



Athletes' Rights and Mega-Sporting Events

Sporting Chance White Paper 4.2
Version 1, January 2017



Athletes' Rights and Mega-Sporting Events

Sporting Chance White Paper 4.2
Version 1, January 2017

Cite as: Mega-Sporting Events Platform for Human Rights, "Athletes' Rights and Mega-Sporting Events" (Sporting Chance White Paper 4.2, Version 1, January 2017).

Attribution: This paper has been prepared by Brendan Schwab, Head of UNI World Athletes, UNI Global Union.

Authorship note: The White Papers in this series represent the views of either co-authors, respective authors (where separate sections have been contributed), and in some cases, interviewees. For the avoidance of doubt, where individual authors are named, the views are their own and not those of their organisation. Where there are multiple contributors, the papers do not necessarily represent the views of each contributor and no consensus is implied.

Copyright: © Copyright Mega-Sporting Events Platform for Human Rights and Institute for Human Rights and Business (IHRB), January 2017. Published by IHRB. All rights reserved. The MSE Platform and IHRB permit free reproduction of extracts from this publication provided that due acknowledgment is given.

The Mega-Sporting Events Platform for Human Rights

The Mega-Sporting Events Platform for Human Rights (MSE Platform – www.megasportingevents.org) is an emerging multi-stakeholder coalition of international and intergovernmental organisations, governments, sports governing bodies, athletes, unions, sponsors, broadcasters, and civil society groups. Through dialogue and joint action our mission is to ensure all actors involved in staging an event fully embrace and operationalise their respective human rights duties and responsibilities throughout the MSE lifecycle. Chaired by Mary Robinson, the MSE Platform is facilitated by the Institute for Human Rights and Business (www.ihrb.org).

The Sporting Chance White Papers

This White Paper Series was originally developed to support the Sporting Chance Forum on Mega-Sporting Events and Human Rights, co-convened by the US Department of State, the Swiss Federal Department of Foreign Affairs, and IHRB in Washington D.C. on 13-14 October 2016. Comments were received at and following the Forum, and each White Paper has been updated to reflect those inputs.

A total of 11 White Papers have been produced, clustered into four themes referring to key stakeholder groups (see below). These White Papers aim to present the latest thinking, practice, and debate in relation to key human rights issues involved in the planning, construction, delivery, and legacy of MSEs. Each paper also considers the case for, and potential role of, an independent centre of expertise on MSEs and human rights.

Each White Paper has been published as “Version 1” and the MSE Platform would welcome comments, input, and expressions of support with regard to future iterations or research on each topic.

1. Sports Governing Bodies

- White Paper 1.1 Evaluating Human Rights Risks in the Sports Context
- White Paper 1.2 Sports Governing Bodies and Human Rights Due Diligence
- White Paper 1.3 Corruption and Human Rights in the Sports Context

2. Host Actors

- White Paper 2.1 Host Actors and Human Rights Due Diligence in the Sports Context
- White Paper 2.2 Procurement and Human Rights in the Sports Context
- White Paper 2.3 Human Rights Risk Mitigation in the Sports Context
- White Paper 2.4 Remedy Mechanisms for Human Rights in the Sports Context

3. Sponsors and Broadcasters

- White Paper 3.1 Sponsors and Human Rights in the Sports Context
- White Paper 3.2 Broadcasters and Human Rights in the Sports Context

4. Affected Groups

- White Paper 4.1 Children’s Rights in the Sports Context
- White Paper 4.2 Athletes’ Rights and Mega-Sporting Events

Contents

| | |
|--|-----------|
| Executive Summary | 5 |
| 1. Introduction and Overview | 7 |
| 1.1 Introduction | 7 |
| 1.2 Overview | 8 |
| 1.3 Statement of Principles | 9 |
| 1.4 Cross-Cutting Issues | 10 |
| 2. Mapping and Gap Analysis | 10 |
| 2.1 2022 FIFA World Cup Qatar | 10 |
| 2.2 Governing Standards | 11 |
| 2.3 Overview of the Circumstances Confronting Athletes | 16 |
| 3. How to Fill the Gaps | 26 |
| 3.1 Application of International Human Rights Standards to Athletes | 26 |
| 3.2 Facilitation of Social Dialogue and Collective Bargaining | 28 |
| 3.3 Access to Remedy | 30 |
| 4. The Potential Role of an Independent Centre on MSE and Human Rights | 32 |
| Annex: Overview of the UN Guiding Principles on Business & Human Rights | 34 |

Executive Summary

Athletes are the public face of mega sporting events (MSEs). Athletic performances are essential to the prestige, popularity and viability of MSEs and, in turn, the sporting and business undertakings of International Sporting Organisations such as the International Olympic Committee (IOC) and international sporting federations (ISOs). This white paper considers the position of athletes who are among the key groups affected by MSEs.

The work of professional athletes is, by its nature, highly skilled and valuable, yet risky and precarious. As a condition of that work, athletes are subject to regulations that are extraordinary and far-reaching in their complexity and subject matter. The athlete, therefore, is at the centre of the intersection between sport and human rights.

This paper maps the conduct of MSEs and their impact on athletes by reference to international human rights standards. Necessarily, this paper does so by examining the regulatory control exercised by ISOs, which perform the dual role of governing MSEs as well as governing and regulating the conduct of sport. This paper then identifies any gap in ensuring that the human rights of athletes are protected, respected and remedied. Finally, this paper suggests how those gaps may be filled and provides recommendations on the role that a Mega-Sporting Events Centre (MSE Centre) might play in addressing them.

Four major gaps are identified:

- There is presently an absence of a binding and standing human rights policy and capacity across professional sport within major ISOs and MSEs that deals with the human rights of athletes.
- A human rights due diligence process is often absent from the governance, regulation and conduct of ISOs and MSEs in relation to the athletes who participate in a MSE, and whose work, careers and livelihoods as athletes are often dependent or greatly affected by that participation.
- Social dialogue and collective bargaining are not widespread, and are commonly and actively discouraged by ISOs even in relation to athletes who are organised into legitimate trade unions and athlete and player associations. Where social dialogue and collective bargaining occurs, however, the outcomes for both the athletes and their sports have been overwhelmingly positive. Where barriers exist to the establishment of social dialogue and collective bargaining, such as in relation to child athletes, there is commonly an absence of structured dialogue with their legitimate representatives.

- Notwithstanding the substantial legal capacity of ISOs to protect, promote and enforce the human rights of athletes through a sports based grievance mechanism, such a mechanism has not been created in connection with MSEs. As a consequence, no recourse to dispute resolution can be had for cases related to human rights. This leaves athletes with access to judicial remedies (where available) in order to have their human rights upheld, a path prohibited either by sporting regulation or precluded by the time sensitive nature of sport.

All four gaps can be addressed through the work of the proposed MSE Centre. Accordingly, this paper makes ten recommendations regarding the position of the athletes. They address:

- The development of the requisite policy and legal framework to apply to ISOs and MSEs based on accepted international human rights standards and existing principles and criteria (e.g. the United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles)).
- Ensuring a human rights due diligence process is implemented in accordance with the UN Guiding Principles where the activities or decisions of the ISO impact athletes, including in connection with MSEs.
- Encouraging dialogue with the legitimate representatives of athletes including social dialogue and collective bargaining with legitimate trade unions and athlete and player associations where such an avenue exists.
- Assisting with the development and tailoring of grievance mechanisms at the sporting level.
- Building knowledge and expertise on the intersection between athletes and human rights.
- Providing a forum for the promotion and exchange of best practice when it comes to the effective regulation of sport in a way that is consistent with the human rights of athletes.

