



**3. Third opinion, of 10 November 2016, on the Involvement of Courts and other types of bodies to clarify conflicts in organisations such as FIFA or its associated federations, at the request of the Supreme Court of Uruguay.
Reporting Judge: Commissioner Fernando Castro Caballero.**

Consultation submitted by the Supreme Court of Justice of the Oriental Republic of Uruguay to the Ibero-American Committee for Judicial Ethics on 10 May 2016:

The Supreme Court of Justice of the Oriental Republic of Uruguay [*Corte Suprema de* “Whether forming part of tribunals or other bodies to clarify conflicts in organisations such as FIFA or its associated federations, which have rules that expressly prohibit applying to the common courts to clarify such disputes, constitutes an ethical conflict in the activity of judges”.

Background to the consultation:

The Supreme Court of Justice of Uruguay ruled via Ruling no. 573 of 2004 on a request presented by the Uruguayan Institute of Legal and Social Studies [*Instituto de Estudios Legales y Sociales de Uruguay*] and the of Uruguayan Press Association [*Asociación de Prensa del Uruguay*], in which it declared that the participation of active judges in Uruguayan Football Association [*Asociación Uruguaya de Fútbol*] (AUF) tribunals was inexpedient.

The petitioners based their claim against the legality of said practice on (i) the effects on judicial independence that may arise from the dual capacity of a practising judge, and (ii) the misunderstandings that may emerge in regard to this dual role (officially judicial, on the one hand, and 'quasi-judisdictional' in football decision-making bodies, on the other) taking into account, moreover, public scepticism directed towards these sporting associations, the management of which is independent and is guided by significant economic interests. Evidence of a series of controversial incidents involving persons affiliated with the AUF was presented as proof of these assertions.

The AUF contended in defence of this practice that the criticism of the alleged effect on judicial independence is baseless, since the mere fact that active judges are people who have attained such high office is ample proof that they possess the qualities of honesty, equanimity, objectivity and suitability that are required to resolve sporting disputes. In



addition, should any doubts arise about possible conflicts of interest that may affect the independence or impartiality of a judge/arbitrator, the party involved can have their claim heard satisfactorily via a recusal remedy before the appropriate sporting body. Moreover, it argued that FIFA rules and the statutes of national associations that exclude the judiciary from the resolution of sports conflicts constitute arbitration clauses that establish a type of compulsory arbitration, a concept previously recognised by the national legal system.

The Supreme Court of Uruguay considered in its ruling that "generic invocation of the Charter and of the procedural laws that enshrine the independence of judges, and the principles of impartiality and authority of the judicial court, are clearly insufficient to demonstrate incompatibility between the performance of the jurisdictional role and forming part of the internal tribunals of a civil association". However, it considered it appropriate to issue a statement on this matter in which it warns that the prestige of the judiciary may be undermined, given that scepticism towards these organisations among a sector of public opinion is widely recognised, as is the growing number and the repercussion of those conflicts that are excluded from the judicial branch due to the rules adopted by FIFA and its member organisations.

The consultation by the Uruguayan Supreme Court of Justice fits within the framework of ethics. However, the considerations that are given here, without prejudice to their purely advisory nature and ethical quality, cannot override the legislation of each country.

For example, in some countries, such as Spain, the legal regulation of the rules governing incompatibility for judges, its administrative application by the General Council of the Judiciary and the interpretation of the Supreme Court have specifically resolved this issue, enshrining the rule that judges are prohibited from taking part in 'sports justice' bodies of this type.

Indeed, a final ruling by the Spanish Supreme Court on proceedings in its judgment of 31 March 2011 (remedy no. 123/2010, ES:TS:2011:2111, reporting judge: Conde Martín de Hijas) confirmed the administrative decision to reject the compatibility request submitted by a practising judge in Barcelona who wished to serve as a member of the Appeals Committee of the Spanish Football Federation [*Real Federación de Fútbol*] on the grounds that such an activity entailed the exercise of jurisdiction outside the judiciary and that this sports justice in turn had public law functions that determined incompatibility with the exercise of the ordinary jurisdictional function.¹

¹ Supreme Court of Spain (Chamber 3, Section 7), judgment of 31 March 2011 (remedy no. 123/2010, ES:TS:2011:2111, reporting judge: Conde Martín de Hijas) (incompatibility of post of judge with that of member of the Appeals Committee of the Spanish Football Federation on the grounds that it entails exercise of jurisdiction outside the judiciary and the





In his request, submitted in December 2009, the Catalan judge indicated that his duties consisted of a weekly meeting, usually in Madrid on Thursdays from 17:30 onwards, with reimbursement of travel expenses and 330.56 euros per day for hotel and living expenses.

The decision of the Spanish General Council of the Judiciary rejecting the request adopted in 2010 was based on the fact that, “whatever the legal nature of the arbitration may be, its exercise by active Judges and Magistrate Judges, in so far as it entails settling disputes via non-judicial means, is impeded by the status of rigid incompatibility to which members of the Judiciary are subject”. Therefore, in the opinion of the Council of the Judiciary the post of Judge or Magistrate Judge was incompatible with the exercise of any other jurisdiction outside the Judiciary, if jurisdiction is understood in the sense of “*iuris dictio*” or resolution of disputes by non-judicial means, as already established by the plenary ruling of the General Council of the Judiciary of 16 April 1986.

The Spanish Supreme Court confirmed this administrative decision considering that it fell to the Council of the Judiciary to decide the rules governing incompatibility for judges and that in this task “its decision should be guided by the criterion of ensuring that the possible compatibility will not adversely affect the proper functioning of the Administration of Justice, with the natural consequence that it will have to deny it when it has objective information that facilitates a reasonable assessment that the effectiveness of the requested compatibility may impede or undermine the strict fulfilment of judicial duties”.

In the opinion of the Supreme Court, recalling its own case law, “the rules governing incompatibility for the judiciary respond to the purpose of substance of preserving their independence, avoiding the danger that they may become involved in activities that generate interests, or the appearance thereof, that give the public the impression that the judiciary appears to be compromised or tainted. Judgments of 7 March 2001 and 8 February 2010 remedy 316/08”.

