RECLAIMING ECONOMIC LEGACY: ONE LEGAL STRATEGY FOR A 2022 FIFA WORLD CUP USA

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I. INTRODUCTION

The U.S. Department of Justice recently indicted several top officials of the Fédération Internationale de Football Association (FIFA) for racketeering, money laundering, and wire fraud.[1] The U.S. Federal Bureau of Investigation (FBI) and the Swiss Attorney General continue to investigate corruption in the bidding process for the 2018 and 2022 FIFA World Cups.[2] The 2018 World Cup was awarded to Russia, and the 2022 World Cup was awarded to Qatar.[3] The indictments and investigations have increased the possibility of uncovering hard evidence of corruption, intensifying speculation that FIFA will strip the 2022 World Cup from Qatar

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[1] Press Release, U.S. Dep't of Just. Off. of Pub. Aff., Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption (May 27, 2015), http://www.justice.gov/opa/pr/nine-fifa-officials-and-five-corporate-executives-indicted-racketeering-conspiracy-and [hereinafter DOJ Press Release]; Press Release, U.S. Dep't of Just. Off. of Pub. Aff., Sixteen Additional FIFA Officials Indicted for Racketeering Conspiracy and Corruption (Dec. 3, 2015), http://www.justice.gov/opa/pr/sixteen-additional-fifa-officials-indicted-racketeering-conspiracy-and-corruption.

[2] *See* Owen Gibson, *Swiss Investigating 53 Cases of Possible Money Laundering at FIFA*, GUARDIAN (June 17, 2015), http://www.theguardian.com/football/2015/jun/17/fifa-investigation-53-cases-money-laundering-swiss-attorney-general; Mark Hosenball, *FBI Probe Includes 2018, 2022 World Cup Host Awards: U.S. Official*, REUTERS (June 3, 2015, 2:38 PM), http://www.reuters.com/article/us-soccer-fifa-fbi-idUSKBN0OJ26X20150603; Euan McKirdy, *Swiss FIFA Corruption Allegations Grow, Cast Hosting of World Cups Further into Doubt*, CNN (July 13, 2015), http://edition.cnn.com/2015/07/13/football/swiss-fifa-probe-widens.

[3] *See* Scott Davis, *FIFA May Not Be Able to Change the Hosts of the 2018 and 2022 World Cups Even if They Want To*, BUS. INSIDER (June 10, 2015), http://www.business insider .com/fifa-russia-qatar-world-cups-2015-6.

and the host Qatar Football Association (QFA) and award it instead to the second-place bidder, the United States Soccer Federation (USSF).[4] FIFA, however, explicitly rejected this possibility when, in response to Compliance Committee Chief Domenico Scala's announcement that "the awarding could be void" if the investigations resulted in evidence of "bought votes," FIFA proclaimed that it had "no legal grounds to take away the hosting of the FIFA World Cup."[5]

That claim is true to an extent; FIFA's regulations and contracts with national associations mandate resolution of disputes through FIFA's own internal mechanisms and substantive rules, neither of which provide the basis to rescind the award to the QFA.[6] The World Cup hosting rights and responsibilities are contractual, however, so FIFA could award the World Cup to another bidder or call a re-bid, and no tribunal would enforce the FIFA–QFA agreements because contracts procured through bribery are void pursuant to transnational public policy.[7] The problem is that unilaterally voiding any contract means that the QFA will sue, subjecting FIFA to proceedings before the Court of Arbitration for Sport (CAS) and requiring FIFA to prove bribery attributable to the QFA by clear and convincing evidence.[8] FIFA does not want to take on the expense of litigation and the risk of losing.[9]

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[4] *See* Davis, *supra* note 3; Dan Murphy, *FIFA Scandal: Could Host Qatar Forfeit the 2022 World Cup (+Video)*, CHRISTIAN SCI. MONITOR (May 29, 2015), http://www.csmonitor.com/layout/set/print/World/Security-Watch/Backchannels/2015/0528/FIFA-scandal-Could-host-Qatar-forfeit-the-2022-World-Cup-video; James Reevell, *Could FIFA Really Take the World Cup from Russia or Qatar?*, BBC NEWS (June 8, 2015), http://www.bbc.com/news/world-europe-33044898.

[5] Mark Morgenstein, *FIFA: No Grounds to Strip Russia or Qatar of World Cup*, CNN (June 9, 2015), http://edition.cnn.com/2015/06/08/football/fifa-scandal.

[6] *See infra* Part III.A.

[7] *See infra* Part II.A (explaining the hosting and organizing agreements between FIFA and the host-nation's association); World Duty Free Co., Ltd. v. Republic of Kenya, ICSID Award, Case No. ARB/00/7 (Oct. 4, 2006) (writing that "bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy" so that "claims based . . . on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal").

[8] *See infra* Part III.A–B (describing FIFA's internal dispute mechanisms, including recourse to the CAS for claims based on commercial interests); Reevell, *supra* note 4 ("The Qataris are bullish and will fight any move to take the tournament away from them with every legal resource at their disposal.").

[9] *See, e.g.*, Hosenball, *supra* note 2 (citing former FIFA ethics chief stating that FIFA would have to pay compensation to Qatar if FIFA redid the bids).

If there is to be a World Cup USA in 2022, then the USSF must attack the QFA's award, both to give FIFA legal cover and to force FIFA to act. In the United States, the party who loses a bid on a transnational contract because of the unlawful practices of the winning bidder can pursue monetary and equitable remedies through a common law claim of tortious interference with prospective economic advantage and through a claim under state unfair competition statutes.[10] These causes of action have analogues in civil law countries, such as Article 4a of the Swiss Federal Act on Unfair Competition (FAUC), which makes unlawful corrupt acts that harm economic interests.[11] Because FIFA rules already mandate the choice of Swiss law, the USSF could initiate arbitration to enjoin the QFA from performing its contractual hosting obligations, thus removing the impediment for FIFA to find another host.[12]

The common law "economic advantage" and Swiss requirement for "damnification with an economic interest"[13] highlight an important issue: whether the USSF has a measurable economic interest in hosting the World Cup necessary to provide the basis for injunctive relief. In most transnational contracts for services, the economic injury is clear: the plaintiff loses profits it could have made had it won the contract.[14] The contracts

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[10] *See infra* Part III.B.1.

[11] Bundesgesetz gegen den Unlauteren Wettbewerb [UWG] [Unfair Competition Act] Dec. 19, 1986, SR 241, art. 4(a) (Switz.), *superseded by* Bundesgesetz gegen den Unlauteren Wettbewerb (status as of July 1, 2012) [UWG] [Unfair Competition Act] Dec. 19, 1986, SR 241, art. 4a (Switz.). An unofficial English translation of the original 1986 Act is available at the website of the World Intellectual Property Organization (WIPO), from which this Article draws its quotations to the original and current Act. *See Federal Act on Unfair Competition of December 19, 1986*, WIPO, http://www.wipo.int/wipolex/en/text.jsp?file_id=125647 (last visited Jan. 29, 2016) [hereinafter *FAUC 1986*]. Moreover, the law was amended in 2012. *Federal Act on Unfair Competition of December 19, 1986 (Status as of July 1, 2012)*, WIPO, http://www.wipo.int/wipolex/en/details.jsp?id=11896 (last visited Jan. 29, 2016) [hereinafter *FAUC 2012*]. Although no English translation is available of the most current version of the law, a German version is available. *See id.* The authors refer to this German version and translate accordingly. *See infra* Part III.B.1 (explaining the private anti-corruption provisions of the FAUC and comparing those to similar U.S. laws).

[12] *See infra* Part III.B.2.

[13] Michael Ritscher & Stefan J. Schröter, *Country Reports: Switzerland*, *in* INTERNATIONAL HANDBOOK ON UNFAIR COMPETITION 547, 557 (Frauke Henning-Bodewig ed. 2013).

[14] *See, e.g.*, Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937, 941–43 (Cal. 2003) (seeking disgorgement of profits of $30 million that the plaintiff expected to make from

related to the World Cup, however, give the national association little more than the right to host and manage the games; they in fact require the association to bear significant costs while FIFA reserves for itself billions of dollars in revenue from broadcasting and merchandising.

Economists have studied the World Cup and the Olympics, finding these large-scale events typically have little or no positive effect on the economies of the host nation.[15] The events can provide economic benefits through their "legacy" for the host association, however.[16] Economists cannot quantify the effect on the event's legacy, goodwill, and interest in the sport generated by serving as the World Cup host.[17] However, if the USSF were to serve as host, it could expect quantifiable benefits to entities and activities that come under its purview, such as an attendance boost and potential increases in the value of individual teams in Major League Soccer (MLS), as well as related non-quantifiable benefits, such as increased interest and participation in soccer in the United States.[18] Because the USSF was denied this opportunity through the QFA's alleged tortious acts, the USSF suffered an irreparable pecuniary injury to its economic interests—and that of its professional league members—necessary to enjoin the QFA from hosting the World Cup.[19]

This Article explores one potential strategy for the USSF to acquire hosting rights for the 2022 World Cup or, at the very least, to re-open the bidding for this mega-event.[20] Part II offers background information on

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commissions for brokering military equipment sales to South Korea had the contract not been lost to a competitor because of bribery).

[15] *See infra* Part IV.A.

[16] *See infra* Part IV.A.

[17] *See infra* Part IV.A.

[18] *See infra* Part IV.B–C. Although most of the world refers to the sport of association football as simply "football," the sport is commonly called "soccer" in the United States. This Article uses the U.S. term when speaking in terms of the game itself, while using the term "football" only when it appears as part of an organization's name or in the context of a quote.

[19] *See infra* Part III.B.1.

[20] Though the authorities are investigating the bidding process for both the 2018 and 2022 World Cups, this Article will address only the latter. The United States did not bid on the 2018 World Cup, so it has no basis to make a tortious interference or unfair competition claim against the Football Union of Russia. *See USA Bid Committee to Focus on 2022 FIFA World Cup*, U.S. SOCCER (Oct. 15, 2010), http://www.ussoccer.com/stories/2014/03/17/13/52/usa-bid-committee-to-focus-on-2022-fifa-world-cup (announcing the USA Bid Committee's decision to withdraw its 2018 FIFA World Cup bid to "focus on the 2022 campaign").

FIFA, the World Cup, the bidding process for the 2022 World Cup, and the allegations of corruption in that process. Part III explores FIFA's mandated internal-dispute mechanisms and their inability to afford the USSF a remedy based on a direct challenge to the World Cup award. In Part III, this Article explains how the USSF can use the FAUC in a collateral challenge to enjoin the QFA, allowing bids to be re-opened. Because the FAUC requires "prejudice" to "economic interests," Part IV turns to economic scholarly literature to describe the effect of the World Cup on national economies, especially the positive effect on the legacy of the USSF and its member entities such as MLS. In conclusion, Part V looks forward to the USSF's prospects for reclaiming the 2022 World Cup.

II. BACKGROUND

A. FIFA and the World Cup

Headquartered in Zurich, Switzerland, FIFA is a private Swiss nonprofit entity that governs soccer worldwide.[21] It has developed a comprehensive internal body of law through statutes,[22] as well as disciplinary[23] and ethics[24] codes, all of which constitute legislative, executive, and judicial functions.[25] FIFA is a confederation of independent soccer associations from 209 nations; each national association has one member in the FIFA Congress,

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[21] Fausto Martin De Sanctis, *Requirements for the 2014 FIFA World Cup in Brazil and Requirements of Governmental Bodies to Deter Financial Crimes in the Football Sector*, 21 SW. J. INT'L L. 27, 39 (2014).

[22] *See* FIFA, FIFA STATUTES arts. 6–7 (2015), http://www.fifa.com/mm/Document/AFFederation/Generic/02/58/14/48/2015FIFAStatutesEN_Neutral.pdf [hereinafter FIFA STATUTES].

[23] *See* FIFA, FIFA DISCIPLINARY CODE (FDC) arts. 1–2 (2011), http://www.fifa.com/mm/document/affederation/administration/fifa_dc_en_34118.pdf [hereinafter FIFA DISCIPLINARY CODE].

[24] *See* FIFA, FIFA CODE OF ETHICS arts. 1–4 (2012), http://www.fifa.com/mm/document/affederation/administration/50/02/82/codeofethics_v211015_e_neutral.pdf [hereinafter FIFA CODE OF ETHICS].

[25] De Sanctis, *supra* note 21, at 44 (characterizing these statutes and regulations as "a Constitution of the governing body of international football"). *See* Samuel Morris, Comment, *FIFA World Cup 2022: Why the United States Cannot Successfully Challenge FIFA Awarding the Cup to Qatar and How the Qatar Controversy Shows FIFA Needs Large-Scale Changes*, 42 CAL. W. INT'L L.J. 541, 544–45 (2012) (referring to legislative, executive, and administrative bodies, with the latter encompassing two judicial bodies). *See also Governance*, FIFA.COM, http://www.fifa.com/governance/index.html (last visited Jan. 29, 2016).

and each member has an equal vote on matters such as electing the president and amending FIFA Statutes.[26] Member groups from the various continents form six regional confederations.[27] The regional confederation presidents are also FIFA vice presidents who, along with persons appointed by the confederations, one female member, and the president, comprise the twenty-five member FIFA Executive Committee.[28] The Executive Committee wields tremendous power, from amending the FIFA Statutes and the various codes to setting tournament times, places, and formats (including, until recently, the venue for the World Cup).[29] FIFA's judicial arm is comprised of the General Secretariat, an Appeals Committee, and two bodies of first resort: the Disciplinary Committee and the Ethics Committee.[30]

To be members, associations agree to submit to FIFA's statutes, codes, and other rules.[31] FIFA allows one—and only one—association to represent its nation as a member.[32] FIFA manages its relationships with the members and their nations through a standard cooperation agreement that sets out rights among and duties between the association and its parent government.[33] Under this agreement, the national association is separated from the government as the only entity regulating soccer (i.e., both

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[26] Kate Youd, Comment, *The Winter's Tale of Corruption: The 2022 FIFA World Cup in Qatar, the Impending Shift to Winter, and Potential Legal Actions Against FIFA*, 35 NW. J. INT'L L. & BUS. 167, 178 (2014). *See* FIFA STATUTES, *supra* note 22, at arts. 22–29 (detailing the makeup and duties of the Congress).

[27] Youd, *supra* note 26, at 178.

[28] FIFA STATUTES, *supra* note 22, at art. 30, § 1; Guillermo Jorge, *Fixing FIFA: The Experience of the Independent Governance Committee*, 21 SW. J. INT'L L. 165, 166–67 (2014). *See also* FIFA STATUTES, *supra* note 22, at art. 30, § 4 (providing that the confederation for Europe, the Union of European Football Associations (UEFA), has three vice presidents).

[29] FIFA STATUTES, *supra* note 22, at art. 26, § 2, art. 31, § 9; FIFA DISCIPLINARY CODE, *supra* note 23, at art. 147, § 1; FIFA CODE OF ETHICS, *supra* note 24, at art. 88; Morris, *supra* note 25, at 545. *See also Executive Committee*, FIFA.COM, http://www.fifa.com /about-fifa/committees/committee=1882019/index.html (last visited Jan. 29, 2016). For an explanation of the change in venue selection, see *infra* note 47 and accompanying text.

[30] FIFA STATUTES, *supra* note 22, at arts. 61–65 (detailing the judicial bodies and roles of each respectively); Morris, *supra* note 25, at 545; Youd, *supra* note 26, at 180–81.

[31] FIFA STATUTES, *supra* note 22, at arts. 10, 13.

[32] *Id.* at art. 10, § 1 ("Any Association which is responsible for organising and supervising football *in all of its forms in its Country* may become a Member of FIFA." (emphasis added)).

[33] Sarah Longhofer, Note, *Contracting Away Sovereignty: The Case of Brazil, FIFA, and the Agreement for the Right to Host the 2014 World Cup*, 23 TRANSNAT'L L. & CONTEMP. PROBS. 147, 149–50 (2014).

professional and amateur, and both intra and international) within its country.[34] For example, professional leagues such as MLS, the National Women's Soccer League (NWSL), and the lower-division North American Soccer League (NASL) are members of the USSF,[35] but the USSF is also the sole National Governing Body for amateur soccer in the United States and the U.S. representative to FIFA under the Ted Stevens Amateur Athletic Act.[36] Qatar likewise has its own national association, the QFA.[37]

National associations like the USSF and the QFA agree to FIFA rules because that is the only way to participate in the premiere international soccer event: the quadrennial FIFA World Cup.[38] The national associations enter teams in World Cup qualifying tournaments for each regional confederation; the top thirty-two teams advance from these regional tournaments to the World Cup, where they play in randomly-drawn groups of four, with two teams from each group advancing to a single-elimination, sixteen-team bracket to determine the world champion.[39] The international scope of the competition ensures global interest, allowing FIFA to command nine-figure licensing rights for the sponsorship and broadcasting that will reach more than one billion viewers.[40] Between 2011 and 2014, 70% of

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[34] FIFA, STANDARD COOPERATION AGREEMENT arts. 3, 5, http://www.fifa.com/mm/document/affederation/administration/75/81/23/standard_cooperation_agreement_efsd_47345.pdf (last visited Jan. 29, 2016).

[35] *Professional Council*, U.S. SOCCER, http://www.ussoccer.com/about/affiliates/professional-soccer (last visited Jan. 6, 2016).

[36] ChampionsWorld LLC v. U.S. Soccer Fed'n, Inc., 726 F. Supp. 2d 961, 966 (N.D. Ill. 2010) (citing 36 U.S.C. §§ 220501–220529). *See Associations: USA*, FIFA.COM, http://www.fifa.com/associations/association=usa (last visited Jan. 29, 2016).

[37] *Associations: Qatar: Qatar Football Association*, FIFA.COM, http://www.fifa.com/associations/association=qat (last visited Jan. 29, 2016).

[38] Daniel Gandert & Harry Epstein, *The Court's Yellow Card for the United States Soccer Federation: A Case for Implied Antitrust Immunity*, 11 VA. SPORTS & ENT. L.J. 1, 5 (2011) (FIFA "could be described as the most powerful IF [International Federation], with the FIFA World Cup being the largest sporting event in the world.").

[39] M.L. Rose, *World Cup Soccer Structure*, HOUSTON CHRON., http://livehealthy.chron.com/world-cup-soccer-structure-2736.html (last visited Jan. 6, 2016).

