Marquette Sports Law Review

Volume 31 | Issue 2 Article 6

2021

Forced Arbitration and Regulatory Power in International Sport - Implications of the Judgment of the European Court of Human Rights in *Pechstein* and *Mutu v. Switzerland*

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INTERNATIONAL PERSPECTIVE

FORCED ARBITRATION AND REGULATORY POWER IN INTERNATIONAL SPORT - IMPLICATIONS OF THE JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS IN *PECHSTEIN* AND *MUTU V. SWITZERLAND*

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INTRODUCTION

Some courts have permitted the Court of Arbitration for Sport (CAS) to exercise a non-consensual, "arbitral" jurisdiction, contrary to conventional arbitral principles.[1] CAS's forced jurisdiction was the subject of recent challenges before the European Court of Human Rights (ECtHR) in *Pechstein and Mutu*.[2] The judgment in that case largely dismissed claims by two athletes of violations of the *European Convention on Human Rights* (ECHR).[3]

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1. Whilst the jurisdiction is described as 'arbitral,' significant elements of the tribunal's dispute settlement jurisdiction lack the fundamental element of consent or an arbitration agreement that is typical of true arbitration. *See* NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 2.01 (6th ed. 2015); *see also,* GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 45 (2nd ed. 2015); *see also,* JULIAN D. M. LEW QC ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 99 (2003). On the necessity for an arbitration agreement, *see* Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S 38. For an analysis of CAS's *de facto* jurisdiction, *see* LLOYD FREEBURN, REGULATING INTERNATIONAL SPORT: POWER, AUTHORITY AND LEGITIMACY ch. 5 (2018).

2. Pechstein and Mutu v. Switzerland, App. Nos. 40575/10 and 67474/10, Eur. Ct. H.R. (2018), http://hudoc.echr.coe.int/eng?i=001-186828. All ECtHR decisions are available at http:/hudoc.echr.coe.int/. The form of the challenge was narrow in focusing on procedural issues and the consequences of the imposition of arbitration in lieu of access to litigation in a state court, as opposed to the non-consensual determination of substantive rights by private bodies.

3. *Convention For the Protection of Human Rights and Fundamental Freedoms,* as amended by Protocols Nos. 11 & 14, ETS 5 (entered into force 3 Sept. 1953). The principal breaches alleged were of Art. 6 § 1

Unusually for a tribunal that aspires to the judicial, CAS publicly celebrated the case as having approved its non-consensual jurisdiction.[4] By press release, CAS claimed that "[t]he ECHR judgment is another confirmation, this time at a continental level, that CAS is a genuine arbitration tribunal and that such sports jurisdiction is necessary for uniformity in sport."[5]

Notwithstanding the opinion of CAS, I suggest that first, rather than representing a broad endorsement of a non-consensual "sports jurisdiction" as claimed by CAS, the implications of the judgment in *Pechstein and Mutu* are narrower, being limited by the arguments that were determined by the court. In particular, the arguments challenging the jurisdiction of CAS were focused on procedural issues and, except for the compulsion of arbitration, otherwise did not address the non-consensual application of other rules of international sports federations. But this is a relatively mundane observation.

Second, and more importantly, the reasoning of ECtHR judgment may be viewed as entailing the foundation for potential future challenges both to CAS's *de facto* jurisdiction, and to exercises of the *de facto* powers of international sports governing bodies, with significant implications for the future of both.[6] This follows because the consequences of the court permitting forced arbitration in sport extend beyond the mere imposition of arbitration as a form of dispute settlement in lieu of access to litigation in a state court. It involves the non-consensual imposition of the unilaterally determined private regulatory regimes of international sports governing bodies and the determination of the individual rights of athletes and others who fall under the power of these bodies.[7] In this

relating to the lack of independence of CAS, and to the failure to grant a public hearing. The Court dismissed the first challenge by a 5-2 majority and upheld the second. *Pechstein and Mutu*, App. Nos. 40575/10 and 67474/10 ¶ 196.

4. CAS released a media release on the same day that the court's judgment was announced. Court of Arbitration for Sport, *The ECHR Recognizes that CAS Fulfils the Requirements of Independence and Impartiality* (Oct. 2, 2018), http://www.tas-cas.org/fileadmin/user_upload/Media_Release_Mutu_Pechstein_ECHR.pdf. CAS similarly issued a press release concerning the rejection of an appeal against this judgment: Court of Arbitration for Sport, *The European Court of Human Rights (ECHR) Rejects the Request of Claudia Pechstein to Refer Her Case to the Grand Chamber of the ECHR* (Feb. 5, 2019), https://www.tas-cas.org/fileadmin/user_uplo ad/Media_Release_Pechstein_ECHR_GC.pdf.

5. Court of Arbitration for Sport, *supra* note 4 ("The SFT already came to the same conclusion in 1993 and 2003; the German Federal Tribunal as well in 2016"). CAS claimed that "the ECHR considers that there is an interest in allowing the disputes arising in professional sport, in particular those with an international dimension, to be submitted to a specialized jurisdiction, able to rule on such cases in a quick and inexpensive manner." *Id.*

6. The conventional legal understanding of the nature of the powers of international federations is that it is consensual and exercised through contracts. *See* FREEBURN, *supra* note 1, at 19–23. This understanding is challenged as a fiction: the power is, in significant respects, non-consensual or *de facto* power. *Id.* The judgment in *Pechstein and Mutu* confirms the non-consensual power of CAS.

7. The majority of all cases that come before CAS as disciplinary in nature. *See* JOHAN LINDHOLM, THE COURT OF ARBITRATION FOR SPORT AND ITS JURISPRUDENCE AN EMPIRICAL INQUIRY INTO LEX SPORTIVA 289 (2018). A significant part of CAS's caseload involves disputes between individuals and sports governing bodies, three-quarters of these disputes involving an international or regional sports governing body. *Id.* at 292–93. Individuals are mostly unsuccessful with appeals to CAS, losing two-thirds of cases (and losing 85% of cases brought before CAS's Ad Hoc Procedure, which is an expeditated procedure that applies during

respect, forced arbitration is the unique feature of the *de facto* regulatory regime of international sport that distinguishes the regime from other transnational orders.[8]

Notwithstanding its significance, this wider effect of the compulsion of arbitration in international sport is not explicitly recognised. More critically, nor is it supported by the justifications that are advanced for forced sports arbitration. Fundamental questions thereby arise about the legal validity and the human rights implications of this private *de facto* regulatory regime and the forced arbitral system that underpins it. In particular, this *de facto* regime operates as a private regulatory system effectively isolated from state courts and national law by the deference given to arbitration,[9] despite the possibility of sport operating as an independent private legal order being denied by various courts.[10] Accordingly, a proper appreciation of the implications of *Pechstein and Mutu* is of grave significance and the ECtHR judgment should not be allowed to stand for more than what was strictly determined by the court.

The following section of this article discusses the judgment in *Pechstein and Mutu,* and this provides the background necessary for an understanding of the arguments that follow. What follows this is a description of the limited scope of the *Pechstein and Mutu* judgment and then a discussion of the ways in which the rules of international federations are non-consensually applied. Next, there is a discussion of the conventional conception of the basis of regulatory power

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events such as Olympic Games). In contrast to appeal cases more generally, which tend to be decided in favour of respondents, CAS overwhelmingly decides appeals in favour of appellant sports governing bodies where individuals are the respondents. *Id.* at 297, 302, 311.

8. While it is noted that the recognition of the wider compulsive effects involved in forced arbitration and the non-consensual nature of the rule of international federations introduces an underappreciated dimension to the issue and to conceptions of *Lex Sportiva*, it is unnecessary here to descend into the debate as to the characterisation of the regulatory regime of international sport as a transnational regime. *See* Ken Foster, *Is There a Global Sports Law?*, 2 ENT. LAW 1 (2003); Allan Erbsen, *The Substance and Illusion of Lex Sportiva*, 441–42, *in* IAN BLACKSHAW ET AL., THE COURT OF ARBITRATION FOR SPORT 1984 – 2004 (2006); *see* Franck Latty, *Transnational Sports Law*, 107 INT'L SPORTS L.J. 34 (2011); *see* Lorenzo Casini, *The Making of a Lex Sportiva by the Court of Arbitration for Sport*, 12 GER. L.J. 1317 (2011); *see* BURKHARD HESS, THE DEVELOPMENT OF LEX SPORTIVA BY THE COURT OF ARBITRATION FOR SPORT 59 (Klaus Vieweg ed., 2015).

9. *See, e.g.*, *International Arbitration Act 1974* (Cth) sch 2 (Austl.); Arbitration Act 1996, c. 23, s 9(4) (Eng); Federal Arbitration Act, 9 USC. § 3 (2021); Arbitration Act 1991, S.O. 1991, c. 17, ss 5(4), 6 (Can.); Arbitration Act 1996, s 6, sch 1, art 5 (N.Z). State courts will refuse to litigate matters determined by an arbitration agreement enforceable under the UNCITRAL Model Law United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985, art 8, Jun. 21, 1985; and the New York Convention. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II, *supra* note 1 (entered into force 7 June 1959, art II). *See e.g.*, Slaney v Int'l Amateur Athletic Fed'n, 244 F.3d 580, 594, 601 (7th Cir. 2001); Gatlin v. U. S. Anti-Doping Agency, Inc., No. 3:08-cv-241/LAC/EMT, 2008 WL 2567657 (N.D. Fla. 2008); *Raguz v Sullivan* [2000] 50 NSWLR 236 (Austl.). Participants in international sport who have limited scope to challenge actions of international federations in national courts but whose participation in the sports arbitral process will be considered to involve the acceptance by the complainant of the validity of that arbitral regime and of the rules upon which the regime is based experience a "catch 22." *See* FREEBURN, *supra* note 1, at 124–25.

10. *See Cooke v. Football Association* (1972) THE TIMES, 24 March; Reel v. Holder [1981] 3 All ER 321 (UK); Oberlandesgericht Frankfurt am Main (OLG) [Higher Regional Court of Frankfurt am Main] Apr. 18, 2001, 13 U 66/01 56; X AG v Y, SFT, case 4C.1/2005, BGE 132 III 285, 288– 289 (2005).

in international sport and the reality of the *de facto* power of international federations. This is followed by an analysis of the accepted justifications of non-consensual CAS arbitration. Here, it is argued that these justifications are limited to a justification of arbitration as a form of dispute settlement and are manifestly inadequate to justify the non-consensual application of the rules of international federations. This is followed by observations regarding issues relevant to the possible justification of *de facto* power in international sport. In conclusion, it is suggested that a broader perspective of the *de facto* power of international sports governing bodies and of forced CAS arbitration may - and should – lead to different arguments and outcomes to those in *Pechstein and Mutu*.

I. *PECHSTEIN* AND *MUTU*

The cases of the athletes Adrian Mutu and Claudia Pechstein in the ECtHR related to judgments of the Swiss Federal Tribunal (SFT) which confirmed awards of CAS.[11] In German speed-skater Claudia Pechstein's case, CAS upheld a two-year ban imposed by the International Skating Union (ISU) on Pechstein participating in and thereby earning her livelihood from her sport on the basis of a doping test that she challenged as unreliable. In Romanian footballer Mutu's case, a CAS award required him to pay more than €17 million in what was described as "compensation" to his former English employer, Chelsea Football Club Ltd (Chelsea FC), after the club dismissed him from employment.

Notwithstanding these substantive sanctions, the cases of both complainants in the ECtHR principally attacked the fairness of the procedures of CAS and relied upon the right to a fair trial in Article 6 ECHR to do so. The human rights-based challenges to the fairness of the CAS arbitration regime were, in essence, collateral attacks against the substantive penalties.

Whilst the circumstances of Claudia Pechstein's case are more well-known, Adrian Mutu's case serves best to illustrate the arguments presented here, albeit that points relating to the validity of the *de facto* power of the international governing body of football, the Fédération Internationale de Football Association (FIFA), were not taken, and that Mutu's case proceeded as if the obligations to which he was subjected were contractual.[12]

11. Pechstein and Mutu v. Switzerland, App. Nos. 40575/10 and 67474/10, Eur. Ct. H.R. (2018).

12. While there may be different perspectives on this, ultimately, Claudia Pechstein's case could be argued to reduce to an argument about the weight given to medical evidence. For present purposes therefore, it does not serve the purposes of this discussion as aptly as the facts of Adrian Mutu's case.

A. The Adrian Mutu Dispute

Adrian Mutu had been employed by the Italian football club, AC Parma. English club Chelsea FC paid AC Parma €22,500,000 as a "transfer fee" to secure AC Parma's agreement to transfer Mutu's employment to Chelsea FC. Although Mutu consented to the transfer of his employment, this amount was not paid to Mutu and Mutu was not a party to this agreement between the employer clubs.[13] The transfer arrangements were governed by rules made by FIFA.[14]

FIFA makes and administers extensive rules that, in practice, govern participation in football world-wide and many areas of off-field conduct of participants.[15] These rules are expressed to apply and apply in fact to participants, and not merely to FIFA's direct members.[16] FIFA's rules include both a detailed disciplinary regime which operates to the exclusion of state courts and which gives jurisdiction to CAS,[17] and a detailed system for the registration and transfer of players between clubs.[18] Despite being subjected to

13. Whilst notionally, a contracted player is also required to consent to a transfer, the options for players whose clubs wish to transfer them (and to receive transfer fees) may be bleak. Cases of players being transferred against their will are well known. Damion Mannion, *When Footballers Are Sold Against Their Will, Including Di Maria, Ozil and Carroll*, TALKSPORT, (Jul. 23, 2017), https://talksport.com/football /259337/when-footballers-are-sold-against-their-will-including-di-maria-ozil-and- carroll/ (conversing, and reflecting the commodification of the personal services of football players, the reverse situation of players wishing to leave their club for 'greener pastures' but the club wanting to retain the player are also well known).

14. FIFA is an entity headquartered in Switzerland whose members are the national governing bodies for football in each country. The dispute arose in England where the Football Association (FA) is the member of FIFA as the relevant national governing body of football. FIFA's player transfer rules are. FÉD'N INT'L DE FOOTBALL ASS'N, REGULATIONS FOR THE TRANSFER AND STATUS OF PLAYERS (Jun. 5, 2018), https://resources.fifa.com/image/upload/regulations-on-the-status-and-transfer-of-players-march-2020.pdf?cloudid=pljykaliyao8b1hv3mnp. FIFA's transfer rules restrict a player's ability to move between clubs.

15. FIFA's rules impose restrictions on the commercial transactions that participants may conduct, their employment relationships, personal behaviour and drug use. *See* Lloyd Freeburn, *The Fiction of Democracy in FIFA's Governance of Football and the Case of Football Federation Australia*, 19(3) INT'L SPORTS L.J. 184 (2018); *see also* FREEBURN, *supra* note 1, at ch. 3. These rules override the terms of contracts binding participants. *See, e.g.*, FIFA & WADA v. Superior Tribunal de Justiça Desportiva do Futebol (STJD) & Confederação Brasileira de Futebol (CBF) & Mr Ricardo Lucas Dodô, CAS 2007/A/1370 & 1376 (Sept. 11, 2008); Tribunal fédérale [TF] [Federal Supreme Court] Jan. 9, 2009, 4A_460/2008, *Dodo v. FIFA and WADA* (Switz.).