The recommended role of the MSE Centre is mostly facilitative. The optimal outcome is one where the interests of the sport and the athletes are addressed in partnership.

Introduction and Overview

1

1.1 Introduction

International sport is continuing to see the emergence of world player associations, including in sports which conduct some of the world's most prestigious and lucrative MSEs. For example, FIFPro, the world footballers' association, represents approximately 65,000 professional footballers through national player associations in over 60 countries, whilst the International Rugby Players' Association (IRPA) and the Federation of International Cricketers' Associations (FICA) respectively represent the vast majority of the world's professional rugby players and cricketers in the same manner.

UNI World Athletes is the world players' association across professional sport and an autonomous sector of the UNI Global Union. UNI World Athletes represents over 85,000 professional athletes through FIFPro, FICA, IRPA, EU Athletes, the National Football League Players Association (NFLPA), the National Hockey League Players Association (NHLPA), the National Basketball Players Association (NBPA), the Japanese Professional Baseball Players Association (JPBPA) and the Australian Athletes' Alliance (AAA). Together, these bodies comprise more than 100 national player associations in over 60 countries.

World player associations are commonly structured as federations of national and regional athlete and player associations. The national associations that belong to UNI World Athletes and its affiliates such as FIFPro, IRPA and FICA are free and democratic trade unions whose principal purposes are to organise and collectively bargain on behalf of the professional athletes who are eligible to belong to them. Their office bearers are elected by, and accountable to, their athlete members. They are committed to sport, and they are committed to the advancement of human rights. The work of the professional athletes they represent is, by its nature, highly skilled and valuable, yet risky and precarious.

This white paper provides an overview of the interface between ISOs, as the international governing bodies of sport, and the application of international human rights standards to athletes, particularly in the context of MSEs.

This paper necessarily summarises some key aspects of this interface, and the issues that arise. It does not purport to be a comprehensive statement of the current legal and regulatory environment confronting elite athletes.

1.2 Overview

Whilst this paper focuses on the position of the athletes, it is written in the context of a broader three-part goal in relation to human rights in sport. First, the human rights of everyone involved in the delivery of sport must be respected, promoted and upheld. Second, the same must be true for the athletes, whose role is essential to the delivery of MSEs and the sporting and business undertakings of ISOs. Third, the impact of sport must be positive, including in social, economic, environmental and cultural terms.

As the highly visible pinnacle of world sport, MSEs must at all times fully deliver on this goal. Further, the attainment of this goal in full is necessary if sport is to retain its social licence.

For the reasons set out below, this paper recognises that:

- ISOs have vast global authority and the capacity to regulate, though political influence and contract, the conduct of everyone involved in their sport at the international, regional and national levels. That authority can be used as a force for good to ensure the protection of human rights.
- The UN Guiding Principles should be embedded legally, culturally and institutionally into the policies and procedures of all ISOs, including in connection with MSEs.
- The UN Guiding Principles "Protect, Respect and Remedy" Framework should apply to ISOs and their stakeholders, including in respect to athletes who commonly confront serious violations of their fundamental rights. Moreover, the athletes have a strong expectation that their sport will always demonstrate the highest standards of leadership and citizenship in all of its activities.
- The legal and political acceptance by governments and ISOs of the notions of the autonomy and specificity of sport demand that ISOs at all times demonstrate the highest standards of governance including with respect to human rights. However, ongoing governance failures within ISOs coupled with and a cultural acceptance within some major sports that certain but undefined special needs should prevail over the rule of law creates an uncertain legal and political environment in which to attempt to embed human rights. For example, the governance failures have contributed to the widely reported abuse in connection with preparations for the 2022 FIFA World Cup Qatar.
- Sport's regulatory framework and arbitration system presently preclude the fundamental human rights of athletes from being protected, respected and upheld.
- Core internationally recognised human rights standards including those referred to at page 14 of the UN Guiding Principles should be expressly recognised by all ISOs. Further, the rights of individuals under continental and national law should be respected, including their right of access to the courts and judicial mechanisms.

- Fundamental reform is required and should be embraced by ISOs to ensure that core human rights standards prevail over the notions of the autonomy or specificity of sport.
- Ongoing human rights due diligence processes should be required of ISOs in the conduct of their activities including when making decisions and promulgating regulations that may impact the work, careers and lives of athletes due to their involvement in sport.
- The historical preference of ISOs has been to build the legitimacy of the notions of the autonomy and specificity of sport through having that notion legally and politically recognised. However, ongoing governance crises and human rights abuses are preventing that legitimacy from being achieved. Dialogue with legitimate representatives of athletes including collective bargaining and social dialogue with trade unions and athlete and player associations are the most effective means by which the legitimacy of sport's governance can be restored and any perceived tension between international human rights standards and the specificity of sport resolved.
- An independent institutional framework should be established in accordance with the UN Guiding Principles to provide for requisite external accountability, encourage social dialogue and collective bargaining, assist with the conduct of human rights due diligence processes, facilitate community consultation and to ensure those who have had their rights violated can access a remedy, and that any abusive behaviour is ceased and corrected. To this end, the proposed MSE Centre could be developed and tailored to play these roles.

1.3 Statement of Principles

This paper fully endorses the UN Guiding Principles including the United Nations' "Protect, Respect and Remedy" Framework and their application to ISOs and MSEs. Due to the global and far reaching nature of the activities and the close relationship between ISOs, government and business, ISOs can and should ensure that:

- Government, insofar as it is involved in or connected with a MSE (directly or indirectly), recognises and upholds its obligations to respect, protect and fulfil human rights and fundamental freedoms.
- Business, including ISOs and the sporting bodies and institutions directly and indirectly affiliated to them, jointly and severally uphold their responsibility to respect human rights and comply with all applicable laws.
- Government and business, including ISOs, embed social dialogue and collective bargaining as well as community consultation and dialogue with the legitimate representatives of affected groups into their activities.

- The need for rights and obligations to be matched to appropriate and effective remedies when breached.

1.4 Cross-Cutting Issues

The observations in this paper are, in principle, relevant to all groups affected by or involved with the conduct of MSEs. In particular, such groups, including workers, residents and local communities, women, indigenous communities, LGBTI peoples and children, can be the most impacted yet least represented in the conduct of a MSE.

The issues of due diligence and access to remedy are highly relevant to the position of athletes in the contexts of MSEs. Sporting Chance White Paper 2.1 on host due diligence provides a case study on the risk assessment and due diligence processes in relation to child rights and the Commonwealth Games. The observations in Sporting Chance White Paper 2.4 on access to remedy relating to athletes are relevant to this paper, particularly sections on sport and human rights, sports arbitration and grievance mechanisms, and judicial mechanisms to protect athletes' rights.

2

Mapping and Gap Analysis

2.1 2022 FIFA World Cup Qatar

UNI World Athletes and FIFPro have been appalled by ongoing reports of the abuse of many people involved in football. The circumstances surrounding the 2022 FIFA World Cup have determined that respect for human rights must now be a mandatory aspect of the administration of sport at all levels.