[40] 65th FIFA Congress, FINANCIAL REPORT 2014 37 (2015), http://www.fifa.com/mm/document/affederation/administration/02/56/80/39/fr2014weben_neutral.pdf. *See Almost Half the World Tuned In at Home to Watch 2010 FIFA World Cup South Africa*, FIFA.COM, http://www.fifa.com/worldcup/news/y=2011/m=7/news=almost-half-the-world-tuned-home-watch-2010-fifa-world-cup-south-africat-1473143.html (last visited Jan. 29, 2016) ("The in-home television coverage of the competition reached over 3.2 billion people around the world, or 46.4 percent of the global population."); DOJ Press Release, *supra* note 1.

FIFA's $5.7 billion in revenue came from licensing media and marketing rights to the 2014 World Cup.[41] Interestingly, revenues from television broadcasting rights, advertising, and ticket sales are not shared with the host country.[42] Instead, FIFA requires the host country to submit an operating budget for FIFA approval, which FIFA covers while retaining all excess revenue for itself.[43] Thus, host nations are required to build all stadiums and infrastructure but cannot expect to share in the economic spoils of the tournament.[44] These revenue policies have resulted in windfall profits for FIFA, reportedly at a cash surplus of $1.4 billion in 2014.[45]

B. The 2022 Bidding Process

Before the World Cup matches can be televised, their location must be determined.[46] The FIFA Statutes lay out the bidding and selection process to host the event, but these provisions are broad and have changed over time.[47] In 2009, FIFA announced that both the 2018 and 2022 World Cup hosts would be decided in a single process, and it invited all member associations to submit a bid to host either or both events.[48] Given the economics of hosting an international sporting event, one might expect little

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[41] DOJ Press Release, *supra* note 1.

[42] ANDREW ZIMBALIST, CIRCUS MAXIMUS: THE ECONOMIC GAMBLE BEHIND HOSTING THE OLYMPICS AND THE WORLD CUP 31 (2015). Prior to the 2010 World Cup, FIFA shared some revenues with host nations; the current practice began with South Africa's hosting. *Id.*

[43] *Id.*

[44] Longhofer, *supra* note 33, at 154.

[45] Keith Weir, *FIFA Has $1.4 Billion Cash Pile to Fall Back On*, REUTERS (Mar. 21, 2014), http://www.reuters.com/article/2014/03/21/us-soccer-fifa-finances-idUSBREA2K1GO20140321.

[46] *See FIFA World Cup*, FIFA.COM, http://www.fifa.com/aboutfifa/worldcup (last visited Jan 29, 2016). The 2010 World Cup, hosted in South Africa, amassed 3,170,856 spectators at its games and was broadcast on 245 separate channels in 204 countries. *Id.*

[47] *Compare* Morris, *supra* note 25, at 546–47 (summarizing the approaches through the years to selecting the World Cup host), *with* FIFA STATUTES, *supra* note 22, at art. 31, § 9 (detailing provisions for the FIFA Congress—i.e., all 209 FIFA member associations each with an equal vote—rather than the Executive Committee to make the final decision.). *See also* FIFA STATUTES, *supra* note 22, at art. 80.

[48] Letter from Jérôme Valcke, Sec'y Gen. of FIFA, to Member Ass'ns of FIFA Eligible to Bid for the 2018 and/or 2022 FIFA World Cup (Jan. 15, 2009), http://www.fifa.com/mm/document/affederation/administration/99/74/80/20182022invitationtobidcirculare.pdf.

interest.[49] Economic research based on post-event analysis almost unanimously finds that large, international sporting events do not generate substantial returns for the host nation.[50] The positive return to the host nation is a long-term projection that is difficult to quantify.[51] Even with the lack of empirical support for an economic return, pre-event studies publicly praise the huge economic payoff a host nation can expect.[52] Furthermore, over one million visitors and over one billion viewers equate to unparalleled exposure and prestige in the international sports world.[53] Armed with optimistic pre-event studies and a belief in the importance of international exposure, national soccer associations have tremendous incentives to bid for the privilege of hosting.[54] Accordingly, eleven associations registered a total of nine bids for the 2018 and 2022 World Cups.[55]

As part of the process, FIFA required associations to establish a bid committee.[56] USSF head Sunil Gulati chaired the U.S. Bid Committee with former President Bill Clinton as an honorary chair.[57] The chair of the QFA, Sheik Hamad bin Khalifa bin Ahmad Al-Thani, served as a member of the

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[49] Andrew Zimbalist, *Brazil's Long To-Do List*, AMERICAS Q. (2011), www.americasquarterly.org/zimbalist ("South Africa spent almost $12 billion to host the 2010 World Cup, while Merrill Lynch estimates that Qatar will spend over $65 billion to prepare for the 2022 soccer competition.").

[50] ZIMBALIST, *supra* note 42, at 38–39.

[51] *Id.* at 55.

[52] *Id.* at 33–34. These studies are "promotional in nature" and make their conclusions based on assumptions of the number of visitors the events will attract. *Id.* Hired consultants have estimated figures such as $12 billion in output for South Africa and a $24.8 billion increase in output for Japan. *Id.*

[53] *See FIFA World Cup*, *supra* note 46. *See also* 65th FIFA Congress, *supra* note 40.

[54] *See, e.g.*, FIFA, 2022 FIFA WORLD CUP BID EVALUATION REPORT: USA (2010), http://www.fifa.com/mm/document/tournament/competition/01/33/74/55/b8usae.pdf [hereinafter USA BID EVALUATION REPORT]; FIFA, EVALUATION REPORTS ON THE BIDS FOR THE 2018 AND 2022 FIFA WORLD CUPS: EXECUTIVE SUMMARIES (2010), http://www.fifa.com/mm/document/tournament/competition/01/33/59/45/bidevaluationreport.pdf.

[55] *See, e.g.*, USA BID EVALUATION REPORT, *supra* note 54, at 2.

[56] *See id.* at 3. *See also* FIFA, 2022 FIFA WORLD CUP BID EVALUATION REPORT: QATAR 3 (2010), http://www.fifa.com/mm/document/tournament/competition/01/33/74/56/b9qate.pdf [hereinafter QATAR BID EVALUATION REPORT].

[57] *President Bill Clinton Named Honorary Chairman of USA Bid Committee to Host FIFA World Cup in 2018 or 2022*, U.S. SOCCER (May 17, 2010), http://www.ussoccer.com/stories/2014/03/17/13/47/president-bill-clinton-named-honorary-chairman-of-usa-bid-committee.

Qatar Bid Committee.[58] The bid committees submitted a bid book, FIFA visited each bidder's country, and the FIFA Evaluation Committee prepared Bid Evaluation Reports.[59] These reports analyzed logistical issues (e.g., stadiums, transportation, and security), as well as legal and financial issues (e.g., the submission of FIFA-mandated Hosting and Bidding Agreements by each association and FIFA-mandated Government Guarantees showing the willingness of host countries to offer concessions to FIFA for customs, taxation, and licensing rights).[60]

By the time of the bid selection in December 2010, five bidders remained in contention for the 2022 World Cup.[61] Under the rules in effect at that time, the Executive Committee had sole power to choose the winner, which it did with rounds of secret ballots.[62] Based on the Evaluation Reports and an objective prospective, there should have been little doubt as to the outcome between the USSF and the QFA.[63] Although known more for North-American-style gridiron football than soccer, the United States has modern stadiums in major cities, moderate summer climates in most of the country (and domed stadiums in others), and recent experience with logistical concerns, such as travel and security, from hosting international tournaments (the 1996 Olympics and the 1994 World Cup).[64] The only infrastructural concern was related to ground travel among the four time zones, whereas Qatar emphasized the proximity of its venue sites.[65] Logistical elements of the QFA's bid, however, militated against it: Qatar

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[58] *Qatar 2022 Announces Bid Committee Leadership*, DUBAI CHRON. (Mar. 25, 2009), http://www.dubaichronicle.com/2009/03/25/qatar-2022-announces-bid-committee-leadership. *See also Board of Directors*, QATAR FOOTBALL ASS'N, http://www.qfa.com.qa/board-of-directors (last visited Jan. 29, 2016).

[59] *See* USA BID EVALUATION REPORT, *supra* note 54, at 3. *See also* QATAR BID EVALUATION REPORT, *supra* note 56, at 3.

[60] *See, e.g.*, USA BID EVALUATION REPORT, *supra* note 54, at 39–40. *See also* QATAR BID EVALUATION REPORT, *supra* note 56, at 33–34.

[61] Youd, *supra* note 26, at 171.

[62] Morris, *supra* note 25, at 548–49. The lowest vote-getter in each round was eliminated. *Id.*

[63] *Compare* USA BID EVALUATION REPORT, *supra* note 54, at 39–40, *with* QATAR BID EVALUATION REPORT, *supra* note 56, at 33–34.

[64] USA BID EVALUATION REPORT, *supra* note 54, at 8, 11–13, 26.

[65] *Compare id.* at 40, *with* QATAR BID EVALUATION REPORT, *supra* note 56, at 8–9. Expansive geography did not deter the Executive Committee from awarding the 2018 World Cup to Russia, which has host cities ranging from Kaliningrad on the Baltic Sea to Ekaterinburg on the Asian side of the Ural Mountains. *2018 FIFA World Cup Russia*, FIFA.COM, http://www.fifa.com/worldcup/index.html (last visited Jan. 29, 2016).

needed nine new stadiums, the blistering 120-degree summers posed a health risk to players and fans, and the country has no experience hosting global sporting events.[66] From FIFA's perspective, Qatar's major advantage was its concession to every condition in the Government Guarantees (including altering its laws); the United States made no such compromise.[67] Whether these guarantees, the desire for a first-ever Middle East World Cup, or some other justification (e.g., a corrupt process) led to the result is unclear; however, the QFA won the final round of bidding by a margin of six.[68]

The QFA and FIFA subsequently entered into a contract—or, more likely, several contracts—establishing rights and responsibilities for the World Cup.[69] Although World Cup contracts are secret, which can create uncertainty as to which entity or entities actually host the event,[70] some public documents give a clue as to the contractual provisions.[71] For example, the FIFA Standard Cooperation Agreement requires the president of the host association to establish an organizing committee for every international match; furthermore, the president of the host association or the president's delegate also assumes leadership of the organizing committee, and several committee members must also be association members.[72] FIFA Statutes require the FIFA Organising Committee for the FIFA World Cup to ensure compliance with the Organising Association Agreement.[73] According to the Regulations for the most recent World Cup in 2014, FIFA designated the Brazilian Football Confederation (CBF) as the Organising

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[66] QATAR BID EVALUATION REPORT, *supra* note 56, at 7–8.

[67] *Compare* USA BID EVALUATION REPORT, *supra* note 54, at 39, *with* QATAR BID EVALUATION REPORT, *supra* note 56, at 33.

[68] Youd, *supra* note 26, at 171.

[69] *FIFA and Qatar Sign Declaration of Appointment*, FIFA.COM (Dec. 16, 2010), http://www.fifa.com/worldcup/qatar2022/photos/galleries/y=2010/m=12/gallery=fifa-and-qatar-sign-declaration-appointment-1352866.html ("FIFA President Joseph S. Blatter and the Qatar FA [Football Association] signed a declaration of appointment in Doha on 16 December 2010.").

[70] *See, e.g.*, *Russia Gets Official Status of 2018 FIFA World Cup Host*, RT (Jan. 23, 2011), http://rt.com/news/russia-host-world-cup-signing-ceremony (characterizing the 2018 World Cup agreement as "a three-headed contract between FIFA, the Russian Football Union and the Russian government").

[71] *See* STANDARD COOPERATION AGREEMENT, *supra* note 34, at arts. 15–16.

[72] *Id.* at art. 15.

[73] FIFA STATUTES, *supra* note 22, at art. 38.

Association.[74] The CBF then set up a Local Organising Committee (LOC) pursuant to the Bidding and Hosting Agreements between FIFA and the CBF; both the CBF and the LOC were collectively referred to as the Organising Association.[75] The working relations between the Organising Association and FIFA were governed by a "special contract," the Hosting Agreement, and other FIFA rules.[76] The LOC for the 2010 World Cup in South Africa was similarly established as an internal division of the South African Football Association pursuant to the Organising Association Agreement.[77] Under both the 2010 and 2014 Regulations, the LOCs had to provide the staff, security, and insurance for every match and event of the World Cup, as well as fulfill all other "obligations and responsibilities" stipulated in other contracts (e.g., stadium construction).[78]

Given the way in which FIFA structures World Cup contracts, FIFA and the QFA likely have a similar organizing association agreement. Members of the Qatar Bid Committee became members of the committees working to execute the QFA's host duties.[79] Pursuant to the Hosting Agreement, the QFA established an LOC with "responsibility for event planning, promotion

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[74] FIFA REGULATIONS: 2014 FIFA WORLD CUP BRAZIL art. 1(2), http://www.fifa.com/mm/document/tournament/competition/01/47/38/17/regulationsfwcbrazil2014_update_e_neutral.pdf (last visited Jan. 29, 2016).

[75] *Id.* at art. 1(3)–(4).

[76] *Id.* at art. 1(5).

[77] FIFA REGULATIONS: 2010 FIFA WORLD CUP SOUTH AFRICA art. 1(2)–(5), http://www.fifa.com/mm/document/tournament/competition/56/42/69/fifawcsouthafrica2010inhalt_e.pdf (last visited Jan. 29, 2016).

[78] *Id.* at art. 1(2)–(5); REGULATIONS: 2014 FIFA WORLD CUP BRAZIL, *supra* note 74, at art. 2(1)–(2).

[79] Press Release, Supreme Comm. for Delivery & Legacy, Hassan Al Thawadi, http://www.sc.qa/en/media (last visited Nov. 8, 2015) (describing how Al Thawadi's appointment as Secretary General for the Supreme Committee for Delivery & Legacy "follows on from his role as Chief Executive Officer in Qatar's 2022 Bid Committee"); Press Release, Supreme Comm. for Delivery & Legacy, Nasser Fahad Al Khater, http://www.sc.qa/en/media (last visited Nov. 8, 2015) (describing how Supreme Committee for Delivery & Legacy Executive Director of Communications oversaw media and marketing for the Qatar 2022 Bid Committee); Press Release, First Qatar 2022 Local Organising Committee Meeting Held in Doha (Feb. 25, 2015), http://www.fifa.com/worldcup/qatar2022/news/y=2015/m=2/news=first-qatar-2022-local-organising-committee-meeting-held-in-doha-2532186.html [hereinafter LOC Press Release] (stating that Al Thawadi and Al Khater are the CEO and Deputy CEO, respectively, of the Qatar 2022 Local Organising Committee).

and marketing, as well as operations and all related tournament duties."[80] By Emiri decree, a separate committee, the Supreme Committee on Development and Legacy (SCDL), was established to oversee all infrastructure projects (e.g., construction of new stadiums) and issues related to legacy (e.g., developing new cooling technology and improving the competitiveness of Qatari soccer).[81] Some infrastructure projects relevant to host duties (e.g., road network expansions and a nationwide metro system) were already part of Qatar's National Vision 2030.[82] The SCDL therefore interacts with the LOC,[83] which is an arm of the QFA pursuant to its organizing association agreement with FIFA.[84] These facts are critical to assigning responsibility, seeking legal redress, and determining economic harm for the alleged bribes paid in the bidding process.[85]

C. Corruption in the Process: Allegations, Indictments, and Investigations

Corruption has long plagued FIFA, and scholars attribute this corruption to the poor governance structure of the organization.[86] Some corrupt practices have been obvious. For example, previous FIFA Statutes forbade cash payments to officials but permitted gifts of a value based on local custom, which led to generous gifts (e.g., $30,000 Hublot watches and $2,000 necklaces from the associations of England and Australia, respectively).[87] FIFA's global reach but semi-autonomous structure provides for the movement of money across borders and subsequent money laundering.[88] The regional confederation presidents serve on the FIFA Executive Committee while also serving on various other committees, creating conflicts of interest.[89] Some aspects that seem positive—such as encouraging all nations to have a voice in the process and initiating

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[80] *FAQ*, SUPREME COMMITTEE FOR DELIVERY & LEGACY, http://www.sc.qa/en/media/faq (last visited Jan. 29, 2016).

[81] *Id.*

[82] *Id.*

[83] LOC Press Release, *supra* note 79.

[84] *See supra* Part II.A.

[85] *See infra* Part II.C.

[86] Joseph Stromberg, *A Sports Governance Expert Explains Why FIFA Is So Corrupt—and How to Fix It*, VOX CULTURE (June 2, 2015, 1:08 PM), http://www.vox.com/2015/5/27/8671925/how-to-fix-fifa.

[87] Mikhail Reider-Gordon, *Money Laundering, Corruption, and the World Cup: In the Wake of Brazil 2014*, 21 SW. J. INT'L L. 97, 101 (2014); De Sanctis, *supra* note 21, at 41–43.

[88] *See* Reider-Gordon, *supra* note 87, at 112–15.

[89] Jorge, *supra* note 28, at 167.

development programs[90]—become negative when those with the voting power demand that bidders fund national programs. The Executive Committee is therefore "the setting for extensive logrolling, favor exchanges, and power-broking among global, regional, and local players."[91]

When the Executive Committee chose the QFA as the 2022 World Cup host, most observers concluded the fix was in—a conclusion supported by sanctions imposed by FIFA internally following allegations of Qatari vote buying.[92] For example, FIFA official Amadou Diakite of Mali was suspended for two years after he allegedly told reporters posing as lobbyists that Qatari 2022 officials had offered bribes of $1 million to African representatives.[93] Moreover, Qatari Executive Committee member Mohamed Bin Hammam was banned from soccer for life.[94] Two *Sunday Times* investigative journalists chronicle how he engineered a plot that included voting pacts with other Executive Committee members,[95] payments to African Executive Committee members and to Jack Warner of Trinidad and Tobago,[96] and support for the appeal of a suspended Executive Committee member so that the vote of his replacement would not go to the USSF.[97] Other accusations arose from a British parliamentary inquiry into England's failed 2018 bid.[98] The *Sunday Times* journalists reported that the media director for the Qatar Bid Committee, Phaedra Al-Majid, claimed that

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[90] *See supra* Part II.A.

[91] Jorge, *supra* note 28, at 167.

[92] Although unrelated to the QFA, instances of corruption by Executive Committee members surfaced even before the final voting when FIFA suspended two Executive Committee members from the process and issued other sanctions based upon allegations of their attempt to sell votes to reporters posing as lobbyists for the U.S. bid. *See* Sean Rassel, *The Necessity for National Federations to Stand Up for Themselves*, 20 MICH. ST. INT'L L. REV. 797, 816 (2012); *FIFA Bans Adamu and Temarii over World Cup Vote Claims*, BBC SPORT, http://news.bbc.co.uk/sport2/hi/football/9203378.stm (last updated Nov. 18, 2010).