16. FIFA claims the power to regulate football players, albeit that players are not members of FIFA. FÉD'N INT'L DE FOOTBALL ASS'N, FIFA STATUTES Art. 6 (Aug. 2018),https://resources.fifa.com/image/upload/the-fifa-statutes2018.pdf?cloudid=whhncbdzio03cuhmwfxa. FIFA requires that "[a]ll bodies and officials must observe the Statutes, regulations, decisions and Code of Ethics of FIFA in their activities" (Art. 8(1)) and purports to command that "[e]very person and organisation involved in the game of football is obliged to observe the Statutes and regulations of FIFA as well as the principles of fair play." *Id.* at Art. 8(3). FIFA requires its members, the national governing bodies, 'to cause their own members to comply with the Statutes, regulations, directives and decisions of FIFA bodies.' *Id.* at Art. 14(1)(d)).

17. *See id.* at Art. 53-6.

18. SEE FÉD'N INT'L DE FOOTBALL ASS'N, REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS (2019), https://resources.fifa.com/image/upload/regulations-on-the-status-and-transfer-of-players-june-2019. pdf?cloudid=ao68trzk 4bbaezlipx9u.

the rules of FIFA and the Football Association (FA) (FIFA's member which governs football in England), Mutu was neither a member of FIFA nor of the FA.[19] In contrast, Chelsea FC was a member of the FA.[20]

Mutu was transferred to but subsequently transgressed in his employment with Chelsea FC. This led the club to terminate Mutu's employment contract.[21] Mutu was also suspended from football worldwide for seven months.[22] Further, Chelsea FC took action under FIFA's rules to recover damages from Mutu, including the amount of the transfer fees exchanged between the employers, Chelsea FC and AC Parma.[23] After Mutu had been unsuccessful in a number of initial challenges,[24] FIFA's internal disciplinary body, the Dispute Resolution Chamber ("DRC") ordered him to pay over €17 million to Chelsea, most of this amount being calculated by reference to the transfer fee paid by Chelsea FC.[25]

1. The CAS Award

As noted, the focus here is on the nature of the *de facto* regulatory regime imposed in international sport, rather than the correctness of the approach of the CAS Panel to the legal issue of the calculation of damages. Nevertheless, some discussion of this issue is necessary to understand the alternative regulatory regime of international sport and the way in which human rights issues may arise under that regime.

CAS applied the rules of FIFA, finding that the amount of compensation was fully consistent with Article 22 of FIFA's Regulations for the Status and

19. The members of the FA include various sub-national football governing bodies and some football clubs. Individual players are not entitled to membership. *See* FOOTBALL ASS'N, ARTICLES OF ASSOCIATION Art. 12, http://handboo k.fapublications.com/#!/book/26/chapter/s556-articles-of-association/content?section=s1183-exclusion-of-table-a. The denial to footballers of membership on national federations appears to be the norm amongst FIFA members. *See* F. Roitman & D. Grosvernier, *Governance Structures at National Association Level*, CIES SPORTS INTELLIGENCE, Figure 2 (2018) https://www.cies.ch/filea dmin/documents/News_Agend a_Publications/Governance_Structures_at_National_Association_Level_2018.pdf.

20. Mutu v. Chelsea Football Club Limited, CAS 2008/A/1644 ¶ 20 (Jul. 31, 2009). *See also* FOOTBALL ASS'N, RULES OF THE ASSOCIATION Rule A3 (May 23, 2019). Mutu was not apparently a member of Chelsea. His relationship with the club was that of employer/employee, not club/club member.

21. Mutu v. Chelsea Football Club Limited, CAS 2008/A/1644 ¶ 20 (Jul. 31, 2009). The presence of cocaine was detected in a sample collected from Mutu in a drug test conducted by the Football Association. Pechstein and Mutu v. Switzerland, App. Nos. 40575/10 and 67474/10, ¶10, Eur. Ct. H.R. (2018).

22. *Id.*

23. FIFA's rules permitted football clubs to recover transfer fees from players. FÉD'N INT'L DE FOOTBALL ASS'N, REGULATIONS FOR THE TRANSFER AND STATUS OF PLAYERS Arts 21-23 (Jul. 5, 2001), https://resources.fifa.com/image/upload/fifa-rstp-2005.pdf?cloudid=hbnv1yed9mu4teok2xg6.

24. *See* Mutu v. Chelsea Football Club, CAS 2005/A/876 (Dec. 15, 2005); *see also* Chelsea Football Club v Adrian Mutu, CAS 2006/1192 (May 21, 2007).

25. Tribunal fédérale [TF] [Federal Supreme Court] June 10, 2010, 4A_458/2009, *Mutu v. Chelsea Football Club Ltd.*, B.c. 4. 3-4 (Switz.). The amount ordered was €17,173,990 to be paid within 30 days, "failing which the amount would attract 5% interest and the matter would be referred to the FIFA Disciplinary Committee." *Id.*

Transfer of Players.[26] CAS also considered that the amount of compensation determined by FIFA's DRC pursuant to FIFA's regulations was consistent with English law, proceeding on the basis that the rules of FIFA were contractually applicable.[27] Notwithstanding this purported cumulative application of the FIFA rules and English law,[28] the CAS Panel primarily applied FIFA's regulations.[29] Accordingly, CAS upheld FIFA's order for Mutu to pay Chelsea FC compensation. In addition, CAS ordered Mutu to pay costs of the arbitration.

2. SFT Review

Significantly, the validity of CAS's interpretation of English law relating to damages available to an employer from an employee's breach of contract was never tested. The SFT upheld the award of CAS and refused to entertain Mutu's arguments regarding damages as inadmissible.[30]

The SFT also rejected Mutu's contention that CAS was irregularly composed by wrongly including two arbitrators who Mutu claimed should have been excluded and that CAS therefore lacked sufficient independence and impartiality.[31] Finally, the SFT rejected Mutu's contentions that the CAS award violated material public policy within the meaning of Article 190(2)(e) of the *PILA*.[32]

3. FIFA's De Facto Power

Perhaps unfortunately for the footballer, Mutu's case had been narrowly presented at the outset, initially merely disputing his liability within the regime established by FIFA's rules.[33] Accordingly, Mutu's liability was conceived as

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26. *Id.* at 4–5.

27. *Id.* at 15.

28. *See id.* at 20–21. This form of application of FIFA's regulations and English law is as required by Article R58 of the CAS Code, *see infra* note 66 and accompanying text.

29. *See id.* at 4–5. (refusing reductions in the amount of damages on the basis of the text of the FIFA Regulations).

30. *Id*. at 20.

31. *Id.* at 8.

32. *Id.* at 6, 20–21. ("'PILA' is the commonly used English abbreviation of the *Federal Statute on International Private Law* of 18 December 1987, RS 291 (Switzerland)").

33. In fact, early in the dispute, Mutu agreed to submit the issue of whether he had unilaterally breached his contract without cause or without sporting cause within the meaning of FIFA's rules, in particular Articles 21-23 of the FIFA *Regulations for the Status and Transfer of Players*, *see* FIFA, *supra* note 22 , to an internal body, the Football Association Premier League Appeals Committee ('FAPLAC'). When the FAPLAC decided against him, Mutu appealed to CAS. Again, he unsuccessfully argued a narrow point, that on their true construction, the terms of Article 21 of the FIFA Transfer regulations did not apply to him, basing his argument on the meaning of the term 'unilateral breach' used in the regulation. As well as agreeing to have the FAPLAC determine the issue of his breach, Mutu did not challenge the CAS award upholding the jurisdiction of the FAPLAC: Mutu v. Chelsea Football Club, CAS 2005/A/876 (Dec. 15, 2005). *See also* the subsequent CAS award upholding the jurisdiction of the DRC: Chelsea Football Club v Adrian Mutu, CAS 2006/1192 (May 21, 2007).

contractual in the SFT and by the ECtHR. Nevertheless, while Mutu did not establish that he was forced to accept the arbitration clause that applied to him, the *de facto* power of FIFA in the case is manifest. Even Mutu's contractual obligations, like Claudia Pechstein's obligation to accept CAS arbitration as a condition of practising her profession, appear to have been "forced." For example, FIFA stipulates that its members, the national associations that govern football in each country, must "cause their own members to comply with the Statutes, regulations, directives and decisions of FIFA bodies."[34] By its rules, the FA, as FIFA's member in England, requires employment contracts between English football clubs and players to be in a form specified by it.[35] Giving effect to the stipulations of FIFA, the standard form FA employment contract requires compliance with rules that include the rules of FIFA.[36] Consistent with the FA's standard form contract, the employment contract between Chelsea and Mutu required Mutu to observe the rules of FIFA.[37]

On the assumption that it was not open to a footballer in Mutu's position to negotiate on the terms of the FA standard form contract, it would appear to be difficult to avoid any conclusion other than that the terms of the FA contract including the application of FIFA's rules, the application of English law, the imposition of CAS arbitration, exclusion from state courts, and the limited recourse to review within the SFT, were all consequences that were forced. Further supporting this, FIFA's rules that prevent players from moving internationally between clubs without first obtaining an international clearance certificate from FIFA means that players have no choice but to submit themselves to FIFA's rules.[38] From a broader perspective, the proposition that Mutu or any professional international footballer could choose to practise his profession without being subjected to FIFA's rules is untenable.[39]

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34. FÉD'N INT'L DE FOOTBALL ASS'N, Statutes Art. 14(1)(d) (June 2019), https://resources.fifa.com/image/upload/fifa-statutes-5-august-2019en.pdf?cloudid=ggyamhxxv8jrdfbekrrm.

35. See FOOTBALL ASS'N, *supra* note 20.

36. *See id.* at Rule C1(j)(i). Problematically and paradoxically, the obligation to comply with FIFA's rules appears to override any inconsistent term of the contract; *see* FOOTBALL ASS'N, PREMIER LEAGUE CONTRACT cl.3.1.9.,https://ipmall.law.unh.edu/sites/default/files/hosted_resources/SportsEntLaw_Institute/Agent%20Contracts%20Between%20Players%20&%20Their%20Agents/6_PREMIER%20LEAGUE%20PLAYERS%20CONTRACT.pdf (last visited Mar. 8, 2021). This clause absolves a player from the obligation of complying with Club Rules that conflict with or vary the express terms of the contract, but which does not similarly absolve the player from complying with conflicting rules of FIFA or the FA. *See also Chelsea Football Club Limited*, CAS 2006//A/11922.

37. It also specified the application of English law, *Chelsea Football Club Ltd*, CAS 2006/A/1192 at 4. *See* FOOTBALL ASS'N, *supra* note 36. To the extent that English law was relevant, it was applied by virtue of the stipulation in Mutu's employment contract.

38. *See* FÉD'N INT'L DE FOOTBALL ASS'N, *supra* note 14. FIFA also possesses power to prevent a player who has been ordered to pay an amount by a FIFA body from participating in any football-related activity until the amount is paid. *Id.* at Art. 17. FÉD'N INT'L DE FOOTBALL ASS'N, DISCIPLINARY CODE 14-15 (2019), https://resources.fifa.com/image/upload/fifa-disciplinary-code-2019-edition.pdf?cloudid=eukqwuptuclcddzqjdlu.

39. *See* N. Stewart, *Restraint of Trade in Sport*, 6(3) SPORT AND THE L. J. 41,42 (1998). In relation to the application of the rules of international federations more generally, *see* MICAHEL BELOFF ET AL., SPORTS

Plainly, the rules of FIFA were not applied against Mutu as the rules of a voluntary associations are applied to the members of the association.[40] Rather, it is suggested that the true position is that the rules of FIFA were applied against Mutu through the *de facto* power of FIFA and the FA.[41] While Mutu did not take issue with the notional application of FIFA's rules by virtue of his employment contract with Chelsea FC, it is important to understand that, in practice, FIFA's rules are applied independently of the consent of participants and in precedence to any contract between a player and her or his club.

B. The ECtHR Judgment

There is an obvious self-interest in CAS's characterization of the ECtHR's judgment as supporting its forced jurisdiction. Recognising this, it is nevertheless possible, at a superficial level, to understand the basis of CAS's assertions. After all, it is true that the court rejected challenges to the arbitral jurisdiction of CAS, confirming the procedural rectitude of the arbitral regime. However, the legal significance of the dismissal of these challenges and the veracity of CAS's claims as to the court's broad endorsement of CAS's "sports jurisdiction" fundamentally depend upon the nature of the challenges brought before and dismissed by the court. While CAS may have wished for its transnational, *de facto* or "sports jurisdiction" to be confirmed as valid by the ECtHR, I submit that this is not what *Pechstein and Mutu* determined.

In reliance upon Article 6 § 1 of the Convention, it was contended by Claudia Pechstein and Adrian Mutu that, because of procedural defects, CAS was not an independent and impartial tribunal, and that the complainants had been denied a public hearing.[42] Significantly, in the course of considering the independence and impartiality of CAS, the ECtHR found that Pechstein's acceptance of the jurisdiction of CAS arbitration was not freely given in circumstances where the athlete was required, on the one hand, to either accept arbitration and earn her living by practising her sport at a professional level or, on the other, to refuse the arbitration clause and be obliged to give up her professional activities completely.[43] Indeed, the Court recognised that both athletes' consent to CAS's jurisdiction was equivocal and could not be described

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LAW 2.23 (2nd ed. 2012); *see also* James A.R. Nafziger, *Lex Sportiva*, INT'L SPORTS L. J. 3, 7 (2004); JAMES A.R. NAFZIGER, INT'L SPORTS LAW 7 (2nd ed. 2004).

40. As non-members, participants in football have no effective say in the governance or rule-making of the governing bodies, which are neither representative of nor accountable to them. *See* Freeburn, *supra* note 15.

41. It does not appear to be either necessary or relevant here to identify whether the application of FIFA's rules was affected by FIFA or the FA, either separately or in combination with each other, or with Chelsea, or any through combination of these bodies. Whatever the precise formulation, on the reasoning of the ECtHR, the rules were forced against Mutu.

42. Pechstein and Mutu v. Switzerland, App. Nos. 40575/10 and 67474/10, ¶ 181, Eur. Ct. H.R. (2018).

43. *Id.* at ¶ 113.

as having been freely given.[44] This finding, that the case involved a "forced arbitration," was repeated when the ECtHR found that the athletes' rights to a public hearing had been violated.[45]

In the absence of free consent of either athlete, the ECtHR was required to determine whether CAS was "an independent and impartial tribunal established by law" when considering whether the complainants' rights to a fair trial under Article 6 ECHR had been met.[46] A majority of the court decided that CAS was sufficiently independent and impartial and that there had been no violation of the athlete's Article 6 rights.[47]

The majority judgment noted that CAS had the appearance of a "tribunal established by law."[48] CAS possessed jurisdiction to examine matters submitted to it on the basis of rules of law and after proceedings conducted in a prescribed manner. Its decisions provided a judicial-type solution and could be appealed to the SFT, which considered CAS awards to be similar to those of a State court.[49]

Significantly, arguments advanced by the athletes to challenge the independence and impartiality of CAS were based on an alleged imbalance between athletes and international federations in the mechanism for selecting CAS arbitrators and on assertions of a possible bias on the part of arbitrators.[50] The attacks of the applicants focussed on these procedural issues.[51] These contentions were considered by the ECtHR to be inadequate to impugn the independence and impartiality of CAS.[52]

In this respect, it is important to note that no issue of the necessity or appropriateness of CAS's jurisdiction for international sport was relevant to the consideration of the independence and impartiality of CAS and whether, accordingly, the complainants had been afforded a fair hearing as was their right under Article 6 ECHR.