In this specific case, the Supreme Court examined the function performed by the Appeals Committee of the Spanish Football Federation and analysed it in the light of the cause of incompatibility outlined by Spanish legislation consisting of “the exercise of any other jurisdiction outside the judiciary”.

Firstly, the Supreme Court considered that the function of the sports committee lies within the sphere of public law and although its decisions cannot be appealed directly



before the jurisdiction of an administrative court, they are a legally binding pre-litigation remedy that may grant access, where applicable, to said jurisdiction.

Secondly, the power to impose disciplinary action in the sporting sphere is a purely administrative function, regulated by administrative rules. Thus, the Appeals Committee of the Spanish Football Federation is a body that exercises a public function of an administrative nature delegated to said federation, and does so by hearing an appeal remedy [*recurso de apelación*] against rulings by decision-making bodies, applying the full set of administrative and legal rules. As such, the sports justice committee is a body whose purpose is to resolve disputes via the application of legal rules.

Thirdly, in the opinion of the Supreme Court, the sports committee's function can be classified as “jurisdiction outside the Judiciary”. This classification is the result of a logical, systematic and teleological interpretation of the various causes of incompatibility established by Spanish legislation, specifically with any situation that involves the exercise of a legal activity, except for teaching or research.

To this end, the Supreme Court itself points out that of the nine grounds for incompatibility outlined in Article 289 of the Organic Law of the Judiciary, four seek to prevent reconciling jurisdictional activity “sensu stricto” with “the exercise of any jurisdiction outside that of the Judiciary”, “with jobs of any kind in Courts of any jurisdiction”, “with the exercise of the legal profession [*Abogacía*] or that of Representatives before the courts [*Procuraduría*]” and “with any kind of legal advice, paid or otherwise”. According to the Supreme Court, the purpose of this regulation is to try to “safeguard the independence or impartiality of judges to the fullest extent possible, precluding the exercise of legal activities which may put them at risk or taint them, either immediately or through their potential repercussions or their external appearance”. The Spanish Supreme Court concludes it would therefore not make sense in this systematic overview of the different grounds for incompatibility to interpret that sports justice does not constitute the exercise of a jurisdiction outside the Judiciary because if Judges are prohibited from merely giving legal advice, admitting compatibility in the exercise of sports justice would permit them in point of fact to implement law rules to decide on disputes on which they are forbidden from advising.

As a preventive measure aimed at preserving the image and reputation of the administration of justice, adopted in the context of the public criticism of corruption that has been aimed at football associations over recent years, the Supreme Court of the Oriental Republic of Uruguay deemed the participation of active judges in the aforementioned sports arbitration tribunals to be “inexpedient”. Apart from this statement, in its grounds it also questioned the validity and legitimacy of exclusion



clauses precluding legal action for all disputes arising from sporting activities. In the words of the Court, “conflicts between subjects are apparently becoming more frequent and intense, which implies that the actions of judges in AUF tribunals lead to recurrent transfers of jurisdiction in court cases, an aspect that in itself, without further consideration, can be considered inexpedient”.





Consequently, in the absence of legislation that establishes unequivocal proof of the violation of a professional duty, the Court limited itself to declaring the participation of active judges in bodies that rule on sports disputes inexpedient, clarifying that such a pronouncement, “cannot become an obstacle to the free deliberation that each judge may undergo within their conscience and inner self, and that a decision to remain in the aforementioned tribunals will not be considered as professional misconduct, nor will it entail any negative consequences in their professional career”.

The consultation asks whether it is ethical for judges to form part of sports bodies and tribunals given that FIFA and its associated federations expressly prohibit their members from applying to the ordinary courts.

It can not be overlooked that in many countries, active or former state judges have often been placed in charge of “sports justice” at the same time, combining both functions. However, it should also be recognised that in some countries the applicable rules governing incompatibility have been tightened and the ethical codes themselves have led to a questioning of the participation of professional judges in these sports justice bodies for the reason outlined in the consultation (i.e. the aim to remove sports justice from any judicial oversight), but also for other reasons such as the confusion that can occur between sports justice and ordinary justice, the latter, in any event, being a guarantee of the former; as ordinary judicial oversight could potentially require a judge to review what another judge has decided in sports justice, and it may even occur that the ordinary judge occupies a lower level in the respective judiciary hierarchy than the one who acted as a sports judge).

In this case, it should be specified that the scope of the Committee's competence extends to examining and judging the ethical issues outlined in the Code for purely consultative purposes.

Framework of this opinion

The Code of Judicial Ethics approved by the Plenary Assembly of the Ibero-American Judicial Summit at its 13th meeting held in Santo Domingo, Dominican Republic, in June 2006 sets out the purpose of the Committee in these terms

ARTICLE 83. The Ibero-American Committee for Judicial Ethics proposes to:

a) Advise the various Ibero-American Judiciaries and Councils of the Judiciary or the Judicial Summit itself when their representatives so request. It will resolve consultations



submitted by Commissioners or Delegates as to whether the behaviour of public officials of justice-dispensing bodies respects Judicial Ethics, as well as when the domestic judicial ethics bodies of each nation have resolved issues of this nature and an opinion is requested of the Ibero-American Committee.

b) Facilitate discussion, dissemination and development of judicial ethics through publications or through courses, seminars, diploma courses and other academic events.

c) Strengthen the conscience of Ibero-American dispensers of justice as regards judicial ethics. As can be observed, this objective is not limited to the application of the Code, but to promoting respect for Judicial Ethics, to facilitating discussion, dissemination and development of said ethics and to strengthening the conscience of Ibero-American dispensers of justice as regards judicial ethics.