[93] *Amadou Diakite Appeals FIFA Ban*, ESPN.COM (May 10, 2011), http://espn.go.com/sports/soccer/news/_/id/6521474/suspended-fifa-official-amadou-diakite-appeals-ban-cas.

[94] *Mohamed Bin Hammam Resigns from Football, Banned for Life*, FIFA.COM (Dec. 17, 2012), http://www.fifa.com/governance/news/y=2012/m=12/news=mohamed-bin-hammam-resigns-from-football-banned-for-life-1973422.html.

[95] HEIDI BLAKE & JONATHAN CALVERT, THE UGLY GAME: THE CORRUPTION OF FIFA AND THE QATARI PLOT TO BUY THE WORLD CUP 2–3, 176–77, 212–15 (2015).

[96] *Id.* at 101–02, 109–12, 119–20, 390–97. Some of these payments, such as to Jack Warner, may have gone to support Bin Hammam's bid to become FIFA president. *E.g.*, Youd, *supra* note 26, at 171–72, 182–83.

[97] *Id.* at 256–57.

[98] Rassel, *supra* note 92, at 816.

Committee members offered $1.5 million to the football associations of African FIFA Executive Committee members Issa Hayatou and Jacques Anouma—though with no questions asked about how those funds were used—in exchange for their votes.[99] David Triesman, the former chief of England's 2018 World Cup bid, alleged that four Executive Committee members—Warner, Nicolas Leoz, Ricardo Teixeira, and Worawi Makudi—had made "improper and unethical requests" (e.g., Warner requested funds for an educational center, Leoz requested an honorary knighthood, and Makudi requested money to approve a match between England and Thailand).[100]

Despite denials of any wrongdoing by the bid committee or of any association with Bin Hammam,[101] the allegations became exponentially more credible after U.S. and Swiss action.[102] In May and December of 2015, the U.S. Department of Justice (DOJ) unsealed the indictments of thirty individuals—including many FIFA officials—for racketeering, wire fraud, and money laundering related to matches under the purview of both the regional confederation representing North America, Central America, and the Caribbean, and the confederation representing South America.[103] The charges do not relate to the 2022 World Cup, but the individuals do: Warner,

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[99] BLAKE & CALVERT, *supra* note 95, at 119–20; Jeré Longman, *Six from FIFA Are Accused in Bribery Case*, N.Y. TIMES (May 10, 2011), http://www.nytimes.com/2011/05/11/sports/soccer/six-top-fifa-officials-named-in-bribery-investigation.html.

[100] Longman, *supra* note 99.

[101] *See* Hamad bin Khalifa bin Ahmad Al Thani, *Qatar Had the Strongest Bid for the 2022 FIFA World Cup. Here's Why*, GUARDIAN (June 20, 2014), http://www.theguardian.com/commentisfree/2014/jun/20/why-qatar-had-strongest-bid-for-2022-fifa-world-cup; *Qatar FA Hits Back at English Football Chief Dyke*, DAILY MAIL (June 3, 2015), http://www.dailymail.co.uk/wires/afp/article-3108896/Qatar-hits-English-football-chief-Dyke.html (quoting statement from Sheik Hamad bin Khalifa bin Ahmad Al-Thani welcoming the Swiss investigations and noting that a prior internal investigation cleared the organization of "any wrongdoing"); *Qatar 2022 World Cup Bid Committee Denies Corruption Allegations and Says Mohamed Bin Hammam Had No Association with Them*, DAILY MAIL (June 1, 2014), http://dailym.ai/1nTEUj0.

[102] Elliot C. McLaughlin & Greg Botelho, *FIFA Corruption Marks "World Cup of Fraud," IRS Chief Says*, CNN (May 28, 2015), http://edition.cnn.com/2015/05/27/football/fifa-corruption-charges-justice-department.

[103] *See* Superseding Indictment at 15–27, United States v. Hawit, Cr. No. 15-252 (S-1) (RJD) (E.D.N.Y. Nov. 25, 2015), http://www.justice.gov/opa/file/797261/download; Indictment at 113–18, 122–24, United States v. Webb, No. 15 CR 0252(RJD) (RML) (E.D.N.Y. May 20, 2015), http://www.justice.gov/opa/file/450211/download; DOJ Press Release, *supra* note 1.

Teixeira, and Leoz have been indicted.[104] In addition, the DOJ unsealed guilty pleas by Warner's sons, Darrell and Daryan, and by former Executive Committee member Chuck Blazer, who admitted in court to taking bribes—including one with a co-conspirator (likely Warner)—for the 1998 and 2010 World Cups.[105] As part of their plea deal, the Warner brothers and Blazer have cooperated with law enforcement.[106] Bin Hammam has caught the attention of the DOJ because the superseding indictment also describes payments to Warner from a "Co-Conspirator #8" who can only be Bin Hammam.[107]

Authorities from multiple nations have launched independent investigations into corruption in the 2018 and 2022 bidding process.[108] Although Swiss banks are notorious for maintaining the privacy of their account holders, the Swiss government can access those accounts, and its Attorney General has received eighty-one reports of suspicious bank activity related to these incidents so far.[109] According to documents observed by Reuters, the FBI has interviewed a former employee who was present when the Qatar Bid Committee allegedly paid $1.5 million to three African Executive Committee members.[110] Although she made a sworn statement recanting the allegations, the employee, Phaedra Al-Majid, later told the FBI that she was pressed by representatives of the Qatar Bid Committee to do so.[111] A Brazilian police investigation unearthed evidence of payments

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[104] Indictment, *supra* note 103, at 115–18, 122–24.

[105] Transcript at 28–31, United States v. Blazer, No. 13-CR-602, 13-MC-1011 (E.D.N.Y. Nov. 25, 2013), http://www.nytimes.com/interactive/2015/06/03/sports/soccer/document-chuck-blazer-court-papers-made-public.html (testifying to conspiring with other FIFA executives to accept bribes, including for the 1998 and 2010 World Cups); DOJ Press Release, *supra* note 1; Stephanie Clifford, *Ex-FIFA Official Chuck Blazer Admitted Accepting Bribes for World Cup Votes*, N.Y. TIMES (Jun. 3, 2015), http://www.nytimes.com/2015/06/04/sports/soccer/soccer-official-chuck-blazer-admitted-accepting-bribes-for-world-cup-votes.html.

[106] Clifford, *supra* note 105.

[107] Superseding Indictment at 34, United States v. Hawit, Cr. No. 15-252 (S-1) (RJD) (filed Nov. 25, 2015) ("At various times relevant to the Indictment, Co-Conspirator #8 was a high-ranking official of FIFA and AFC, the regional confederation representing much of Asia.").

[108] *FIFA Scandal: Around the World in Football Investigations*, BBC NEWS (June 2, 2015), http://www.bbc.com/news/world-us-canada-32965432.

[109] Gibson, *supra* note 2; McKirdy, *supra* note 2.

[110] Hosenball, *supra* note 2.

[111] *Id.* *See* BLAKE & CALVERT, *supra* note 95, at 287–98 (alleging that former bid committee member and current LOC member Nasser Al-Khater threatened Al-Majid with a

made to Teixeira by Qatari construction companies not affiliated with the Qatar Bid Committee.[112] These investigations and criminal proceedings have the potential to provide credible evidence of payments and other benefits to many voters in the 2022 bidding process from persons linked to Qatar—if not the Qatar Bid Committee—and thus to the QFA.[113]

III. FROM OBSTACLE TO OPPORTUNITY

Assuming the USSF finds sufficient evidence of corruption, it may wish to pursue the 2022 World Cup with a lawsuit in a U.S. court; however, one commentator has called it "folly" to look outside the internal dispute procedures of international sports organizations like FIFA or the International Olympic Committee (IOC).[114] International sports law arises from a variety of sources, some based in international agreements and judicial decisions, others in the private law of the rules and disciplinary procedures of international sports organizations.[115] The FIFA Statutes explicitly prohibit member associations from finding recourse in ordinary courts of law; instead, associations must consent to arbitrate any disputes in the Court of Arbitration for Sport (CAS) and then only "after all other internal channels have been exhausted."[116] FIFA has a Disciplinary Committee and an Ethics Committee, which are governed by the FIFA Disciplinary Code and the FIFA Code of Ethics, respectively.[117] These committees are similar to arbitration panels: the chair (at least of the Disciplinary Committee) has legal training, and both codes provide procedural and evidentiary rules, such as the allowance for a broad range of

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million-dollar lawsuit for breaching a nondisclosure agreement and accompanied her to a lawyer's office to sign the retraction).

[112] *Brazil Investigation Uncovers Qatari Payment to Ricardo Teixeira*, WORLD SOCCER (June 15, 2015), http://www.worldsoccer.com/news/brazil-investigation-uncovers-qatari-payment-to-ricardo-teixeira-362859.

[113] *Id.*; Longman, *supra* note 99.

[114] James A. R. Nafziger, *International Sports Law as a Process for Resolving Disputes*, 45 INT'L & COMP. L.Q. 130, 130 (1996). *See* Rassel, *supra* note 92, at 803 (calling it "nearly impossible" to coordinate national justice systems with international sports federations like FIFA).

[115] Rassel, *supra* note 92, at 801, 803.

[116] FIFA STATUTES, *supra* note 22, at art. 67, §§ 2, 3(c); *id.* at art. 68, § 2. *See* Youd, *supra* note 26, at 179 (quoting 2 AARON N. WISE & BRUCE S. MEYER, INTERNATIONAL SPORTS LAW AND BUSINESS 1461 (1999)) ("FIFA rules require all those subject to its jurisdiction to waive any right to take recourse to the courts . . . .").

[117] FIFA STATUTES, *supra* note 22, at art. 62, § 1; *id.* at art. 63, § 1.

evidence, the provision for legal representation, and a burden of proof akin to clear and convincing evidence.[118] U.S. courts routinely enforce mandatory arbitration and choice of law agreements in international contracts, and the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), codified in the Federal Arbitration Act, requires courts to stay proceedings pending arbitration.[119] Any attempt to sue in a U.S. court would therefore be futile; accordingly, any challenge related to the 2022 World Cup begins with FIFA.

Unfortunately, commentators have concluded that FIFA's internal dispute mechanisms and substantive law do not grant FIFA the authority to provide the relief the USSF seeks: acquiring the World Cup by first having it stripped from the QFA.[120] If FIFA were to do so, it would face a legal challenge by the QFA.[121] The USSF can help its own cause, however, by targeting the source of the problem: the contract, or contracts, between FIFA and the QFA establishing hosting rights and responsibilities. If the QFA and its LOC (for convenience, referred to collectively as the QFA) were enjoined from performing the operational and managerial duties for the World Cup, FIFA would have no impediment to granting that right to another association. The Executive Committee could do so under the *force majeure* provision of the FIFA Statutes, and it must do so to have a World Cup in 2022.[122] Moreover, as this Part explains, this solution comports with FIFA's dispute mechanisms, which permit the USSF to bring an action against the QFA in the CAS, not as an appeal but as an original action, which can apply not only FIFA Codes but also Swiss law.[123]

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[118] FIFA CODE OF ETHICS, *supra* note 24, at ch. II (containing articles of procedure and evidence); FIFA DISCIPLINARY CODE, *supra* note 23, at art. 81, § 5 ("The chairman of each committee shall have legal qualifications."); Youd, *supra* note 26, at 179, 181–82 (referring to "FIFA's internal arbitral-like panel[s]").

[119] 9 U.S.C. §§ 201, 206 (2012); Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518; Scherk v. Alberto-Culver Co., 417 U.S. 506, 508–09, 516, 519–20 (1974) (enforcing clause requiring arbitration in France of disputes related to contract formed in Switzerland between German citizen and U.S. corporation to achieve "the orderliness and predictability essential to any international business transaction").

[120] Morris, *supra* note 25, at 574–75; Youd, *supra* note 26, at 170.

[121] Andre Mayer, *FIFA's "Internal Struggle" over Russia, Qatar World Cups*, CBC NEWS (June 10, 2015), http://www.cbc.ca/news/business/fifa-s-internal-struggle-over-russia-qatar-world-cups-1.3106498.

[122] FIFA STATUTES, *supra* note 22, at art. 85.

[123] *Id.* at art. 68, § 3.

A. FIFA's Internal Dispute Rules and Procedures and Their Inadequacy for a U.S. Claim with FIFA

Both the Disciplinary Code and the Code of Ethics have provisions that proscribe bribery and corruption.[124] These codes have many shortcomings related to the jurisdiction of the committees, the scope of applicability to legal persons, and the allowable sanctions, so a USSF request to FIFA to strip the award from the QFA will likely fail.

The USSF cannot challenge FIFA or the Executive Committee directly.[125] The Disciplinary Code applies to both natural persons (e.g., players and officials, including officials of FIFA) and to legal persons (e.g., the associations and members of associations, namely soccer clubs).[126] The Disciplinary Committee, therefore, has authority to sanction individuals and entities.[127] By including associations and clubs, however, the Code can be read to exclude other legal persons, such as the Executive Committee, from its scope.[128] The Code of Ethics is even more restrictive because it is limited to natural persons (e.g., players, officials, and agents).[129] Thus, the Ethics

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[124] The Executive Committee revised the Disciplinary Code in 2011 and the Code of Ethics in 2012, after many if not all of the alleged corrupt acts in the bidding process had occurred. The 2011 Disciplinary Code, FIFA DISCIPLINARY CODE, *supra* note 23, at art. 4, applies only to facts after it came into force, but the only provision pertaining to corruption has long been a part of this Code, FIFA DISCIPLINARY CODE art. 59 (2004). The Ethics Code, however, applies to conduct that occurred prior to the revision, except that no individual can be sanctioned for conduct that would not have contravened the Code in force at that time. FIFA CODE OF ETHICS, *supra* note 24, at art. 3. This safe harbor would potentially apply here only to the giving of high-value gifts as opposed to cash, and then only if those gifts were not given to influence an official's decision. *Compare id.* at art. 20, § 1(a) (limiting gifts only to those of "symbolic or trivial value"), *with* FIFA CODE OF ETHICS art. 10, § 2 (2009) (allowing officials to give gifts "in accordance with the average relative value of local cultural customs to third parties, provided no dishonest advantages are gained and there is no conflict of interest"), *and* FIFA CODE OF ETHICS art. 11, § 1 (2009) ("Officials may not accept . . . any gifts or other advantages that are offered, promised or sent to them to incite breach of duty or dishonest conduct for the benefit of a third party . . . .").

[125] *See* FIFA DISCIPLINARY CODE, *supra* note 23, at art. 3.

[126] *Id.*

[127] FIFA STATUTES, *supra* note 22, at art. 62, § 2 ("The Disciplinary Committee may pronounce the sanctions described in the[] Statutes and the FIFA Disciplinary Code on Members, Clubs, Officials, Players, intermediaries and licensed match agents.").

[128] Consider the legal maxim *expressio unius est exclusio alterius*, which in the context of statutory construction means that the expression of "one thing implies the exclusion of the other." *Expressio unius est exclusio alterius*, BLACK'S LAW DICTIONARY 661 (9th ed. 2009).

[129] FIFA CODE OF ETHICS, *supra* note 24, at art. 2.

Committee may only sanction "persons bound by this Code"; accordingly, the Committee has no authority over legal persons such as the Executive Committee.[130] The USSF can seek sanctions against individual Executive Committee members, but it was the Executive Committee as a whole that selected the QFA, and it was FIFA as an entity that entered into the contract.[131]

The USSF could nevertheless bring an action under the codes against individual members of the Executive Committee in an attempt to show such widespread corruption as to invalidate the bidding process.[132] The Disciplinary Code likely does not apply to actions related to the bidding process, even though it contains a provision on corruption.[133] Article 62 prohibits both the active offering, promising, or granting and the passive soliciting or accepting of "an unjustified advantage to a body of FIFA . . . or an official on behalf of himself or a third party in an attempt to incite it or him to violate the regulations of FIFA."[134] The Code does not define "unjustified advantage," but in the context of the Disciplinary Code, this provision likely applies to competitive corruption—that which aims to affect the outcome of a sports competition—rather than organizational corruption, which is typified by bribes for determining host cities or facilitating the sale of a sports franchise.[135] Most acts prohibited by the Disciplinary Code relate to on-field conduct such as violating the laws of the game, brawling, and offensive behavior, although it may also sanction off-the-field conduct.[136]

Even if Article 62 does apply, it does not afford the remedy the USSF seeks. It lists only three sanctions: a fine, a ban on taking part in soccer-related activities, and a ban on entering any stadium.[137] Accordingly, a USSF action under the Disciplinary Code could result in enjoining individual members of the Executive Committee from participating in the

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[130] *Id.* at art. 5. *See also* FIFA STATUTES, *supra* note 22, at art. 63, § 2 ("The Ethics Committee may pronounce the sanctions described in these Statutes, the FIFA Code of Ethics and the FIFA Disciplinary Code on Officials, Players, intermediaries and licensed match agents.").

[131] *See* FIFA DISCIPLINARY CODE, *supra* note 23, at art. 3.

[132] *Id.*

[133] *Id.* at art. 2.

[134] *Id.* at art. 62, §§ 1–2.

[135] Andrew Spalding et al., *From the 2014 World Cup to the 2016 Olympics: Brazil's Role in the Global Anti-Corruption Movement*, 21 SW. J. INT'L L. 71, 77 (2014).

[136] Youd, *supra* note 26, at 180.

[137] FIFA DISCIPLINARY CODE, *supra* note 23, at art. 62, § 1.

World Cup.[138] Because the expression of these three sanctions excludes the application of any other sanction, Article 62 does not provide the basis to invalidate the QFA's organizing association agreement.[139]

The Code of Ethics seems more promising because it "focuses on general conduct within association football that has little or no connection with action on the field of play."[140] Two provisions from the subsection on "Undue Advantage" proscribe precisely the conduct at issue. Article 19 prohibits persons bound by the Code from performing duties in cases of existing or potential conflicts of interest, which extends to gaining any possible advantage by the persons bound by the Code or their families, relatives, friends, and acquaintances.[141] Article 21 on Bribery and Corruption prohibits persons bound by the Code from "accept[ing] any personal or undue pecuniary or other advantage [for] execution or omission of an act that is related to their official activities and is contrary to their duties or falls within their discretion."[142] The phrase "persons bound by this Code" recurs in both articles and is significant because it limits who may be sanctioned: "The Ethics Committee may pronounce the sanctions described in this Code . . . on the persons bound by this Code."[143] Because the Code of Ethics limits its scope to natural persons, the Ethics Committee cannot invalidate or rescind the World Cup award because the contracts are not between any one member of FIFA and the QFA but rather are between FIFA and the QFA as legal entities, neither of which is "bound by the Code."[144] In addition, the Code of Ethics allows only a handful of sanctions, none of which extends to a contract.[145] The closest is the "return of awards," which seems to apply to awards earned from on-field competition like trophies and money rather than the bid award for the World Cup.[146]

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[138] *Id.*

[139] Morris, *supra* note 25, at 553–54.