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44. Mutu did not establish that he had been forced to sign an arbitration clause but, because he did challenge the appointment of one of the CAS arbitrators, the ECtHR considered that he had not unequivocally waived his right to have his case heard by an independent and impartial tribunal. *See id.*; *see also* Nick De Marco QC, *The Right to a Fair Hearing in Sports' Cases*, SPORTS L. BULL. (Oct. 8, 2018), https://www.sportslawbulletin.org/right-fair-hearing-sports- cases/ ("'*n'avait pas été libre et 'sans equivoque*' [147]").

45. De Marco, *supra* note 44 ("'*il s'agit d'un arbitrage force'* [181]"); *see also* Bundesgerichtshof [BGH] [Federal Court of Justice] Jun. 7, 2016, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 292 (Ger.); Tribunal fédérale [TF] [Federal Supreme Court] Mar. 22, 2007, 133 ARRÊTS DU TRIBUNAL FEDERAL SUISSE [ATF] 235 (Switz.); *cf.* Stretford v. Football Ass'n [2007] EWCA Civ 238 (appeal taken from Eng.).

46. COUNCIL OF EUR., EUROPEAN CONVENTION ON HUMAN RIGHTS Art. 6 (2013), https://www.echr.coe.int/documents/convention_eng.pdf ("In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law").

47. Pechstein and Mutu v. Switzerland, App. Nos. 40575/10 and 67474/10, ¶ 159, Eur. Ct. H.R. (2018).

48. *Id.* at ¶ 149.

49. *Id.* at ¶ 98.

50. *Id.* at ¶ 124.

51. *Id.* at ¶¶ 124, 133–34.

52. *Id*. at ¶¶140–43.

In addition to the challenges based on Article 6, Mutu also sought to rely upon Article 4 § 1 of the Convention relating to the prohibition of slavery and forced labour, Article 8 relating to respect for private and family life, and Article 1 of Protocol 1 regarding the protection of property. The ECtHR determined that Mutu's complaints under Articles 4 § 1 and 8 failed to demonstrate any violation of the rights and freedoms set out in the Convention or its Protocols.[53] However, these complaints were considered on the basis that Mutu's obligations were contract-based.[54] They were neither argued nor considered to be forced or non-consensual obligations imposed through the *de facto* power of FIFA. The argument based on Article 1 of Protocol 1 was not open to Mutu as the state involved, Switzerland, had not ratified that Protocol.[55]

II. THE LIMITED SCOPE OF THE *PECHSTEIN* AND *MUTU* JUDGMENT

Part of the reason for what I suggest is an under-rationalization of CAS's forced or mandatory transnational jurisdiction is the fact that the challenges that have been mounted to that jurisdiction have been focused on the validity of CAS's procedures. Debates over the process of appointing CAS arbitrators and their potential bias concern the procedural independence and impartiality of the tribunal.[56] This was the case in *Pechstein and Mutu*, where the complainants'

53. *Id.* at ¶¶ 190-91 (noting that Switzerland had not ratified Protocol No. 1 to the Convention).

54. *Id*. at ¶ 119; *see* Tribunal fédérale [TF] [Federal Supreme Court] June 10, 2010, 4A_458/2009, *Mutu v. Chelsea Football Club Ltd.,* B.c. 4. 3-4 (Switz.). The SFT judgment considered Mutu's complaints to be contract-based, whether it was a case of "contractual restrictions of economic freedom" or "commitments that are excessive due to their object." *See generally* Schweizerisches Zivilgesetzbuch [ZGB], Code civil [CC], Codice civile [CC] [Civil Code] Dec. 10, 1907, SR 64, art. 27(2) (Switz.); Schweizerisches Zivilgesetzbuch [ZGB], Obligationenrecht [OR], Code des obligations [CO], Codice delle obbligazioni [CO] (Code of Obligations) Mar. 30, 1911, art. 20(1) (Switz.). The SFT also considered the issue of the method of calculation of damages to be a question of contractual liability, and therefore beyond review. It reached a similar conclusion on the principle of adequate causality. *Mutu v. Chelsea Football Club Ltd*, at ¶ 4.4.10.

55. Following the judgment in *Pechstein and Mutu*, the ECtHR reached a different conclusion on the facts of the case. Ali Rıza and Others v. Turkey, App. No. 30226/10, ¶ 246, Eur. Ct. H.R. (2020) (concluding that Turkey had violated Article 6 § 1 ECHR in failing to afford the complainants access to a fair trial due to structural deficiencies in the Arbitral Committee of the Turkish Football Federation (TFF)). The deficiencies were that the board of directors of the TFF had too much influence on the organisation and functioning of the Arbitration Committee and that that there were inadequate safeguards to protect the members of the Arbitration Committee from outside pressure. While the court reached a different conclusion to that in *Pechstein and Mutu*, this different conclusion flowed from a similar analysis of the formal, procedural aspects of the arbitral tribunal. The case does not add to the discussion in this paper. For a discussion of this case, *see* Despina Mavromati, *Riza v Turkey: European Court of Human Rights Gives Further Guidance on Establishing Independent Arbitral Tribunals*, LAWINSPORT (Feb. 6, 2020), https://www.lawinsport.com/topics/item/riza-v-turkey-european-court-of-human-rights-gives-further-guidance-on-establishing-independent-arbitral-tribunals.

56. Even those who foresee significant implications arising from the judgment appear to focus on issues of procedure, *see e.g.*, De Marco, *supra* note 44 ("The effects are indeed likely to be far-reaching"); Antoine Duval, *The "Victory" of the Court of Arbitration for Sport at the European Court of Human Rights: The End of the Beginning for the CAS*, ASSER INT'L SPORTS L. BLOG (Oct. 10, 2018), http://www.asser.nl/SportsLaw/Blog/post/the-victory-of-the-court-of-arbitration-for-sport-at-the-european-court-of-human-rights-the-end-of-the-beginning-for-the-cas ("the CAS will have to undergo a radical change").

arguments related to an alleged failure to receive a fair hearing in accordance with their Article 6 ECHR rights.[57] Such challenges seek to establish deficiencies in CAS's dispute resolution procedures in comparison with the procedural rights that a complainant would otherwise enjoy under systems of litigation in state courts but which are denied to them by being required to submit to CAS arbitration. Accordingly, judicial scrutiny is not brought to bear upon a wider issue that is implicit in the claims of CAS as to the effect of *Pechstein and Mutu* and its "sports jurisdiction." That wider issue is the general validity and human rights implications of the non-consensual, private determination of substantive rights by CAS and the international federations whose rules CAS enforces. This issue becomes obscured by arguments about the procedure of CAS.[58]

Accordingly, because the judgment in *Pechstein and Mutu* was based on the procedural context of the Article 6 ECHR challenges to the jurisdiction of CAS, its effect is therefore limited by that context. The finding that the arbitral procedures of CAS did not lead to a denial of the complainants' right to a fair hearing under Article 6 ECHR does not entail the conclusion that the forced or "sports jurisdiction" of CAS is somehow generally valid or that the compulsion entailed in the regulatory regime of international sport cannot form the basis of other claims of breaches of human rights. Further, the conception of Mutu's Article 4 and 8 *ECHR* complaints as being contract-based restricts any implications that could be drawn in relation to exercises of non-consensual power that may contravene the human rights protections in these Articles.[59] It was in this contractual context in which Mutu failed to enunciate a clear claim relating to the violation of his human dignity,[60] or demonstrate how his right to private and family life would be violated.[61]

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57. *See* Budesgericheshof [BGH] [Federal Court of Justice], Jun. 7, 2016, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ], ¶ 65 (Ger.). *See also* Tribunal fédérale [TF] [Federal Supreme Court] Mar. 22, 2007, 133 ARRÊTS DU TRIBUNAL FEDERAL SUISSE [ATF] 235 (Switz.).

58. While complainant Adrian Mutu's raised allegations of breaches of his rights under Articles 4 and 8 ECHR, these arguments were treated as if they arose from contractual obligations, rather than as exercises of non-consensual, *de facto* power, *see* Tribunal fédérale [TF] [Federal Supreme Court] June 10, 2010, 4A_458/2009, *Mutu v. Chelsea Football Club Ltd.* (Switz.).

59. It is unfortunate for present purposes that the judgment of the ECtHR dismissed Mutu's Article 4 and 8 complaints with little explanation. It is not clear from the judgment what arguments were put before the court, although Mutu's arguments on these points did not appear to have been well developed when they were presented to the SFT. *See generally id.* In relation to Art. 4, the SFT characterised Mutu's argument as invoking the provision but stopping there and not even attempting to demonstrate its violation. *Id.* at ¶ 4.4.3.3. Mutu's Art. 8 argument was based on the award having the effect of restricting his right to carry out his professional activity. *Id.* at ¶ 4.4.3.3. The SFT dismissed this as mistaken on the ground that Mutu had managed to obtain subsequent employment as a footballer. The SFT also considered that the CAS award itself did not jeopardize Mutu's economic existence. This would have been the consequence of a possible subsequent sanction pronounced by FIFA rather than the CAS award. *Id.* at ¶ 4.4.8.

60. Which would unquestionably fall within the concept of public policy under the *Swiss Private International Law Act*. CODE CIVIL [CC] [Civil Code] SR 12, art. 190 (Switz.).

61. Tribunal fédérale [TF] [Federal Supreme Court] June 10, 2010, 4A_458/2009, ¶ 4.4.3.3, *Mutu v. Chelsea Football Club Ltd.* (Switz.).

For reasons that follow, it is suggested that to the extent that *Pechstein and Mutu* is regarded as supporting anything more than acceptance of the arbitral procedures of CAS as a procedurally valid form of dispute settlement in lieu of litigation in a state court, such a view cannot - and should not - be supported. Indeed, it is suggested that the narrowness of the challenges considered by the court in *Pechstein and Mutu* leaves open the question of the substantive independence of CAS arbitration, that is whether the application by CAS of the rules of international federations to determine disputes to which the federations are party can be considered "independent." Further, recognition of the non-consensual nature of regulatory power in international sport also raises basic questions of legality and has the effect of making claims of other human rights violations arising from the non-consensual imposition of private obligations, rather than those obligations being consensual and contract-based, more credible and likely.

III. THE FORCED APPLICATION OF THE RULES OF INTERNATIONAL FEDERATIONS

The forced application of the rules of international federations more generally, and not merely the compulsion of arbitration, arises in two ways.

A. Recognition of the Compulsion of the Rules of International Federations in Sport in the Reasoning of Pechstein and Mutu

The first follows inevitably as a matter of reasoning from the ECtHR judgment in *Pechstein and Mutu*. It follows from the conclusion that arbitration is forced in the circumstances where athletes are required to either accept arbitration and earn their living by practising their sports at a professional level or to refuse CAS arbitration and be obliged to give up their professional activities completely, that not only is arbitration forced, the application of all of the rules of international federations is similarly forced and non-consensual.

Typically, the requirement to accept CAS arbitration is contained in more general rules made by the international federations that govern each sport. Participants are not, in normal circumstances, separately bound to accept sports arbitration but are generally bound to comply with all of the rules of the relevant international federation as a condition of participation, of which the prescription of arbitration forms is merely one part. The rules of international sports governing bodies that prescribe arbitration in sports do not stand alone and are not some form of *sui generis* rule; they are merely one part of a regime of regulation imposed by the international federations. These rules may be incorporated into a contract binding a participant through the effect of a general

reference in the contract to the rules.[62] Alternatively, the rules purport to operate as quasi-legislative instruments made pursuant to the self-proclaimed private "authority" of the international federations.[63]

In either the incorporation through general reference case, or in the quasi-legislative case, participants have no choice but to either accept the application of all of the rules of international federations (not merely the arbitration rule) and earn their living by practising their sports at a professional level or to refuse to accept the rules and be obliged to give up their professional activities completely. Accordingly, for the same reason that the ECtHR found CAS arbitration to be forced,[64] so too must it follow that other obligations arising from the imposition of the rules of international federations are similarly non-consensual.

B. The Compulsion of the Rules of International Federations Through the Application of Those Rules by CAS in Forced Arbitration

The second way in which the application of the rules of international federations is forced on athletes arises from the approach taken by CAS to the arbitration of disputes. The ECtHR was correct in observing that CAS had jurisdiction over a wide range of disputes. However, the ECtHR was not called upon to consider - and it did not appear to consider - what CAS actually does in determining disputes.

In an appeal against a decision of a sports governing body, a CAS Panel has full authority to review the facts and the law.[65] Nevertheless, under the CAS Code, the Panel is "required to decide the dispute according to the applicable regulations" and then, "subsidiarily," according to a number of prescribed choice of law rules.[66] This approach was followed by CAS in Mutu's case.[67] The problem that this gives rise to is that the regulations that are required to be

62. *See*, *e.g.*, FOOTBALL ASS'N, *supra* note 20, at Rule C1 (j)(i). The incorporation by reference of the rules of FIFA effected by the standard form player contract stipulated by the Football Association in England. Chelsea FC argued that FIFA's rules were incorporated into the club's contract with Mutu, *See* Mutu v. Chelsea Football Club Limited, CAS 2008/A/1644, ¶ 12 (Jul. 31, 2009).

63. *See* FREEBURN, *supra* note 1 at 125–36.

64. At least in Claudia Pechstein's case.

65. CT. OF ARB. FOR SPORT, CODE OF SPORTS-RELATED ARBITRATION ¶ R57 (Jan. 1, 2019), https://www.tas-cas.org/fileadmin/user_upload/Code_2019_en_.pdf. *See* Mutu v. Chelsea Football Club Limited, CAS 2008/A/1644, ¶ 12 (Jul. 31, 2009); *see also* N, J, Y & W v FINA, CAS 1998/208, in CAS DIGEST II, 234 ; N., J., Y., W. v. FINA, Tribunale fédérale [TF] [Federal Supreme Court] Mar. 31, 1999, 5P.83/1999, in CAS DIGEST II 775 (Switz.); *see also* Fazekas v. IOC, CAS 2004/A/714, ¶¶ 7–8 (Mar. 31, 2005); *see also* De Bruin v. FINA, CAS 98/211, in CAS DIGEST II 255 (Jun. 7, 1999); *see also* French v. Australian Sports Commission & Cycling Australia, CAS 2004/A/651, 28 (Jul. 11, 2005).