The Code has unequivocally given the Committee a broader scope than that covered by its rules. The Committee's vision encompasses Judicial Ethics. As such it appears pertinent to set forth some clarifications as to methodology. Part I of the Code formulates the principles of judicial ethics with a systematic purpose, i.e, with a construction in mind that includes a set of contents taken from the field of ethics, formulated with precision, resolving possible overlapping and/or contradictions, and with the aspiration that these formulated principles will extend throughout the field encompassed by the subject. However, the nuance posed by Part II, referring to Ethics before the Code and expressly using of the idea of “development”, envisaged in Article 83 cited above, shows a commitment to a permanent re-examination of the question, consistent with changing times and ideas.

The code benefits from the intellectual authority of its authors, Manuel Atienza and Rodolfo Vigo, and the status of a regulation in force, having been adopted by the Assembly of the Ibero-American Judicial Summit. When the Committee moves within the scope of Part I, it has certainty as to the specific content of the Judicial Ethics on which it bases its opinions. This is also the case when it takes inspiration from other bodies approved by the Assembly. When it investigates and expounds on the field of Judicial Ethics outside the contents included in the Code, the value of its opinions results from the sum of the grounds it sets forth and the representativity of its members, elected by the Assembly. Likewise, its opinions are not binding either in this or in any other case (Article 95 of the Code of Ethics (CE)).

This interpretation by the Committee would be incomplete if it did not take into account the legal context of each country and particularly the regulation of sports justice, on the

one hand, and the rules governing incompatibility for judges. Indeed, in some countries, such as Spain, the regulation of sports justice is clear on the one hand, with regard to exclusion clauses or people affected by sports justice forgoing recourse to ordinary courts; and, on the other hand, there is no doubt either as to the rules that should be applied to the incompatibility of judges to participate in sports judicial bodies in legally regulated terms, interpreted by the judges' governing body and confirmed by the Spanish Supreme Court .

It should always be borne in mind that, if a country has chosen to settle the issue legally, the invocation of an interpretation of the ethical code *contra legem* would be inadmissible. On the contrary, in those countries where there is no regulation to that effect, it would be of great importance, although perhaps not decisive, to take the legal solutions adopted in other countries into account for the purposes of ethical interpretation in the terms explained in this opinion.

In short, the problem raised can be approached from a strictly legal perspective, for which the rules governing incompatibility established in each State should be taken into account, and from a strictly ethical perspective, in which case ethical codes or codes of conduct should be taken into account. In both instances, there is an interdependence between the ethical and the legal that cannot be overlooked and which should always be identified with sufficient clarity.

Quasi-judicial bodies of private sports associations

The bodies referred to in the opinion have the following features:

- a) they are bodies with a temporary mandate, created by their instruments of incorporation,
- b) they are not agreed upon by the parties to the conflict in relation to their dispute, but are imposed as a result of belonging to the association.
- c) they have a range of competences that far exceeds the realisation of a sporting event.
- d) the right to obtain a decision from the permanent bodies of the Judiciary is totally or significantly curtailed by commitments acquired in order to belong to the association in question.

Feature b) is particularly relevant, since the selection of a judge as the arbitrator in a dispute that already exists ensures that the parties and the judge are clear what interests are at stake and can evaluate that participation in light of them, such that choosing an arbitrator is a way for the parties to exercise their right of defence.





Having reviewed the Statutes of FIFA and some bodies associated to it, the Ibero-American Committee for Judicial Ethics proceeds to undertake a study of the most relevant features that characterise these "quasi-judicial" bodies for dispute resolution included in the broad field defined by these statutes. This field stretches beyond the thematic ambit of sport and the human realm of their members.² This review is warranted by the need for a deeper understanding of the meaning of the "quasi-judicial" power exercised by active judges or magistrate judges when they are deciding on a sports dispute outside the sphere of their official professional duties.

² FIFA Statutes

61 Judicial bodies 1. The judicial bodies of FIFA are (a) the Disciplinary Committee, (b) the Ethics Committee and (c) the Appeal Committee. 2. The judicial bodies shall consist of a chairman, a deputy chairman and a specific number of other members. The composition of the judicial bodies should respect the fair distribution of positions and take account of the Members. 3. The judicial bodies are to be composed in such a way that the members, together, have the knowledge, abilities and specialist experience that is necessary for the due completion of their tasks. The chairmen and deputy chairmen of the judicial bodies shall be qualified to practise law. The term of office shall be four years. The members may be re-elected or relieved of their duties at any time, although they may only be relieved of their duties by the Congress. 4. The chairmen and deputy chairmen of both chambers of the Ethics Committee shall fulfil the independence criteria as described in the Standing Orders of the Congress. 5. The chairmen, deputy chairmen and other members of the judicial bodies shall be elected by the Congress and shall not be members of the Executive Committee or of a standing committee. 44 VI. JUDICIAL BODIES AND DISCIPLINARY MEASURES 6. If the chairman, the deputy chairman or a member of a judicial body permanently ceases to perform his official function during his term of office, the Executive Committee shall appoint a replacement to serve until the next Congress. 7. The responsibilities and function of the judicial bodies shall be stipulated in the FIFA Disciplinary Code and the FIFA Code of Ethics. 8. The decision-making powers of certain committees remain unaffected. 62 Disciplinary Committee 1. The function of the Disciplinary Committee shall be governed by the FIFA Disciplinary Code. The committee shall pass decisions only when at least three members are present. In certain cases, the chairman may rule alone. 2. The Disciplinary Committee may pronounce the sanctions described in these Statutes and the FIFA Disciplinary Code on Members, Clubs, Officials, Players, intermediaries and licensed match agents. 3. These provisions are subject to the disciplinary powers of the Congress and Executive Committee with regard to the suspension and expulsion of Members. 4. The Executive Committee shall issue the FIFA Disciplinary Code. VI. JUDICIAL BODIES AND DISCIPLINARY MEASURES 45 63 Ethics Committee 1. The function of the Ethics Committee shall be governed by the FIFA Code of Ethics. It is divided into an investigatory chamber and an adjudicatory chamber. The adjudicatory chamber shall take decisions if at least three members are present. The chairman may take decisions alone in specific cases. 2. The Ethics Committee may pronounce sanctions on Officials, Players, intermediaries and licensed match agents. Said sanctions shall be described in these Statutes, the FIFA Code of Ethics and the FIFA Disciplinary Code 3. The Executive Committee shall issue the FIFA Code of Ethics. 64 Appeal Committee 1. The function of the Appeal Committee shall be governed by the FIFA Disciplinary Code and the FIFA Code of Ethics. The committee shall pass decisions only when at least three members are present. In certain cases, the chairman may rule alone. 2. The Appeal Committee is responsible for hearing appeals against decisions from the Disciplinary Committee and the Ethics Committee that are not declared final by the relevant FIFA regulations. 3. Decisions pronounced by the Appeal Committee shall be irrevocable and binding on all the parties concerned. This provision is subject to appeals lodged with the Court of Arbitration for Sport (CAS).