[140] FIFA CODE OF ETHICS, *supra* note 24, at art. 1.

[141] FIFA CODE OF ETHICS, *supra* note 24, at art. 19, §§ 2–3.

[142] *Id.* at art. 21, § 1. This Article also requires persons bound by the Code to report attempted bribes and to avoid the appearance of "improper conduct." *Id.* at art. 21, §§ 1, 3.

[143] *Id.* at art. 5. *See also* FIFA STATUTES, *supra* note 22, at art. 63 ("The Ethics Committee may pronounce the sanctions described in these Statutes, the FIFA Code of Ethics and the FIFA Disciplinary Code on Officials, Players, intermediaries and licensed match agents.").

[144] *See supra* text accompanying note 130.

[145] FIFA CODE OF ETHICS, *supra* note 24, at art. 6, § 1; Morris, *supra* note 25, at 553–54.

[146] FIFA CODE OF ETHICS, *supra* note 24, at art. 6, § 1(d). The return of awards is a sanction listed in the Statutes and both Codes; the Disciplinary Code specifies that "[t]he person required to return an award shall return the benefits received, in particular sums of

The Disciplinary and Ethics Committees can also apply the FIFA Statutes, but the provisions in force in 2010, which applied to the World Cup bidding process at that time, provide nothing of substance. Article 76 required only that the Executive Committee "decide the venue for the final competitions organised by FIFA" and "issue guidelines in this connection," both of which the Executive Committee did.[147] The Statutes say nothing about bribery or corruption. Nor do the Statutes offer remedies different from the Disciplinary or Ethics Codes.[148]

An appeal of a Committee decision would likewise be unavailing because those bodies apply FIFA rules, none of which provide a remedy.[149] The first appeal is internal, to the FIFA Appeals Committee, which would likely affirm that no ground exists under the Statutes or Codes to rescind any World Cup contracts.[150]

A party may then appeal to the CAS, a body outside of FIFA's control.[151] The CAS contains an Appeals Arbitration Division and an Ordinary Arbitration Division.[152] As the name suggests, the Appeals Arbitration Division is responsible for resolving disputes concerning decisions of federations like FIFA.[153] Most FIFA cases are heard in this division because they are on appeal from FIFA's internal bodies.[154] The

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money and symbolic objects (medal, trophy etc.)." FIFA DISCIPLINARY CODE, *supra* note 23, at art. 16. *See* Youd, *supra* note 26, at 191 (writing "'awards' seems to refer to awards within the context of the game of football (i.e., trophies or money) and not the award of something as intangible as tournament hosting rights").

[147] FIFA, FIFA STATUTES art. 76 (2009).

[148] *Id. See also* FIFA STATUTES, *supra* note 22, at art. 65.

[149] FIFA STATUTES, *supra* note 22, at art. 64, § 1.

[150] *Id.* ("The function of the Appeal Committee shall be governed by the FIFA Disciplinary Code and the FIFA Code of Ethics."); *id.* at art. 64, § 2 (placing responsibility for appeals from the Disciplinary and Ethics Committees with the Appeal Committee).

[151] *Id.* at art. 64, § 3; *id.* at art. 67, §§ 1–2. For more on the role, jurisdiction, and operation of the CAS, see Louise Reilly, Symposium, *Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes*, 2012 J. DISP. RESOL. 63, 63 (2012).

[152] COURT OF ARBITRATION FOR SPORT, STATUTES OF THE BODIES WORKING FOR THE SETTLEMENT OF SPORTS-RELATED DISPUTES S20 (2013), http://www.tas-cas.org/fileadmin/user_upload/Code20201320corrections20finales20_en_.pdf [hereinafter CAS STATUTES].

[153] *Id.* at S20(b) ("The Appeals Arbitration Division constitutes Panels, whose responsibility is to resolve disputes concerning the decisions of federations, associations or other sports-related bodies insofar as the statutes or regulations of the said sports-related bodies or a specific agreement so provide.").

[154] Youd, *supra* note 26, at 184.

Ordinary Arbitration Division handles "first-instance" disputes that have not been considered elsewhere; these are typically commercial arbitration cases.[155] One student commentator has suggested that the USSF could bypass FIFA's internal committees and pursue an action against FIFA in the Ordinary Arbitration Division.[156] Such a proceeding would be based on written submissions—including designation of evidence, which could be broader than in U.S. court proceedings because CAS procedural rules do not speak to admissibility—as well as oral hearings if deemed appropriate by the panel.[157] The "comfortable satisfaction" burden of proof in the CAS is stricter than most U.S. civil actions because it is akin to the clear and convincing evidentiary standard.[158] A larger obstacle is that "FIFA law will be the primary basis for a CAS decision," so the student commentator concluded that it is "impossible for the CAS to rescind a bid award, because FIFA rules do not discuss rescinding bids."[159]

The final level of appeal is to the Swiss Federal Tribunal (SFT), which U.S. courts recognize as the only tribunal for an appeal from the CAS.[160] The SFT has severely limited grounds for modifying a CAS decision:

> The SFT will vacate an arbitration award only if the CAS panel was "constituted irregularly, erroneously held that it did or did not have jurisdiction, ruled on matters beyond the submitted claims, or failed to rule on a claim," or if "the parties are not treated equally by the CAS panel, if a party's right to be heard is not respected, or if the award is incompatible with Swiss public policy."[161]

One reporter has suggested the Executive Committee could unilaterally revoke the 2022 award under the FIFA Statutes.[162] Article 85 on unforeseen contingencies and *force majeure* states, "The Executive Committee shall

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[155] Reilly, *supra* note 151, at 64.

[156] Morris, *supra* note 25, at 555 (citing Kenya Football Fed'n v. FIFA, CAS 2008/O/1808 (Ct Arb. for Sport 2010), http://www.centrostudisport.it/PDF/TAS_CAS _ULTIMO/52.pdf.

[157] *See* CAS STATUTES, *supra* note 152, at R44.1.

[158] Youd, *supra* note 26, at 185.

[159] Morris, *supra* note 25, at 559.

[160] Gatlin v. U.S. Anti-Doping Agency, Inc., No. 3:08-cv-241/LAC/EMT, 2008 WL 2567657, at *1 (N.D. Fla. June 24, 2008).

[161] Morris, *supra* note 25, at 559–60 (quoting Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations*, 10 PEPP. DISP. RESOL. L.J. 51, 54 (2009)).

[162] Reevell, *supra* note 4.

have the final decision on any matters not provided for in these Statutes or in cases of force majeure."[163] To the extent this provision grants the Executive Committee discretion to act, it does not give FIFA legal cover against fighting the inevitable lawsuit from the QFA; indeed, the reason that the USSF should contemplate legal action is because FIFA has made clear that it will not act.[164] Nor does corruption in the bidding process trigger the *force majeure* clause because past bribery does not render impossible present performance by either party.[165] Nevertheless, the USSF can make it impossible by obtaining an injunction enforceable against the QFA.

B. Transforming FIFA's Processes into an Advantage: A Competent Tribunal with Jurisdiction to Issue Enforceable Awards

Making the QFA a party seems to change nothing because the USSF faces the same obstacles in an action against FIFA as it does in an action against its members. FIFA's internal dispute mechanisms still apply.[166] The Disciplinary Code reaches legal entities, and its proscription against corruption offers the potential sanction of a ban from soccer-related activities.[167] Though this seems to be the remedy the USSF seeks, that sanction applies only to natural, and not legal, persons.[168] The best sanction against the QFA as a body is a fine, and a modest one at that: 10,000 Swiss francs, which at the time of this writing is roughly the equivalent of the same amount in U.S. dollars.[169] The Ethics Committee has no jurisdiction over legal entities such as the QFA, nor do the Ethics Code proscriptions against bribery and corruption apply to legal entities.[170] Because the contract is between FIFA and the QFA rather than any individual members of the QFA, the Committee cannot offer the USSF the relief it seeks.[171] Without a substantive basis for the claims, appeals are likewise futile. Changing the party does change the result, however, because it allows for application of

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[163] FIFA STATUTES, *supra* note 22, at art. 85.

[164] *See* Hosenball, *supra* note 2.

[165] Dietrich Maskow, *Hardship and Force Majeure*, 40 AM. J. COMP. L. 657, 663–64 (1992).

[166] *See supra* notes 149–65 and accompanying text (explaining the FIFA dispute resolution mechanisms).

[167] FIFA DISCIPLINARY CODE, *supra* note 23, at art. 62, § 1(b).

[168] *Id.* at arts. 10(c), 11(e)–(f).

[169] *Id.* at art. 62, § 1(a).

[170] FIFA CODE OF ETHICS, *supra* note 24, at arts. 2, 21.

[171] *See* FIFA DISCIPLINARY CODE, *supra* note 23, at art. 3.

Swiss unfair competition law in proceedings before the CAS.[172] This substantive law provides the remedy the USSF seeks, although the tribunal has jurisdiction to issue an enforceable judgment only against the QFA.[173]

1. Domestic Laws that Protect Economic Interests from Bribery by Third Persons

Nations have engaged in cooperative efforts to tackle bribery and corruption in both the public and private sectors.[174] For example, parties to the United Nations Convention Against Corruption must establish domestic laws allowing individuals harmed by the corrupt acts of others to pursue a legal remedy against the wrongdoer.[175] One way the United States fulfills its obligation under this convention is through the common law claim of tortious interference with prospective economic advantage.[176] A similar law is found in state statutes on unfair competition.[177] Parties with an interest in an international contract for goods or services that have been harmed by the corrupt acts of others have made claims for both,[178] including situations where a bidder loses a contract to provide services because of corrupt acts by agents of the winning bidder.[179]

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[172] *See* FIFA STATUTES, *supra* note 22, at art. 66 (recognizing the CAS power to resolve FIFA disputes applying Swiss law).

[173] *Id.*

[174] U.N. Convention Against Corruption art. 35, *opened for signature* Dec. 9, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005).

[175] *Id.*

[176] A.B.A. SEC. OF INT'L LAW, RECOMMENDATION AND REPORT, at 18 (Aug. 2005), http://www.americanbar.org/content/dam/aba/migrated/intlaw/policy/crimeextradition/conventioncorruption08_05.authcheckdam.pdf. *See* Travis Newport, *Tortious Interference with International Contracts*, 9 CURRENTS: INT'L TRADE L.J. 80, 83 (2000) (discussing tortious interference in the context of litigating international contracts).

[177] Nika A. Antonikova, *Private Sector Corruption in International Trade: The Need for Heightened Reporting and a Private Right of Action in the Foreign Corrupt Practices Act*, 11 BYU INT'L L. & MGMT. REV. 93, 101 (2015); Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 459, 484 (2012).

[178] Mark, *supra* note 177, at 484.

[179] *Compass Settles UN Deal Lawsuits*, BBC NEWS (October 16, 2006), http://news.bbc.co.uk/2/hi/business/6054476.stm (reporting that UK catering company Compass paid $74 million to rivals ES-KO International and Supreme Foodservice to settle claims that a Compass unit had used insider information to win a contract to supply UN peacekeepers in Liberia with food and water).

Consider the California case *Korea Supply Co. v. Lockheed Martin Corp.*[180] Korea Supply Company (KSC) represented a bidder for a contract to supply military equipment to the government of South Korea; Loral Corporation (now Lockheed Martin) instead won the contract because its agent offered bribes and sexual favors to key Korean officials.[181] Because losing the bid resulted in losing a $30 million commission, KSC asserted claims for tortious interference with prospective economic advantage and violation of California's Unfair Competition Law (UCL).[182] The UCL has a broad scope, allowing both public prosecutors and private persons to sue for any conduct "that can properly be called a business practice and that at the same time is forbidden by law."[183] Because the UCL is equitable in nature, plaintiffs can enjoin the defendant from engaging in unfair practices; however, because the UCL also precludes the recovery of money damages, it could not form the basis for KSC's lost profits.[184]

The Court did rule, however, that KSC "may recover damages for the injuries it claims to have suffered as a result of unfair competition" through the tort of intentional interference with prospective economic advantage.[185] California requires proof of five elements:

(1) An economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff;

(2) The defendant's knowledge of the relationship;

(3) Intentional acts on the part of the defendant designed to disrupt the relationship;

(4) Actual disruption of the relationship; and

(5) Economic harm to the plaintiff proximately caused by the acts of the defendant.[186]

Although other jurisdictions reformulate the elements—or even have other names for the tort like tortious interference with advantageous relations, tortious intentional interference with economic relationships, and tortious

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[180] 63 P.3d 937 (Cal. 2003).

[181] Mark, *supra* note 177, at 485.

[182] *Korea Supply Co*., 63 P.3d at 941.

[183] *Id.* at 943 (citation omitted).

[184] *Id.* at 943–44, 948–49.

[185] *Id.* at 949.

[186] *Id.* at 950 (citation omitted).

interference with business relationships—the California approach uses the definition provided by the *Restatement (Second) of Torts*.[187] This tort has higher pleading and proof requirements as compared to its more specific counterpart, tortious interference with contract. The plaintiff must prove not only the fact of interference but also that the interfering act is unlawful, "that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard" such as a violation of the Foreign Corrupt Practices Act or an independent tort like fraud.[188]

Although the "interfering act" element is narrow, the "harm" element is broad. Plaintiffs need not prove lost profits "to a mathematical certainty" but need only produce evidence to permit the trier of fact to "make an intelligent and reasonable estimate of the amount."[189] Further, damages for lost goodwill are also recoverable.[190] If a plaintiff wishes to secure an injunction against activities that tortiously interfere, it must establish the element of harm.[191] U.S. courts hesitate to issue an injunction for economic harm (e.g., loss of business opportunity and customer goodwill), but they will do so if the harm is irreparable, that is, "great, certain and imminent."[192] Courts have ruled that "[e]quity . . . will restrain tortious acts where it is essential to preserve a business or property interest" such as to protect the reputation of a wine importer by enjoining a defendant from shipping wine in ways that damage its quality.[193] Accordingly, proving tortious

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[187] RESTATEMENT (SECOND) OF TORTS § 766B (AM. LAW INST. 1979) ("One who intentionally and improperly interferes with another's prospective contractual relation . . . is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation [where] the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation."). *See* Newport, *supra* note 176, at 81–82.

[188] *Korea Supply Co*., 63 P.3d at 953–54.

[189] Newport, *supra* note 176, at 85 (citing Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp., 65 F.3d 1113, 1124–25 (4th Cir. 1995)).

[190] Newport, *supra* note 176, at 85.

[191] *See, e.g.*, H.L. Hayden Co. of N.Y., Inc. v. Siemens Med. Sys., Inc., 879 F.2d 1005, 1024 (2d Cir. 1989) (declining to grant an injunction to prevent potential harm to reputation because "pecuniary injury is an element of [tortious interference] and must be established as a basis for injunctive relief, as well as damages.").

[192] Cardinal Health, Inc. v. Holder, 846 F. Supp. 2d 203, 211 (D.D.C. 2012) (citing Nat'l Mining Ass'n v. Jackson, 768 F. Supp. 2d 34, 53 (D.D.C. 2011)).

[193] Chateau Vegas Wine, Inc. v. Southern Wine and Spirits of America, Inc., 265 P.3d 680, 687 (Nev. 2011) (citing Guion v. Terra Marketing of Nev., Inc., 523 P.2d 847, 848 (Nev. 1974)).

interference that harms the plaintiff's goodwill could form the basis for an injunction to preserve the plaintiff's business interest.[194]

Similar to the United States, Swiss relief for corrupt acts that harm a plaintiff's economic interests originated in tort law.[195] In 1986, the government enacted the Federal Act Against Unfair Competition "to ensure fair and undistorted competition in the interest of all concerned."[196] The Act deemed unfair and unlawful "[a]ny behavior or business practice that is deceptive or that in any other way infringes the principle of good faith and which affects the relationship between competitors or between suppliers and customers."[197] This broad scope therefore ranged from consumer fraud and exploiting the achievements of others to inducing the breach of a contract.[198] Article 4(b) of that Act provided that it was an act of unfair competition for anyone "seek[ing] to obtain advantage for himself or for someone else by affording or offering to employees, agents or other ancillaries of a third party benefits to which they are not legally entitled to induce those persons to act contrary to their duty in accomplishing their service or professional tasks."[199] The Act provided both criminal penalties and civil relief, which both natural persons and organizations could and still can seek.[200]

To fulfill its obligations under international corruption law, the Swiss amended the FAUC in 2006 by adding Article 4a.[201] Although the gist of former Article 4(b) remained unchanged, Article 4a specifies that it applies to private sector transactions for both the offering and accepting of bribes.[202]

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[194] *See id.*

[195] Ritscher & Schröter, *supra* note 13, at 549.

[196] *FAUC 1986*, *supra* note 11, at art. 1. English is not one of the official languages of Switzerland, nor does the Swiss Federal Council have an English translation of the current FAUC that is currently in force. *See 2 Private Law—Administration of Civil Justice—Enforcement*, FED. COUNCIL, https://www.admin.ch/opc/en/classified-compilation/2.html (last visited Jan. 29, 2016).

[197] *FAUC 1986*, *supra* note 11, at art. 2.

[198] *Id.* at arts. 3–4.

[199] *Id.* at art. 4(b).

[200] *Id.* at arts. 9–10; *FAUC 2012*, *supra* note 11, at arts. 9–10; Ritscher & Schröter, *supra* note 13, at 577, 579–80.

[201] Dieter A. Hofmann & Oliver M. Kunz, *Tightening of Swiss Anti-Corruption Legislation—"Few Men Have Virtue to Withstand the Highest Bidder"*, DEMOCRACY REPORTING INT'L EUR. (Oct. 24, 2008), http://www.imakenews.com/eletra/mod_print_view.cfm?this_id=1242876&u=driem&show_issue_date=F&issue_id=000310059&lid=b11&uid=0.

[202] *FAUC 2012*, *supra* note 11, at art. 4a.