66. CAS is bound to apply rules of federations – "the applicable regulations." CT. OF ARB. FOR SPORT, *supra* note 65, at R58. C v Federation Internationale de Natation Amateur, CAS 95/141 in CAS DIGEST I 215, 219 (Apr. 22, 1996); B v International Triathlon Union, CAS 98/222 330, 336 (Aug. 9, 1999).

67. *See* Tribunal fédérale [TF] [Federal Supreme Court] June 10, 2010, 4A_458/2009, *Mutu v. Chelsea Football Club Ltd.*, ¶ 4.4.2 (Switz.).

applied are the rules unilaterally made and imposed by the *de facto* power of the sport's governing body as a form of quasi-legislation.[68]

In almost all cases, CAS determines the substantive matters in dispute before it in accordance with those rules,[69] which form the substantive law governing the resolution of the dispute.[70] For the most part, CAS does not apply a system of law, principles or rules determined independently of the international federation parties to disputes. The text of the rules of international federations overrides norms derived from external sources.[71] While CAS has frequently held that it has jurisdiction to disregard such rules,[72] it almost never does.[73] Only when the rules and regulations are completely inconsistent or contrary to mandatory provisions of the governing law will CAS disregard them.[74] Effectively, despite its de novo review powers, CAS applies "no more than a deferential arbitrary and capricious standard of review."[75]

Saying this is not to deny that CAS has established norms that are not found directly in the rules of international federations.[76] But this fact does little to

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68.This represents a departure from the normal rules of arbitration in which the parties are free to choose the applicable law as an exercise of party autonomy. EMMANUEL GAILLARD AND JOHN SAVAGE, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 94–95 (1999). This freedom is widely recognised including by International Conventions. *Id.* at 95–96.

69. "In most appeals proceedings before the CAS, the issue at stake has been settled by the mere application of the regulations of the sports organisation, without the need for recourse to national law." ADAM LEWIS AND JONATHON TAYLOR, SPORT: LAW AND PRACTICE E3.120 (3rd ed. 2014). *See* USA Shooting & Quigley v. International Shooting Union, CAS 94/129, in CAS DIGEST I 187, 194 (May 23, 1995); *see also* ARcycling AG v. Union Cycliste Int'l, CAS 2004/A/477 23, ¶ 58 (Jan. 31, 2005).

70. *See* GAILLARD ET AL., *supra* note 68, at 2, 77. *See also* Compagnie d'Armement Maritime SA v. Compagnie Tunisienne de Navigation S.A., [1971] A.C. 572, 603; Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II, *supra* note 1, at Art. V.I(d). The distinction has been drawn that sports bodies' rules are not applicable as 'law' but are to be considered contractually agreed provisions like terms of a contract. Tribunale fédérale [TF] [Federal Supreme Court] Dec. 20, 2005, 132 ARRÊTS DU TRIBUNAL FÉDÉRAL SUISSE [ATF] III 285 (Switz.). This distinction appears largely technical and proceeds on the assumption that the rules have been agreed, rather than imposed.

71. Erbsen, *supra* note 8, at 441 (citing cases where external norms may have worked to mitigate strict liability rules). NWBA v IPC, CAS 1995/122, in CAS DIGEST I, 173 at 184; Chagnoud v FINA, CAS 1995/141, in CAS DIGEST I, 215 at 221; Meca-Medina & Majcen v FINA, CAS 1999/A/234-235, 31; *Reinhold v FISA*, CAS 2001/A/330, in CAS DIGEST III, 197 at 204-205; IAAF v MAR & Boulami, CAS 2002/A/452, in CAS Digest III, 440 at 452. Though there is some inconsistency in approach. *See* Bouras v IJF, CAS 1998/214, CAS Digest II, 308 at 322.

72. CAS treats its own rules as overriding those of the tribunal whose decision is being reviewed, thereby ignoring any purported limits on its power of review. *See* BELOFF, *supra* note 39, at 310. *See, e.g.* Edwards v IAAF, CAS OG/04/003 (Aug. 21, 2004); Kendrick v ITF, CAS 2011/A/2518 (Nov. 10, 2011); Buci v FEI, CAS 2010/A/2283, (Jun. 2011).

73. Erbsen, *supra* note 8, at 443; Marcus Mazzucco & Hilary Findlay, *Re-Thinking the Legal Regulation of the Olympic Regime: Envisioning a Broader Role for the Court of Arbitration in Sport*, 2010 INT'L SYMP. FOR OLYMPIC RSCH.

74. *See* FREEBURN, *supra* note 1, at 146–51.

75. Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L. J. 90 (2008). CAS defers to the international federations by applying their rules unless it is shown that this results in arbitrariness or capriciousness. *See* Erbsen, *supra* note 8 at 446. Even in doping cases, CAS defers to textual rules and only fills gaps.

76. LINDHOLM, *supra*, note 7, at 213. In Chapter 7, Lindholm analyses CAS's normative contribution, classifying this contribution as general constitutional and administrative norms including respect for

dilute the substance of the problem arising from CAS's approach to the application of the rules of the international federations as the principal determinate of sports disputes. Moreover, while the norms developed by CAS that are not derived from the rules of international federations can, from one perspective, be viewed as a "significant normative contribution,"[77] these norms do not substantively limit the rule and decision-making powers of international federations. In some cases, CAS's "norms" support those powers.

For example, one of the norms developed by CAS is respect for "the freedom of associations to establish their own rules."[78] That these rules are compulsorily applied to persons who are not members of the associations and who have not consented to the rules is not considered. Another norm is the application by CAS of a principle of formal legality.[79] The rules of sports governing bodies must "emanate from duly authorised bodies."[80] This norm amounts to rule-making bodies in sports being required to comply with their own constitutions. It adapts a public law standard in which the rule-making bodies are ultimately authorised by democratic bodies that are representative of those subjected to regulation. However, it omits the requirement for democratic legitimacy. Then, CAS has adopted a norm prohibiting arbitrary or unreasonable rules and measures.[81] Again, this norm presumes a power on the part of international federations to impose rules and ignores the possibility that rules unilaterally determined and imposed by a private body on other individuals are thereby arbitrary.[82]

Another example of CAS's norms supporting the position of sports governing bodies is the stringent threshold that CAS requires athletes to meet to successfully challenge a suspension imposed by a sports governing body. It is not enough for an athlete to show that the suspension was excessive; the suspension must be shown to be "extremely serious and totally disproportionate."[83] Similarly, the proportionality test applied to sanctions issued by international federations requires that a sanction on an athlete be "evidently and grossly disproportionate to the offence."[84] Yet, while CAS has

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fundamental rights, norms governing CAS and its procedure, and norms governing sanctions and other remedies.

77. *Id.* at 213.

78. Squizzato v. FINA, CAS 2005/A/830, ¶ 50 (Jul. 15, 2005).

79. USA Shooting & Quigley v. UIT, CAS 1994/129, in CAS Digest I, 187 (May 23, 1995).

80. Darren Kane, *Doping: Fairness at Core of Sun Yang Case Despite Headline Hysteria*, SYDNEY MORNING HERALD (Nov. 22, 2019), https://www.smh.com.au/sport/s wimming/fairness-at-core-of-sun-yang-case-despite-headline-hysteria-20191122-p53d4r.html.

81. *See* AEK Athens v UEFA, CAS 98/200 (Aug. 20, 1999), in DIGEST OF CAS AWARDS II 1998-2000.

82. The SFT clearly only considered arbitrariness as between Mutu and his employer, not as between Mutu and FIFA or the FA. *See* Tribunal fédérale [TF] [Federal Supreme Court] June 10, 2010, 4A_458/2009, *Mutu v. Chelsea Football Club Ltd.*, ¶ 4.4.2 (Switz.).

83. Hipperdinger v. Ass'n of Tennis Pro., CAS 2004/A/690, ¶ 52 (Mar. 24, 2005).

84. Meca-Medina & Majcen v FINA, CAS 1999/A/234-235, 11.3; Hipperdinger v. Ass'n of Tennis Pro., CAS 2004/A/690, ¶ 55 (Mar. 24, 2005); Squizzato v. FINA, CAS 2005/A/830, ¶ 50 (Jul. 15, 2005).

adopted this application of a principle of proportionality, it does not apply a proportionality principle to "govern the division and exercise of power within sports."[85]

Other norms developed by CAS are not material to the current discussion,[86] while other norms reflect generally applicable legal principles that would be imposed in almost all legal systems anyway.[87]

Consequently, the imposition of sports arbitration does not merely lead to arbitration as a form of dispute settlement that applies to the exclusion of access to State courts. That is, it is not simply a case of private arbitration replacing litigation before a State court. The effect of courts allowing sports arbitration to be compelled is that all of the rules of international federations are also then compulsorily applied against participants. This is the result of CAS determining disputes by the application of the rules of the international federations. CAS does not apply mutually agreed or determined rules, nor any independent system of justice, but merely acts to ensure procedural fairness and to ensure that the international federations comply with their own rules.[88]

IV. THE UNDER-RATIONALISATION OF THE BASIS OF THE REGULATORY POWER OF INTERNATIONAL FEDERATIONS

A. The Orthodox Conception of the Regulatory Power of International Federations

Recognition of the more general compulsion involved in the regulatory regime of international federations means that the conventional conception of the jurisprudential basis of this *de facto* regulatory authority of international sports federations is under-rationalised. The wider, non-consensual nature of the

85. LINDHOLM, *supra* note 7, at 201.

86. *Id.* at 191. For example, norms relating to the allocation of powers between sports bodies.

87. *See* USA Shooting & Quigley v. UIT, CAS 1994/129, in CAS DIGEST I, 187 (May 23, 1995); *Anderson*, CAS 2008/A/1545, ¶¶ 19-20 (Jul. 16, 2010). For example, norms requiring the application of natural justice or qualitative legality requiring rules to be accessible, predictable and clear.

88. Again, for present purposes, it is unnecessary to descend into the issue of the content of any concept of *lex sportive*. It is sufficient to note that the content of any sport-specific rules that are applied by CAS in precedence to the rules of international federations is very small. Erbsen, *supra* note 8, at 453. "CAS's nominally unique Lex Sportiva is really an amalgam of general due process and equity norms tailored to sporting disputes." This is so notwithstanding recognition of some principles considered unique to sport, such as the principle that competitors should have equal chances. *See* Federation Internationale de Luttes Associees, CAS 2001/A/317, ¶ 24 (Jul. 9, 2001). *See* BELOFF, *supra* note 39, at 309; *see also* HESS, *supra* note 8, at 67–68; *see also* Latty, *supra* note 8, at 36; *see also* Foster, *supra* note 8, at 9. Beyond this, the recognition of the wider, non-consensual application of the rules of international federations supports the wider view of *lex sportiva* adopted by others. *See* Casini, *supra* note 8, at 1319; Latty, *supra* note 8, at 37; Antoine Duval, *Lex Sportiva: A Playground for Transnational Law*, 19 EUR. L. J. 822, 827–28 (2013). "Consequently, lex sportiva can be understood as a body of national rules and principles that allows sport-related activities and disputes to be disconnected from the rules and principles of various national legal systems." LINDHOLM, *supra* note 7, at 628.

power exercised by international federations is either generally not expressly recognised or, if it is implicitly accepted, its implications ignored.

Certainly, the ECtHr in *Pechstein and Mutu* did not acknowledge compulsion beyond the compulsion of arbitration as a form of dispute settlement, which may be explicable by the fact that the point was not taken by the parties. The ECtHR is not alone in this approach - nor have other courts which have considered the issue of forced arbitration in sport directly discussed the compulsion of other rules of international federations.[89] Further, sports law commentators similarly have not considered the wider issue of compulsion as distinct from compulsion of arbitration as a form of dispute settlement in lieu of access to state courts.[90] The conventional conception of the regulation of international sport as being consent-based is the dominant perspective,[91] that conventional conception beginning to assume the status of a legal fiction.[92] This fiction is maintained notwithstanding the challenge occasioned by the fact that international federations extensively regulate the affairs of persons who are not their members and with whom they are not in a contractual relationship.[93]

The effects of the compulsion of the private regulatory power of international federations is significant, both in terms of its practical effects (as

89. *See* Tribunal fédérale [TF] [Federal Supreme Court] Mar. 22, 2007, 133 ARRÊTS DU TRIBUNAL FEDERAL SUISSE [ATF] 235 (Switz.); *see also* Bundesgerichtshof [BGH] [Federal Court of Justice] Jun. 7, 2016, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ], at 8 (Ger.).

90. *See* Antonio Rigozzi and F Robert-Tissot, *"Consent" in Sports Arbitration: Its Multiple Aspects*, 59–60, *in* ELLIOT GEISINGER & ELENA TRABALDO DE MESTRAL, SPORTS ARBITRAITON: A COACH FOR OTHER PLAYERS? (2015); ANDREA MARCO STEINGRUBER, CONSENT IN INTERNATIONAL ARBITRATION 2.45 (2012); Andrea Marco Steingruber, *Sports Arbitration: How the Structure and Other Features of Competitive Sports Affect Consent as it Relates to Waiving Judicial Control*, 20 AM. REV. OF INT'L ARB. 59, 73 (2009); Antoine Duval & Ben Van Rompuy, *The Compatability of Forced CAS Arbitration with EU Competition Law: Pechstein Reloaded*, SSRN 21 (Jun. 23, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621983; Ian Blackshaw, *Arbitration: Olympic Athlete Consent to CAS Arbitration*, WORLD SPORTS L. REP. 7(11) (2009); Maureen A. Weston, *Doping Control, Mandatory Arbitration, and Process Dangers for Accused Athletes in International Sports*, 10 PEPP. DISP. RESOL. L. J. 8 (2009); Daniel H Yi, *Turning Medals into Metal: Evaluating the Court of Arbitration for Sport as an International Tribunal*, 6 ASPER REV. OF INT'L BUS. AND TRADE L. 312 (2006). *Cf.* FREEBURN, *supra* note 1.

91. This conventional conception is that the authority of sports governing bodies is purely consensual, arising from the membership agreement between the organisation and its members. *See* BELOFF, *supra* note 39, at 2.24, 2.26, 2.37, MARK JAMES, SPORTS LAW 2.2.1 (2nd ed. 2013); LEWIS ET AL., *supra* note 69, at A2.13; J.R.S FORBES, JUSTICE IN TRIBUNALS 19 (4th ed. 2014); Alan Sullivan, *The Role of Contract in Sports Law*, 5 AUSTL. AND N. Z. SPORTS L. J. 3, 10 (2010); 24 JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS (Bobbs-Merrill, 1979) 196, § 3.01; Steve Cornelius, *Liability of Referees (Match Officials) at Sports Events*, INT'L SPORTS L. J. 52, 53 (2004). CAS similarly subscribes to the conventional conception. *See* USOC v IOC, CAS 2011/O/2422, ¶ 45 (Oct. 4, 2011) ("The WADA Code is neither a law nor an international treaty. It is rather a contractual instrument binding its signatories in accordance with private international law").