In the 1990s, FIFPro supported the successful efforts of the international trade union movement, human rights groups, business and FIFA to address the problem of the use of child labour in the manufacture of FIFA licensed footballs. The revelations of human rights abuse in connection with the preparations for the 2022 FIFA World Cup Qatar have prompted FIFPro to remind the football world of the important role of football in setting the necessary standards and the close relationship between the players and everyone involved in the construction and organisation of the FIFA World Cup.

FIFPro has long sought to have the situation resolved, and players have been outspoken in their condemnation of the abuse.

In September 2013, the author, speaking in his former capacity as the chair of FIFPro's Asian division, said:

"The 2022 FIFA World Cup was awarded to Qatar to promote football and, more importantly, football's universal values in the Middle East. This can only be achieved if Qatar respects the rights of the key people who will deliver that World Cup: the workers who build the World Cup stadia and the players who play in them."

At the same time, FIFPro made a number of public demands of FIFA including:

"FIFPro assumes that adherence to FIFA's principles and international labour standards are conditions on which Qatar was awarded the extraordinary privilege of hosting football's greatest event."

"FIFA has previously acted to ensure international labour standards are respected when it worked with the International Labour Organisation in the fight against child labour in the manufacture of footballs. A similar initiative is urgently needed in Qatar."

"Further, independent workplace health and safety experts appointed by FIFA and the ILO must be permitted to inspect all worksites and make binding recommendations to ensure international labour standards are respected in Qatar."

UNI World Athletes and FIFPro therefore fully welcomed the recommendations set out in Professor John G. Ruggie's recent report, "For the Game. For the World. FIFA and Human Rights" and expect their complete implementation as a matter of urgency and in time for the 2018 and 2022 FIFA World Cups.

2.2 Governing Standards

2.2(a) International Instruments – Sport and Human Rights

Article 1 of UNESCO's International Charter of Physical Education, Physical Activity and Sport (UNESCO Charter) provides that the practice of physical education, physical activity and sport is a fundamental right for all. The UNESCO Charter sets out a number of universal defining principles which each ISO should ensure are upheld both by itself as an international governing body in sport and the various sporting bodies and stakeholders that operate under each ISO's auspices. Those defining principles include:

- Access to sport without discriminating on the basis of ethnicity, gender, sexual orientation, language, religion, political or other opinion, national or social origin, property or any other basis (Article 1.1).
- The freedom to develop through sport must be supported by all governmental, sporting and educational institutions (Article 1.2).
- Sport must be inclusive and promote equal opportunities for all (Articles 1.3 and 1.4).
- Every human being must have the opportunity to attain a level of achievement through sport (Article 1.6).
- All stakeholders must participate in creating a strategic vision for sport, including sport professionals (Article 3).
- All stakeholders must ensure their activities are economically, socially and environmentally sustainable (Article 5). In particular, the organisers of sports events “must pay due consideration to the overarching principle of sustainability, be it economic, social, environmental or sporting” (Article 5.1), especially in relation to the legacy of major sports events (Article 5.4).
- Policy decisions must be based on sound factual evidence (Article 6.1).
- Good governance must be implemented (Article 10.4).

Furthermore, Article 10.5 of the UNESCO Charter imposes clear obligations on employers in sport:

*“Any employer in the field of physical education, physical activity or sport or related areas must pay due consideration to the psychological and physical health of their employees, **including professional athletes. International labour conventions and basic human rights must be respected, in particular to avoid child labour and human trafficking.**”* (emphasis added).

UN Guiding Principle 12 provides that an “authoritative list of the core internationally recognised human rights is contained in the International Bill of Human Rights”. The critical instruments include the:

- Universal Declaration of Human Rights.
- International Covenant on Civil and Political Rights.
- International Covenant on Economic, Social and Cultural Rights.
- Eight core conventions of the International Labour Organization (ILO) as set out in the Declaration on Fundamental Principles and Rights at Work.

Without limitation, the relevant instruments entitle everyone, including professional athletes, to the:

- Right of freedom of association, to form trade unions and to collectively bargain.
- Right to work and the free choice of employment.
- Right to equal pay for equal work.
- Elimination of forced labour, including through subtle means such as the accumulation of debt or the retention of identity papers.
- Protection of wages.

UN Guiding Principle 12 also provides that, "(D)epending on circumstances, business enterprises may need to consider additional standards."

2.2(b) The Regulatory Commitment of ISOs to Human Rights

As noted in White Paper 2.4, the Olympic Charter, as in force from 8 December 2014:

"expressly connects sport, human rights and peace and builds on the philosophy that underpinned the adoption of the Universal Declaration of Human Rights in 1948."

Similarly, article 3 of the FIFA Statutes was recently amended to provide that:

"FIFA is committed to respecting all internationally recognised human rights and shall strive to promote the protection of these rights."

The Olympic Charter includes seven "fundamental principles of Olympism". The fourth states:

"4. The practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play."

Sporting Chance White Paper 2.4 also summarises the extensive regulatory regime that ISOs such as the IOC and FIFA have established, and how those regimes are legally upheld through arbitration within the sporting framework even where they may be contrary to national law.

The general principles of human rights enunciated in the Olympic Charter and the FIFA Statutes, however, have yet to be entrenched as express legal rights of athletes working within their purview. A further process of regulatory promulgation is needed. Such a process was recently contemplated by the IOC when it, through the adoption of Agenda 2020, moved to address the concerns of LGBTI athletes in response to crowd behaviour at the 2014 Sochi Winter Olympics.

Recommendation 14 of the IOC's Agenda 2020 is to "strengthen the 6th fundamental principle of Olympism." It now reads:

"6. The enjoyment of the rights and freedoms set forth in this Olympic Charter shall be secured without discrimination of any kind, such as race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status."

2.2(c) Barriers to the Implementation of the Human Rights of Athletes

Despite the broad commitment to human rights in the Olympic Charter, there are considerable cultural and institutional barriers to the full acceptance of the human rights of athletes by ISOs and the world of sport. In simple terms, this is due to how sport is governed globally and in almost all countries, and the emphasis placed on the autonomy and specificity of sport.

The fifth and seventh fundamental principles of Olympism provide:

"5. Recognising that sport occurs within the framework of society, sports organisations within the Olympic Movement shall have the rights and obligations of autonomy, which include freely establishing and controlling the rules of sport, determining the structure and governance of their organisations, enjoying the right of elections free from any outside influence and the responsibility for ensuring that principles of good governance be applied..."

"7. Belonging to the Olympic Movement requires compliance with the Olympic Charter and recognition by the IOC."

According to the Sports Governance Observer 2015, as prepared by Dr Arnout Geeraert and published by the October 2015 Play the Game conference in Aarhus, Denmark:

"Even though they have allowed politics to influence their policies and decisions, autonomy from formal regulatory public interference is an obsession for (International Sporting Federations, or) ISFs. Modern sport's construction is, in essence, rooted in classic liberalism, namely in the concept of freedom of association. Autonomy is therefore a deeply ingrained and cherished principle in the sports world. It is an essential part of ISFs' belief system; a doctrine that they aim to spread among political institutions and stakeholders in order to keep the governance of international sport strictly private."

Unconditional, or poorly defined, autonomy presents a threat to the good governance of sport. Accordingly, poor governance rightly presents a threat to sport's autonomy. The prevalence of corruption within ISOs promoted Play the Game to label 2015 the "year that killed the autonomy of sport".