At first glance it would seem clear that the authority of judges to settle disputes defined by sporting associations in bodies that differ from the judicial system does not take on the appearance of "pure" or conventional arbitration, i.e., it is not the alternative and regulated mechanism for conflict resolution recognised by the State whose decisions become *res judicata*. This constitutes serious grounds for considering that it lies beyond the ambit of ethics, and should even be prohibited by action by a competent authority, for a judge to suspend his official status in order to form part of a private tribunal of the type outlined above, governed by rules of procedure and convened within the framework of the rules of the association concerned, which, for reasons of speciality or efficiency accepted by the members, replaces the system of justice - of which the judge is part - in the adjudication of a dispute.

The Committee does not overlook the fact that there are certain conditions under which the State recognises the legitimate jurisdictional power of arbitral tribunals that are freely convened by the parties once the dispute has arisen, or those of permanent bodies that exercise disciplinary functions intended to uphold the harmonious coexistence of the members of an association within it. In this regard, it should be remembered that jurisdiction may be understood as the power exercised by the authorities of the public power to legitimately settle contentious issues of various types that arise within the personal, material and territorial scope of those authorities; it is, therefore, an exclusive attribute of the State that emanates directly from its sovereignty. As it is a power that rests exclusively with the public authorities, the State reserves the right to regulate and inspect the circumstances in which this public function is delegated on an exceptional basis to private arbitrators.

These conditions of organisation and function may vary according to the domestic legal system of each country. In any event, the exercise of jurisdictional power by arbitral tribunals must be subject to the strict terms of their validity, i.e., it must be carried out in accordance with the regulatory frameworks imposed by the State that authorise the exceptional recognition of this public function in private bodies.

Among other characteristics - which may vary according to the regulatory environment of each Ibero-American country - arbitration must assume a form of *voluntariness*, *temporality*, *exceptionality*, as well as submitting to the *public and procedural* nature of the rules that regulate it. As such, although alternative arbitral resolution mechanisms are recognised in the various national legal systems, there is no doubt that this jurisdictional power should be deployed through the regulatory and value-based channels that govern the performance of public office in general and the institution of arbitration in particular.





The compatibility of a judge's performance of roles of this type is precluded from consideration in this opinion.

However, as will be discussed below, the judicial bodies outlined in the statutes of FIFA and the federated associations do not properly match or align with what we have previously called the “pure” or conventional arbitration that is regulated in the various legal systems because it has special distinguishing characteristics; or with the strictly defined condition of bodies that settle associations’ internal conflicts, always subject to subsequent judicial review at the request of an entitled party. If it does not fall under these circumstances, it becomes necessary to stop and review the characteristics, connotations and consequences of the ‘quasi-judicial’ powers entrusted to football sports tribunals, to examine whether this dual role as judge and sports arbitrator (or member of an operative decision-making body) can constitute a potential ethical, albeit not legal, breach in the exercise of judicial duty.

Firstly, the provisions outlined in the statutes of the world governing body of football, FIFA (International Federation of Association Football) should be taken into account. It should be noted that the FIFA Statutes are a kind of higher-level founding charter or constitutional document that pronounces mandatory regulatory parameters for all associated football sporting organisations.³ As regards sports arbitration jurisdiction, Article 68 of the FIFA statutes stipulates:

“.....

3. The Associations shall insert a clause in their statutes or regulations, stipulating that it is prohibited to take disputes in the Association or disputes affecting Leagues, members of Leagues, Clubs, members of Clubs, Players, Officials and other Association Officials to ordinary courts of law, unless the FIFA regulations or binding legal provisions specifically provide for or stipulate recourse to ordinary courts of law. Instead of recourse to ordinary courts of law, provision shall be made for **arbitration**. Such disputes shall be taken to an independent and duly constituted arbitration tribunal recognised under the rules of the Association or Confederation or to CAS. The Associations shall also ensure that this stipulation is implemented in the Association, if necessary by imposing a binding obligation on its members. The Associations shall impose sanctions on any party that fails to respect this obligation and ensure that any appeal against such sanctions shall likewise be

³ In accordance to Article 2(d) of the statutes, one of the primordial objectives of FIFA is: “to control every type of Association Football by taking appropriate steps to prevent infringements of the Statutes, regulations or decisions of FIFA or of the Laws of the Game”.



strictly submitted to arbitration, and not to ordinary courts of law.” (bold not in original text).





We shall begin by noting that there is a difference between CAS (Court of Arbitration for Sport⁴), on the one hand, and FIFA bodies and the bodies created by national associations. In the latter, an intention is clearly expressed in the statutes to exempt conflicts that have a natural national venue in the bodies of the Judiciary to whose jurisdiction they belong. In this they differ from CAS which is basically a list of arbitrators - which can act as an original or an appellate body - and mediators acting within the framework of the International Council of Arbitration for Sport. Both bodies are organised by the International Sports Federations (IFs), the Association of Summer Olympic IFs (ASOIF), the Association of International Olympic Winter Sports Federations (AIOWF), the Association of National Olympic Committees (ANOC), and the International Olympic Committee (IOC), i.e., by organisations that are not associations dedicated to football. The parties to a conflict are subject to commitments acquired outside these organisations - membership of FIFA implies this commitment, in the terms outlined above. The venue may very probably not correspond unequivocally to one country. As such, the Committee understands that it is up to the countries to distinguish between the bodies and limits its opinion to the bodies of national associations and FIFA.