92. PATRICK S. ATIYAH & STEPHEN A. SMITH, ATIYAH'S INTRODUCTION TO THE LAW OF CONTRACT 71 (6th ed. 2005) (stating legal fictions "stand in the way of the proper organization, understanding, and application of the law. A fiction hides the truth, which is always a dangerous thing. It is therefore important that fictions be identified as such and, where possible, discarded"). *See also*, *Nagle v Feilden* [1966] 2 QB 633, 653 (Salmon LJ) ("Today fictions in our courts are unnecessary. They are dangerous, too, for any fallacy can be conclusively proved to be true if but one false hypothesis be conceded").

93. FREEBURN, *supra* note 1 (challenging this legal fiction directly).

Adrian Mutu could attest) and in terms of the violence that this *de facto* regulatory regime – including CAS's purported "sports jurisdiction" - does to fundamental legal principles, violence that is occasioned under the cover of support for sports arbitration.

B. The De Facto Power of International Federations and Legal Principle

Put briefly, although they exercise a wide range of regulatory powers, international federations are private legal entities.[94] While some of their functions have a public character, they do not exercise delegated state authority, but operate under and are regulated by private law.[95] In liberal democratic societies, it is a fundamental principle that only the state has compulsive power; private law obligations cannot be compelled.[96] It is for this reason that the regulatory authority of international federations as private law entities, that is as voluntary associations, is assumed to be consent and contract based. This is the

94. They are usually limited liability companies. Many are non-governmental not-for-profit associations founded under and governed by Swiss national private law. *See* Art. 60-79 Swiss *Civil Code*. Under Swiss private law, they are given enormous protection from scrutiny. *See* JOHN FORSTER & NIGEL POPE, THE POLITICAL ECONOMY OF GLOBAL SPORTING ORGANISATIONS (2004); *See also* Andreas Georg Scherer and Gudio Palazzo, *The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance, and Democracy*, 48 J. OF MGMT. STUD. 899 (2011); Richard H. McLaren, *Is Sport Losing Its Integrity?* 21 MARQ. SPORTS L REV. 553, n. 5 (2011). Autonomy from state control is an article of faith amongst international federations. It is also significant that appeals to the SFT from awards of CAS proceed under the Swiss *Private International Law Act* of 1987.

95. *See* FORSTER & POPE, *supra* note 94.

96. In liberal political theory, all citizens have "perfect freedom to order their actions, and dispose of their possessions and person as they think fit, within the bounds of the law of Nature, without asking leave or depending upon the will of any other man." JOHN LOCKE, TWO TREATISES ON GOVERNMENT 106-08 (vol. 5, 2000); *See also*, JOHN C. REES, JOHN STEWART MILL'S ON LIBERTY 17-18, 21-2, 71–2, 78–9 (1985); JOHN RAWLS, A THEORY OF JUSTICE 60 (1971); *See* NEIL MACCORMICK, INSTITUTIONS OF LAW 223 (2007); Andreas L Paulus, *Commentary to Andreas Fischer-Lescano & Gunther Teubner the Legitimacy of International Law and the Role of the State*, 25 MICH. J. OF INT'L L. 1047, 1053 (2004) ("[N]on-State actors can only bind themselves . . . As soon as public interests are at stake, only public decision-making appears legitimate").

position in common law jurisdictions,[97] and in civil law jurisdictions.[98] Nevertheless, this assumption is untenable to the extent that it is applied beyond the members of the international federations as voluntary associations and beyond the limits of any relevant contract.[99] Accordingly, to consider that international federations are free to exercise self-declared, private dominion over others contravenes basic principle and it does so in a number of additional ways.

First, this violates the separation between governmental and private power. This is fundamental, the state's right of compulsion is unique and is not a right enjoyed by private individuals.[100] Individuals may only be subjected to the political control of another, if, and to the extent that, each agrees to empower such authority.[101] The *de facto* power of international federations, given effect to by the forced jurisdiction of CAS, contravenes this basic principle.

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97. Under private law in common law jurisdictions, contracts are the form of legally recognised voluntary undertaking that create obligations. Hence the proposition that the authority of private or domestic tribunals is "derived solely from contract, that is from the agreement of the parties concerned." R v Criminal Injuries Compensation Board, Ex parte Lain [1967] 2 QB 864 at 882 (Lord Parker CJ); 884 (Diplock LJ) (Eng.); *See, e.g.,* in the United States: Lawson v Hewell, 50 P. 763 (Cal. 1897); Anthony v Syracuse Univ., 231 N.Y.S. 435, 439 (N.Y. App. Div. 1928); Mayer v Journeymen Stonecutters' Ass'n et. al., 20 A. 492, 494 (N.J. Ch. 1890); Elizabeth Hosp. Inc. v Richardson, 167 F.Supp. 155, 163 (W.D. Ark. 1958), *aff'd*, 269 F.2d 167 (8th Cir 1959), *cert. denied* 361 US 884 (1959); *See also* in England: Law v Nat'l Greyhound Racing Club Ltd [1983] 3 All ER 300 at 302, 305, 307; Lee v Showmens Guild [1952] 1 All ER 1175*;* Abbott v Sullivan [1952] 1 All ER 226; Byrne v Kinematograph Renters Soc'y Ltd [1958] 2 All ER 579; Davis v Carew-Pole & Others [1956] 2 All ER 524; R v Disciplinary Committee of the Jockey Club; Ex parte Aga Kahn [1993] 2 All ER 853; R v Football Ass'n of Wales; Ex parte Flint Town United Football Club [1993] 2 All ER 833; R v Jockey Club; Ex parte RAM Racecourses Ltd [1993] 2 All ER 225, 248; *Wilander v Tobin* [1997] 2 CMLR 346, 357 (Lord Woolf MR); R v Appeal Board of the Jockey Club [2005] EWHC 2197 (Admin); *See also* in Australia: Ausl. Football League v Carlton Football Club [1998] 2 VR 546, 550 (Austl.); McClelland v Burning Palms Surf Life Saving Club [2002] 191 ALR 759 (Austl.); *Clements v Racing Victoria Limited (Occupational and Business Regulation)* [2010] VCAT 1144 (Austl.).

98. In relation to associations under civil law jurisdictions, the application of the rules of associations to members is founded on the voluntary membership relationship between the association and its members. This is the position under a contractual theory (the *Vertragstheorie*) in which the relationship is based on a contract between the parties; and under an institutional theory (*Normentheorie*) in which an association's articles of association "are an 'objective law' based on the freedom of association" that are not like negotiated contractual terms, but represent an "attempt to establish an order of social life that ensures the achievement of a super-individual purpose," is applied. *See* Rosmarjin van Kleef, *The Legal Status of Disciplinary Regulations in Sport*, 14 INT'L SPORTS L. J. 24, 31 (2014); *see also*, Cédric Aguet, *La sanction disciplinaire infligee par une federation Internationale a l'encoutre d'un non-membre a-t-elle une source de droit de l'association? – Reflexions a la lumiere de l'arret du Tribunal federal No 4P.240/2006*, JUSLETTER (April 16, 2007), https://jusletter.weblaw.ch/juslissue s/2007/419/_5623.html__ONCE&login=false.

99. The members of international federations are the national federations from each member country, not individual athletes or other participants. *See* FREEBURN, *supra* note 1, at 6–7, 23–5. Frequently, there is no contract between an international federation and an individual participant, with attempts to remedy this shortcoming including resort to various other legal fictions, including the 'chain of contracts' theory: *see id.* at 69–84.

100. *See* REES, *supra* note 96, at 21-2, 71–2, 78–9; *see also* LOCKE, *supra* note 96, at 106; RAWLS, *supra* note 96, at 60. This principle is embedded in the legal systems of liberal societies, *see, e.g.,* Munn v. People of State of Illinois, 94 U.S. 113, 124 (1876).

101. *See* FREEBURN, *supra* note 1 (*citing* LOCKE, *supra* note 96, at 70, 118–20, 164). Locke regarded the state's prerogative to punish:

This is not a problem simply because it violates the traditional separation of public and private powers. It is a problem made more grievous by the fact that the right of the state to compulsion is based on political legitimacy.[102] That is, public law power is ultimately justified in being authorised by democratically accountable legislatures.[103] However, unlike public or governmental power, the *de facto* power of international federations and the non-consensual arbitral power of CAS does not entail the application of the laws of a democratically elected parliament or other form of representative body. Instead, it involves the non-consensual application of private rules that are arbitrarily determined by bodies that are unrepresentative of those over whom they exercise power and that lack any sound claim to a legitimacy that justifies their *de facto* power.[104]

The jurisprudence of the ECtHR recognises the special nature of governmental power, for example in relation to the level of tolerance states are granted in how they regulate relations between individuals.[105] States are permitted some freedom in determining what their objectives should be, which is, as a matter of separation of powers, not to be second-guessed by the courts. In relation to state power, as opposed to the power of international federations,

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> as an entrustment, by its citizens, of their own natural power to punish. It is only because the state undertakes to act on behalf of its citizens to punish those who commit wrongdoings that it: (i) justifiably prohibits individuals from exercising their individual right to punish; (ii) justifiably punishes, as the state. The power of the state to punish is therefore entirely derivative; the obligation of the individual not to engage in private punishment is conditional on the state's having undertaken that role.

Benjamin C Zipursky, *Philosophy of Private Law*, *in* THE OXFORD HANDBOOK OF JURIS. AND PHILOSOPHY OF LAW 639 (Jules Coleman & Scott Shapiro eds., 2002).

102. FREEBURN, *supra* note 1; *see also* CARLO FOCARELLI, INTERNATIONAL LAW AS SOCIAL CONSTRUCT: THE STRUGGLE FOR GLOBAL JUSTICE 176 (2012); Vivien Collingwood, *Non-Governmental Organisations, Power and Legitimacy in International Society*, 32 REV. OF INT'L STUD. 439, 448 (2006).

103. *See* Jan Smits, *Private Law and Fundamental Rights: A Sceptical View*, *in* CONSTITUTIONALISATION OF PRIVATE LAW, 19–22 (Tom Barkhuysen & Siewert Lindenbergh eds., 2006); *See also* Stathis Banakas, *The Constitutionalisation of Private Law in the UK: Is There an Emperor Inside the New Clothes?*, *in* CONSTITUTIONALISATION OF PRIVATE LAW 83-7 (Tom Barkhuysen & Siewert Lindenbergh eds., 2006); Scott Shapiro, *Authority*, in THE OXFORD HANDBOOK OF JURIS. AND PHILOSOPHY OF LAW 432-7 (Jules Coleman & Scott Shapiro eds., 2002); SIMON GARDINER, ET AL, SPORTS LAW 92 (4th ed. 2012) (citing L. Hancher and M. Moran, *Organising Regulatory Space*, *in* A READER ON REGULATION 150 (Robert Baldwin et al. eds., 1998)); Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. SOC'Y OF INT'L LAW 596, 599 (1999); Julia Black, *Constitutionalising Self-Regulation*, 59 MOD. L. REV. 24, 29-32 (1996); PAUL PHILLIP CRAIG, PUBLIC LAW AND DEMOCRACY IN THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA Ch. 2 (1991) (discussing the work of A V Dicey); T.R.S. ALLAN, LAW, LIBERTY, AND JUSTICE 21-2 (1993); Samantha Besson, *Theorizing the Sources of International Law*, *in* PHILOSOPHY OF INTERNATIONAL LAW 163, 176 (2010).

104. 'Legitimacy' is used in the sense of 'justification'. In this sense, it may be taken to mean both 'legitimacy' in its normative sense, its pull to compliance, and legal legitimacy, and the legal authority of international federations to impose their regulatory power. *See* FREEBURN, *supra* note 1, at 46–9.

105. *See, e.g.*, Von Hannover v. Ger., App. Nos. 40660/08 and 60641/08, ¶ 104, Eur. Ct. H.R. (Feb. 7, 2012); E.S. v. Swed., App. No. 5786/08, ¶ 58 Eur. Ct. H.R. (Jun. 21, 2012); Söderman v. Swed., App. No. 5786/08, ¶ 79 Eur. Ct. H.R. (Nov. 12, 2013); Odièvre v. Fr., App. No. 42326/98, ¶ 46, Eur. Ct. H.R. (Feb. 13, 2003); Evans v. U.K., App. No. 6339/05, ¶ 77, Eur. Ct. H.R. (Apr. 10, 2007); Mosley v. U.K., App. No. 48009/08, ¶ 109, Eur. Ct. H.R. (May 10, 2011).

it is important to note that the "substantive concept of the margin of appreciation takes the idea of political morality as a starting point. It is based on the assumption that State authorities are justified to take measures prescribed by law in pursuing collective goals."[106] The role of states in pursuing collective goals is legitimised by democracy.[107] However, this is not a claim to legitimacy that can be made by international sport governing bodies – they are not democratically representative of those over whom they exercise power.[108]

Nor is the exercise of private regulatory power by international federations justifiable as a consequential effect arising from the pursuit of a separate, independent objective.[109] It is not an objective bounded by a private, consensual relationship, it is a power exercised in pursuit of a self-proclaimed, private regulatory status over third parties, independently of their individual consent.[110]

Then, nor does the *de facto* regulatory power of international federations involve the exercise of a fundamental right by the international federations.[111] While the federations possess the right of freedom of association as legal persons, *de facto* power exercised non-consensually over non-members is not the exercise of freedom of association or the exercise of the individual liberty of a federation as a voluntary association regulating its members. Indeed, it is incoherent to consider the exercise of such power as consistent with a regime based on individual liberty because the "right" of one individual to rule over other individuals would be defeating of all liberty.[112]

The *de facto* power of international federations is also contrary to other, rule of law principles. The rule of law dictates the existence of measures of legal protection against arbitrary interference by public authorities with the right protected by the Convention.[113] In general theory, the protection of the rule of

106. DRAGOLJUB POPOVIC, EUROPEAN HUMAN RIGHTS LAW – A MANUAL: AN INTRODUCTION TO THE STRASBOURG COURT AND ITS JURISPRUDENCE 49 (2013).

107. *See* FREEBURN, *supra note* 1, at 173–74.

108. *See infra* note 127.

109. As in the German case, Case Nos 2 *BvR* 17033/833, 1718/83 and 856/84, *BVergG*, vol 70, at 138-73 concerning the freedom of a church to lay off an employee who had expressed views incompatible with the church's beliefs and teachings. *See* Obst v. Ger., App. No. 425/03, ¶¶ 51-52, Eur. Ct. H.R. (Sep. 23, 2010); *see also* Siebenhaar v. Ger., App. No. 18136/02, ¶ 46, Eur. Ct. H.R. (Feb. 3, 2011). Nor is the regulatory power of international federations merely an effect of the expression of those bodies' freedom of expression. *See* Roberts v U. S. Jaycees, 468 US 609, 626-27 (1984); *see also* Associated Society of Locomotive Engineers & Firemen v. U.K., App. No. 11002/05, Eur. Ct. H.R. (Feb. 27, 2007).

110. *See* FREEBURN *supra* note 1, at Chs. 1–4.

