equal-pay-case-judgment-appeal-delay-us-soccer.

[81] While the Equal Pay Act of 1963 gives jurisdiction to, *inter alia*, US federal courts to hear causes of action arising under it, the Equal Pay Act does not specify that those fora are exclusive. 29 U.S.C. §217. Similarly, Title VII gives jurisdiction to "Each United States district court and each United States court of a place subject to the jurisdiction of the United States." 42 U.S.C. §2000e.

[82] USSF Bylaws, *supra n.__* at Bylaw 703 §1, 9. *But see* Bank, *U.S. Soccer Lawsuits supra* n.__ at 14 (arguing that "[the USWNT's grievances] fundamentally relate to broader concerns about business operations and employment status" and are therefore ineligible for arbitration under Bylaw 703.

[83] *Morgan, et al v. United States Soccer Fed'n, Inc.* No. 2:19-cv-01717 (C.D. Cal 2019), Answer and Affirmative Defenses, ¶17, available at https://www.courtlistener.com/recap/gov.uscourts.cacd.739234/gov.uscourts.cacd.739234.42.0.pdf.

the filing of its case, leveraging the full scope of the team's cultural, economic, and political clout against the organization, particularly in light of timing of the USWNT case's filing, just a few months before the 2019 World Cup.[84] A source of viewership estimated at approximately 15 million people for a single match, the 2019 World Cup final featuring the favored USWNT versus host country France was a valuable asset that ISFG affiliates would not have been eager to jeopardize through escalating friction with the team.[85] Illustrating both the USWNT's economic viability and public relations power, after the tournament, the USWNT jersey became the best-selling Nike jersey in one season ever.[86]

Due both to the position of the USWNT, a national team with disproportionate dominance and visibility on the international state, and the US judiciary, operating within the province of a powerful nation in which soccer does not rule, the USSF may have faced an uphill battle had it attempted to shift the dispute to internal private channels. An attempt to invoke the non-intervention policy to dissuade US federal courts from participation in the suit likely would not have been fruitful in this case. The authority of US federal courts to entertain legal questions founded in sports activities is established and exercised,[87] and USSF admitted subject matter jurisdiction in the USWNT case.[88] Not only does the US chaff at challenges to its exercise of jurisdiction, professional soccer

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[84] USWNT were widely favored. Liz Clarke, *U.S. soccer players keep World Cup separate from lawsuit, but they're scoring in both*, 22 June 2019, available at https://www.washingtonpost.com/sports/2019/06/22/us-soccer-players-keep-world-cup-separate-lawsuit-theyre-scoring-both/.

[85] Fox estimated approximately 14.3 million US viewers for the 2019 World Cup final. Abigail Haas, *U.S. viewership of the 2019 Women's World Cup final was 22% higher than the 2018 men's final*, 10 July 2019, available at https://www.cnbc.com/2019/07/10/us-viewership-of-the-womens-world-cup-final-was-higher-than-the-mens.html. FIFA estimated worldwide viewership for the entirety of the tournament at over a billion viewers. bbc.com, *Women's World Cup: record breaking numbers*, 8 July 2019, available at https://www.bbc.com/news/world-48882465.

[86] Danielle Gonzalez, *Nike's Highest-Selling Soccer Jersey Belongs To The U.S. Women's Team*, 1 July 2019, available at https://www.huffpost.com/entry/nike-highest-selling-soccer-jersey-us-womens-team_l_5d1a3927e4b07f6ca581ab86.

[87] The US has in sum total shown greater readiness to recognize sports as regulable commerce than the EU. *See* Marc Edelman, *Sports Data Policies Could Represent Next Big Antitrust Challenge For Pro Sports Leagues*, 10 June 2019, available at https://www.forbes.com/sites/marcedelman/2019/06/10/sports-data-policies-could-provide-next-big-antitrust-challenge-for-pro-sports-leagues/#27d058d03284 (referring to antitrust law suits against which "professional sports leagues have periodically found themselves defending...over the past 50 years").

[88] *Morgan, et al v. United States Soccer Fed'n, Inc.* No. 2:19-cv-01717 (C.D. Cal 2019), Document 56, available at https://www.courtlistener.com/recap/gov.uscourts.cacd.739234/gov.uscourts.cacd.739234.56.0.pdf. The Central District of California also rejected USSF's motion to transfer under 28 U.S.C §1404. *Id*.

commands a relative lack attention in the US (unlikely to inspire any particular sympathy for USSF from US courts) that enervates the political pressure upon which ISFG's non-intervention policy is predicated.[89] Furthermore, higher levels of football governance might very likely not have thought it worthwhile to intervene in furtherance of the non-intervention principle in this case. The relatively low interest in US soccer in other parts of the world does not place this dispute in the center of the international public eye, apart from the global resonance of the gender equality issues. And, notably, unlike the Canada 2015 dispute, the current USWNT suit does not name FIFA as a defendant.[90] The messy political frictions and unseemly discrimination issues at stake do not reflect well on the institution of football, and may give good reason for FIFA and other ISFG institutions to keep their distance where possible.[91]