A number of provisions of the article cited above should be highlighted. The existence of one or various arbitral jurisdictions is envisaged, acting in substitution of the ordinary courts, resolving “disputes in the Association or disputes affecting Leagues, members of Leagues, Clubs, members of Clubs, Players, Officials and other Association Officials”. Appeal before arbitral jurisdiction is mandatory and it is forbidden to formulate any request for defence [*amparo*] to be filed before the ordinary courts; the effectiveness of the prohibition of applying to the ordinary courts may be ensured by a series of sanctions specified in the statutes, which can range from simple reprimands to the most drastic penalty of a ban on the accused taking part in any football-related activity.⁵

⁴ CAS is organised by the International Council of Arbitration, which is made up in turn by the International Olympic Committee, the Association of Summer Olympic International Federations, the Association of International Olympic Winter Sports Federations and the Association of National Olympic Committees

⁵ Article 65 of the FIFA Statutes.



Consequently, sports tribunals that comply with the FIFA statutes, and therefore all others that act as judicial bodies of associated football federations, are binding, permanent and can settle any kind of litigation. that occurs between their members, players and officials related to football. For example, contractual disputes between sports clubs, labour conflicts that may arise between a club and a player, civil claims for damages, in short any disagreement about a legal relationship established via football, depend on the opinion of the arbitrators who preferentially apply rules intended to ensure positive practices in the interest of sport. Any ensuing matter or question of dispute, ancillary or primary, is thus closed by the final word pronounced by the arbitral jurisdiction.

It should therefore be noted that FIFA imposes a general clause excluding the competence of ordinary courts to hear disputes connected to football-related activity, to the detriment of the protection of members' fundamental rights. As the consultation that was submitted and the ruling issued by the Supreme Court of Justice of Uruguay in this case point out, the validity of binding and coercive clauses of this type, which categorically prohibit applying to a State's ordinary jurisdiction, may be called into question before international human rights instruments on the grounds that they entail excessive restrictions on the right to effective judicial protection.

However, a question must be addressed in reference to this last point: on what precise matters do football-related sports arbitration bodies pronounce in the exercise of their 'quasi-judicial' function? The arbitral jurisdictions of FIFA, of confederations - grouping of national associations by continent - and of sports federations exercise preferential competence in respect of the person or organisation in dispute, whether it is "Leagues, members of Leagues, Clubs, members of Clubs, Players, Officials and other Association Officials (board member, committee member, referee and assistant referee, coach, trainer and any other person responsible for technical, medical and administrative matters) or any other person attached" to a football body. In addition to this *in personam* jurisdiction there is a substantive criterion that is defined by general sports regulations, i.e., the disciplinary code and code of ethics, institutional regulations, rules of play and competition that comprise a special set of sports rules.



In this way, it can be said that these arbitral jurisdictions make up an internal and endogenous mechanism for resolving disputes arising in football associations, federations and confederations. Whilst in principle they only pronounce on issues wholly relating to sporting activity, they sometimes pronounce on business affecting the functioning of leagues, competitions and contests, such as breaches of disciplinary regulations outlined in statutes and regulations, and in these respects prohibitions still apply against bringing an action to request protection of rights [*amparo de derechos*] before an ordinary court in the light of possible infringements that may have taken place, by act or omission, during the arbitration proceedings.

In this regard, for example, the preamble of the FIFA Code of Ethics establishes protection of the image of the federation and of football as the objective of sports rules.

“FIFA bears a special responsibility to safeguard the integrity and reputation of football worldwide. FIFA is constantly striving to protect the image of football, and especially that of FIFA, from jeopardy or harm as a result of illegal, immoral or unethical methods and practices. In this connection, the following Code has been passed. Additional organisational and procedural regulations in connection with sanction procedures as a result of any violation of the rules of conduct of this Code are given below”.

It should be noted that the procedure established in the FIFA regulations does not envisage many of the safeguards that comprise the right to due process which is fully guaranteed under the constitutional rule of law. Thus, for example, provisions such as probing investigations, forced collaboration of the accused, a possible lack of grounds in judicial rulings and the substantiation of said rulings on a clear and firm belief on the part of the judge run counter to the bedrock of any Ibero-American system of justice.⁶ This statement does not aim to judge the rules adopted by sports associations, as that lies beyond our remit and we recognise that they may be intended to exalt sporting values, but rather to point out that a judge who has taken an oath of office serves other principles. A judge who takes part in the judicial activity of a sports association and does so simultaneously in the name of the State is carrying out the task of administering justice in both cases, but under substantially different parameters. This circumstance can potentially place them in situations that are incompatible with the provisions of Chapter VIII of the Ibero-American Code of Judicial Ethics (CIEJ) entitled "Integrity".

⁶ For example, see Articles 97, 99, 110 and 116 of the FIFA Disciplinary Code.



In Europe, for example, and in Spain in particular, sports justice remains a strictly private agreement or regulation, albeit enshrined or protected by law. As such there is no doubt that its actions are subject to the supranational system of law or each national system.

This has been the case for the rules of football sports associations in sporting matters in relation to the application of the fundamental economic freedoms of the European Union, as was shown by the Court of Justice of the European Communities in its judgment of 15 December 1995, *Bosman* (C-415/93, Rec. p. I-4921, EU:C:1995:463).