111.Where the margin of appreciation allowed to a State to protect individuals from infringements of their right to private and family life will be greater. *See, e.g.*, Fernández Martínez v. Spain, App. No. 56030/07, ¶ 78, Eur. Ct. H.R. (May 15, 2012); E.S. v. Swed., Appl. No. 5786/08, ¶ 58, Eur. Ct. H.R. (Jun. 21, 2012); Evans v. U.K., App. No. 6339/05, ¶ 77, Eur. Ct. H.R. (Apr. 10, 2007); Mosley v. U.K., App. No. 48009/08, ¶ 109, Eur. Ct. H.R. (May 10, 2011).

112. *See* FREEBURN, *supra* note 1, at Ch. 6.

113. *E.g.*, Malone v. U.K., App. No. 8691/79, ¶ 67, Eur. Ct. H.R. (Aug. 2, 1984); *e.g.*, Hasan and Chaush v. Bulg., App. No. 30985/96, ¶ 84, Eur. Ct. H.R. (Oct. 26, 2000). The rule of law is one aspect of the right to respect of private and family life under Article 8 § 1 ECHR. It is one of the fundamental principles of a democratic society and inherent in all provisions of the Convention. *See* WILLIAM A. SCHABAS, THE

law against arbitrary power applies equally to private as well as public power.[114] Protection against arbitrary power is necessary to "ensure that human rights of the individual are 'practical and effective', rather than 'theoretical and illusory.'"[115] The forced, unilateral exercise of *de facto* power by international federations would appear to be arbitrary as unaccountable, unilateral exercises of power and not conform with the requirements of the rule of law.[116] This is particularly the case when this non-consensual power may be exercised wholly inconsistently with express contractual obligations to which the individual is party, making it impossible for the individual to anticipate consequences and plan their actions.[117]

Inadequate regard has been given to the nature of regulatory power exercised in international sport. The rule-making powers and the rule-making institutions involved have been incorrectly assumed to be valid or legitimate. This misapplied assumption is applied to effectively afford the private international federations with a status reserved only for governmental bodies, thereby facilitating their exercise of quasi-legislative private power in contravention of basic principles of individual equality and autonomy.

When the focus is on issues of arbitral procedure or when compromises in human rights are considered to be the outcome of freely made contracts, rather than the consequence of quasi-legislative rules of international federations forced on participants in sport through the exercise of *de facto* power,

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EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMMENTARY 367–68 (2015) (citing Iatridis v. Greece, App. No. 31107/96, ¶ 58, Eur. Ct. H.R. (Mar. 25, 1999)). *See* Carbonara and Ventura v. It., App. No. 24638/94, ¶ 63, Eur. Ct. H.R. (May 30, 2000); *see also* Cap. Bank AD v. Bulg., App. No. 49429/99, ¶ 133, Eur. Ct. H.R. (Nov. 24, 2005).

114. *See* IMMAUEL KANT, PRACTICAL PHILOSOPHY 323 (Mary J. Gregor eds. 1996); Immanuel Kant, *On the Common Saying: That May Be Correct in Theory but it is of No Use in Practice* in PRACTICAL PHILOSOPHY 273 (Mary J. Gregor ed., 1996); THOMAS HOBBES, LEVIATHAN WITH SELECTED VARIANTS FROM THE LATIN EDITION OF 1668 80, 138 (Edwin Curel eds., 1994). *See generally* R. George Wright, *Arbitrariness: Why the Most Important Idea in Administrative Law Can't Be Defined, and What This Means for the Law in General*, 44 U. RICH. L. REV. 839 (2010); William Lucy, *The Rule of Law and Private Law*, in PRIVATE LAW AND THE RULE OF LAW, 41, 70, 75 (Lisa Austin & Dennis Klimchuck eds., 2014). *See* van Kleef, *supra* note 98, at 30.

115. Olivier De Schutter, *Human Rights in Employment Relationships: Contracts as Power*, in THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EMPLOYMENT RELATION 108 (Filip Dorssemont et al. eds., 2013) (quoting, Airey v. Ir., App. No. 6289/73, ¶ 24, Eur. Ct. H.R. (Oct 9, 1979)); Demir and Baykara v. Turk., App. No. 34503/97, ¶ 66, Eur. Ct. H.R. (Nov. 12, 2008). *See* Siliadin v. Fr., App. No. 73316/01, ¶ 89, Eur. Ct. H.R. (Jul. 26, 2005).

116. FREEBURN, *supra* note 1, at 164-169 and authorities cited. *See generally* A.V. DICEY, LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION 202 (2nd ed. 1886); Lord T. Bingham, *The Rule of Law*, 66 CAMBRIDGE L. J. 67, 69, 72 (2007). *See* LON L. FULLER, THE MORALITY OF LAW Ch. 2 (1964). *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 270–71 (2011); *see also* J. RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 214–18 (2nd ed. 2009); *see also* Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 6–7 (2008); Gerald J. Postema, *Fidelity in Law's Commonwealth*, *in* PRIVATE LAW AND THE RULE OF LAW 17, 19 (Lisa Austin & Dennis Klimchuck eds., 2014); Timothy Endicott, *The Coxford Lecture: Arbitrariness*, 27 CANADIAN J. OF L. AND JURIS. 52 (2014) (citing THE WORKS OF JEREMY BENTHAM, Ch. XVII (John Bowring ed., 1838–1843).

117. Leander v. Swed., App. No. 92248/81, ¶¶ 50-51 Eur. Ct. H.R. (Mar. 26, 1987); Malone v. U.K., App. No. 8691/79, ¶ 67, Eur. Ct. H.R. (Aug. 2, 1984). *See* FREEBURN, *supra* note 1, at 164–69.

consideration of the effects of the compulsion of private arbitrary power is avoided.[118]

These objections highlight the conundrum in which international sport requires categorical rules, but where exercises of private power in liberal democratic societies are to be based on consent and the imposition of private law obligations cannot be compelled. Despite this conundrum, no court has expressly determined - nor can it be assumed - that international federations possess some special form of private law status, superior to other private individuals, that their rules operate as a form of quasi-legislation and that they are or should be free to enforce these rules through sport's own private system of forced arbitration to the exclusion of state courts. Even if it is accepted that international sport requires some form of consistent application of rules and consistency in dispute settlement, this does not entail acceptance of the private dominion of unrepresentative and illegitimate international federations and the compulsive jurisdiction of CAS.

C. De Facto Power and Independence

The private law status of international federations has an important effect in relation to the independence of forced arbitration by CAS.

When considering the issue of independence, an important distinction operates between public and private law contexts. In public law contexts, the law applied by courts and other tribunals to determine disputes is generally applicable law made by legislatures or other properly authorised entities. In that context, the legitimacy of the law or the validity of its application to the disputants is not in question. Because of this, where a government is involved in a dispute with one of its citizens, the issue of the substantive independence of the dispute settlement process - because of the application of laws made by that government to settle that dispute - does not arise. The law-making process is legally authoritative. The fact that the law involved can be characterised as having been made by one of the parties in dispute does not impugn the independence of the dispute settlement procedure. Therefore, questions of independence concerning a dispute settlement procedure (the right of access to a fair trial) in public law contexts principally concern procedural issues.[119]

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118. The SFT clearly only considered arbitrariness as between Mutu and his employer, not FIFA or the FA. Tribunal fédérale [TF] [Federal Supreme Court] June 10, 2010, 4A_458/2009, *Mutu v. Chelsea Football Club Ltd.*, ¶ 4.4.2 (Switz.).

119. This is reflected in the approach of the ECtHR under which "[i]ndependence is mostly concerned with institutional safeguards, such as the appointment of the judges, the terms of office, their irremovability, and the impression of independence." GERANNE LAUTENBACH, THE CONCEPT OF THE RULE OF LAW AND THE EUROPEAN COURT OF HUMAN RIGHTS 164 (2013) (citations omitted). The ECtHR has acted to protect the independence of the judiciary from the legislature, for example by judging retrospective legislation intended to influence the outcome of judicial proceedings as contrary to the rule of law. *See, e.g.*, National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society v. United

In contrast, the private law context in which international sports governing bodies operate is substantively different. Unlike governments, those private entities may only bind themselves. They do not possess compulsive power over others. Accordingly, it is not only an error to assume that the rules of international federations are legitimate to be applied to determine a dispute involving those bodies, the fact of the application of those rules may constitute the very substance of disputes in this context. The consequence of the presumption that the rules of an international federation are proper to be non-consensually applied to determine a dispute involving that party bestows a privileged position on the international federation, predetermines a fundamental issue in dispute and is inherently partisan.[120]

A different approach to the consideration of the independence of forced arbitration by CAS is therefore demanded. Ensuring procedural rectitude in the arbitral process is inadequate to establish independence in the private law context of forced arbitration by CAS.

It would therefore appear to assume too much to consider that the court in *Pechstein and Mutu* was elevating international federations to such a new form of legal status, but that the court was doing this only implicitly, not finding it necessary to even refer to this, let alone advance grounds that would justify it. Instead, the court limited its justification to the grounds that have been previously advanced to justify forced arbitration in sport.

V. INADEQUATE JUSTIFICATION OF THE COMPULSION OF ARBITRATION

In relation to these grounds, I argue that the existing judicial justification of forced arbitration in sport is manifestly inadequate and defective to the extent that forced arbitration supports the compulsion of the rules of international federations.

Kingdom, App. Nos. 21319/93, 21449/93 and 21675/93, ¶ 10, Eur. Ct. H.R. (Oct. 23, 1997); Maurice v. France, App. No. 11810/03, ¶ 5, Eur. Ct. H.R. (Oct. 6, 2005).

120. For this reason, it is dangerous to equate international federations with governments. *See, e.g.*, AEK Athens v UEFA, CAS 98/200 (Aug. 20, 1999), in DIGEST OF CAS AWARDS II 1998-2000; *See also* Luc Silance, *Interaction of the Rules in Sports Law and the Laws and Treaties Made by Public Authorities*, OLYMPIC REV. 618, 622 (Oct. 1977) ("international sports organisations are modelled on the pattern of federal States, since they govern national sports federations and obey rules contained in 'Statutes'. General Meeting or Session, Board of Directors or Executive Board, disciplinary measures: the International Olympic Committee and the International Sports Federations are comparable to inter-State international organisations"). LINDHOLM, *supra*, note 7, at 6. In disputes involving sports governing bodies, "CAS acts as an arbiter in a conflict between, on one hand, a rule- and decision maker and, on the other, those governed by those rules and decisions, not entirely dissimilar to the role played by national courts resolving disputes between public entities and individuals." *Id.*

A. The Justification of Arbitration Does Not Entail the Justification of General Private Power

The system of mandatory sports arbitration is justified on utilitarian, functional grounds, CAS provides a swift, independent, and impartial means of resolving international sports disputes by a specialized tribunal.[121] In addition to this "prompt settlement" justification, arbitration by compulsion in international sport is typically justified by reference to the need for uniformity and consistency in dispute settlement.[122] Although, as has been noted, it was unnecessary for it to do so, the ECtHR appears to have accepted these utilitarian justifications.[123] Nevertheless, these justifications are manifestly inadequate to support the non-consensual private power that operates in international sport.

First, even if valid, these utilitarian grounds are specific to the justification of arbitration, they have no obvious wider relevance, i.e. relevance to the justification of the non-consensual determination of other rights.[124] At their highest, utilitarian grounds may provide some support for the settlement of disputes by arbitration, but they do not extend to support the general, non-consensual application of other rules of international federations.[125]

It is no answer to this shortfall in reasoning to observe that consistent rules are necessary for the functioning of international sport.[126] While consistent rules are necessary, it is a basic error of logic to then assume that the unilaterally

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121. Tribunal fédérale [TF] [Federal Supreme Court] Mar. 22, 2007, 133 ARRÊTS DU TRIBUNAL FEDERAL SUISSE [ATF] 235 (Switz.). Though the SFT required as a "counterbalance" that an athlete must have a right to have an adverse CAS award judicially reviewed by the SFT to remedy "[breaches] of fundamental principles and essential procedural guarantees [which] may be committed by the [arbitrators called upon to decide in his case]." *See also* Tribunal fédérale [TF] [Federal Supreme Court] Apr. 18, 2011, 4A_640/2010, 7, 9 (Switz.) ("One should not fail to recognize that in the worldwide fight against doping the CAS is of ever more important significance. Thus an international development towards the CAS jurisdiction in doping matters is to be upheld with a view to ensuring compliance with international standards in this field"). *See* Tribunal fédérale [TF] [Federal Supreme Court] Nov. 7, 2011, 4A_246/2011, 4 (Switz.); *see also* Tribunal fédérale [TF] [Federal Supreme Court] Jan. 20, 2010, 4A_548/2009, 4.1 (Switz.); *see also* Bundesgerichtshof [BGH] [Federal Court of Justice] Jun. 7, 2016, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ], at ¶¶ 59, 62 (Ger.); *See* Antonio Rigozzi, *Challenging Awards of the Court of Arbitration for Sport*, 1 J. INT'L. DISP. SETTLEMENT 217, 244 (2010), (citing Tribunal fédérale [TF] [Federal Supreme Court] Mar. 22, 2007, 133 ARRÊTS DU TRIBUNAL FEDERAL SUISSE [ATF] 235 (Switz.)); Rigozzi et al., *supra* note 90, at 60.

122. *See* Steingruber, *supra* note 90, at 60; *see also* S. Netzle, *Jurisdiction of Arbitral Tribunals in Sports Matters: Arbitration Agreements by Reference to Regulations of Sports Organisations*, 11(45) *Arbitration of Sports-Related Disputes*, ASA SPECIAL SERIES 5 (Nov. 1998); RIGOZZI, *supra* note 121, at 224; Ulrich Haas, *Role and Application of Article 6 of the European Convention on Human Rights in CAS Procedures*, 3 INT'L SPORTS L. REV. 43, 53 (2012).

123. Pechstein and Mutu v. Switzerland, App. Nos. 40575/10 and 67474/10, ¶ 98, Eur. Ct. H.R. (Oct. 2, 2018).

124. For this reason, the third 'real' reason identified by Rigozzi and Robert-Tissot that forced arbitration by CAS is in exchange for adjudication by a state court should not be accepted, *see* RIGOZZI, *supra* note 121, at 67.

125. *See* FREEBURN, *supra* note 1, at 122.