Similarly, the related notion of the specificity of sport presents a threat to the rights of those connected with sport, including the players, from being protected, respected and, if needed, remedied. The substantial body of case law is testimony to this.

Recognition of the “specific nature of sport”, as a notion within the Treaty on the Functioning of the European Union (TFEU), is, of course, conditional. It demands good governance, social dialogue and the protection and development of young people, especially through education. Further, it does not affect sport where it is an economic activity. Reforms are required for these conditions to be upheld. As sports are structured as cartels, they warrant not special treatment and protection, but enhanced scrutiny and accountability.

A 2010 paper of the European Parliament on the TFEU and EU sports policy encourages social dialogue as a vehicle for the sports movement to take the lead in resolving tensions over the meaning of the specificity of sport:

*“Rather than passively relying on the reference to the ‘specific nature of sport’ contained in Article 165 to seek to repel the influence of EU law in sport, **the sports movement should take a lead in defining this contested term. This definition should be built into the relevant sports regulations following an open and transparent method of operation facilitated by the governing bodies but involving affected stakeholders. The definition should be thoroughly reasoned and backed with robust data.**” (emphasis added)*

However, the development of social dialogue within sport has proven to be particularly challenging. The paper also notes:

*“In this respect, the reference in Article 165(2) to the promotion of cooperation between bodies responsible for sports adds impetus to the (European) Commission’s agenda. **In particular, the Commission has long promoted dialogue with the sports movement and has been at the forefront of encouraging social dialogue. Article 165 also adds impetus to efforts to move dialogue between the EU and the sports movement onto a more structured footing.** However, given the diversity of the sports movement, structuring dialogue on a meaningful and inclusive basis is a significant challenge for the EU.” (emphasis added)*

The slow development of social dialogue would not seem to be a structural issue, as advanced and sophisticated collective bargaining occurs in many parts of the sporting world, including in various sports in North America, Australia and New Zealand as well as within European and world football. The issue is leverage, with the bargaining position of the athletes and their representatives being undermined by the recognition of sport’s apparently special nature without the condition that it be implemented with the requisite knowledge base obtained through social dialogue with the partners most affected.

2.3 Overview of the Circumstances Confronting Athletes

Athletes, like everyone, need government and business to act to ensure that their human rights are protected and respected. In addition to the failure to embed the human rights of athletes within sport's global regulatory framework, and to subject those to the perceived notions of the specificity of sport, discussed at 2.2 (above), four broad concerns can be identified:

The lack of recognition of the rights of athletes to exercise the right to organise and collectively bargain, a right regarded as fundamental by the ILO, including in connection with ISOs and MSEs. Further, where the athletes' voice is to be encouraged, the forum for any consultation and its subject matter are regulated by ISOs.

The relatively low status afforded athletes' rights, especially in the context of increasingly complex and far-reaching sporting regulation. This is commonly reflected in the absence of a human rights due diligence process to identify, prevent, mitigate and account for the human rights impacts of decisions being made by ISOs which govern the involvement of athletes in sport.

The relationship between the rights of athletes and increasing concerns over the integrity of sport.

Instances where athletes have had their fundamental human and political rights violated by reason of their public profile as professional athletes, or where athletes have sought to protest on human rights grounds.

2.3(a) The Right to Organise and Collectively Bargain

Despite the central role of the athlete in the delivery of sport, they are, as a group, commonly denied the right to organise and collectively bargain. This occurs both globally and nationally, due to the absence of a clear legal right to do so and the natural fear many athletes feel of the threat of reprisal from clubs, leagues and ISOs. There is also an established preference on the part of many ISOs, including the IOC, to regulate the mode of athlete representation within the sporting framework without regard to ILO standards.

There are three broad models of athlete representation in relation to ISOs and MSEs:

1. The mode of athlete consultation is regulated by the ISO.
2. The ISO recognises and negotiates with a world players' association, and facilitates and encourages negotiations between employers and player unions as well as other interested stakeholders, both under the regulations of the sport and relevant labour law.
3. The MSE is a joint venture between employers and the players' association.

2.3(a)(i) ISO Regulated Athlete Consultation

Made up of 16 current and former Olympic athletes, the IOC Athletes' Commission is established pursuant to Rule 21 of the Olympic Charter and provides the vehicle for consultation with athletes within the Olympic Movement. Administratively supported by the IOC sports department, the:

"mission of the Commission is to ensure that the athletes' viewpoint remains at the heart of the Olympic Movement decisions. To that effect, the Commission is invited by the IOC President to submit proposals, recommendations and/or reports to the IOC Executive Board or the IOC Session. In a next step, the Commission develops toolkits, guidelines and projects to support athletes on and off the field of play. The Commission members have representation on all relevant IOC commissions, including the IOC Executive Board, subject to the applicable rules of the Olympic Charter."

Significantly, the responsibilities of the IOC Athletes' Commission include:

Within the IOC, to "(r)epresent athletes throughout the Olympic Movement and give input on activities related to the implementation of Olympic Agenda 2020, specifically focusing on protecting and supporting clean athletes, both on and off the field of play..."

Within the Olympic Movement, to "(l)ead the Athletes' Engagement Strategy to liaise, communicate and engage with athletes worldwide. This includes developing the Olympic Athletes' Hub, and being present at the Olympic Games and Youth Olympic Games to interact with athletes, as well as liaising with relevant IOC Recognised Organisations such as International Federations, WADA, the IPC, WOA, ANOC, Continental Associations, CAS and others..."

The Olympic Charter encourages the development of athlete commissions throughout the Olympic Movement. For example, the existence of an athletes' commission within an ISO or National Olympic Committee is relevant to the question of IOC membership.

The Athletes' Commission Charter of the Australian Olympic Committee (AOC), for example, provides that the commission's role is to "advise" the executive of the AOC and obliges each member of the commission not to act in the best interests of the athletes or even sport, but "solely in the best interests of the Committee (i.e. the AOC) and its members as a whole" (emphasis added).

The World Anti-Doping Agency (WADA), similarly, has established an athletes' committee. The stated role of the 17-person body is to "serve as the voice of clean athletes, encouraging integrity and fairness for sport and athletes". The objectives and key activities of the committee include providing "insight to and feedback on the World Anti-Doping Program including the Code, testing standards, ADAMS etc" and acting as "ambassadors and spokespersons for WADA and doping-free sport". It is appointed by the Committee's chair and the President of WADA in consultation with WADA's Director

General. The committee's terms of reference further provide:

"Confidentiality. All Committee members are required to sign a confidentiality agreement upon appointment.

"Communications and Media. All members must read and agree to comply with WADA's Media Relations policy (as attached). If a member should receive a request for an interview in relation to their role in WADA or WADA's work in the fight against doping in sport, they should consult first with the WADA Media Relations Senior Manager or (if absent), with the WADA Communications Director.

"Funding Support. WADA shall provide the necessary administration and operational resources for Committee meetings."

2.3(a)(ii) World Player Associations

Established in 1965, FIFPro is the most developed world players' union. Under the terms of a memorandum of understanding signed in 2006, it is exclusively recognised by FIFA as the representative body of the world's professional footballers. Similarly, FIFPro recognises FIFA as football's international governing body. The cooperation between FIFA and FIFPro includes:

FIFA committing to negotiate all changes to international regulations that affect player transfers, contracts and registrations (the FIFA Regulations for the Status and Transfer of Players (RSTP)), and agreeing not to implement any changes without FIFPro's agreement.