Under the provision on active bribery, which is roughly translated here, it is an act of unfair competition if one "promises or grants an undue advantage to an employee, partner, agent or any other auxiliary person of a third party in the private sector if the advantage is intended to influence the recipient to do or to omit to do something in violation of his duties or subject to his discretion."[203] Though the Act does not define "undue advantage," Article 4a is entitled "Bribing and Accepting Bribes," and commentators claim that Article 4a prohibits the payment of bribes when the intent is to influence the recipient to perform a specific act that is contrary to his or her duties.[204]

Article 4a clearly proscribes the alleged acts of persons who may be associated with the QFA in winning the World Cup bid.[205] FIFA is a private entity.[206] According to two different witnesses, persons on the Qatar Bid Committee granted an undue advantage in the form of million-dollar payments to several members of the Executive Committee, who are agents of FIFA.[207] The payers intended that money to influence the members to exercise the subject of their discretion—the votes for the 2022 World Cup host—to the benefit of the Qatar Bid Committee and ultimately the QFA. The same analysis would apply to the payments made by Bin Hammam to various Executive Committee members and to the payments made by the Qatari construction companies to Teixeira. The USSF would, of course, have to link those payments to the QFA for the QFA to be liable for them.[208]

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[203] *Id.* at art. 4a, § 1(a).

[204] The quoted English text is the translation of the authors. *Id.* at art. 4a (entitling the article "Bestechen und sich bestechen lassen"); *id.* at art. 4a, § 1(a) ("gebührenden Vorteil"). *See also* Hofmann & Kunz, *supra* note 201.

[205] *FAUC 2012*, *supra* note 11, at art. 4a.

[206] *See* Stefan Szymanski, *FIFA's Long Game*, N.Y. TIMES (May 28, 2015), http://www.nytimes.com/2015/05/29/opinion/the-long-game-of-soccers-world-body-fifa.html.

[207] *See, e.g.*, *Amadou Diakite Appeals FIFA Ban*, *supra* note 93; Ben Bryant et al., *Qatar World Cup 2022 Investigation: FIFA Chief Investigator to Interview Bid Committee Members*, TELEGRAPH (Mar. 19, 2014), http://www.telegraph.co.uk/sport/football/world-cup/10709821/Qatar-World-Cup-2022-investigation-Fifa-chief-investigator-to-interview-bid-committee-members.html.

[208] Despite having no official role with the Bid Committee, many circumstantial links exist. BLAKE & CALVERT, *supra* note 95, at 101–02 (describing deputy chief executive of the Qatar Bid Committee Ali Al-Thawadi as the point of contact between Bin Hammam and the Bid Committee); *id.* at 72–73, 122 (explaining how Najeeb Cherikal had a contract with the Bid Committee to provide "international relations" services and also made illicit payments on behalf of Bin Hammam).

Article 9 of the FAUC allows a competitor to enforce its rights under the unfair competition law.[209] Similar to California's UCL, the first remedy listed is equitable: anyone who through an act of unfair competition "suffers or is likely to suffer prejudice to his clientele, his credit or his professional reputation, his business or his economic interests in general" can request that the courts "prohibit an imminent prejudice" or "remove an ongoing prejudice."[210] The court may enjoin the defendant for an infringement that has been or is about to be committed.[211] This authority extends to an injunction "to terminate an ongoing infringement while a risk of re-offending is not required."[212] As with a U.S. action for tortious interference, Article 9 also allows for money damages, including "the surrender of profits."[213] If damages cannot be quantified, the court may estimate them under the Code of Obligations, which governs tort actions.[214] A party that does not seek damages or equity may also request a declaratory judgment.[215] Article 10 extends the ability to enforce Article 9 to professional and trade organizations that are entities with a membership, such as associations.[216] Article 11 allows for Article 9, Paragraph 1 proceedings against an employer when "an act of unfair competition has been committed by an employee or other ancillary in the course of his service or professional tasks."[217]

The USSF could make a claim for the 2022 World Cup bid as a competitor of the QFA and potentially as a national association on behalf of its members such as MLS. Although the alleged bribery has been attributed to individuals affiliated with the now-defunct Qatar Bid Committee, because the Committee acted on behalf of the QFA in attempting to secure the bid—and the Committee included members who are part of the QFA or of the LOC—the QFA is a proper defendant under Article 11.[218] Assuming the

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[209] Ritscher & Schröter, *supra* note 13, at 577.

[210] *FAUC 1986*, *supra* note 11, at art. 9, § 1(a)–(b).

[211] *Id.* at art. 9, § 1.

[212] Ritscher & Schröter, *supra* note 13, at 579–80.

[213] *FAUC 1986*, *supra* note 11, at art. 9, § 3.

[214] Ritscher & Schröter, *supra* note 13, at 579.

[215] *FAUC 1986*, *supra* note 11, at art. 9, § 1(c).

[216] *Id.* at art. 10, § 2(a); Ritscher & Schröter, *supra* note 13, at 577.

[217] *FAUC 1986*, *supra* note 11, at art. 11.

[218] Though the USSF could also sue FIFA under the passive bribery provision of Article 4a for the individual Executive Committee members' accepting bribes, it could not link those members' rogue actions to FIFA. *See FAUC 2012*, *supra* note 11, at art. 4a, § 2. As addressed in Part III.A, *supra*, conflict of interest and accepting bribes violate FIFA Ethics rules. Some Executive Committee members like Mohamed Bin Hammam have been sanctioned by FIFA

USSF proves violations of Article 4a, each violation constitutes an "act of unfair competition."[219] The USSF has suffered a prejudice because, as the second-place bidder in 2010,[220] it would have won a contract to host the 2022 World Cup but for the acts of bribery of its competitor.[221] If the event had already passed, the only remedy would be monetary: a calculation of the economic damages from the USSF's lost opportunity.[222]

However, the World Cup is still years away, and the prejudice caused by the 2010 scandal can be rectified. Although an injunction prohibiting the QFA and its committees from performing their contractual duties would not

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under these rules. *See* Youd, *supra* note 26, at 182–83. Even if the USSF could make an argument for liability because FIFA should have done more to prevent the corruption, that argument would likely not get the USSF its desired remedy. *See* Hofmann & Kunz, *supra* note 201 (writing that Swiss law imposes corporate criminal liability for failing to take all necessary and reasonable organizational measures to prevent corruption). No tribunal is likely to force FIFA to enter into a complex, long-term contractual relationship with the USSF. So if an injunction is the goal, why not enjoin the other party to the hosting and organizing agreements rather than antagonize the entity with the power to re-award the World Cup?

[219] *See FAUC 2012*, *supra* note 11, at art. 4a.

[220] Given that allegations of corruption surfaced almost immediately, the statute of limitations may bar bringing this action. But the ongoing nature of the act of unfair competition—the QFA in going forward with planning and marketing continues to earn the benefits of any corrupt acts—suggests that the limitations period has not started to run. *See* Anne-Catherine Hahn, *Switzerland*, GLOBAL GUIDE TO COMPETITION LITIGATION 161, 161–62 (2015), http://www.bakermckenzie.com/files/Upload/bk_competitionlitigationguide_may15.pdf. Even if it has, Swiss statutes extend the one-year limit for torts to match the criminal limitations period when the act is sanctionable both civilly and criminally. OBLIGATIONENRECHT [OR] [CODE OF OBLIGATIONS] Mar. 30, 1911, SR 220, art. 60(1)1 (Switz.) [hereinafter CODE OF OBLIGATIONS]. The FAUC provides for imprisonment up to three years as well as a fine for a violation of Article 4a, which equates to a seven-year limitations period from the day on which the final act was carried out. *See FAUC 2012*, *supra* note 11, at art. 23(1); SCHWEIZERISCHES STRAFGESETZBUCH [StGB] [CRIMINAL CODE] Dec. 21, 1937, SR 757 (1938), art. 97(d) (Switz.). *See also id.* at art. 98(b). Although the Swiss impose a ten-year period of repose, that bar would not apply until December 2020 at the earliest, which is far too close to the World Cup events for the USSF to satisfy the logistical requirements of hosting. *See* CODE OF OBLIGATIONS, *supra* note 220, at art. 60(1).

[221] *See* Stefan Bondy, *Bribery Scandal Surrounding Qatar World Cup Voting Could Open Door for U.S. to Host 2022 World Cup*, N.Y. DAILY NEWS (June 3, 2014), http://www.nydailynews.com/sports/soccer/qatar-scandal-divert-2022-world-cup-u-s-article-1.1814278 (explaining that the United States finished second behind Qatar in the voting).

[222] *See* Hahn, *supra* note 220, at 165.

grant the USSF the ultimate relief it seeks, an injunction "would remove an ongoing prejudice."[223] The hosting responsibilities are not limited to the two-month event but include a tournament in 2021[224] and all of the current planning, preparation, and marketing by the QFA's organizing committees. If the USSF is to host the 2022 World Cup and benefit from the marketing and promotion of the event, it needs the right to engage in these activities immediately. To analogize to the common law, an economic advantage need only be prospective to form the basis for equitable relief.[225] The USSF needs an injunction to give FIFA the discretion to re-award the 2022 World Cup: an injunction forbidding a party from performing under the contract would constitute *force majeure*,[226] thus excusing FIFA's non-performance and triggering the Executive Committee's discretion under Article 85 of the FIFA Statutes.[227] Because the USSF was the second-place bidder in 2010, and because the United States is one of a handful of countries with the ability to host the World Cup on short notice, the Executive Committee should exercise that discretion in favor of the USSF.[228]

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[223] *See FAUC 1986*, *supra* note 11, at art. 9(1)(b).

[224] The FIFA Confederations Cup is normally held in the summer preceding the World Cup. In the 2021 Confederations Cup, FIFA has chosen to move it from Qatar to another, still to be determined, Asian Confederation nation due to the oppressive summer heat in Qatar. FIFA has indicated that Qatar will still host an international tournament in 2021, but it will take place in the winter and will likely be a youth-level tournament. *See* Tony Manfred, *Qatar Loses Key Pre-World Cup Tournament Because of Oppressive Summer Heat*, BUS. INSIDER (Feb. 26, 2015, 12:33 PM), http://www.businessinsider.com/qatar-loses-2021-confederations-cup-2015-2.

[225] *See* Gieseke v. IDCA, Inc., 844 N.W.2d 210, 212 (Minn. 2014).

[226] *See* N. Nat. Gas Co. v. Approx. 9117 Acres in Pratt, Kingman, and Reno Counties, Kansas, No. 10-1232-MLB-DWB, 2015 WL 4134322, at *9 (D. Kan. Jul. 8, 2015) (holding that a state court injunction constituted *force majeure* to excuse non-performance of oil and gas lease); Sicor Ltd. v. Cetus Corp., 51 F.3d 848, 857 (9th Cir. 1995) (finding, in the context of international distribution contract, that *force majeure* provision triggered by "legal restraints or actions imposed by government authorities. . . . could embrace an injunction or sequestration order"). *See also* Karen Goepfert, *For the Long Haul: The Suitability of the Base Contract for the Sale and Purchase of Natural Gas for Long-Term Transactions*, 27 ENERGY L.J. 583, 591 n.37 (2006) (quoting model contract of North American Energy Standards Board that includes "court order" as *force majeure*).

[227] FIFA STATUTES, *supra* note 22, at art. 85.

[228] *See infra* Part V for a more thorough discussion of the factors favoring the USSF.

2. Proceedings in the CAS and Enforcing the Award

FIFA Statutes permit appeals from FIFA's internal judicial bodies to the CAS, but CAS jurisdiction is not limited only to appeals.[229] To the contrary, Article 66 seems to grant the CAS much broader authority: "FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne, Switzerland, to resolve disputes between FIFA, Members, Confederations, Leagues, Clubs, Players, Officials, intermediaries and licensed match agents."[230] Although FIFA Statutes require that "[r]ecourse may only be made to CAS after all other internal channels have been exhausted,"[231] Swiss law does not require exhaustion of internal governing body remedies where "exhaustion would be inequitable or futile."[232] The Statutes grant FIFA's internal judicial bodies the authority to apply the FIFA Statutes and Codes yet say nothing about those bodies applying Swiss law—or any external law.[233] The CAS, however, "shall" apply FIFA regulations *and* Swiss law.[234] Accordingly, if the dispute between FIFA members is based exclusively on Swiss law—such as a claim under the FAUC—then the CAS is the tribunal of first resort because an action in the Disciplinary or Ethics Committee is futile.[235]

The USSF has precedent for bypassing FIFA bodies and filing an original action with the CAS.[236] In *Kenya Football Federation*, a dispute among members of the Kenyan national association arose, resulting in the election of two groups both claiming leadership; the group that established Football Kenya Ltd. (FKL) dissolved the Kenya Football Federation (KFF), and FIFA recognized the legitimacy of FKL.[237] The KFF brought an action against FIFA in the Ordinary Arbitration Division of the CAS for damages and an order that FIFA recognize it as the legitimate member association.[238] The panel concluded that it had jurisdiction over the dispute under the FIFA Statutes.[239] It further ruled that Swiss law applied but said nothing about

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[229] FIFA STATUTES, *supra* note 22, at art. 64, §§ 2–3; *id.* at art. 67, § 1.

[230] *Id.* at art. 66, § 1.

[231] *Id.* at art. 67, § 2.

[232] Youd, *supra* note 26, at 195–96 (citing WISE & MEYER, *supra* note 116, at 1420).

[233] FIFA STATUTES, *supra* note 22, at art. 62, § 2; *id.* at art. 63, § 2.

[234] *Id.* at art. 66, § 2.

[235] *Id.*; Youd, *supra* note 26, at 195–96 (citing WISE & MEYER, *supra* note 116, at 1420).

[236] Kenya Football Fed'n v. FIFA, CAS 2008/O/1808 (Ct Arb. for Sport 2010), http://www.centrostudisport.it/PDF/TAS_CAS_ULTIMO/52.pdf.

[237] *Id.* at 2–5.

[238] *Id.* at 5.

[239] *Id.* at 10.

FIFA rules.[240] In another matter before the Ordinary Arbitration Division, the panel likewise ruled based only on Swiss and other governmental laws.[241] That case, *AEK Athens*, concerned whether Union of European Football Associations (UEFA) restrictions on ownership of multiple teams violated antitrust laws.[242] Although the parties disputed the appropriateness of UEFA's rule, the laws governing the dispute itself were those of Switzerland and the European Community.[243] Given that the FAUC and Swiss antitrust laws both protect economic interests from unfair competition practices, and given the financial nature of awarding the host duties for the World Cup, the USSF can apply the FAUC in a proceeding before the CAS as a tribunal of first resort.[244]

The CAS undoubtedly has jurisdiction over the QFA based on its prior consent as a condition of joining FIFA.[245] Nor is there an impediment to the USSF suing the QFA. At least one arbitration involved a claim by one national association against another—which, incidentally, was the QFA.[246] To ensure the widest possible reach for the injunction and to clarify corporate identities and responsibilities, the USSF should also name the subsidiary LOC as a party. CAS jurisdiction extends not only to direct FIFA members like national associations but also to indirect members like leagues, clubs, and players within those associations.[247] Although no precedent exists for suing local committees, the LOC was formed pursuant to contracts between FIFA and the QFA, and it performs tasks to fulfill the QFA's

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[240] *Id.* at 10–11. CAS rules defer to the choice of law of the parties to the dispute. *See* CAS STATUTES, *supra* note 152, at R45.

[241] AEK Athens v. Union of European Football Ass'ns (UEFA), CAS 98/200, at 10–11 (Ct. Arb. for Sport 1999), http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/200.pdf.

[242] *Id.* at 8–9.

[243] *Id.* at 10–11.

[244] Youd, *supra* note 26, at 194; Reilly, *supra* note 151, at 64. *Compare* Hahn, *supra* note 220, at 161 (writing that Swiss antitrust laws protect claimants who "are or have been obstructed from entering or competing in a particular market due to an unlawful restraint of competition"), *with FAUC 1986*, *supra* note 11, at art. 1 ("The purpose of this Law is to ensure fair and undistorted competition in the interest of all concerned.").

[245] Youd, *supra* note 26, at 192.

[246] Iraqi Football Ass'n v. FIFA, CAS 2008/A/1621 (Ct. Arb. for Sport 2008), http://www.centrostudisport.it/PDF/TAS_CAS_ULTIMO/10.pdf.

[247] Youd, *supra* note 26, at 188 n.155.

obligations under those contracts such that it likely qualifies as an indirect member.[248]

The burden of proof presents one negative factor about a CAS action: it is the equivalent of clear and convincing evidence, a higher threshold than most civil actions in the United States.[249] The flexibility of the types of evidence that arbitration panels can consider counterbalances that negative, however.[250] The criminal prosecutions of FIFA members must meet the even-higher threshold of beyond a reasonable doubt, so one may assume the governmental investigators will generate a high volume of evidence.[251] In addition, the quality of that evidence will be better than what the USSF could procure on its own, such as the sworn testimony of persons such as Blazer and potentially the bank information from Swiss authorities.[252] Although the panel may decline to consider some evidence admissible in U.S. courts, it can also base its ruling on sources inadmissible in the United States.[253] In light of the scope of the investigations and prosecutions, and after assuming that they uncover some evidence related to the several reported instances of corruption, a fraction of that evidence should be sufficient to establish a violation of Article 4a. Although the QFA could appeal any decision, the

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[248] *See FAQ*, SUPREME COMMITTEE FOR DELIVERY & LEGACY, www.sc.qa/en/media/faq (last visited Jan. 10, 2016).

[249] Chris Davies, *The "Comfortable Satisfaction" Standard of Proof: Applied by the Court of Arbitration of Sport in Drug Related Cases*, 14 U. NOTRE DAME L. REV. AUSTL. 1, 1–2 (2012).

[250] *See* Antonio Rigozzi & Brianna Quinn, *Evidentiary Issues Before CAS*, *in* INTERNATIONAL SPORTS LAW AND JURISPRUDENCE OF THE CAS: 4TH CONFERENCE CAS & SAV/FSA LAUSANNE 39 (Michele Bernasconi ed., 2014), http://lk-k.com/page/2/?year& lawyer =antonio-rigozzi&expertise&s&post_type=publication.

[251] *Id.* at 26.