126. Stichting Anti-Doping Autoriteit Nederland (NADO) and the Koninklijke Nederlandsche Schaatsenrijders Bond (KNSB) v. Wesley Lommers, CAS 2010/A/2311, 2312, ¶ 6.18 (Aug. 22, 2011).

determined rules of self-proclaimed private sports' governing bodies must therefore be the rules to be observed. The fact that there must be consistent rules in international sport does not mean that it is acceptable for those rules to be unilaterally determined by self-proclaimed governing bodies that are illegitimate in being unrepresentative of and unaccountable to those over whom they exercise power.[127] Nor is it obvious that all of these rules are necessary for the conduct of international sport and that they therefore need to be consistently applied.[128]

Further, merely because an effective dispute resolution system may be desirable does not justify compulsion, nor does it mean that any system should therefore be supported. The need for an effective dispute settlement regime does not entail that a regime of international arbitration is either the appropriate form of dispute resolution to adopt in international sport, or that this objective can only be fulfilled by a regime of international arbitration. Conflating the objective of an effective international dispute settlement regime with support for the CAS regime, in a circular way, then encourages support for a compulsory or forced international arbitral regime, as compulsion is necessary to make such a regime effective by avoiding the jurisdictional difficulties of litigation of international sport disputes in state courts and by facilitating the consistency imperative of international sport.[129]

Of course, the rationale of the desirability of an effective dispute settlement regime applies in areas beyond sport if it is not a generally applicable observation. But again, this does not lead to the conclusion that it is valid to impose arbitration non-consensually. Plainly, the system of international investment arbitration illustrates that alternatives to this imposition by *de facto* private power are possible and available.[130]

B. Deferring to a Specialist Tribunal and Deferring to CAS

Next, while CAS unquestionably has some expertise in the technical aspects of sport, the argument that courts should defer to CAS as a specialist tribunal is defeated by the fact that CAS does not principally act as a specialist tribunal. In most cases, CAS does not settle disputes by the application of technical rules. It principally applies the regulatory rules of international federations, which

127. *See* FREEBURN, *supra* note 1, at 35–37; *See* Freeburn, *supra* note 15.

128. *See* Stephen Weatherill, *Is the Pyramid Compatible with EC Law?*, 3 INT'L SPORTS L. J. 3-4 (2005).

129. *See* FREEBURN, *supra* note 1, at 138–39.

130. International investment arbitration is supported by many international treaties and national investment laws. Major international treaties include: the Canada-Mexico-United States: North American Free Trade Agreement (NAFTA), 32 I.L.M. 289, 605 (1993); *Lome Agreements* (*see* EUROPEAN PARLIAMENT, EUROPEAN PARLIAMENT FACT SHEETS 6.4.5 (2009), http://biblio.central.ucv.ro/bib_web/bib_pdf/EU_books/0140.pdf; *Energy Charter Treaty*, (*see* The Energy Charter, 17 December 1994, 10 (2) FOREIGN INVESTMENT LAW JOURNAL 258 (1995); Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), Mar. 18, 1965, 575 U.N.T.S. 159.

operate to regulate a wide range of activities not directly connected to conduct of the sporting field. By deferring to CAS in these circumstances, the courts are merely deferring to the international federations, operating under the cover and under the procedural supervision of CAS.

More than this, in the context of private disputes, and ignoring the difficulty posed by CAS's practice of applying the rules of international federations, the non-consensual imposition of arbitration on the basis of the expertise of the arbitral tribunal is problematic as a matter of basic principle. This is because the non-consensual imposition of a private body to determine the rights of individuals on the grounds of the body's expertise involves a violation of individual autonomy. Expertise cannot justify compulsion in private law.[131]

C. The Partisan Justification of Arbitration

The faults in this utilitarian reasoning are aggravated when it is understood that this reasoning is applied in a partisan way to support the power of sports governing bodies, but not to hold them accountable.[132]

The system is applied in a biased way as it is only international federations that are permitted to force other participants into CAS arbitration through, for example, an arbitration rule in the federations' statutes subsequently imposed on the other party. Individual participants are not permitted to call on the jurisdiction of CAS in the case of a dispute with an international federation unless the international federation has itself granted CAS jurisdiction.[133] This is

131. Individual autonomy requires that individuals be free to make their own choices, even if these choices may be wrong or that another individual knows better. *See* REES, *supra* note 96, at 21-22; *see also* JOHN RAWLS, POLITICAL LIBERLISM 36 (2005); RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 281-284 (2000); Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507, 510–511 (1993); STEPHEN HOLMES, THE ANATOMY OF ANTILIBERALISM 4 (2nd ed. 1993); *See also* RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 167–168, 206 (1993); STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM 231 (1991). Stephen Perry, *Political Authority and Political Obligation*, *in* OXFORD STUDIES IN PHILOSOPHY OF LAW 64 (L. Green & B. Leiter eds., 2013).

132. *See* FREEBURN, *supra* note 1, at 137–38.

133. Ashley Cole v. Football Ass'n Premier League (FAPL*)*, CAS 2005/A/952, ¶ 4 (Jan. 24, 2006); Clube de Regatas do Flamengo, Sao Paulo FC, Fluminense FC, Santos FC & Cruzeiro Esporte Clube. v. CONMEBOL, CAS 2008/A/1503, ¶ 3 (Apr. 7, 2008); A v. Caykur Rizespor Kulubu Dernegi & Turkish Football Fed'n, CAS 2008/A/1602, ¶ 4 (Feb. 20, 2009); Int'l Rugby Bd. v. Troy & Austl. Rugby Union (ARU), CAS 2008/A/1664, ¶ 3 (Jun. 2009); Football Fed'n Islamic Republic of Iran (IRIFF) v. Fédération Internationale de Football Ass'n (FIFA), CAS 2008/A/1708, ¶ 3 (Nov. 4, 2009); Telecom Egypt Club v. Egyptian Football Ass'n (EFA), CAS 2009/A/1910, ¶ 3 (Sept. 9, 2010); Omer Riza v. Trabzonspor Kulübü Dernegi & Turkish Football Fed'n, CAS 2010/A/1996, ¶¶ 2–3 (Jun. 10, 2010); Al-Wehda Club v. Saudi Arabian Football Fed'n (SAFF), CAS 2011/A/2472, ¶ 2 (Aug. 12, 2011); Persisam Putra Samarinda, Deltras Sidoardjo FC, Pelita Jaya FC, L & E. v. Football Ass'n of Indon. *(PSSI)*, CAS 2012/A/2688, ¶ 2 (Apr. 12, 2012); Rayo Vallecano de Madrid SAD v. Real Federación Española de Fútbol (RFEF), CAS 2013/A/3199, ¶ 5 (Oct. 22, 2013); *see* Tribunal fédérale [TF] [Federal Supreme Court] 4A_160/2007, (Switz.); *see also* Tribunal fédérale [TF] [Federal Supreme Court] Nov. 6, 2009, 4A_358/2009, ¶ 3.2.4 (Switz.).

so notwithstanding that the purported justifications for mandatory arbitration apply equally both to individual athletes and to international federations. The need for the prompt settlement of sports disputes by a specialist independent and impartial tribunal and for consistency in dispute settlement in international sport is not dependent upon a determination to this effect by an international federation.

From the perspective of an individual athlete, this disparity in the mandatory application of sports arbitration may be perceived as a regime to support the private dominion of those who make the rules; it is not an impartial and independent system of justice.

D. Inadequate Rights of Appeal from CAS Awards

The ECtHR's reliance on the "right of appeal" from CAS awards to the SFT to support forced sports arbitration also appears erroneous, that "appeal right" being so narrow as to be practically illusory.[134] Indeed, the SFT itself described Mutu's public policy violation complaints as confusing the role of the SFT with a court of appeal, observing that no right of appeal applied in relation to issues such as the process of interpreting contracts or the rules of private bodies or in relation to the consequences of those interpretations, or even where findings of fact are wrong, a rule of law violated, where a CAS award was contrary to provisions of Swiss or European law, or where CAS wrongly applied principles of damage, causality or burden of proof.[135]

This criticism is not merely theoretical. For example, while CAS found that the amount of damages awarded against Mutu was consistent with English law, it is not at all clear that this view is correct or that Chelsea FC would have been able to obtain a similar award of damages against its former employee on the application of English law in an English court, rather than through the application of FIFA's regulations by CAS. It is possible to take issue with various applications of English law by CAS to the facts of the case – an opportunity and right that Mutu was denied by the forced application of the CAS regime.

The principal such issue is that CAS considered the transfer fee to be a compensable loss in the absence of a causative link between the payment or loss

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134. *See Swiss Private International Law Act*. CODE CIVIL [CC] [Civil Code] SR 12, art. 190(2)(e) (Switz.), under which an appellant must establish that a CAS award violates material public policy. This operates to exclude errors of fact, law and even capricious and arbitrary decisions. The 'appeal right' is largely illusory. *See* RIGOZZI, *supra* note 121; *see also* Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations*, 10 PEPP. DISP. RESOL. L. J. 51, 58–59 (2009); Alexandra Veuthey, *Re-Questioning the Independence of the Court of Arbitration for Sport in Light of the Scope of its Review*, 4 INT'L SPORTS L. REV. 105 (2013).

135. Tribunal fédérale [TF] [Federal Supreme Court] June 10, 2010, 4A_458/2009, *Mutu v. Chelsea Football Club Ltd.*, ¶ 4.4.2 (Switz.).

of the transfer fee and Mutu's breach of contract. CAS dealt with the issue of causation merely by declaring "that, contrary to the Appellant's submissions, the damages were caused by the Player's breach leading to the termination of the Employment Contract."[136] Notwithstanding this postulate, the benefit and purpose of the transfer fee was secure AC Parma's agreement to the transfer of Mutu's employment from AC Parma to Chelsea FC. That purpose was fully realised upon the transfer. That is, the fee was paid by Chelsea FC to AC Parma to secure that club's agreement to forgo the services of Mutu as an employee footballer.[137] Mutu's services were then lost to AC Parma, regardless of how long Mutu may subsequently have been employed by Chelsea FC. The payment and the amount of the transfer fee was to achieve the transfer from one club to the other and was unrelated to the terms of any separate employment contract between Chelsea FC and Mutu. Mutu's breach of contract, which led to Chelsea FC prematurely terminating that contract, cannot therefore be considered to have caused any loss to Chelsea by reference to the payment of the transfer fee pursuant to an unrelated contract with a third party.[138]

For present purposes, a more fundamental issue for the application of the law to the situation is that the whole approach within the sports regulatory regime is attended by an abiding unreality. The principal fiction present in Mutu's circumstances is the view accepted by CAS that the transfer fee was a cost of employment that was appropriate to be recovered as the wasted costs of entering into the employment contract between Mutu and Chelsea FC.[139]

Of course, a football transfer fee does not have the same character as a cost of employment such as employee training or an employee uniform. More than this, football transfer fees are a cost that is established by the elaborate but artificial player transfer regime operated between employer football clubs and maintained by FIFA independently and regardless of the consent of individual footballers, notwithstanding that the employees may know of the scheme. To adapt an observation made in a similar context nearly sixty years ago,[140] the FIFA transfer system is an employers' system, set up in an industry where the employer clubs, their national associations and FIFA, as the international association of these national associations, have established a united, monolithic

136. Mutu v. Chelsea Football Club Limited, CAS 2008/A/1644, ¶ 34 (Jul. 31, 2009).

137. *See* Vladan Pavlovic et al., *Controversies About the Accounting Treatment of Transfer Fee in the Football Industry*, 19 MGMT.: J. OF SUSTAINABLE BUS. AND MGMT SOL. IN EMERGING ECONS; BELGRADE 17 (2014) ("The transfer fee represents a compensation for the termination of a contract, due to a player's transfer to a new club"). *Id.*

138. In the absence of a causative link, the question of foreseeability, or, more correctly, whether the damage in question was of a kind which was not unlikely to result would not appear to arise.

139. Mutu v. Chelsea Football Club Limited, CAS 2008/A/1644 ¶ 31 (Jul. 31, 2009).

140. *See* Eastham v Newcastle United Football Club Ltd and Others, [1963] 3 All ER 139. *Eastham* was an English common law restraint of trade case that involved a football transfer system under which employers were entitled to retain footballers and refuse consent to their transfer to another club even after their contracts had expired. *Id.* The observation remains pertinent, nevertheless.

front all over the world. Employee footballers have no effective power over the content or application of FIFA's rules to them, including FIFA's transfer rules. These rules are then enforced against them by CAS. It is no wonder that the employers all over the world would consider the system a good system. But whether a court should consider football transfer fees a cost of employment recoverable by an employer football club in the case of a breach of contract by an employee is another matter.

The artificiality of football's transfer market is supported by economic analyses that show that "the net amount that almost any club spends on transfer fees bears little relation to where it finishes in the league,"[141] a club's league position reflecting the collective contribution of employee footballers to the club's success. The principal factor that explains about ninety percent of the variation between clubs in league position is player salaries, not transfer fees.[142] In fact, the value of players on the football transfer market is not driven by a quantification of the economic contribution of particular players to a club's overall financial performance, but principally by the revenue being distributed to clubs from league broadcast revenue.[143] Perhaps as a consequence of this, the reality is also that few football clubs pursue an accounting quest for return on investment in players.[144]

More specific to the current discussion, in a year in which Chelsea FC recorded its highest revenues at the same time as it performed poorly on field, the club's chairman confirmed that it had been the long-term strategy of the club to separate its financial performance from its sporting performance, and therefore further reducing the relevance of any individual player's contribution to the club's financial returns stating "[i]t has long been our aim for the business to be stable independent of the team's results and we continue to reinforce

141. SIMON KUPER & STEFAN SZYMANSKI, SOCCERNOMICS: WHY ENGLAND LOSES, WHY SPAIN, GERMANY AND BRAZIL WIN, AND WHY THE US, JAPAN, AUSTRALISA- AND EVEN IRAQ-ARE DESTINED TO BECOME THE KINGS OF THE WORLD'S MOST POPULAR SPORT 14 (2014); *See* Stephen Dobson, Bill Gerrard, & Simon Howe, *The Determination of Transfer Fees in English Nonleague Football*, 32 APPLIED ECON. 1145 (2000) (observing that all empirical studies of professional English football showed that transfer fees were "determined by the characteristics of the player being transferred, the timing of the transfer, and the size and status of the selling and buying clubs"); PAVLOVIC ET AL, *supra* note 137, at 18 (noting that while transfer fees may sometimes prove profitable, this was a consequence of marketing effects); ALEX DUFF & TARIQ PANJA, FOOTBALL'S SECRET TRADE: HOW THE PLAYER TRANSFER MARKET WAS INFILTRATED 3 (2017). Prologue: "clubs perpetually engage in panic buying of players." *Id.*

142. KUPER & SZYMANSKI, *supra* note 141, at 15.

143. *See* Dr. Robert Butler, *The Economics of Football Transfer Fees*, RTE (Jan. 8, 2018), https://www.rte.ie/brainstorm/2018/0103/930793-the-economics-of-football-transfer-fees/; *see also* Bernd Frick, *The Football Players' Labor Market: Empirical Evidence from the Major European Leagues*, 54 SCOTTISH J. OF POL. ECON. 422, 426; DUFF & PANJA, *supra* note 141; Ahmed Murad, *China Spree Pushes Football Transfer Fees Spending to Record $4.8 bn*, FIN. TIMES, Jan. 27, 2017 (citing the growth of football in China, in addition to citing the influence of broadcasting revenue in English football).

144. KUPER, *supra* note 141, at 25.

that."[145] Accordingly, CAS's approach to the possibility or likelihood of Chelsea FC amortising the transfer costs paid for Mutu over the term of the player's contract is confounded by the reality and deeply flawed as a basis upon which to calculate damages for breach of contract.[146]

These issues illustrate the dangers arising from the limited review rights of CAS awards under the Swiss *Private International Law Act*.