An international dispute resolution mechanism (the FIFA Dispute Resolution Chamber) to resolve employment related disputes between clubs and players, with FIFPro nominating 50% of the arbitrators.

FIFPro representation within key committees, such as the FIFA Players' Status Committee, in which a third of the seats are held by FIFPro nominees.

FIFPro working with FIFA's confederations, including UEFA, where a formal European social dialogue has been established under the auspices of the European Commission to address matters such as minimum contract requirements for players. A four party autonomous agreement was concluded in 2012 on this subject between FIFPro's European division, the European Club Association, the European Professional Football Leagues and UEFA.

The relationship has not prevented the need for FIFPro to access remedies through litigation and formal process. FIFPro continues to support Claudia Pechstein's legal challenge to the Court of Arbitration for Sport (CAS), and has filed a complaint in the European Commission against the anti-competitive effect of the operation of the FIFA RSTP.

World Rugby also recognises IRPA, the International Rugby Players' Association. The admission of Rugby Sevens into the Olympic Games resulted in the establishment of a rugby athletes' commission in accordance with IOC requirements. However, the commission is constituted in partnership with IRPA. Among the commission's highest priorities is the advancement of the relationship between World Rugby and IRPA through a "joint commitment to developing (a) revised memorandum of understanding between World Rugby and IRPA to provide a stronger blueprint of collaboration on international issues affecting players and the game as a whole."

2.3(a)(iii) Joint Venture MSEs

The World Cup of Hockey 2016 in Toronto, Canada, featured eight teams competing for a best-on-best international hockey championship: Team Canada, Team Czech Republic, Team Finland, Team Russia, Team Sweden, Team USA, Team Europe and Team North America. More than 150 of the best players in the National Hockey League (NHL) participated in this tournament.

The tournament is a joint effort of the National Hockey League Players' Association (NHLPA) and NHL, in cooperation with the International Ice Hockey Federation (IIHF). The tournament was played on NHL-sized rinks using NHL rules and officiated by NHL officials. Other competition matters – such as the anti-doping policy governing the tournament, the framework and procedure for supplementary discipline, the medical protocols, media and broadcasting policies and access, etc. – are the responsibility of the NHL and NHLPA in consultation with third parties, including the IIHF, where appropriate.

Article 24 of the 2012 – 2022 Collective Bargaining Agreement (CBA) between the NHL and NHLPA deals with international hockey under the auspices of a joint "international committee". The CBA relevantly provides:

"24.5 The NHL and the NHLPA shall continue to work together to jointly create and exploit other international projects and initiatives involving NHL Players other than International Hockey Games, including games, series, events or contests (e.g., the World Cup of Hockey, European Champions' League, Victoria Cup Competition, Olympic participation, etc.). All revenues from such projects and initiatives (net of expenses incurred pursuant to budgets approved by the International Committee, including without limiting the generality of the foregoing, Direct Costs and NHL and NHLPA staffing costs) shall be excluded from (Hockey Related Revenues) HRR pursuant to Section 50.1(b)(xviii) and divided equally between the NHL and NHLPA."

Similarly, the CBA between Major League Baseball (MLB) and the Major League Baseball Players Association (MLBPA) deals with "international play". Article XXV(K) (4) of the CBA provides that all international play is subject to joint cooperation between MLB, the MLBPA and the MLB clubs. The World Baseball Classic, baseball's world championship of nations, is conducted by the World Baseball Classic, Inc. (WBCI), a company created at the direction of MLB and the MLBPA to operate the World Baseball Classic tournament. The tournament, which is sanctioned by the World Baseball Softball Confederation (WBSC), is supported by MLB, the MLBPA, Nippon

Professional Baseball (NPB), the Korea Baseball Organization (KBO), their respective players' associations and other leagues and players from around the world.

2.3(a)(iv) ISOs, Athletes and Freedom of Association

The notion of the autonomy of sport is often used to demand, even despite any legal certainty to the contrary, that athletes are not workers and entitled to the protection of national and international labour law. ISOs are cartels and, as such, can defend their position by denying athletes (through heavy sanction) the right to participate in events conducted by the federation or in alternative events that do not carry the federation's sanction.

Mr John Coates, the Vice President of the IOC, the President of the Australian Olympic Committee and the President of both the CAS and the International Council of Arbitration for Sport (ICAS), the body responsible for financing and administering the CAS, told Australian radio in late 2015 that the intrusions of the WADA Code on athletes, such as being available for drug testing at any time, are, "part of the privilege of being an Olympian, part of the privilege of participating in the sport".

Accordingly, an athlete is required to agree to the demands of his or her ISO, or be denied the right to participate, compete and work. This requirement applies in equal measures to regulatory regimes such as the WADA Code and the FIFA RSTP as it does to the resolution of disputes by CAS.

This model of governance sees athletes exercise very limited control or influence over matters of fundamental importance to them, such as the right to compete, wages, commercial and financial terms, health and safety, discipline and dispute resolution, all matters which are essential subjects of labour law and collective bargaining.

The development of the jurisprudence of the CAS in the application of article 17 of the FIFA RSTP following the Matuzalem case, which relied on the notion of the specificity of sport to determine a player's apparent market value, compares relevantly and starkly with the opinion of Advocate General Lenz in Jean Marc Bosman's successful 1995 legal challenge to football's transfer system before the European Court of Justice. In his opinion, the right of a club to claim financial compensation for the loss of the services of a player:

"...presupposes precisely that a player can be regarded as a sort of merchandise for which a price is to be paid. Such an attitude may correspond to today's reality, as characterized by the transfer rules, in which the 'buying' and 'selling' of players is indeed spoken of. That reality must not blind us to the fact that this is an attitude which has no legal basis and is not compatible with the right to freedom of movement ... I also have considerable doubt as to whether a system which ultimately amounts to treating players as merchandise is liable to promote the sporting ethos..."

The inconsistent legal reality between the European Court of Justice and the CAS is by design, and raises questions about sports' compliance with international human rights

standards. Professor Ruggie noted the need for substantive and procedural protections for players if the CAS is to operate consistently with these standards.

The response by WADA to the initial moves to establish UNI World Athletes in 2011 is an example of the concerns ISOs express with the organisation of athletes into trade unions. Former WADA Chairman John Fahey's minuted remarks to the WADA Foundation Board on 20 November 2011 read:

"(The athlete) associations... were based along the lines of a union and took their authority from membership, which involved receiving paid fees to have people look at what were described as the conditions under which they operated. Those conditions were of course relevant to the pay received to play sport. He thought that it was incumbent on all who believed that sport was a very different and separate operation to other workplaces to make that clear. In his opinion, the least amount of credibility given to these people (the athlete unions), the better. They must be seen for what they were: a union, and if individual sportsmen and women wanted that, it was their choice. But WADA should make this clear at every opportunity possible and under no circumstance would it recognise them as representatives of the sportsmen and women of the world."