Another reason USSF may have elected not to pursue arbitration is the possibility that US courts would not have found or enforced any arbitration agreement. The lower court ruling in favor of USSF on the USWNT's gender discrimination claims showed great deference to the players' collective bargaining agreement (CBA).[92] As with enforcement of arbitration agreements, this attitude is representative of the pro-freedom of contract posture of US and other courts.[93] However, an ISFG affiliate's corporate governance structure's mandatory arbitration provisions may be somewhat irrelevant, if

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[89] *See* Philip Bump, *How the U.S. can arrest FIFA officials in Switzerland, explained*, 27 May 2015, available at https://www.washingtonpost.com/news/the-fix/wp/2015/05/27/how-the-us-can-arrest-fifa-officials-in-switzerland-explained/?noredirect=on (declaring, "when it comes to flexing international muscle, we're usually the champions." This comment was made with respect to the 2015 FIFA corruption cases).

[90] *Morgan* Complaint, *supra* n. 62 at ¶34. FIFA's relatively minor involvement in the USWNT dispute would not confer grounds for jurisdiction over the organization without contest. In particular, FIFA does not employ the USWNT players and therefore the causes of action pled are not applicable to them.

[91] In fact, the lawsuit has generated severe costs for USSF, including resignation of the organization's president subsequent to a poorly handled legal team that characterized the USWNT (and perhaps women's sports more broadly) as inferior to the men's. *See* Kevin Draper, *US Soccer President Carlos Cordeiro Resigns*, 12 Mar 2020, available at https://www.nytimes.com/2020/03/12/sports/soccer/uswnt-carlos-cordeiro-us-soccer.html (describing the resignation of USSF's president "days after a legal filing widely condemned as misogynistic, [throwing] the federation's leadership into turmoil"). The Federation has reportedly "lurched from crisis to crisis" throughout recent history following at least one "embarrassing loss" by the men's team, changes to coaching and c-suite personnel, and "besides the equal pay lawsuit...a number of other[s]"). *Id*.

[92] *See Morgan v. Soccer Fed'n supra* n.__ at 4-14 (spending nearly a third of the opinion detailing the process by which the USWNT's CBA was negotiated).

[93] *See* Gurian, *Rethinking Judicial Review supra* n.__ at 509 (explaining that federal policy favors arbitration agreements even in cases where terms "are extremely beneficial to the businesses [and] would be considered unconscionable under state law").

they are found not to constitute valid, consent-based arbitration agreements between relevant parties.[94]

In private contract, affirmative assent permits opting into a specific public (forum selection) or private (binding arbitration) adjudication clause.[95] The fact that ISFG oversees virtually any organized soccer activities anywhere in the world, and requires arbitration throughout all levels of its organizational membership, also elicits questions as to the degree of freely-given consent—and therefore validity—of the arbitration agreements it requires. In this case, a mandatory arbitration agreement extrapolated from USSF's bylaws, absent explicit language in a contract between the USSF and USWNT, would likely not be found binding on players.[96] Because the USWNT was not persuaded that private channels promised a sought-after remedy, the weaknesses of ISFG's private dispute resolution system were left exposed, discouraging the organization from pressing for private adjudication.

Despite the existence, in civil procedure, of a doctrinal legal test, and in an arbitration context, of a facially binding arbitration clause, extra-legal factors carry sufficient weight to make remedy a potentially determinative factor in where a dispute will be adjudicated, notwithstanding its absence from explicit legal language. In arbitration in particular, a mechanism predicated on consent, parties' belief in the availability of a remedy can have serious implications for whether arbitration channels are actually used or not. Apart from the fact that an arbitration clause found invalid may not be honored, remedy, *de facto*, remains important to whether parties opt to pursue their claims in private channels.

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[94] In the *Mutu* and *Pechstein* cases *supra* n.__, the court upheld a mandatory arbitration clause giving CAS competence over the dispute when it comprised part of a football player's employment contract with his team. It did not uphold the arbitration clause in a contract between a German figure-skater and her national federation, when belonging to the national federation was necessary for her to participate in her profession in any form. *Mutu and Pechstein supra* n.__. The USSF Bylaws' arbitration language is more akin to that in the *Pechstein* case, than that at issue in the *Mutu* employment contract.

[95] *See, e.g.* Restatement of the U.S. Law of International Commercial and Investor-State Arbitration §1.2(a) (2019) (codifying the rule that "International arbitration is based on the agreement of the parties." The comment to this rule refers to it as a "core principle of the U.S. law of international arbitration (and international arbitration law more generally)").

[96] *See* Bank *U.S. Soccer Lawsuits supra* n.__ at 14 (reviewing instances in which a "blanket prohibition on litigation['s]" lack of specificity resulted in a "mandatory arbitration clause not [being] as mandatory as it might seem." One of these instances is the *RFC Searing* case, in which the arbitration clause "flunked the 'defined legal relationship' requirement under Belgian law and the New York Convention's Model Arbitration Law").