E. Private Power and Public Policy

I contend that procedural fairness or integrity cannot serve as the necessary legitimising agent of private regulatory power and thereby justify the non-consensual imposition of arbitration and the removal of an individual's right of access to a state court, let alone the consequential imposition of more general private regulatory power.[147] Certainly, this is inconsistent with the requirement for an arbitration agreement as the basis of state support for international arbitration.[148] In this regard, it has never been satisfactorily explained how a

145. Dominic Fifield, *Chelsea Announce Net Loss of £70.6m Despite Record Turnover*, THE GUARDIAN (Dec. 17, 2016), https://www.theguard ian.com/football/2016/dec/16/chelsea-announce-net-loss-despite-record-turnover. While this observation was made some years after Mutu's employment with Chelsea FC had been terminated, it nevertheless reflects the substantial separation that exists between club finances and individua payer transfer fees.

146. Other difficulties with the approach of the DRC and CAS to the assessment of damages also arise, including a bizarre approach by the DRC to the issue of mitigation of damages (see Mutu v. Chelsea Football Club Ltd., CAS 2008/A/1644, ¶ 4, (Jul. 31, 2009). An approach that appears to have been adopted by CAS. Further, even assuming that the transfer fee could be considered to have been wasted as a result of the breach by Mutu, English law applies a ceiling to Chelsea FC's claim for the transfer fee as wasted expenditure incurred by it. Chelsea FC was not entitled to be placed in a better position than if its contract with Mutu had been performed. *See* Robinson v. Harman, 1 EX 850, 855 (1848); *see generally* Parke B: PJ Spillings (Builders) Ltd v. Bonus Flooring Ltd, [2008] EWHC 1516 (QB) (Jun. 16, 2008); C & P Haulage v. Middleton [1983] EWCA Civ 5 (Jun. 27, 1983); CCC Films (London) Ltd v. Impact Quadrant Films Ltd [1984] 3 All ER 298 (Jan. 23, 1984); Omak Maritime Ltd v. Mamola Challenger Shipping Co [2010] 2 C.L.C.194 (Aug. 4, 2010). Had the contract been performed, the proper question to be determined is how much of the transfer fee Chelsea FC would have recouped by virtue of Mutu playing football for the club pursuant to his contract, any probable recovery being highly questionable. Further, the DRC and CAS applied an arbitrary 'specificity of sport' principle to supplement more usual legal principles. See Mutu v. Chelsea Football Club Ltd., CAS 2008/A/1644, ¶ 5–6, (Jul. 31, 2009).

147. Even iniquitous regimes can afford to confer procedural fairness. *See* Mark Ellis, *Toward a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice*, 72 PITT. L. REV. 191, 194-196 (citing the examples of Zimbabwe, apartheid South Africa and Nazi Germany as examples of regimes with clear legal rules but rules that imposed human rights violations); *see also* FREEBURN, *supra* note 1, at 140–41.

148. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II, *supra* note 1, at art. II ¶ 2. *See* UNITED NATIONS COMM. ON INT'L TRADE L., UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION art. 7(1) (1985); European Convention on International Commercial Arbitration, art. I(1)(a), (2)(a), Jan. 7, 1964, 484 UNTS 349; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 25, Mar. 18, 1965, 17 U.S.T 1270, 575 UNTS 159; Inter-American Convention on International Commercial Arbitration, art. 1, Jan. 30, 1976, 1438 UNTS 245. For similar national legislation, *see* Swiss Private International Law Act, ch. 12, which is based on arbitration as between parties. E.g. *Swiss Private International Law Act*. CODE CIVIL [CC] [Civil Code] SR 12, arts. 176(3), 177(2), and 178 (Switz.); *Australian International Arbitration Act 1974* (Cth), § 3 (Auslt.), which defines

forced CAS award could or should be enforced in the absence of an arbitration agreement between the parties as required by the *New York Convention.*[149] Here, the international federations enjoy the privileged position of monopoly bodies which are almost always able to enforce their own sanctions, either directly or indirectly, without resort to a state court. It is the subjects of the *de facto* regulatory power that must attempt to avail themselves of the protection offered by a state court from the imposition of that *de facto* power and who must establish some positive legal right in order to do so.[150]

Despite the problems of principle attaching to the *de facto* power of international federations, it nevertheless appears to be the case that courts allow non-consensual private power to be justified, although the jurisprudential basis of this may be inadequately explained and the basis of that justification problematic. For example, the private interests of a party imposing *de facto* power on another individual would appear irrelevant to the question of justification on equality or personal autonomy grounds.[151] Allowing justification by reference to public policy grounds is also problematic.

In this regard it is relevant to note the response of the European Court of Justice in *Union Royale Belge de Societies de Football Association v Bosman,*[152] to a complaint that preventing private bodies from relying upon public policy justifications would make the EU Treaty more restrictive against those private bodies in comparison with the Treaty's application to Member States. The court stated:

> That argument is based on a false premiss. (sic) There is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question.[153]

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arbitration agreements by reference to the terms of art II of the New York Convention; Code de procédure civile [C.P.C.] [Code of Civil Procedure], art. 1442 (Fr.); Chinese Arbitration Law, art. 4; Japanese Arbitration Law, art. 2(1); Arbitration Act of Korea, art. 3.2; Brazilian Arbitration Law, art. 4. *Cf.* English Arbitration Act of 1996; Arbitration (Scotland) Act 2010, art. 4.

149. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II,, *supra* note 1.

150. To date, it has largely only been courts protecting competition law rather than individual or human rights that have limited the *de facto* powers of international federations. *See e.g.,* C-4155/93, Union Royale Belge de Societies de Football Ass'n. v. Bosman, 1995 E.C.R. I-4921; Bundeskartellamt Decision B2 – 26/17 in administrative proceedings against DOSB and IOC. https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/AktuelleMeldungen/2019/25_10_2019_decision_Olympische_Spiele.html?nn=4136442.

151. Personal autonomy underpins the notion of private life under the Convention. Pretty v. U. K., App. Nos. 2346/02, ¶¶ 61, 65, Eur. Ct. H.R. (Apr. 29, 2002); Christine Goodwin v. U. K., App. No. 28957/95, ¶ 90, Eur. Ct. H.R. (Jul. 11, 2002).

152. C-4155/93, Union Royale Belge de Societies de Football Ass'n. v. Bosman, 1995 E.C.R. I-4921, ¶ 86.

153. *Id.* This was in the context of Article 45 TFEU. This was repeated in C-350/96, Clean Car Auto Services v. Landeshauptmann Von Wien, 1998 E.C.R. I-2521. Hartkamp observes that the issue is open and

It is submitted that the false premise addressed by the court in this paragraph in *Bosman*,[154] was false in more ways than the court recognised the distinction between governmental power and private power, and the democratic legitimacy of governments are what entitle governments to rely upon public interest justifications. In view of this distinction, lacking the legitimacy associated with governmental power, the basis upon which private bodies should be permitted to justify what would otherwise be unlawful violations of human rights by reference to public policy considerations has not been explained. Issues of legitimacy and equality and separation of powers stand as impediments to allowing such justifications.[155]

Another issue is the difficulty in transposing the provisions of the ECHR relevant to the vertical relationships between States and individuals to horizontal relationships between individuals, in particular the circumstances in which it may be possible to transpose the proportionality test relating to the justification of an exercise of power from vertical State/individual relationships to horizontal private relationships.[156] A distortion of the reality of the conflict involved in the exercise of *de facto* power is occasioned by balancing the purported rights of the sports-governing body to exercise *de facto* regulatory power against the rights of the party who is subjected to interference. In this context, assessing the *de facto*, private, regulatory power of international federations, even by reference to public policy considerations, involves the danger identified long ago by Roscoe Pound:

> When it comes to weighing or valuing claims or demands, . . . we must be careful to compare them on the same plane. If we put one as an individual interest and the other as a social interest we may decide the question in advance [of] our very way of putting it.[157]

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considers that individuals should be allowed to rely upon public interest justifications. However, this position is advocated in the context of the freedom to contract, as opposed to the justification of non-consensual restrictions. Even in contract cases, he considers that individuals will not usually be able to satisfy public interest exceptions. *See* ARTHUR HARTKAMP, EUROPEAN LAW AND NATIONAL PRIVATE LAW 62–63 (2d ed. 2016); *see also* Arthur Hartkamp, *The Effect of the EC Treaty in Private Law: On Direct and Indirect Effects of Primary Community Law*, 18 EUR. REV. PRIVATE L. 527 (2010).

154. C-4155/93, Union Royale Belge de Societies de Football Ass'n. v. Bosman, 1995 E.C.R. I-4921, ¶ 85.

155. *See* FREEBURN, *supra* note 1.

156. *See* De Schutter, *supra* note 5, at 118–31, 129–30 (citing Palomo Sánchez and Others v. Spain, App. Nos. 28955/06, 28957/06, 28959/06 and 28964/06, Eur. Ct. H.R. (Sept. 12, 2011)).

157. Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 2 (1943). De Schutter, *supra* note 115, at 131. Refer to this quote as well as to the same observation made by Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963); and Laurent Frantz, *Is the First Amendment Law? -- A Reply to Professor Mendelson*, 51 CAL. L. REV. 729, 747–49 (1963).

The assessment of competing interests needs to recognize the problems presented in the exercise of private *de facto* power, including the lack of legitimacy of international federations.

CONCLUSION

Three principal observations flow from this analysis.

First, while CAS may superficially appear to possess the character of "an independent and impartial tribunal established by law," the practice of CAS of determining disputes by the application of the unilaterally determined rules of the sports governing bodies means that the regime is not one of the rule of law, but rather the rule of the rules of the international sports federations.[158] CAS's approach to the application of the rules of international federations relegates it to the "position of a mere enforcer of the norms that are created by international sport bodies and unfairly imposed on athletes."[159] There is no "equality before the law" when the law is unilaterally determined by one party.[160]

On this perspective, the reality of the *de facto* power of international sports federations and of CAS's practice in enforcing the non-consensual, forced and unilaterally determined rules of international federations means that the ECtHR judgment is paradoxical in substance. The ECtHR's judgment in rejecting the appeals of Pechstein and Mutu on the basis that CAS's procedures are independent and impartial leads to the forced application of a regulatory regime unilaterally determined by one of the parties to the disputes and which cannot be logically considered independent or impartial.

Second, the judicial recognition of the forced or *de facto* power of international sports governing bodies by the ECtHR that is entailed in *Pechstein and Mutu* raises different and potentially more significant legal and human rights implications to those that were considered by the court. Viewed from a broader perspective than that which was brought to bear in *Pechstein and Mutu*, a perspective that takes a more complete account of the nature of the *de facto* private power arranged against athletes in international sport, the validity of this *de facto* power on grounds of fundamental legal principle becomes questionable.

The full implications of this in legal systems that require a complainant to establish a positive legal right that enables them to resist the imposition of *de*

158. *See* FREEBURN, *supra* note 1, at 145–46.

159. Mazzucco & Findlay, *supra* note 73, at 19. *See, e.g.*, USA Shooting & Quigley v. UIT, CAS 1994/129, in CAS DIGEST I, 187, 197; Bouras v. IJF, CAS 1998/214, in CAS DIGEST II, 308, 318–19; Hall v. FINA, CAS 1998/218, in CAS DIGEST II, 325; Prusis v. IOC, CAS OG 2002/001, in CAS DIGEST III, 573, 578; Tsagaev v. IWF, CAS OG 2000/010, in CAS DIGEST II, 658 at 662-664. *See also* B v. IJF, CAS 1999/A/230, in CAS DIGEST II, 369, 375. *Cf.* Rebagliati v. IOC, CAS OG 1998/02, in CAS DIGEST I, 419, 424.

160. Postema, *supra* note 116, at 7 ("[the] law's rule fails when power is held to account only when it serves the interest of those doing the holding").

facto power in international sport remain to be determined. Nevertheless, on the basis of the argument presented here, two issues arise. First, the judicial acceptance of forced arbitration in international sport proceeds on an inadequate basis, at least to the extent that this forced arbitration facilitates the forced application of the rules and decisions of international federations. Second, the argument that Switzerland, the state involved in all CAS cases,[161] fails to properly protect athletes' human rights becomes much stronger.[162] In at least these two areas, the courts, whose central role is to ensure the protection of individual rights,[163] have an opportunity to restrain the extent to which the development of international sport's modern regulatory regime has outstripped the accountability mechanisms of domestic and international law through its capacity to ride roughshod over the premise that "non-State actors can only bind themselves."[164]

The third and final observation to be made is that, ultimately, the problem involved in establishing an effective regulatory regime for international sport has two dimensions – legality and legitimacy.[165] With respect to legality, I have suggested that the tendency of some courts to attempt to support the regime's efficacy by supporting forced arbitration has required that fundamental legal principle be sacrificed and cannot be justified. Moreover, this is unnecessary as avenues exist for the regime to be placed on a legally sound foundation.[166] Similarly, there are remedies to the legitimacy deficit in international sport's governance regime.[167] However, as long as the consent, contract-based conception of regulatory power in international sport is maintained in lieu of a proper understanding of the reality of the *de facto* power of international federations and the role of CAS in giving effect to that power, there will be no

161. The seat of CAS and of each arbitration panel is Lausanne, Switzerland. CT. OF ARB. FOR SPORT, *supra* note 65.

162. States must protect human rights by regulating the conduct of private actors. De Schutter, *supra* note 115, at 105–06. That is, the State must not only abstain from interfering itself with private and family life, but it must also protect individuals from infringements of their right to private and family life that are attributable to others. Söderman v. Swed., App. No. 5786/08, ¶ 78, Eur. Ct. H.R. (Nov. 12, 2013); Airey v. Ir., App. No. 6289/73, ¶ 32, Eur. Ct. H.R. (Oct 9, 1979); X and Y v. the Netherlands, App. No. 8978/80, ¶ 23, Eur. Ct. H.R. (Mar. 25, 1985); Aksu v. Turkey, App. Nos. 4149/04 and 41029/04, ¶ 59, Eur. Ct. H.R. (Mar. 15, 2012); Tavlı v. Turkey, App. No. 11449/02, ¶ 28, Eur Ct. H.R. (Nov. 9, 2006); Ciubotaru v. Moldova, App. No. 27138/04, ¶ 50, Eur. Ct. H.R. (Apr. 27, 2010); Young, James and Webster v. UK, App. Nos. 7601/76 and 7806/77, Eur. Ct. H.R. (Aug. 13, 1981).

163. *See, e.g.*, partly dissenting opinion of Judge Martens in Van De Hurk v. Netherlands, App. No. 16034/90, Eur. Ct. H.R. (Apr. 19, 1994).

164. Paulus, *supra* note 96, at 1053. ("As soon as public interests are at stake, only public decision-making appears legitimate").

165. *See* FREEBURN, *supra* note 1, at 43-49.

166. The example of international investment arbitration has already been cited. *See* Freeburn, *supra* note 1 (outlining a proposal for an international treaty, see chapter 8).

167. As observed in FREEBURN, *supra* note 1, at 176 ("As a reform, the introduction of a requirement of representative democracy to international sports federations would appear to be relatively unobjectionable in principle").

incentive for solutions to be sought to international sport's legality and legitimacy problems.