However, some 80,000 athletes, represented through legitimate trade unions and athlete and player associations, are bound by the WADA Code, which forms a fundamental term of their employment or involvement in sport. These players and their organisations constitute UNI World Athletes:

| Affiliate | Country | Player associations * | Players * | WADA jurisdiction |
|--------------|---------|-----------------------|---------------|-------------------|
| AAA | AUS | 5 | 2,529 | Yes |
| EU Athletes | NED | 27 | 7,467 | Yes |
| FICA | ENG | 7 | 1,618 | Yes |
| FIFPro | NED | 60 | 65,000 | Yes |
| IRPA | NZL | 10 | 3,000 | Yes |
| JPBPA | JPN | 1 | 735 | No * |
| NBPA | USA | 1 | 400 | No ** |
| NFLPA | USA | 1 | 1,800 | No |
| NHLPA | CAN | 1 | 750 | No * |
| TOTAL | | 113 | 83,299 | 79,622 |

Note: * Player association and player figures adjusted to avoid any double counting. For example, cricket, football and rugby player associations respectively belong to AAA, FICA, FIFPro, IRPA and UNI World Athletes.

** Players may be under WADA jurisdiction for some international events.

According to Mr Coates: "These are the unions who are not elected representatives of the athletes. I know who they are." When asked whether he thought players or athletes should not have union bodies representing them, he said, "I think our position is that all bodies should have athletes representatives on their board who are elected by the

athletes themselves. That is the case with the Athletes Commissions in the national federations and the Australian Olympic Committee. It is not some other self-appointed body that goes out and negotiates wages and other matters for them." For example, the ICAS recently involved athlete commissions to purportedly address the lack of athlete representation among CAS arbitrators highlighted by the landmark legal proceedings brought by German speed skater Claudia Pechstein.

The right to organise and collectively bargain, as enshrined in article 20 of the 1948 Universal Declaration of Human Rights and ILO Conventions 87 and 98 is, of course, a fundamental international labour standard. Recognition and respect for the right to organise and collectively bargain involves an obligation on the part of employers and their representatives not to interfere with the independent pursuit and exercise of that right. Article 2 of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) of the ILO provides:

"1. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.

2. In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article."

Relations between ISOs and athletes and the mode of athlete representation highlights the tension that arises within ISOs regarding international human rights standards and the governance of sport. It is a tension that can only be resolved by sport upholding international human rights standards and doing so through the application of the UN Guiding Principles.

2.3(b) The Status of Athletes' Rights

The predominance given by ISOs to notions such as the autonomy and specificity of sport (discussed at 2.2 above) in comparison with the rights of athletes should be measured in the light of the extraordinary and far-reaching complexity of athlete regulation as developed by ISOs, and the difficulties athletes confront in having their rights upheld, and in accessing a remedy where they are breached. The relatively low status afforded athletes' rights in this context would be best remedied through social dialogue and collective bargaining.

The extent of athlete regulation is illustrated by the Index of Athletes Rights & Rules as published by the United States Olympic Committee (USOC) Athlete Ombudsman. The 12-page index cites US sports specific legislation, the USOC Bylaws, the Olympic Charter, the WADA Code (and related documents), the requirements of the United States Anti-Doping Agency (USADA), USOC Policies (which address matters such as

the commercial rights and obligations of athletes, and what performance apparel they may wear), selection procedures, dispute resolution, arbitration, athlete participation in governance matters and political matters, among other things.

Similarly, in the recent 2016 Rio Olympics, Australian athletes were required to sign a 60 page 'partnership agreement' with the Australian Olympic Committee. The agreement is legally controversial. It denies the existence of an employment relationship between the athletes and the AOC, contains onerous provisions regarding the disclosure of information, denies the athlete recourse to the courts, imposes restraints on how the athlete may conduct commercial activities and requires the athlete to release and indemnify the AOC on broad terms. Payment to the athlete is not provided, although some athletes may access funding through various sport and government programs. The agreement incorporates by reference eight external documents (themselves legally complex), including the AOC Constitution, AOC guidelines and bylaws on funding, commercial activities and selection, the Olympic Charter, the WADA Code and the IOC Code of Ethics, the latter of which effectively requires all athletes to waive their data protection rights as a condition of participation in the Olympics. The front page of the agreement reads:

"Your selection to participate in the 2016 Olympic Games as a member of the 2016 Australian Olympic Team is conditional on you entering into this Agreement and observing its terms.

"You should carefully read this Agreement so as to understand its terms and the consequences flowing from any breach of its terms."

2.3(c) The Rights of Athletes and the Integrity of Sport

No stakeholder in sport has a greater interest in the integrity of sport than the athlete, whose living and performance depends on sport being played on its merits. For sport to stay true to its stated values and protect its integrity, athletes, like ISOs, need to be able to have their rights upheld and urgently access a remedy where their rights have been violated, including by an ISO. For example, how can sport maintain its social licence if:

- An LGBTI athlete who is discriminated against in the pursuit of his or her calling as an athlete, or who is vilified whilst competing, cannot access a remedy or ensure that such conduct ceases?
- An ISO or MSE discriminates against athletes on the basis of their gender?
- Anti-doping policy fails to effectively protect clean sport (including the rights of clean athletes) whilst at the same time breaching the fundamental rights of athletes by not protecting the privacy and data protection rights of athletes or punishing them disproportionately for technical and inadvertent breaches of the WADA Code?

- Match fixing continues in circumstances where professional athletes are not paid for months, thereby becoming more susceptible to being corrupted? In February 2016, for example, seven professional footballers from the Former Yugoslav Republic of Macedonia received six month bans after taking part in a protest organised to complain about not having received their salaries for four months?

In the FIFA Dispute Resolution Chamber, football has the most advanced grievance mechanism for the resolution of international labour disputes between clubs and players. However, professional footballers still have great difficulty in having their labour rights upheld throughout the world. FIFPro has undertaken extensive research into the systematic violation of the fundamental rights of players.

The 2016 FIFPro Global Employment Report found that 41% of players experienced delayed payments, 9% suffered from violence, minors were particularly vulnerable, and 29% of players were transferred or moved between clubs against their will. Similar findings were revealed in two earlier research reports, the:

- 2012 FIFPro Black Book, Eastern Europe (supported by a compelling video).
- 2015 FIFPro Buku Hitam, a yet to be published study into issues confronting professional footballers in Asia and Oceania, including Australia, Hong Kong, India, Indonesia, Japan, Malaysia, New Zealand, Palestine, Singapore and South Korea.

Both pieces of research involved extensive player surveying and highlight the serious problems confronting professional footballers, including:

- Approximately one in ten players having their contracts unjustly terminated, including for reasons such as injury.
- Players not being paid in accordance with their contracts (in eastern Europe, over 40%, whilst in Asia one in four players were not paid on time).
- Players being forced by their employers to work in isolation, or train alone, on threat of having to agree to employment related demands of the employer (such as a transfer or early contract termination).
- Over 10% of players being subjected to capricious sanctions and financial penalties by their employers.
- Around 10% of players being subjected to violence by fans and club management.
- Around 10% of players being subjected to bullying and harassment.
- Widespread racism (over 10% of players complained of being subjected to a racist act in eastern Europe).
- Almost 12% of players in eastern Europe and 7% in Asia and Oceania being approached to fix the result of a match, often in circumstances of duress.

Whilst these issues may not, on their face, directly affect the performance of athletes at MSEs, they certainly affect their capacity to prepare and train for MSEs. Further, given the correlation between the abuse of labour rights through the non-payment of wages and corruption such as match fixing, they are most relevant to the regulatory regime promulgated on athletes by ISOs including in respect to MSEs, and the very integrity of the sporting competitions contested at those MSEs.