[252] *See* Mark Hosenball & David Ingram, *Exclusive: Swiss Authorities Probing FIFA Say Garcia Report of Little Help – Source*, REUTERS (June 23, 2015), http://www.reuters.com/article/2015/06/23/us-soccer-fifa-garcia-idUSKBN0P322B20150623#W9EtX1FsQw6dOyuD.97 ("Garcia, who was hired by FIFA, had no subpoena power, did not take sworn testimony, and was operating under FIFA's own ethical rules, which has little enforcement power behind them, the source added."). *See also* Pamela Engel, *The Story Behind the Former Top-Ranking FIFA Executive Who Reportedly Became an FBI Informant*, BUS. INSIDER (May 27, 2015), http://www.businessinsider.com/chuck-blazer-reportedly-informed-fbi-in-fifa-investigation-2015-5 (indicating that Blazer may have cooperated with the FBI to avoid prison time for criminal violations).

[253] Rogozzi & Quinn, *supra* note 250, at 39.

limited grounds for the SFT to review CAS judgments are advantageous to the USSF, assuming it prevails.[254]

As plaintiffs involved in complex, transnational litigation have learned, an unenforceable judgment means nothing.[255] Nations need not recognize and enforce foreign court judgments because of varying and inconsistent standards of recognition and enforcement.[256] Arbitration awards, however, are entitled to near-automatic enforceability under the New York Convention.[257] Every nation that bid for the 2022 World Cup is a party to the New York Convention, including Qatar.[258] The CAS, in particular, is a recognized arbitral body "because international sporting organizations have submitted to its use."[259] Therefore, "any decision that may be handed down by the CAS would be binding on all of the participating nations in the bid process for the 2018 and 2022 World Cups."[260] The USSF would seek enforceability in Qatar, the site of the World Cup. The New York Convention notwithstanding, Qatari law gives its courts some discretion to decline enforcing an international arbitration award.[261] Even if Qatari courts declined enforcement, the injunction would still disrupt the QFA's efforts. The USSF could seek recognition and enforcement in any nation where the

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[254] *See* Rassel, *supra* note 92, at 811. *See also Frequently Asked Questions*, CT. ARB. FOR SPORT, http://www.tas-cas.org/en/general-information/frequently-asked-questions.html (last visited Jan. 29, 2016).

[255] *See* Jeff Todd, *Ecospeak in Transnational Environmental Tort Proceedings*, 63 U. KAN. L. REV. 335, 335 (2015) (In response to adverse $18 billion dollar judgment issued in Ecuador, Chevron preemptively attacked the award in New York by winning an injunction against its enforcement.); Jeff Todd, *Phantom Torts and Forum Non Conveniens Blocking Statutes: Irony and Metonym in Nicaraguan Special Law 364*, 43 U. MIAMI INTER-AM. L. REV. 291, 321–22 (2012) (After uncovering evidence of fraud, Dole successfully challenged adverse judgment in California appellate courts by seeking little-used writ of error *coram vobis*.).

[256] *See* Jeff Todd, *The Rhetoric of Recognition*, 45 MCGEORGE L. REV. 209, 222–25 (2013) (explaining that recognition and enforcement are guided by comity rather than obligation or treaty so that standards vary even among U.S. states).

[257] *See List of Contracting States*, N.Y. ARB. CONVENTION, http://www.newyorkconvention.org/list+of+contracting+states (last visited Jan. 29, 2016) (showing the number of member states and the declaration of each member state that is generally to apply the Convention with other member states).

[258] Rassel, *supra* note 92, at 811.

[259] *Id.* at 820.

[260] *Id.* at 811.

[261] Minas Khatchadourian, *Conducting an ICC Arbitration in Qatar: A Few Legal Safeguards*, 18 NO. 1 IBA ARB. NEWS 34, 36–37 (Feb. 2013).

QFA transacts business as part of planning, operating, and marketing the 2022 World Cup. This includes the United States, the home of AECOM, which is building the new stadium in Al Wakrah,[262] and Switzerland, the home country of FIFA.

With the QFA enjoined from performing hosting duties, the Executive Committee must exercise its discretion to choose a new host if there is to be a World Cup in 2022. Although the injunction does not guarantee an ultimate victory, it at least creates a reasonable avenue for the USSF to win the hosting rights.

C. Obstacles to This Approach

Though this Part describes a process leading to a 2022 World Cup USA, the USSF must acknowledge the obstacles it faces. Although many conceive of arbitration as more efficient than litigation, it is neither free nor fast, especially in a transnational context with so much at stake.[263] The CAS proceedings may be less time-consuming because they are based on a limited amount of documents and do not necessarily require oral hearings; however, the USSF must wait until the government investigations have produced sufficient evidence for it to meet its burden of proof—assuming those investigations result in sufficient evidence of corruption attributable to the QFA.[264] Although a preliminary injunction under the FAUC is possible, it is not the norm for Swiss unfair competition claims.[265] Cost may be the more important factor. For practical purposes, although the QFA has the near-unlimited financial resources of the emirate itself, the USSF in comparison has modest means.[266] It will need to depend on reduced lawyer fees or collaboration among other claimants such as MLS.

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[262] Paul Dickard, *AECOM Announced Today That It Has Been Selected to Provide Design Consultancy and Construction Supervision Services for the Al Wakrah Stadium and Precinct for the 2022 FIFA World Cup Qatar™*, AECOM (June 3, 2013), http://www.aecom.com/press/aecom-announced-today-that-it-has-been-selected-to-provide-design-consultancy-and-construction-supervision-services-for-the-al-wakrah-stadium-and-precinct-for-the-2022-fifa-world-cup-qatar.

[263] *See* Francis King, *Litigate or Arbitrate? The Pros and Cons*, LAW OFFICES FRANCIS KING (Dec. 7, 2012), http://franciskinglaw.com/civil-litigation/litigate-or-arbitrate.

[264] *See* CAS STATUTES, *supra* note 152, at R44.1.

[265] Ritscher & Schröter, *supra* note 13, at 579 (noting that regular, rather than preliminary, injunctions are the norm for Swiss unfair competition claims).

[266] *See, e.g.*, U.S. Soccer Fed'n, Inc., *2014 Audited Financial Statements*, U.S. SOCCER, http://www.ussoccer.com/about/federation-services/resource-center/financial-information (last visited Jan. 29, 2016) (listing the USSF's cash at just under $7.8 million).

Even if the USSF wins, the CAS panel may award only money damages.[267] In addition, although an injunction prevents the QFA from benefitting from its wrongdoing, it does not remedy the harm to the USSF on its own. An injunction merely provides the means for the USSF to force FIFA to select a host other than the QFA.

Finally, the analysis in this Part has relied upon one critical assumption: that the USSF has suffered an economic harm. Without a calculable harm, there can be no damages.[268] More importantly, to obtain an injunction, the USSF must establish not only that the QFA bribed but also that the bribery amounted to a "prejudice" to the USSF's business or economic interests.[269] FAUC Article 9 limits enforcement by "requir[ing] at least a damnification of an economic interest as a prerequisite for the legal interest needed to take legal action."[270] At a minimum, the claimant must show "deterioration of the participant's position in commercial competition" to bring a legal action.[271] This showing presents a major challenge: if the USSF had won the bid, it would have incurred all of the costs of operations but received no revenues from licensing.[272] Moreover, if international arbitral tribunals are as reluctant as U.S. courts to grant equity, then the USSF must show that the economic injuries are so extraordinary and irreparable that they warrant injunctive relief.[273]

IV. PROVING ECONOMIC INTERESTS

Consider the following question: What are the USSF's (i.e., the actual party to arbitration) economic interests and advantages in this context? The answer requires turning to the extensive economics literature on the value to host cities and countries of large-scale sporting events, or "mega-events."

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[267] *See* CAS STATUTES, *supra* note 152, at R31, R46.

[268] *Damages in International Arbitration: How Much is Prevailing Worth?*, JURIS CONF. LLC (October 19, 2012), http://www.jurisconferences.com/2012/damages-in-international-arbitration-october-19-2012.

[269] *See* Josh Herr, *World Cup Scandal Explainer: World's Biggest Sporting Event Faces Bribery Allegations*, FISCAL TIMES (Mar. 18, 2004), http://www.thefiscaltimes.com/Articles/2014/03/18/World-Cup-Scandal-Explainer-World-s-Biggest-Sporting-Event-Faces-Bribery (stating that the World Cup events generate tremendous money in revenue, and that Americans have a higher interest in soccer now than ever before). *See also* Bondy, *supra* note 221.

[270] Ritscher & Schröter, *supra* note 13, at 557.

[271] *Id.*

[272] *See* ZIMBALIST, *supra* note 43.

[273] *See supra* text accompanying notes 191–96.

The vast majority of this literature shows either a small positive return relative to the pre-event predictions or that the costs of the mega-event outweigh the revenues.[274]

A review of post-event studies on the World Cup and the Olympic Games shows the host of these mega-events will see real return in the long term,[275] that is, what FIFA and the International Olympic Committee (IOC) refer to as the "legacy" of the event.[276] This legacy is what the USSF will lose. The USSF will, for instance, never see the potential growth in soccer culture in the United States that would likely result from hosting the World Cup. Although the value to the USSF of an expanding soccer culture in the United States is difficult to place into monetary terms, other legacies lost are not. For instance, Major League Soccer (MLS) will miss the increase in attendance—and concomitant increase in franchise values—that invariably accompany a local World Cup.[277] With some degree of accuracy, the economic damage from this lost legacy can be quantified.

This Part provides an overview and explanation of the economic literature on valuing the World Cup, including a comparison of some recent World Cup hosting experiences. The consistent result in the literature is that the pre-event promises of short and long-term positive effects for hosts are overstated.[278] This Part then discusses the potential economic advantage of winning the World Cup bid for the USSF, and for MLS in particular, with a focus on the economic losses associated with losing the legacy of the World Cup.[279]

A. Valuing Sporting Mega-Events

Imagine you are a politician in a developing country primed to burst into the developed world. What better way to announce your ascendance than to host an event such as the World Cup or the Olympic Games? The whole

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[274] ZIMBALIST, *supra* note 43, at 38.

[275] *Id.* at 37–53 (providing a comprehensive review of the economic literature that analyzes the cost and benefit of sporting mega-events).

[276] *See* Owen Gibson, *London 2012 Has "Raised the Bar" on Legacy Planning, Says IOC President*, GUARDIAN (Mar. 27, 2012), http://www.theguardian.com/sport/2012/mar/27/london-2012-ioc-legacy. *See also* Sam Tighe, *The Tangible Legacy of FIFA and the 2014 World Cup: A Network to Nowhere*, BLEACHER REP. (Feb. 17, 2014), http://bleacherreport.com/articles/1962867-the-tangible-legacy-of-fifa-and-the-2014-world-cup-a-network-to-nowhere.

[277] *See, e.g.*, *supra* note 46 and accompanying text.

[278] ZIMBALIST, *supra* note 43, at 38.

[279] *See infra* Parts IV.B and IV.C.

world will be watching to see how far your country has come. The exposure will lead to greater opportunities for trade, more tourism, an increase in national pride, and even a rise in your own popularity at home.[280] Furthermore, such an event leads to infrastructure projects, such as airports and public transport, which are sorely needed and provide for a lasting legacy.[281] This might sound too good to be true. FIFA and the IOC sell this bill of goods to cities and countries around the world.[282] The painful truth, however, is that the economic value of hosting a mega-event such as the World Cup or the Olympic Games is minimal and the costs generally outweigh revenues, sometimes to a very large degree.[283] Furthermore, the legacy effects of a mega-event are often less than positive. Now imagine a Brazilian politician who fully-backed the building of new soccer stadiums in her country—stadiums that only one year after World Cup 2014 sit empty or underutilized.[284] How does the decision to host both the World Cup in 2014 and the Summer Olympic Games in 2016 seem to her?

Economists call it the "winner's curse."[285] The winner's curse implies that the winning bidder in an auction often overbids, based on overly optimistic expectations of the value of the object bid upon.[286] Further, the likelihood of overbidding and the amount overbid increase as the number of bidders increases.[287] FIFA has the incentive to extend World Cup bidding to as many countries as possible to extract as much as possible from the winning bidder.[288] For World Cup bidding, countries compete by planning the most lavish stadiums and facilities and by agreeing to FIFA's demands for tax breaks and other adjustments to local laws for the duration of the World Cup.[289] Assuming Qatar was awarded the 2022 World Cup based

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[280] *See* ZIMBALIST, *supra* note 43, at 54–64.

[281] *See* Tighe, *supra* note 276.

[282] *See id.*

[283] ZIMBALIST, *supra* note 43, at 38.

[284] Lourdes Garcia-Navarro, *Brazil's World Cup Legacy Includes $550M Stadium-Turned-Parking Lot*, NPR (May 11, 2015), http://www.npr.org/sections/parallels/2015/05/11/405955547/brazils-world-cup-legacy-includes-550m-stadium-turned-parking-lot.

[285] Richard H. Thaler, *Anomalies: The Winner's Curse*, 2 J. ECON. PERSPECTIVES 191, 191–92 (1988) (establishing the winner's curse as an economic phenomenon).

[286] *Id.* at 192.

[287] *Id.*

[288] *See* ZIMBALIST, *supra* note 43, at 29.

[289] *See* Assoc. Press, *Deloitte: Qatar to Spend $200 Billion for World Cup*, USA TODAY (Jul. 9, 2013), http://www.usatoday.com/story/sports/soccer/2013/07/09/deloitte-qatar-to-spend-200-billion-world-cup/2501815.

solely on merit (however unlikely that may be), then it occurred because Qatar was seen as the country that would make FIFA the most revenue and would spend the most on outlandishly-designed stadiums.[290] FIFA is profit-maximizing, even if the bidders are not.

How do countries develop such outsized expectations of the value of a mega-event? Economic analysis of the return to mega-events can be separated into two categories: ex-ante and ex-post studies.[291] First, the ex-ante studies generally find huge benefits relative to costs.[292] Second, the ex-post studies consistently find minimal positive net benefit or even negative returns.[293] The former group comprises those studies done by consulting firms, hired by the supporters of the event to evaluate the economics of the event.[294] The latter group includes studies completed after the event by academic researchers, who have no monetary interest in trumpeting the supposedly huge benefits that accompany a winning bid.[295]

Ex-ante studies tend to overestimate revenues and underestimate costs, so that net revenue is doubly overestimated.[296] They vary somewhat in how estimates for revenue from the mega-event are generated, but all can be pared down to a few common steps. Consider the effect of foreign visitors on the host of a World Cup, which is a major source of expenditure when estimating revenue pre-event.[297] First, the analyst estimates the number of visitors that will come to the host country for the World Cup and the number of days they will stay.[298] Then, she or he estimates the average spending per visitor per day (e.g., net of game tickets, the revenue from which goes

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[290] *See id.* Estimates suggest that Qatar will spend $200 billion on infrastructure, including several new stadiums, as it prepares to host the games. *Id.*

[291] ZIMBALIST, *supra* note 43, at 33–41.

[292] *Id.* at 33–37.

[293] *Id.* at 37–41.

[294] *See, e.g.*, Sean Rassel, *The Necessity for National Federations to Stand Up for Themselves*, 20 MICH. ST. INT'L L. REV. 797, 798–99 (2013) (estimating the economic impact of a U.S. World Cup to hosting twelve to eighteen Super Bowls, with a $5 billion impact and tens of thousands of new jobs created).

[295] *See, e.g.*, Stefan Szymanski, *The Economic Impact of the World Cup*, 3 WORLD ECON. 169 (2002) (studying the economic impact of the 2002 Japan/South Korea World Cup).

[296] Brian Sturgess & Chris Brady, *Hosting the FIFA World Cup*, 7 WORLD ECON. 145, 147, 149 (2006) (criticizing how ex-ante studies inflate the benefits and fail to account for what is displaced in the economy).

[297] Szymanski, *supra* note 295, at 173–74.

[298] *Id.* at 170–73.

directly to FIFA).[299] Then, the analyst creates a multiplier based on the notion that money spent becomes income for someone else, who in turn spends it, such that spending creates further spending and further tax revenue for the host.[300] Because spending is translated into national output (as in standard macroeconomic theory), the spending increase will lead to increases in the host country's output level, commonly measured as Gross Domestic Product (GDP).[301] The multiplier is usually a number greater than 1.0 and as high as 3.5.[302] To generate an estimate of revenue, the analyst multiplies the number of visitors, the number of days, the number of dollars spent per visitor per day, and the multiplier.[303] The result is the amount of revenue the country can expect to generate from the World Cup in terms of spectator spending and, in turn, the expected increase in GDP.[304]

Consultant group Grant Thornton initially estimated that the 2010 World Cup in South Africa would attract 483,000 foreign visitors, later revising that estimate to 373,000.[305] Post-event, the same consulting group computed the actual number of foreign visitors to be 350,000.[306] These numbers contrast with those computed by academic economists, who concluded that the most optimistic result was 220,000 foreign visitors,[307] less than half the original estimate and one-third less than the post-event estimates produced by Grant Thornton.[308]

Overestimation is one issue, but economic relevance is another. Optimistically assume the initial estimate of 483,000 visitors and an average stay of five days at $330 per day.[309] Further, assume a large multiplier of 2.0. Based on these assumptions, the total spending attributable to foreign

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[299] *Id.*

[300] *Id.*

[301] *Id.* at 169.

[302] ZIMBALIST, *supra* note 43, at 34.

[303] *See* Szymanski, *supra* note 295, at 170–75.

[304] *See id.*

[305] Peter Wonacott, *World Cup Expects Fewer Visitors*, WALL ST. J. (Apr. 22, 2010), http://www.wsj.com/articles/SB10001424052748703404004575197882839439108.

[306] Press Release, Grant Thornton, New Zealand Already a Winner from the Rugby World Cup; But Bigger Things Await (2011), http://www.grantthornton.co.nz/Press/2011-press-releases/new-zealand-already-a-winner-from-the-rugby-world-cup.html.

[307] Thomas Peeters, Victor Matheson & Stefan Szymanski, *Tourism and the 2010 World Cup: Lessons for Developing Countries*, 23 J. AFRICAN ECON. 290, 293 (2014).

[308] *See* Press Release, Grant Thornton, *supra* note 306.