Consequences for the party:

In this judgment the supranational European Court concludes that free movement of workers in the European single market applies to regulations laid down by sports associations such as the Belgian Football Federation, FIFA (a Swiss private association that organises world football) or UEFA (the Union of European Football Associations, a private association based in Switzerland) (paragraph 87). On the one hand, this judgment precludes henceforth the application of rules laid down by these sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee, which determine the conditions governing the exercise of an activity by professional athletes who are employees (paragraph 114) . Since then, moreover, the *Bosman* ruling has precluded the application of rules laid down by sporting associations under which, in matches in competitions which they organise, football clubs may field only a limited number of professional players who are nationals of other Member States (paragraph 137). In addition, there is almost unanimous agreement that European competition rules are applicable to football clubs in Europe, as the European Commission itself undertakes to remind us by applying them (the last action took place in the context of the so-called state aid scheme in which major Spanish football clubs are involved)⁷.

⁷ European Commission, Press release State aid: Commission decides Spanish professional football clubs have to pay back incompatible aid, IP/16/2401, Brussels, 4 July 2016, available at http://europa.eu/rapid/press-release_IP-16-2401_en.htm (accessed on 15/08/2016).

Similarly, so-called 'sports justice' in Spain, in the terms in which Supreme Court case law has explained it, is simply the delegated exercise of a public administrative function. As such, all 'sports justice' decisions in Spain are subject to the control of the courts pursuant to Article 24 of the Spanish Constitution, Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 of the European Convention on Human Rights which enshrine the fundamental right to judicial protection or to a civil or criminal judge⁸.

To sum up, in Europe and certainly in Spain, there is no doubt that any clause that prohibits, restrains or discourages access to the ordinary courts to review the exercise of 'sports justice' would be contrary to the fundamental right of access to a judge and it would consequently be null and void and would in any event be understood as excluded.

On the other hand, it must also be borne in mind that the arbitral jurisdictions of national sports associations usually have legal instruments that authorise their organisation and operation, enjoying autonomy to establish a system of classification, enforcement and punishment for infringement of the rules that guarantee the positive conduct of sporting activity. Sanctions can be applied to all participants by the authorities; authorities that range from match referees, through club tribunals, the tribunals or committees of leagues, national federations, continental confederations and even FIFA (such as the Ethics Committee, the Disciplinary Committee, the Appeals Committee). Each State regulates the organisational and functional conditions of its judicial bodies by means of these laws, establishing mechanisms for monitoring the systems of self-governance of these private sports associations that ensure the democratisation of their structure and property and envisage measures to pursue the prohibition of possible abusive practices and discriminatory treatment, such as, inter alia, limitation of the scope of arbitral jurisdiction to strictly disciplinary matters, as is the case in some Ibero-American countries.

⁸ Indeed, these two sporting matters on the extent of this control have been raised before the European Court of Human Rights in Strasbourg, without any pronouncement thus far: *Mutu v Switzerland* (application no. 40575/10) and *Pechstein v Switzerland* (application no. 67474/10).



Thus, the disciplinary responsibility resulting from the disciplinary action exercised against those subject to disciplinary measures in sport in the states that have such laws is independent of the criminal, civil or administrative responsibility that such action may incur. Moreover, in the face of conduct or infringements that may be characterised as an offence, the sports investigator is obliged to report to the competent public authorities. In this respect, from the perspective of States that legally recognise bodies of this type, it can be said that two areas of decision-making coexist and are maintained with regard to disputes that arise from sports activities: on the one hand, those related to sports discipline, the purpose of which is to guarantee the necessary provision of autonomy to facilitate the best possible conduct of the sports activity, and on the other hand, those related to criminal, civil and administrative matters that may arise in parallel to disciplinary infringements, over which the judicial authorities of the respective State have exclusive jurisdiction, at least in principle and by virtue of law.

It is a fact that laws have been passed in some Ibero-American countries enshrining this duality of jurisdictions, restricting the jurisdiction of conflict resolution bodies created by sports associations exclusively to the imposition of private sanctions. However, it should be clarified that in practice the enormous pressure created by the possibility of expulsion from a sports organisation, supported by the rules of its disciplinary codes and the statutes of national associations and FIFA, hinders the exercise of concurrent jurisdictions. The prohibition against applying to the ordinary justice system to resolve claims that may arise from unsporting conduct, prevailing in all FIFA member countries, entails the ineffectiveness of internal legal provisions that leave intact the power of each State to administer justice over other matters that strictly lie beyond the scope of discipline. Imperative clauses that prohibit requesting defence [*amparo*] before the ordinary courts, which if infringed may be punished with sanctions that can extend to ordering "professional death" (or the loss of membership of a sports association), are such a formidable deterrent to the accused player or sports official that they virtually act as a mechanism that blocks or denies state justice.

Indeed, in addition to establishing authorities, procedures and classification of infringements and sanctions, sports disciplinary codes provide general principles for the exercise of disciplinary action, as indicated above. As is the case with public punitive law, the guiding principles include presumption of innocence, right to defence, prohibition of illegal evidence, proportionality in sanctions, equal treatment before the law (all elements contained in due process). However, unlike ordinary procedural statutes, arbitral jurisdiction has two special principles which are enshrined on FIFA's orders: the principle of *pro competitione* and the prohibition against applying to the ordinary courts.



It may consequentially occur that disputed facts that have a connotation or imply consequences of a civil, criminal or administrative nature are not duly tried according to common law because of the impediments imposed by exclusion clauses. Special arbitration of sports associations has the effect of assuming jurisdiction to settle practically the full extent and scope of disputes that arise from sporting activities. In addition to blocking access to state jurisdiction for people who were prejudiced or whose expectations were not met by arbitral action, there is a guiding principle that authorises the limitation of procedural safeguards for individuals in benefit of a higher legal interest associated with the sporting event or competition.

Duties of judges in accordance with Ibero-American Model Code of Judicial Ethics

Whilst the Ethics Committee does not aim to carry out a detailed study of the possible criticisms that could be levelled at sports arbitration for violation of the right to legal protection, it should focus its attention on determining whether the participation of active magistrate judges or judges in the decision-making bodies of sports associations constitutes, from the perspective of ethics, a breach, an incompatibility or behaviour which is not in line with that recommended for the exercise of the office. In order to take a stance on the issue, the Committee considers it necessary to draw attention to extracts from the preamble to the code and the most relevant ethical rules that can be used as a basis for adopting a decision.