2.3(d) Human and Political Rights of Athletes

Sport has a long history of 'athlete activists'. A major challenge for the global player association movement arises when athletes find themselves targeted by government or sporting bodies by reason of their political belief or where their desire to pursue their profession as players has run into political or industrial opposition. This challenge is great because it involves the very freedoms, security and lives of the players, as well as their sporting careers. Further, it requires a high level of political intervention and accountability.

Examples in recent years include:

- The reported torturing and imprisonment of Bahraini international players in response to the Arab Spring.
- The inability of Palestinian players to move freely in order to work and play as footballers. A high level FIFA task force has been unable to resolve this issue, which involved the arbitrary detention and maiming of Palestinian footballers by Israeli security forces.
- The effective detention within Qatar of two players, Zahir Belounis and Abdeslam Ouaddou, due to disputes with their clubs and the operation of Qatar's kafala system.
- Ethiopian marathon runner Feyisa Lilesa's protest whilst winning a silver medal at the Rio Olympics. He is now seeking the right to live in the United States.
- The debate in the United States prompted by National Football League (NFL) player Colin Kaepernick's refusal to stand to attention during the playing of the national anthem before NFL games.

NFL Commissioner Roger Goodell has acknowledged Colin Kaepernick's right to protest, whilst acknowledging it creates a difficult issue for the league:

"...I don't necessarily agree with what he is doing..."

"Players have a platform, and it's his right to do that. We encourage them to be respectful and it's important for them to do that."

"I think it's important if they see things they want to change in society, and clearly we have things that can get better in society, and we should get better. But we have to choose respectful ways of doing that so that we can achieve the outcomes we ultimately want and do it with values and ideals that make our country great."

How to Fill the Gaps

It is recommended that these gaps can be filled through three key measures:

- The proactive articulation and adoption by ISOs of international human rights standards in respect of athletes, underpinned by a human rights due diligence process to be followed in relation to the activities and decisions of the ISOs which affect athletes. The due diligence process should be ongoing and conducted in accordance with the principles enunciated in the UN Guiding Principles.
- Developing a partnership between the athletes and ISOs, by facilitating the involvement of athletes in social dialogue and collective bargaining in connection with ISOs and MSEs, starting with the recognition, promotion and protection of the right to organise and the broadening of dialogue with the legitimate representatives of athletes where practical barriers preclude organising, such as children. Such a process is also essential for any meaningful due diligence process to be carried out in accordance with the UN Guiding Principles. It is not for the ISO to unilaterally determine and regulate the mode of athlete representation. The starting point must be the acceptance by all ISOs of the right of the athlete to negotiate the terms upon which he or she is to be involved in a sport or participate in a MSE, and to be represented by persons of his or her choosing in those negotiations.
- Ensuring that athletes, whose rights are violated, can access a remedy. In the case of so called 'enabling rights' such as the right to organise and collectively bargain, this would include ensuring steps are taken to create an environment conducive to the exercise of those rights.

3.1 Application of International Human Rights Standards to Athletes

As also noted in White Paper 2.4 on remedy, there is presently the absence of a binding and standing human rights policy and capacity across international sport within major ISOs. This is presently true for athletes.

Of the extensive documentation that athletes must agree to as a condition of participating in MSEs, none set out the fundamental rights of athletes based on international human rights standards, especially those referred to at 2.2(a) above. The Australian Athletes' Alliance (AAA), the peak body of player associations in Australia and an affiliate of UNI World Athletes, has developed the AAA Charter of Athletes' Rights based on these

standards. However, the Charter does not have any legal status. Accordingly, athletes and player associations are required to have recourse to judicial mechanisms in order to have the human rights of athletes upheld. This is extremely problematic.

The UN Guiding Principles provide the framework by which international human rights standards can be adopted by ISOs in connection with MSEs to protect athletes. A human rights policy must be adopted that would embed, within the regulatory framework of an ISO, the international human rights of athletes and ensure that they are protected, respected and upheld at all levels of the sport. This is a fundamental requirement of the UN Guiding Principles, including principles 15 and 16. It should draw on the key international instruments discussed at 2.2(a) (above).

In addition to the adoption of a human rights policy, it is necessary for ISOs to build their capacity in relation to human rights and acknowledge that capacity must extend to the position of the athletes. This includes the capacity to build and carry out a human rights due diligence process to identify, prevent, mitigate and account for any human rights risk in relation to athletes. The due diligence process should be conducted in accordance with the principles enunciated in the UN Guiding Principles, including principles 17 to 21. This requires the due diligence process to be ongoing, draw on internal, external and independent human rights expertise and involve meaningful consultation with potentially affected groups. It should also include all internationally recognised human rights as a reference point. It would require a thorough review of the existing regulatory framework of ISOs.

The Official Basketball Rules 2014 as promulgated by the International Basketball Federation (FIBA) are a good example of the benefits that would flow from this approach. Rule 4.4.2 provides that:

*"Players shall not wear equipment (objects) that may cause injury to other players. The following are not permitted...
...
Headgear, hair accessories and jewellery."*

This rule, ostensibly created to promote player safety, has the impact of discriminating against, for example, Muslim women whose faith requires them to play in a headscarf. The impact of the rule has been to deny a player such as Bilqis Abdul-Qaadir the right to play basketball and pursue it as a profession. The straightforward implementation of a human rights due diligence process would have identified the risk, and allow for it to be mitigated by authorising the wearing of specifically designed headgear suited to the athletic endeavour of playing, a process permitted by FIFA in football in 2013.

The application of international human rights standards to athletes would also require the express recognition by ISOs that, in the event of any inconsistency between considerations of the autonomy or specificity of sport and requirements of international human rights, the latter prevail. That recognition needs to be appropriately regulated globally, regionally and nationally, and independently monitored and enforced. In seeking to resolve any tension or ambiguity between these notions, informed dialogue

involving stakeholders based on robust data is to be the preferred approach. When it comes to the athletes, this means collective bargaining through free and democratic player associations.

3.2 Facilitation of Social Dialogue and Collective Bargaining

3.2(a) The Meaning of Social Dialogue

Social dialogue is defined by the International Labour Office to include:

"...all types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers and workers, on issues of common interest relating to economic and social policy. Social dialogue is the ILO's best mechanism in promoting better living and working conditions as well as social justice. It is an instrument, a tool of good governance in various areas and its relevance is not just related to the process of globalization but in general to any effort to make the economy more performing and more competitive and to make society in general more stable and more equitable."

This definition ideally fits the challenges confronting ISO, MSEs, professional athletes and, possibly, governments. Given the important issues of athletes rights involved, the complexity of the issues and the visibility and significance of both the MSEs and the athletes who participate in them, ISOs should actively encourage collective bargaining in an environment which is conducive to professional athletes exercising their right to organise. In so doing, ISOs can learn from the successes of collective bargaining in industry, and in some key parts of the sporting world.

3.2(b) International Framework Agreements

Global union federations (GUFs) have endeavoured with some success to deal with the challenge of the unilateral determination of labour standards by trans-national corporations (TNCs). Not unlike ISOs, TNCs have shown preference for self-regulation through unilaterally developed corporate codes of practice which deal with matters such as corporate social responsibility (CSR).