## III. Remedy as an Affirmative Solution to Reestablishing the Independence of Football Governance Organizations, and Potential Benefits to the Public Legal Order

Why, if a private governance regime has structured itself to internalize dispute resolution and further a larger strategy to avoid scrutiny before civil courts, should there not be cause for alarm? One reason is the degree to which the "law" that ISFG holds out is truly binding and legitimate. Despite its strong "non-intervention" language (and at times aggressive enforcement history[97]), ISFG shows a carefully calibrated degree of deference to national and international governance bodies. ISFG's dispute resolution framework already contains certain carveouts to account for legal remedies civil government can provide. These carveouts may subject ISFG's activities to greater inspection by civil courts. Where ISFG governance statutes make carveouts for adjudication in national fora, such as in matters of employment, not only do they suggest ISFG's diminished competence in these areas, but also a level of deference to nation-state adjudication in tension with the FIFA Statutes' exacting language and posture. This shows that ISFG is aware of incentives to defer to public justice systems when appropriate, rendering its interest in mandatory arbitration somewhat less extractive.

A second check to ISFG are pockets of competing power, as demonstrated by the anomalous facts of the USWNT dispute. In 2019, the USWNT elected to pursue its claims in US federal court over private channels, and in this particular case ISFG may be thankful that its own adjudicatory processes were not implicated. However, a successful plaintiff in civil court is likely to undermine the authority and legitimacy of ISFG's own mandatory private dispute resolution procedures. In the event that the USWNT were to prevail over USSF, ISFG could face a proliferation of follow-on suits between other female teams and the respective clubs and federations to which they belong, interfering with ISFG's top-down governance model. A worst-case scenario for ISFG could be exposure to pressure

[97] *See*, *e.g.*, Hylton, *Sepp Blatter Era supra* n. __ at 151 ("establish[ing] that FIFA...could "blackmail" certain countries...all economically weak, vulnerable nations...").

such as could compel it to redistribute the World Cup wealth.[98] (FIFA has recently raised the prize money for the Women's World Cup from $15 to 30 million, but as it has also done so for the Men's World Cup—from $400 to 440 million—the pay disparity subsequent to the raise in fact increased.[99]) Such comprehensive redistribution is exactly what the USWNT, or at least one of its leading spokespeople, Megan Rapinoe, has expressed an interest in effecting.[100] This gives rise to an important practical consideration for ISFG: the threat of increased exposure to scrutiny—though not legal—posed by a strong national team suing a weak ISFG affiliate in a vigorous civil court is a meaningful one. The doctrinal friction relegating ISFG's preference for arbitration subordinate to its objective of minimizing oversight by civil government means that the system is responsive to power structures that might subject it to undesired scrutiny.

Finally, ISFG stands to play a positive role in the balance of power and accountability at play in the international legal order. Offsetting potential problems with such a private governance system is the fact that the power that ISFG wields can be used to effect positive change where civil government struggles to do so. An example of such an action is FIFA's mandate that Iran allow women to enter football stadiums, which had formerly been prohibited under national law.[101] Where civil governments, and supranational government in particular, face their own political challenges to enforcement, ISFG shows a high degree of effectiveness at enforcing compliance with its policies and judicial decisions, although of course it deals only with a specific subset of activities. In this regard, the private system ISFG operates offers a persuasive advantage over civil governments in its ability to follow-through and enforce its decisions.

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[98] A potentially devastating outcome for FIFA, certainly one that would represent a departure from FIFA's past practice, is being summoned as a defendant in US court—for example, in 2026 when FIFA hosts the men's World Cup in (*inter alia*) the US.

[99] Niall McCarthy, *The Gender Pay Gap at the FIFA World Cup is $370 Million*, 11 June 2019, available at https://www.forbes.com/sites/niallmccarthy/2019/06/11/the-gender-pay-gap-at-the-fifa-world-cup-is-370-million-infographic/#278226fb2751.

[100] Christopher Simpson, *Megan Rapinoe Calls on FIFA, U.S. Soccer for Equal Pay After USWNT Win*, 8 July 2019, available at https://bleacherreport.com/articles/2844656-megan-rapinoe-calls-on-fifa-us-soccer-for-equal-pay-after-uswnt-world-cup-win.
https://en.as.com/en/2019/07/07/football/1562532573_132015.html

[101] *See* James Masters, I*ranian women finally allowed to officially watch soccer match after 40 years*, 10 October 2019, available at https://www.cnn.com/2019/10/10/football/iran-soccer-women-cambodia-spt-intl/index.html.

## Conclusion

The adjudicatory authority that ISFG claims plays a crucial role in helping the organization maintain a degree of insulation from civil government oversight that protects both ISFG affiliates and FIFA, its head, from exposure to liability in civil courts proportional to the extensive activities that ISFG oversees. As scrutiny over these organizations has increased, a solution is available to allow football governance to reinforce the power of the private dispute resolution channels so important to its insultation from civil government. Offering meaningful remedies, and commitments to justice, through its channels, is an underused sword with which the international system of football governance can both make a positive contribution to and reinforce its position in the international order.