The following bases from the Preamble to the Model Code of Judicial Ethics should be taken into account with a brief commentary that explains their relevance to the question in hand:

“(...) the current reality of political authority in general and that of judicial authority in particular shows a clear crisis of legitimacy which means that those who exercise the profession need to ensure that citizens recover their trust in the institutions of the law”⁹

This statement justifies the need to take measures aimed at strengthening civil society's perception of the legitimacy of the justice system. The legitimacy of judicial systems may be compromised by the participation of their members in judicial bodies of private organisations that are associated with a central body - FIFA - that has been publicly called into question.

⁹ Basis III. The Model Code as an institutional commitment to excellence and as an instrument for strengthening the legitimacy of the Judiciary.



“The power conferred on each judge implies specific requirements which would be inappropriate for the common citizen exercising private powers; acceptance of the judicial function brings benefits and advantages but also burdens and disadvantages.

From this perspective of a governing society it is understood that a judge must not only be concerned with ‘being’ in accordance with the dignity appropriate to the power conferred, but also with ‘appearing’ in a manner which will not raise legitimate doubts in society regarding the manner in which the judicial service is carried out”¹⁰.

The code promotes a paradigm of a judge who is extremely cautious and mindful of the positive image of the administration of justice. As such, measures aimed at dignifying the administration of justice as a whole are necessary and desirable in themselves, notwithstanding a specific judge or arbitrator's moral rectitude and integrity in the performance of their function in the exercise of arbitral justice.

“These core aspects of judicial ethics have different names; however it would seem advisable to make use of the term “principles”, given that they lay claim to a certain intrinsically valuable profile which is subject to possibilities and circumstances of time and place”.¹¹

As principles, the effectiveness of these rules should be maximised and their application should be modified and contextualised in the face of the current realities that affect the administration of justice.

That said, the Ethics Committee considers that the following articles are relevant for the resolution of the ethical question raised from the outset. They are reproduced in their entirety, with a final reflection that assimilates all the specific directives.

“Article 1. The institutions which ensure judicial independence within the framework of the State are not designed to place judges in a privileged position. Their purpose is rather to guarantee citizens the right to be judged with legal parameters as a means of preventing arbitrariness, materialising constitutional values and safeguarding fundamental rights”.

¹⁰ Basis IV. Judicial ethics and the need to harmonise the values present in the judicial function

¹¹ Basis XII. Ethical principles as the core of judicial ethics



“Article 8. Judges should exercise the power attached to the judicial function with moderation and prudence”.

“Article 42. An institutionally responsible judge is one who, in addition to fulfilling their specific individual obligations also takes on an active commitment to the proper functioning of the entire judicial system”.

“Article 43. It is a judge’s duty to promote an rationally based attitude in society of respect and trust in the administration of justice.

“Article 47. Judges should be prepared to promote and collaborate in anything that leads to more efficient functioning of the administration of justice”.

“Article 54. Upstanding judges should not behave in a manner which a reasonable observer would consider to be a serious threat to the values and feelings prevailing in the society in which they work”.

“Article 55. A judge should be aware that exercise of the jurisdictional function presupposes requirements that do not apply to other citizens”.

“Article 60. Judges should avoid behaviours or attitudes which may be construed as an unjustifiable or disproportionate attempt to seek social recognition”.

Article 77. Judges should not contract obligations which disrupt or prevent appropriate fulfilment of their specific functions”.

As a final regulatory parameter, the following provision of the Statute of the Ibero-American Judge should be taken into account:

“Article. 44. Professional secrecy. Judges have the obligation to maintain strict confidentiality and professional secrecy in relation to ongoing proceedings and to facts or details learnt in the exercise of their function or as a result of it. They shall not give consultations or evaluations in cases of current or possible judicial conflict”.

Based on the elucidation of values cited above, the Committee proceeds to set out the reasons why it considers that forming part of football-related sports arbitration bodies and the exercise of judicial duties can potentially place the person who performs them



simultaneously in situations that are in conflict with the rules of the CIEJ or may even constitute an infringement, depending on how they are interpreted by the society whose members they serve.



It has been amply demonstrated that the principal aim of private sports jurisdiction is to maintain the positive image of football as a global spectacle rather than to guarantee the legally safeguarded interest of the people involved in a sporting dispute. As one of the most widespread sporting activities and with the largest number of followers on the planet, the various football organisations, namely the world federation, continental confederations, national federations and ensuing subdivided organisations, have undergone development and the fostering of closer links that lead “the integrity and reputation of football worldwide” which FIFA safeguards to be identified with the integrity and reputation of the organisation, which considers it preferable to definitively resolve disputes internally.

Although States can pass legislation aimed at regulating and inspecting the functioning of sports organisations and democratising their structure and property in an attempt to establish measures that prevent the violation of the right to legal protection of the people involved without undermining the autonomy necessary for the positive conduct of sports activities, sports organisations may disregard some of these regulations via an arbitral practice justified under the *pro competitione* principle and guaranteed by the mechanism of imposing extreme professional sanctions.

Thus, even when the areas of jurisdiction that correspond to the public and private spheres are clearly differentiated, by hierarchy and the mandatory nature of the legislation and the statutory rules of the private association, the enshrining of clauses, required by FIFA, frequently results in the jurisdiction of the state being supplanted in its entirety by the arbitral jurisdiction. This situation may be expected to lead to conflict with fundamental rights, which it is the purpose of the State in question and its judges to respect and safeguard.

In such a scenario of potential conflict with the actors who must protect and uphold in their professional duties, it is inexpedient that judges and magistrate judges should take part in the resolution of conflicts of a legal nature in which state powers are evaded via the application of private statutory provisions.