[309] *See generally* Wonacott, *supra* note 305 (using the initial projection of 483,000 total visitors, rather than the updated projection of 373,000 total visitors).

visitors is approximately $1.6 billion.[310] In contrast, taking the 220,000 academic estimates and using a more reasonable multiplier of 1.3,[311] the total spending of foreign visitors is approximately $472 million, less than one-third of the optimistic prediction. The World Bank reports the South African GDP exceeded $375 billion in 2010.[312] Thus, although the most optimistic estimate of extra spending amounts to only 0.4% of GDP, the more reasonable estimate is only 0.1% of South African output.[313] The latter result is consistent with other economic studies on the effect of tourism on the South African economy attributable to the World Cup.[314]

The overestimation problems of ex-ante studies are related to the basic steps for estimating revenue. Consider visitors and their spending. Ex-ante studies treat any spending on the event as new spending, which is simply added to pre-existing models of local economic activity without considering the changes the mega-event may cause.[315] Ex-post studies consider only the actual total number of visitors and actual spending overall, which are both influenced by substitution and income leakages.[316] In sporting mega-events, substitution refers to two primary factors that lead to less spending than might be predicted pre-event.[317] First, there is substitution in the number of visitors.[318] Take London, for example. In any given month, London can expect a certain number of foreign tourists.[319] If the month in question has a mega-event scheduled, some of these tourists will stay away rather than

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[310] *See id.*

[311] ZIMBALIST, *supra* note 43, at 35 (stating that "multipliers greater than 1.3 are simply not credible"). *See* Szymanski, *supra* note 295, at 174 (using a multiplier of 1.47 to estimate the economic impact of the 2002 World Cup in Korea/Japan, but conceding that this is likely too high).

[312] *Data: South Africa*, WORLD BANK, http://data.worldbank.org/indicator/NY.GDP.MKTP.CD/countries/ZA?display=graph (last visited Jan. 29, 2016).

[313] *See id.*

[314] *See, e.g.*, Stan du Plessis & Wolfgang Maennig, *The 2010 FIFA World Cup High-Frequency Data Economics: Effects on International Tourism and Awareness for South Africa*, 28 DEV. S. AFR. 349, 362 (2011).

[315] *See* ZIMBALIST, *supra* note 43, at 33–37.

[316] *See id*. at 38.

[317] *See id.*

[318] *See id.*

[319] *Visitor Economy Facts*, VISITBRITAIN, https://www.visitbritain.org/visitor-economy-facts (last visited Jan. 29, 2016).

fight the crowds.[320] This is, in fact, exactly what happened during the Summer Olympics of 2012.[321] Second, spending on sporting events tends to substitute for spending on other forms of entertainment.[322] For instance, Londoners likely took advantage of the location to attend some Olympic events and, in doing so, spent money on event tickets that would otherwise have been spent elsewhere.[323] Interestingly, ex-ante studies often ignore spending substitution, but businesses understand the concept. Several London theater companies considered temporarily closing during the Olympics due to a reduction in demand.[324]

In addition to negative substitution effects on visitors and spending, leakages from local income can lead to an overestimation of total spending.[325] Economists define an "income leakage" as any circumstance in which spending within a local economy is paid to entities outside of that economy.[326] Income leakages lead to a smaller multiplier and thus result in lower overall spending.[327] Consider a London tourist who pays £250 for a night in a Marriott hotel. Based on the multiplier concept, this £250 in spending becomes income for someone who works at the hotel, who then spends some of that additional income locally, say to buy groceries. Each time the money is spent, it creates income for another person who in turn spends some of it.[328] The value of the multiplier is relatively large when spending creates local income and local spending; however, the value of the multiplier drops when income "leaks" from the local economy.[329] Much of the £250 in spending at Marriott will leak from the UK economy because it will be sent to Marriott corporate headquarters in the United States. Thus, a

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[320] James Hall, *Tourism to the UK Fell During Olympics, Official Figures Show*, TELEGRAPH (Oct. 11, 2012), http://www.telegraph.co.uk/news/uknews/9601588/Tourism-to-the-UK-fell-during-Olympics-official-figures-show.html.

[321] *Id.*

[322] ZIMBALIST, *supra* note 43, at 37.

[323] *See id.*

[324] Matt Trueman, *West End Musicals May Close During London Olympics 2012*, GUARDIAN (Nov. 7, 2011), http://www.theguardian.com/stage/2011/nov/07/west-end-musicals-olympics-2012.

[325] *See* ZIMBALIST, *supra* note 43, at 37.

[326] *See id.* at 36–37.

[327] *See id.*

[328] *See id.* at 36.

[329] *See id.*

multiplier that is not adjusted for income leakages will overstate the extent of spending creation.[330]

Ex-ante studies also tend to underestimate costs, especially in terms of construction and security.[331] Construction costs spiral due to labor market conditions, and security is usually more extensive and expensive than expected.[332] Construction costs tend to escalate due to increased demand for skilled labor and construction materials, as well as old-fashioned labor strife based on the power of organized labor during a local construction boom.[333] In the modern world, security for large-scale sporting events includes preventing terrorist attacks and requires extensive coordination between local police, national police, and the military.[334] Prior to the London Olympics in 2012, the government became concerned that security costs had roughly doubled, with one representative commenting, "It is staggering that the original estimates were so wrong."[335] It is unclear whether this increase in security costs included the placement of military hardware (such as anti-aircraft missile systems and warships) that eventually became necessary to combat the possibility of an attack on one of the Olympic venues.[336] The final cost for security for the 2012 London Olympics was estimated at $1.6 billion.[337]

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[330] *See id.*

[331] *See id.* at 42–46.

[332] *See id.*

[333] Stephen Wade, Assoc. Press, *Olympic Construction Workers Defy Court Order, Stay on Strike at Main Rio 2016 Venue Cluster*, FOX NEWS (Apr. 10, 2014), http://www.foxnews.com/sports/2014/04/10/olympic-construction-workers-defy-court-order-stay-on-strike-at-main-rio-2016. For example, workers in Brazil walked off the job while constructing venues for the 2016 Summer Olympics. *Id.*

[334] Anthony Bond & Ian Drury, *Armed and Ready: For the First Time Since the Second World War, London's Green Space Is Transformed by Anti-Aircraft Guns for Olympic Ring of Steel*, DAILY MAIL (Jul. 12, 2012), http://www.dailymail.co.uk/news/article-2172909/Olympic-security-Londons-green-space-transformed-anti-aircraft-guns-Olympic-ring-steel.html.

[335] *London 2012: Olympic Security Cost Raises Concern Among MPs*, BBC NEWS (Mar. 9, 2012), http://www.bbc.com/news/uk-england-london-17302068.

[336] Bond & Drury, *supra* note 334.

[337] Matthew Black, *Winner's Curse? The Economics of Hosting the Olympic Games*, CBC NEWS (Jul. 30, 2012), www.cbc.ca/news/canada/winner-s-curse-the-economics-of-hosting-the-olympic-games-1.1186962.

B. Contrasting World Cup Fortunes: Germany 2006 and South Africa 2010

In 2006, the World Cup was held in twelve locations throughout Germany, with the final match held in the newly-renovated Olympiastadion in Berlin.[338] The stadium renovation cost €242 million, and the stadium continues to be the home of Hertha Berlin SC, a club that plays in the top division in Germany (i.e., the Bundesliga).[339] The other eleven German stadiums used in the 2006 World Cup continue to be used by big clubs in big cities.[340] Economic analysis suggests that the 2006 World Cup had a small positive effect on net spending in the German tourism industry,[341] no appreciable effect on German unemployment,[342] and little to no effect on other indicators or measures of German economic activity such as retail sales and urban development.[343] At least the legacy of the 2006 World Cup is generally positive because of the continued financial and on-field success of the Bundesliga and of top German clubs (e.g., Hertha, Borussia Dortmund, and Bayern München), as well as noticeable increases in non-quantifiable measures such as "an improved international perception of Germany."[344]

The 2010 World Cup was held in ten stadiums in nine cities in South Africa.[345] Eight games, including a semi-final, were played in a new stadium in Cape Town built for approximately $600 million.[346] The South African Public Service Commission reports total costs for stadium construction of

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[338] *2006 FIFA World Cup Germany: Matches*, FIFA.COM, http://www.fifa.com/worldcup/archive/germany2006/matches/index.html (last visited Jan. 29, 2016).

[339] *Olympiastadion*, STADIUM DB.COM, http://stadiumdb.com/tournaments/world_cup/2006/olympiastadion_berlin (last visited Jan. 29, 2016).

[340] *Germany World Cup 2006 Stadiums*, FOOTBALL ECONOMY.COM, http://www.footballeconomy.com/content/germany-world-cup-2006-stadiums (last visited Jan. 29, 2016).

[341] Swantie Allmers & Wolfgang Maennig, *Economic Impacts of the FIFA Soccer World Cups in France 1998, Germany 2006, and Outlook for South Africa 2010*, 35 E. ECON. J. 500, 501–07 (2009).

[342] *See* Florin Hagn & Wolfgang Maennig, *Large Sport Events and Unemployment: The Case of the 2006 World Cup in Germany*, 41 APPLIED ECON. 3295, 3299 (2009).

[343] Wolfgang Maennig, *One Year Later: A Re-Appraisal of the Economics of the 2006 Soccer World Cup*, 10 HAMBURG CONTEMP. ECON. DISCUSSIONS 1, 16 (2007).

[344] *Id.*

[345] FIFA, 2010 FIFA WORLD CUP SOUTH AFRICA: TECHNICAL REPORT AND STATISTICS 154–55, http://resources.fifa.com/mm/document/affederation/technicaldevp/01/29/30/95/reportwm2010_web.pdf (last visited Jan. 29, 2016).

[346] *Id.* at 155; *Cape Town Stadium*, CAPETOWN.GOV.ZA, http://www.capetown.gov.za/en/FIFA2010/Pages/CapeTownStadium.aspx (last visited Jan. 29, 2016).

$2.05 billion (i.e., Cape Town Stadium plus four other newly-built stadiums and one major upgrade)[347] with a total expenditure for World Cup 2010 of approximately $3.3 billion.[348] With a tourist expenditure—the primary short-term return from a mega-event—of less than a half-billion dollars, based on estimates discussed previously, the short-run return for World Cup 2010 is certainly negative.

However, what of the legacy of the first World Cup in Africa? FIFA established a Legacy Trust to provide ongoing financial support for the development of soccer in South Africa.[349] According to FIFA Secretary General Jérôme Valcke: "[W]e delivered on our promise that the 2010 World Cup would establish sustainable long-term human and social development initiatives through football in the host country. Legacy must be measured in the long term."[350] Although the development of soccer in South Africa is a laudable goal, and one that arguably deserves to be funded, the monetary value of FIFA's investments in South African soccer development pale in comparison to the cost of the World Cup and to the revenue generated by FIFA.[351] As of September 2014, FIFA had disbursed $6.5 million (82 million South African Rand[352]) to a variety of development projects, while FIFA is said to have made $3.65 billion on the 2010 World Cup.[353] A more obvious and costly legacy for South Africa is the white elephant (i.e., the Cape Town Stadium), which sits empty for most of the

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[347] *2010 FIFA World Cup Stadiums*, MEDIA CLUB S. AFR., www.mediaclubsouthafrica.com/component/content/article?id=93:world (last visited Jan. 29, 2016).

[348] Rupert Neate, *South Africa Recoups Just a Tenth of the £3bn Cost of Staging World Cup 2010*, TELEGRAPH (Dec. 10, 2010), http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/leisure/8192484/South-Africa-recoups-just-a-tenth-of-the-3bn-cost-of-staging-World-Cup-2010.html.

[349] *See* Press Release, Administration, South Africa's World Cup Legacy Lives On (Nov. 13, 2014), http://www.fifa.com/about-fifa/news/y=2014/m=11/news=south-africa-s-world-cup-legacy-lives-on-2474284.html.

[350] *Id.*

[351] 61st FIFA CONGRESS, FIFA FINANCIAL REPORT 2010 14 (2011), http://www.fifa.com/mm/document/affederation/administration/01/39/20/45/web_fifa_fr2010_eng[1].pdf.

[352] Press Release, Administration, *supra* note 349 (computing dollar figure on exchange rate of 82 Rand per dollar).

[353] Gerald Imray, Assoc. Press, *South Africa Spent $3 Billion on 2010 World Cup*, YAHOO! NEWS (Nov. 23, 2012), news.yahoo.com/south-africa-spent-3-billion-2010-world-cup-133452820--sow.html.

year.[354] Large stadiums are expensive to maintain, and without a popular sports team as a tenant, the stadium will likely fall into disrepair and become an eyesore rather than a focus of local pride and economic activity.[355]

C. Economic Impact on the USSF and Its Member Leagues

In terms of economic impact and long-term legacy, a World Cup in the United States is more likely to follow the German experience than that of South Africa. Like Germany, the United States has existing transportation, tourism, and sports infrastructure, and the cost of putting on the World Cup is not prohibitive.[356] Like all other host experiences, the USSF could expect to have a budget shortfall given that the revenue associated with a sporting mega-event never lives up to the pre-event estimate.[357] Therefore, like Germany, the real return for the USSF of hosting a World Cup is in the context of legacy effects.[358] Unlike South Africa, the legacy of hosting a World Cup would most likely be positive, especially considering the potential growth of professional soccer in the United States that could follow.

1. MLS Attendance and Franchise Values

The top level of professional soccer in the United States is Major League Soccer (MLS).[359] MLS was conceived when FIFA awarded the 1994 World Cup to the USSF.[360] As part of the award, the USSF agreed to form a

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[354] *The Empty Stadiums: South Africa's White Elephants—Cape Town*, MONOCOLUMN (Oct. 21, 2010), http://monocle.com/monocolumn/business/the-empty-stadiums-south-africa-s-white-elephants.

[355] Juliet Macur, *The Dazzle and the Desolation of World Cup Host Cities*, N.Y. TIMES (June 28, 2014), http://www.nytimes.com/2014/06/29/sports/worldcup/world-cup-2014-residents-wonder-how-new-stadiums-will-benefit-region-after-cup.html.

[356] Victor A. Matheson, *Too Often, Especially In Emerging Economies, the Exorbitant Investment Necessary to Prepare For These Events Goes to Projects With Little Long-Term Economic Value*, AMERICAS Q. (2014), http://www.americasquarterly.org/content/too-often-especially-emerging-economies-exorbitant-investment-necessary-prepare-these-events.

[357] Victor A. Matheson, *Mega-Events: The Effect of the World's Biggest Sporting Events on Local, Regional, and National Economies* 19 (Coll. of the Holy Cross, Dep't of Econs. Faculty Research Series, Working Paper No. 06-10, 2006), http://college.holycross.edu/RePEc/hcx/Matheson_MegaEvents.pdf.

[358] *See supra* text accompanying note 344.

[359] *Professional Council*, *supra* note 35.

[360] Kevin Baxter, *World Cup in 1994 Gave U.S. Soccer the Kick in the Pants It Needed*, L.A. TIMES (May 31, 2014), http://latimes.com/sports/soccer/la-sp-us-world-cup-mls-20140601-story.html.

division-one professional outdoor soccer league.[361] MLS began play in 1996 with a league of teams in ten U.S. cities.[362] The positioning of MLS in the structure of the USSF is similar to that of soccer leagues in major European countries. Specifically, MLS is a wholly separate entity from the USSF, even though MLS and the USSF collaborate on club-related and national team issues and MLS is sanctioned by FIFA through the USSF.[363] The USSF also administers the professional game below MLS, composed of the second-division North American Soccer League (NASL) and third-division United Soccer League (USL).[364] The relationship between MLS and the USSF is not always smooth,[365] but the two organizations find ways to compromise. Areas of cooperation include player development, marketing, and administration.[366]

By the 2011 season, MLS average game attendance was 17,872, greater than that of the National Basketball Association (NBA) and the National Hockey League (NHL).[367] Although this does not mean that MLS has surpassed the NHL and the NBA in fan support,[368] it does show real growth in popularity of the league, at least as an in-person viewing experience. The fact that revenue in the NBA and the NHL dwarfs that of MLS highlights the disparate nature of league revenue streams; although the NHL and the NBA generate a substantial portion of total revenue from television, MLS is

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[361] BEAU DURE, LONG-RANGE GOALS: THE SUCCESS STORY OF MAJOR LEAGUE SOCCER 2 (2010).

[362] *History: Timeline*, U.S. SOCCER, http://www.ussoccer.com/about/history/timeline (last visited Jan. 12, 2016).

[363] *Professional Council*, *supra* note 35; *Associations: USA*, *supra* note 36 (listing MLS as the National League for the USSF).

[364] *Professional Council*, *supra* note 35.

[365] *See* Rob Usry, *The 10 Biggest Signs that US Soccer and MLS Hate Each Other*, PASTE MAG. (Jan. 27, 2016, 10:53 AM), http://www.pastemagazine.com /articles/2016/01/the-10-biggest-signs-that-us-soccer-and-mls-hate-e.html.

[366] A recently-signed global media partnership will bring in a reported $100 million in revenue to be shared by MLS and the USSF. Charles Boehm, *A USSF-MLS Split: Still Out of the Question?*, U.S. NAT'L SOCCER PLAYERS (Oct. 23, 2014), http://www.ussoccerplayers.com/2014/10/ussf-mls-split-still-out-of-the-question.html.

[367] Fred Dreier, *MLS Passes NBA as Third Best-Attended Sport*, SPORTING NEWS (Nov. 7, 2011), http://www.sportingnews.com/soccer-news/205972-mls-passes-nba-as-third-best-attended-american-sport.

[368] *See generally* Nate Silver, *The "Big Five" in North American Pro Sports*, FIVETHIRTYEIGHT (Apr. 4, 2014), http://fivethirtyeight.com/datalab/theres-a-big-five-in-north-american-pro-sports.

largely dependent on game-day revenues.[369] *Forbes* estimated that 90% of revenue for MLS in 2012 came from game- and stadium-related sources.[370]

Given the importance of game-day revenue for MLS clubs, maximizing attendance is paramount. Based on economic research, host countries see an increase in attendance, especially for those clubs in cities fortunate enough to host World Cup games.[371] The "World Cup Bump" in attendance has been measured as 17–21% for clubs whose stadium hosted tournament games, and from 8–20% for top-division, non-hosting clubs in each of five seasons beginning with the season prior to the World Cup.[372] Based on these results and information on spending by MLS fans, one can get an idea of the size of the lost World-Cup-Bump legacy to MLS and to the USSF. Eighteen cities were chosen as potential World Cup venues,[373] of which ten had MLS teams as of the 2015 season.[374] During the 2015 MLS season, the average attendance for the eleven existing clubs in these ten potential host cities was

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[369] MLS's television broadcast contract with FOX and ESPN is reported to be in the $70 million range for eight years, and this amount will be shared with the USSF for the right to broadcast U.S. Men's National Soccer Team games over the same period. Stefan Szymanski, *So What Is the MLS Business Model?*, SOCCERNOMICS (Apr. 23, 2015), http://www.soccernomics-agency.com/?p=692. With twenty teams (and ignoring the sharing of broadcast revenue with the USSF), the contract amounts to less than $450,000 per team per year. *Id.* If, as suggested by Stefan Szymanski based on conversations with sources within MLS and reported on his blog, MLS's share of broadcast revenue is about half of the contract, then teams can expect a little over $200,000 per year over the life of the contract. *Id.*

[370] Chris Smith, *Major League Soccer's Most Valuable Teams*, FORBES (Nov. 20, 2013), http://www.forbes.com/sites/chrissmith/2013/11/20/major-league-soccers-most-valuable-teams.