In this regard, it is reiterated that the fundamental purpose of the judiciary is to guarantee citizens the effectiveness of their rights, the prohibition of arbitrary treatment and subjection to legal parameters that reflect the values and principles shared by the community of civilised nations. Therefore, it is not viable for a judge to hold the institutional responsibility to which they are entitled at the same time as they exercise the jurisdiction corresponding to an arbitral body of a sports association, as the latter is clearly conditioned by interests that differ from strictly legal interests. The prevalence and integrity of the jurisdiction displaces ab initio the admission of any claim that fails to conform to it.

In light of the above, it can be said that the legal and judicial structure established by FIFA is biased, since its main interest is to enforce its own rules and impose them on those who are engaged in the sport of football, either as a lifestyle or as an economic activity. Consequently, the purpose of administering justice to produce the solution that the State considers is the fairest and most equitable and that provides the best safeguards to the parties is relegated in FIFA's judicial bodies in relation to the purpose of securing the decisions of the private organisation.

In short, Human Rights recognised as such by the International Community and national Constitutions are relegated unanimously.

In short, accepting without objection that our judges serve as such in sports bodies attached to FIFA creates a problem of legitimacy in the administrator of justice, as they open themselves up to the possibility that significant groups or even the whole of society may see them not as an upstanding official, a champion of fundamental values, recognised by civilised nations, but as a judge who endorses that such principles may be supplanted in benefit of sports purposes established by private associations.

Summary of the Arguments:

- The function of sports association bodies with the capacity to settle ethical or disciplinary disputes, sometimes called arbitral bodies, differs from conventional arbitration. Like any type of arbitration, the conditions of validity and state recognition are regulated by public policy rules.
- At first sight, because it is an ad-honorem activity, the exercise of these functions would not constitute a cause of legal incompatibility with the condition of being a judge.

- FIFA is the world governing body of football. All private associations and affiliated members must observe the statutes, codes, regulations and sports rules that regulate matters concerning the activity of professional football. The provisions of statutes and disciplinary codes of national football associations are subordinated to the regulatory frameworks established by FIFA.
- In principle this sports jurisdiction extends over matters wholly related to sports discipline. However, as clauses excluding the jurisdiction of ordinary justice are widespread in the statutes of private sports associations, these bodies ultimately hear and judge, to their fullest possible extent, the various aspects of a dispute that go beyond a strictly disciplinary scope. In this way, they can decide, for example, on civil or labour aspects that are connected to a sports dispute.
- Although the rules that recognise this sports arbitration limit the authorised area of private jurisdiction to sports matters, the statutes of sports organisations envisage extremely onerous sanctions for any accused party who requests protection before the state system of administration of justice. In practice these provisions invalidate the ideal concurrence between sports jurisdiction and state jurisdiction, leaving the alleged offender with the sole option of being judged by the arbitral tribunal.
- Arbitration proceedings pursued before the jurisdictional bodies of football sports associations envisage principles and rights related to due process. However, they also incorporate clauses that impose the priority of sports jurisdiction over litigants' other interests in contentious proceedings arising from football.
- The procedural principle that orders ruling in favour of sports jurisdiction significantly restricts the autonomy and independence of the sports arbitration body, to the detriment of the fundamental safeguards of the parties under the jurisdiction of the associations.
- Judges must avoid taking part in any activity that generates mistrust or suspicion in their role as administrators of justice. Judges must not only be irreproachable from every perspective, they also have a duty to take all possible measures to “appear” to be so. Given the economic background of football activity and, above all, the controversy it has generated at global, regional and local levels, participation in jurisdictional bodies of private sports associations affiliated to FIFA entails a negative effect on this duty.



- The judicial function precludes the exercise of certain activities that can be performed by the ordinary citizen, in order to preserve the image, prestige and decorum of the administration of justice. The need to adopt measures to strengthen and increase the legitimacy of the judicial system is an objective pursued by the Ibero-American Model Code of Judicial Ethics.
- The participation of a judge in an arbitral body of a football association connected to FIFA exposes them to being perceived by the community as the defender of interests that may prevail over the principles of the rule of law and democracy, such as just order, respect for the guarantees of equality and due process, which are personified in the members of the judiciary by formal mandate.
- The intervention of the arbitrator/judge in a dispute that may potentially be heard by the state justice system, runs counter to the principle outlined in the Ethical Statute of the Ibero-American Judge, according to which a judge “shall not give consultations or evaluations in cases of current or possible judicial conflict”.

In short, active judges or magistrate judges must use their independence to strive to eradicate any form of arbitrariness and safeguard the supremacy of constitutional values and rights (Article 1 of the EC); must adopt a firm commitment with their attitudes and behaviour to the proper functioning of, respect for and public confidence in the administration of justice (Articles 42, 43 and 47 of the EC); must guard against involvement in situations that in the current context may be disapproved or questioned by the society in which they work (Article 54 of the EC); must be aware of the special burden that exercise of the office implies, entailing privileges but also disadvantages in the interest of honouring the majesty and incorruptibility of the justice system (Basis IV of the CE); and ultimately must avoid taking on specific obligations that affect the fulfilment of the judicial function (Article 77 of the EC). Finally, in reference to a provision that is especially relevant to analyse the ethical problem that is the focus the Committee's attention, active judges or magistrate judges must not give consultations or evaluations in cases of current or possible judicial conflict (Article 44 of the Statute), especially if such a consultation or evaluation is performed in an body which acts in imposed substitution of the state justice system.



Conclusion:

Having completed this study of the nature, relationships and implications of sports arbitration with the judicial function of the State, the Ibero-American Committee for Judicial Ethics concludes that the participation of active judges or magistrate judges in judicial bodies of private football sports associations constitutes an ethical incompatibility that disregards the value-based directives contained in the Model Code of Judicial Ethics and the Statute of the Ibero-American Judge or at the very least entails entering into situations in which infringement of its rules becomes probable or inevitable. In summary, if an active judge or magistrate judge is the agent of an institutional project for the administration of justice that acts in accordance with the legal parameters integral to the rule of law, it is not for them to take on tasks that disregard the very foundations of the institutional edifice of which they form part, in other arbitral decision-making settings.