[371] Bastien Drut & Stefan Szymanski, The Private Benefit of Public Funding: The FIFA World Cup, UEFA European Championship and Attendance at Host Country League Football 2 (2014) (unpublished manuscript), http://www.soccernomics-agency.com/wordpress/wp-content/uploads/2014/04/The-private-benefit-of-public-funding.pdf.

[372] *Id.*

[373] USA BID EVALUATION REPORT, *supra* note 55, at 11–13 (listing Atlanta, Baltimore, Boston, Dallas, Denver, Houston, Indianapolis, Kansas City, Los Angeles, Miami, Nashville, New York City, Philadelphia, Phoenix, San Diego, Seattle, Tampa, and Washington, D.C.).

[374] *Attendance: Home Matches*, WORLDFOOTBALL.NET, http://www.worldfootball.net/attendance/usa-major-league-soccer-2015/1 (last visited Mar. 1, 2016). The eleven clubs in these host cities are: New England (Boston), Dallas, Colorado (Denver), Houston, Sporting Kansas City, Los Angeles, New York City FC, Red Bull NY, Philadelphia, and Washington, D.C. United. The nine non-host-city clubs are: Orlando, Toronto, Portland, San Jose, Vancouver, Salt Lake City, Montreal, Columbus, and Chicago. *Id.*

21,943, while average attendance for other clubs was 21,037.[375] Using these figures as indicators of MLS attendance prior to the United States hosting a World Cup, and assuming the minimum attendance bump, implies an attendance bump of 4,775,377 over a five-year period.[376]

MLS revenue per fan per game was approximately $73 in 2012,[377] implying that the lost bump in attendance revenue is $348.6 million, without factoring in the effects of inflation. Distributed over twenty MLS teams, this amounts to nearly $3.5 million per team per year over five years. Although somewhat speculative given that MLS does not publish financial data, a prominent sports economist pegs 2014 MLS revenue at $233 million.[378] If this is accurate, then the lost World-Cup-Bump legacy may amount to more than what MLS currently generates in revenue in a year. As another point of comparison, consider that MLS currently requires an expansion fee of at least $100 million for clubs to enter the league;[379] thus, the MLS World Cup Bump amounts to more than triple the fee generated from expansion in a new city. In addition to a World Cup Bump for MLS, the USSF can expect to see a similar attendance bump for clubs in the second division, NASL. Although the bump for NASL is expected to be less than that for MLS, economic analysis suggests a positive effect.[380]

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[375] *Id.* (listing total and average attendance figures for MLS team home matches).

[376] The computation is based on the following formula: Minimum World Cup Bump = (21,943 average fans × 17% bump × 11 host city teams × 5 years × 17 games) + (21,037 average fans × 8% bump × 9 non-host city teams × 5 years × 17 games) = 4,775,377. *See supra* text accompanying notes 372, 374, 375.

[377] R. Todd Jewell, *The Effect of Marquee Players on Sports Demand: The Case of US Major League Soccer*, J. SPORTS ECON. (forthcoming 2015) (manuscript at 11), http://jse.sagepub.com/content/early/2015/02/04/1527002514567922.full.pdf+html (basing dollar amount on 2012 revenue figures and not reflecting inflation).

[378] Szymanski, *supra* note 369. Szymanski's estimate has created some controversy. *See* triplet1, *The Szymanski Rebuttal*, BIG SOCCER (May 4, 2015), http://forums.bigsoccer.com/threads/the-szymanski-rebuttal.2019698.

[379] Brian Straus, *MLS Expansion: Latest Involving Las Vegas, Sacramento, Minneapolis Bids*, SPORTS ILLUSTRATED (Nov. 26, 2014), http://www.si.com/soccer/planet-futbol/2014/11/26/mls-expansion-minneapolis-las-vegas-sacramento-don-garber.

[380] Drut and Szymanski estimate a World Cup Bump for second-division teams of 9–17%. Drut & Szymanski, *supra* note 371, at 2. The dollar value of this bump in NASL will be much lower than for MLS, given lower ticket prices, details of which are unavailable at this time. The World Cup Bump may also extend to women's professional soccer. The National Women's Soccer League, owned by the USSF, saw an attendance increase after the 2015 Women's World Cup in Canada. *See* Richard Sandomir, *Women's Pro League Seeks a Bump from U.S. World Cup Success*, N.Y. TIMES (Jul. 9, 2015), http://www.nytimes.com/

Another possible effect is an increase in MLS franchise values. Much of the potential return to owning an MLS franchise is the price at which it could be sold.[381] Although limited information exists on actual franchise values, data on the entry price of expansion teams is publicly available.[382] MLS franchise fees have increased at a very healthy compounded rate of 18%; the first franchise team entered in 1998 (Chicago Fire) for a fee of $5 million, and the most expensive was $100 million in 2013 (New York FC).[383] The cost of franchise entry undoubtedly increases over time due to the limited number of spaces available in the league, but it will also increase with increases in demand for the product.[384] Because the World Cup legacy increases soccer culture in the United States and creates more demand for watching soccer, the legacy lost will be felt in reduced increases in the franchise fee. Further, increases in the franchise fee signal increases in the value of existing franchises.[385] A legal challenge could involve the availability of sufficient data to estimate the legacy lost on franchise values, an amount that could easily run into the hundreds of millions of dollars. Taking the current franchise fee of $100 million as a benchmark, an approximate value of the twenty current MLS clubs is $2 billion.[386] Thus, if hosting the World Cup in the United States led to increased exposure resulting in a 5% increase in franchise values, then the league would be worth an additional $100 million. An increase in exposure leading to a 10% increase in league worth would mean an additional $200 million.

2015/07/10/sports/soccer/womens-pro-league-seeks-a-bump-from-us-world-cup-success.html.

[381] *See* Smith, *supra* note 370.

[382] Christopher Savino, *Franchise Fees in MLS Increasing at a Rate of 18% Since Inaugural Season*, BUSINESS OF SOCCER (BO$), http://www.businessofsoccer.com/2013/06/11/franchise-fees-in-mls-increasing-at-a-rate-of-18-since-inaugural-season (last visited Jan. 29, 2016).

[383] *Id.*

[384] *See id.*

[385] *See id.*

[386] Smith, *supra* note 370 (estimating the total value of MLS clubs at $1.96 billion in 2012, an average franchise value of $103 million for the then nineteen-team league).

2. Non-Pecuniary Benefits for the USSF

A final legacy lost lies in a category of largely non-pecuniary benefits.[387] Economists have tended to avoid measuring things like goodwill or "international image,"[388] but FIFA's focus on legacy effects, and the lack of any empirical evidence of clearly quantifiable benefits from hosting a World Cup, has encouraged some economists to look at non-pecuniary legacy effects of the World Cup.[389] According to one study that analyzed the influence of stadium building for World Cup 2006 on the German economy, "[O]ther effects such as the feel-good benefit for the population and/or image effects that are difficult to quantify, may be sufficiently important to justify major new stadiums and/or subsidies for them via public funds."[390] The difficulty in quantifying legacy effects such as goodwill arises from their non-market nature;[391] it is difficult to put a monetary value on something that is not bought and sold. Difficult, however, does not mean impossible, and economic methods have been applied to placing a monetary value on the intangible benefits from hosting a mega-event.[392]

Estimating the non-market, intangible benefits to hosting a mega-event requires a non-market-based valuation method.[393] The most common tool in economic literature for valuing non-market goods in the economic literature is the contingent valuation method, which boils down to surveying potential consumers regarding their willingness to pay for the good in question.[394] For the London 2012 Olympic Games, researchers asked a total of 902 individuals in three large UK cities—London, Manchester, and Glasgow—to report their households' willingness to pay (in increased taxes to the local tax authority) to put on the Olympics in return for the intangible

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[387] *See Benefits of Bidding for and Hosting FIFA's Other World Cup Events*, FIFA.COM, http://www.fifa.com/governance/competition-organisation/benefits-of-bidding.html (last visited Jan. 29, 2016).

[388] *See* Du Plessis & Maennig, *supra* note 314, at 360.

[389] *See id.* at 363.

[390] Arne Feddersen, André Leão Grötzinger & Wolfgang Maennig, *Investment in Stadia and Regional Economic Development—Evidence from FIFA World Cup 2006*, 4 INT'L J. SPORT FIN. 221, 233 (2009).

[391] *See* Giles Atkinson et al., *Are We Willing to Pay Enough to "Back the Bid"?: Valuing the Intangible Impacts of London's Bid to Host the 2012 Summer Olympic Games*, 45 URB. STUD. 419, 420 (2008).

[392] *Id.* at 420, 422.

[393] *See id.* at 439.

[394] *Id.* at 420.

benefits they expected to receive.[395] Based on the survey results, the researchers estimated that the intangible benefit to the UK would be upwards of £2 billion.[396]

Although a detailed analysis of the London Olympic application of the contingent valuation method and of the method in general are beyond the scope of this Article, two points are relevant to the issue at hand. First, contingent valuation method surveying is based on setting up a hypothetical situation and asking questions based on hypothetical outcomes, and there is a pronounced tendency for respondents to overstate their willingness to pay.[397] With the London Olympic application, the Olympics had yet to occur, the UK had never put on such an event, so the intangible benefits involved were hard to define, much less be given a value.[398] Individuals are not likely to have had enough information to respond with some degree of objectivity.[399] Second, any sampling method such as the contingent valuation method will be more reliable as the size of the sample grows.[400] In valuing the intangible benefits of a USSF-hosted World Cup, an appropriate application of the contingent valuation method would likely involve extensive surveys in many U.S. cities (and clearly more than 900 surveys as in the London Olympic application), which would be an expensive and time-consuming undertaking.[401] Although possible to implement with adequate funding and time, a contingent-valuation-method estimation of willingness to pay for a 2022 World Cup USA would still

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[395] *Id.* at 429.

[396] *Id.* at 440.

[397] Although the contingent valuation method has only recently been used to value the intangible benefits of sporting mega-events, the method has a long history of use in the field of environmental economics, where market forces do not result in "prices" of environmental goods that, nonetheless, have considerable value to individuals and society. *See, e.g.*, Alex Y. Lo & C.Y. Jim, *Protest Response and Willingness to Pay for Culturally Significant Urban Trees: Implications for the Contingent Value Method*, 114 ECOLOGICAL ECON. 58 (2015). The contingent valuation method is not universally accepted by the economics profession because of the hypothetical questioning and tendency toward overstatement of willingness to pay, but it has the advantage of being able to put a price on otherwise "unpriceable" non-market goods. Atkinson et al., *supra* note 391, at 423–25 (discussing the advantages and disadvantages of the contingent valuation method for valuing non-market goods).

[398] Atkinson et al., *supra* note 391, at 425, 427, 429.

[399] See *id.* at 429.

[400] *See* Pinuccia Calia & Elisabetta Strazzera, *Bias and Efficiency in Single Versus Double Bound Models for Contingent Valuation Studies: A Monte Carlo Analysis*, 32 APPLIED ECON. 1329, 1333 (2000).

[401] *See id.* at 1329.

suffer from the hypothetical nature of the survey. It is possible that the international goodwill created by hosting the most important tournament of the world's most popular sport would be worth the cost of putting on the tournament in the United States. However, the most likely economic process to measure the value of this goodwill and other non-pecuniary benefits, contingent valuation method, is inadequate to the task, being both too expensive and too unreliable.[402]

V. CONCLUDING REMARKS

If government investigations and prosecutions reveal that bribery tainted the bidding process for the 2022 World Cup, then the USSF would have the evidence it needs to pursue a claim under the FAUC.[403] FIFA's required internal dispute resolution mechanisms permit the USSF to bring an action against the QFA in the CAS, not as an appeal but as an original action governed by Swiss law rather than FIFA regulations.[404] The CAS could prevent the QFA from benefitting from its corrupt acts by enjoining the QFA from performing the operational hosting duties required by its contracts with FIFA, thus giving FIFA the authority under its *force majeure* provision to find another host: likely the USSF.[405] The USSF can only obtain an injunction, however, if it can show sufficient prejudice to a business or economic interest for which money damages are inadequate.[406]

To the extent that the FAUC equates prejudice to damages from its roots in tort law, this element seems not only difficult but also impossible to prove. Ex-ante studies overestimate the benefits and underestimate the costs of hosting sporting mega-events, and ex-post studies reveal that net benefits to the host are often negative.[407] Even a host city or nation with strong infrastructure—and thus no need to invest in new stadiums, transportation, and the like—will spend considerably on security.[408] Furthermore, the benefits from increased tourism will be smaller than expected due to an overestimation of the number of foreign visitors, negative substitution effects in the number of visitors and their spending, and leakages of spending

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[402] *See* Atkinson et al., *supra* note 391, at 420.

[403] *See FAUC 2012*, *supra* note 11, at art. 4a.

[404] FIFA STATUTES, *supra* note 22, at arts. 67–68.

[405] *Id.* at art. 85.

[406] *See* Ritscher & Schröter, *supra* note 13, at 557.

[407] *See* ZIMBALIST, *supra* note 43, at 33–41.

[408] See *id.* at 43.

from the local economy.[409] When positive post-event economic benefits are measured, the economic relevance of these benefits are minimal.

Most picture the World Cup as hosted by a nation. However, FIFA awards the World Cup to national soccer associations like the QFA or the USSF, not nations or governments.[410] The USSF, and not the United States, would be the party to arbitration,[411] thus the only relevant harm is to the USSF's economic interests. The USSF would not bear the costs of infrastructure improvements, nor would a small economic impact adversely affect the USSF.[412] Yet, the issue remains that the winning World Cup bidder takes on several operational responsibilities that typically cost more than the revenues they generate.[413] Although a World Cup USA would be more similar to the positive German experience, the USSF can still expect a budget shortfall.[414] Thus, how does it show an economic interest and the requisite prejudice?

The USSF has two ways to establish standing to assert an FAUC claim. First, it can assert an unfair competition claim on behalf of its associated professional soccer leagues.[415] Losing the legacy of the World Cup because of the alleged corrupt acts of the QFA affects these leagues, most notably MLS. MLS receives no World Cup Bump, the measurable increase in attendance at professional soccer in countries where the World Cup is hosted. Because the league depends more upon ticket sales than television ads, this loss is significant even with the conservative estimate of $348 million.[416] That figure pales in comparison to franchise values, however.[417] Less growth in demand for soccer in the United States means lower franchise fees, which are currently at $100 million and have grown on a compounded rate of 18% since the inception of the league.[418] More to the point, taking franchise fees as a measure of franchise value and assuming even a modest increase related to World Cup exposure, MLS damages could flow into the high nine-figure range, if not exceed $1 billion.[419] These measures are not

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[409] *See* Hall, *supra* note 320. *See also* ZIMBALIST, *supra* note 43, at 37.

[410] *See supra* text accompanying notes 56–60.

[411] *See supra* Part III.B.2.

[412] *See supra* Part IV.C.

[413] *See* ZIMBALIST, *supra* note 43, at 38.

[414] *Compare supra* Part IV.B., *with supra* Part IV.C.

[415] Ritscher & Schröter, *supra* note 13, at 557.

[416] *See supra* Part IV.C.1.

[417] *See* Savino, *supra* note 382.

[418] *Id.*

[419] *See id.*

exact, but with more data and analysis, economists could quantify them with particularity sufficient to sustain a claim under the FAUC. The harm to MLS is great, certain, and imminent. The harm to the other professional leagues under the umbrella of the USSF is also real, but appropriate data on attendance demand and franchise values is necessary to determine its extent. The leagues cannot win World Cup hosting rights to remove this prejudice, but the USSF can by seeking an injunction on behalf of its members.

The USSF can also assert a claim in its own right as a competitor of the QFA in the bid for the 2022 World Cup. The USSF is a non-profit corporation,[420] so its business is not to make money like its professional league members but instead is "to promote soccer in the United States, including national and international games and tournaments."[421] The most important promotional opportunity for this business interest lies with hosting the World Cup, an event so rare that it happens only every four years and rotates countries and continents.[422]

Some aspects of World Cup legacy are difficult to quantify because they are not market-based, such as the prestige and goodwill generated by hosting. Economists have nevertheless recognized the importance of these benefits and attempted to value them through the contingent valuation method.[423] Even though the contingent valuation method has been criticized for being unreliable, Swiss law nevertheless permits a tribunal to estimate damages that are not quantifiable.[424] The unreliability of measuring the softer aspects of legacy might be an advantage, however, for securing equitable relief: the business interest of the USSF in hosting the World Cup is not to turn a profit but to fulfill its mission of promoting soccer in the United States, so no amount of money can repair this lost opportunity. Equitable relief is therefore necessary.

Despite the injunction, FIFA could still refuse to award the 2022 World Cup to the USSF; however, a number of factors militate toward the Executive Committee exercising its discretion in the USSF's favor. As the second-place bidder, the USSF would have won the 2022 World Cup if not for alleged corruption in the process.[425] Logistics also favor the USSF: only a handful of countries have existing infrastructure necessary to host the event

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[420] U.S. Soccer Fed'n, Inc., *supra* note 266, at 9.

[421] BYLAWS OF THE U.S. SOCCER FED'N, bylaw 102, § 1 (2014).

[422] *See supra* Part IV.A.

[423] Atkinson et al., *supra* note 391, at 420.

[424] *See supra* text accompanying notes 213–15.

[425] *See supra* Part II.C.

by 2022.[426] Additionally, two of those countries cannot host in 2022 because of FIFA statutes precluding successive World Cups in countries belonging to the same confederation: the German and English associations belong to UEFA, as does the Football Union of Russia (the host in 2018).[427] Thus, although transnational dispute resolution is never certain, if it has the will to fight, the USSF could obtain an injunction and reclaim the economic legacy of hosting the 2022 World Cup.

[426] USA BID EVALUATION REPORT, *supra* note 54, at 2.

[427] FIFA STATUTES, *supra* note 22, at art. 80, § 4; *Associations: UEFA*, FIFA.COM, http://www.fifa.com/associations/uefa/index.html (last visited Jan. 29, 2016) (listing the national associations of England, Germany, and Russia as part of UEFA).