According to Mark Thomas of York University, Toronto:

"International Framework Agreements (IFAs) have emerged in recent years as a key alternative to corporate-driven, unilateral regulatory processes...They attempt to present an alternative process by constructing regulatory arrangements that involve both companies and unions, and that provide a framework for establishing working conditions in supply chains that are based on international labour standards developed

through the ILO. They have been described as a mechanism to promote unionization, collective bargaining, and social dialogue between TNCs and workers' organizations."

Thomas identifies that, unlike corporate codes of conduct, IFAs promote "enabling" as well as "protective rights", and, as an agreement, they seek to establish an ongoing relationship between unions and TNCs to ensure compliance and promote ongoing worker engagement in the process of labour rights regulation.

Sport, as globally structured through ISOs and MSEs, is perfectly positioned to negotiate IFAs to give effect to its regulatory ambitions in a way that is consistent with the international human rights of the athletes.

3.2(c) A Partnership with the Athletes

As noted at 2.3(a)(ii) above, the sports of baseball and ice hockey have established sophisticated partnerships between management and players around their MSEs. FIFA continues to be involved in extensive global negotiations with FIFPro to ensure the fairness and effectiveness of its player related regulations. In the words of leading US attorney Jeffrey Kessler, who has extensive experience in representing the National Football League Players Association (NFLPA) and the National Basketball Players Association (NBPA):

"What history has taught us is that there's no inconsistency between having a fair system for players and having a healthy sport. Quite the contrary. What we've seen is that when sports have given players more freedom and have compensated them better the entire sport has grown on the revenue side. The players and the clubs can work together to build the sport much more easily in a fair system than in an unfair system."

Similarly, the key challenges facing the integrity of sport – match fixing, doping, financial sustainability – require the engagement and the commitment of the athletes in order to be effectively addressed. An effective integrity program requires the athletes to agree to regulations, undertake education, address important legal matters such as privacy and to have trust in the process. Reporting approaches to fix games or undertaking testing for drugs can only occur if the athletes have trust and confidence in the established measures that will be effective and safeguard their security, health and privacy.

Financially, athletes agree to labour market restraints that arguably and, indeed, probably violate their legal rights. Yet, most sports exclude the athletes from the strategic decision-making processes required to maximise revenue for the benefit of all stakeholders, including the players.

In 2011, the MLB clubs and the MLBPA signed a new five year CBA through to 2016, guaranteeing 21 years of labour peace. On 26 November 2011, Jon Pessah writing in The New York Times commented on how three key players in American baseball – former MLB Commissioner Bud Selig, former MLBPA Executive Director Don Fehr (now

the President of UNI World Athletes) and New York Yankees owner the late George Steinbrenner – forged two decades of labour peace.

"Just how far did this partnership propel baseball? Consider these two elements in the sport's newest agreement," Pessah writes.

"One calls for the realignment of the game into two 15-team leagues, an idea first put on the table by the union more than 10 years ago. Not only did management adopt an idea developed by the players, it gave the union the credit it deserved. Gone is the acrimony that held the game back for so long..."

*On the issue of the luxury tax and revenue sharing, which holds down the payroll of even the New York Yankees but rewards and encourages the smaller clubs to increase revenues (and payroll) by fielding better teams, **"the union got what it wanted and management got what it wanted – on the same issue."** (emphasis added)*

As noted at 2.3(a)(ii) above, the partnership includes conducting the game's world championships – the World Baseball Classic – as a joint venture between the MLB and the MLBPA. The MLB's international strategy, which sees MLB games played in markets as far away as Sydney and Tokyo, is conducted on the same basis.

In 2014, the benefits of the partnership were extended to the critical area of integrity with a collectively bargained anti-doping regime. In the words of the late Michael Weiner, the former Executive Director of the MLBPA:

"The players are determined to do all they can to continually improve the sport's Joint Drug Agreement. Players want a program that is tough, scientifically accurate, backed by the latest proven scientific methods, and fair; I believe these changes firmly support the players' desires while protecting their legal rights."

It is a model that could help inform the reforms needed to build credibility into the world wide anti-doping effort.

3.3 Access to Remedy

The question of access to remedy is a vital one for athletes, and is considered in the White Paper 2.4. ISOs have developed a comprehensive sports arbitration system. However, as Professor Ruggie noted in his report to FIFA on the question of the players:

"If an arbitration system is going to deal effectively with human rights-related complaints, it needs certain procedural and substantive protections to be able to deliver on that promise. While the FIFA dispute resolution system and the CAS' 300-plus arbitrators who sit at the peak of the system may be well equipped to resolve a great variety of football-related disputes, they generally lack human rights expertise." Professor Ruggie expressly recommended that:

"FIFA should review its existing dispute resolution system for football-related issues to ensure that it does not lead in practice to a lack of access to effective remedy for human rights harms.

FIFA should ensure that its own dispute resolution bodies have adequate human rights expertise and procedures to address human rights claims, and urge member associations, confederations and the Court of Arbitration for Sport to do the same. The review should involve independent experts as well as representatives of players and other users of the system."

This recommendation is equally applicable to many ISOs.

UN Guiding Principle 31 sets out criteria for the effectiveness of non-judicial grievance mechanisms. The criteria, which include legitimacy, accessibility, predictability and compatibility with rights are among the concerns players have with current sports based arbitration. The criteria provide a sound basis on which to approach the reform of sport's current dispute resolution mechanisms. As principle 31(h) provides, those mechanisms should be "based on engagement and dialogue". Such dialogue, of course, should be undertaken in accordance with the fundamental standards of the ILO.

The establishment of grievance mechanisms that meet these criteria will unquestionably be in the best interests of all ISOs and their stakeholders. Should sport be facing an allegation that the human rights of a player or other individual have been violated, the matter can be independently investigated and resolved, through either agreement or, if needed, ordered remediation, including the awarding of a remedy to a person who has suffered loss or had his or her rights breached.

This recommendation cannot work in isolation. It needs to be accompanied by the appropriate adoption of a human rights policy within the regulatory framework of the sport, as noted at 3.1 (above). Otherwise, the grievance mechanism, especially if it exists through arbitration, will lack the jurisdiction to remediate human rights violations, a present constraint of the CAS.

The Potential Role of an Independent Centre on MSE and Human Rights

It is recommended that the proposed MSE Centre be tasked with a number of important functions in relation to the position of athletes. These would be built upon the “protect, respect and remedy” framework of the UN Guiding Principles and international human rights standards. They would also provide the basis to balance these fundamentals with the autonomy and specificity of sport through knowledge and dialogue. Key functions could include:

1. Developing a policy framework based on accepted international human rights standards and their application to professional athletes in connection with ISOs and MSEs. It would be the responsibility of each ISO to adopt that framework in conjunction with the MSE Centre and incorporate it within its contractual and regulatory documents through collective bargaining with athlete representatives where that avenue exists or otherwise through meaningful dialogue with the legitimate representatives of the athletes concerned. Importantly, that framework would include both enabling and protective rights.
2. Assisting ISOs in building their capacity in relation to human rights and the position of the athletes. This includes the capacity for the ISO to construct and carry out a human rights due diligence process to identify, prevent, mitigate and account for any human rights risk in relation to athletes. The due diligence process should be conducted in accordance with the principles enunciated in the UN Guiding Principles, including principles 17 to 21. This requires the due diligence process to be ongoing, draw on internal, external and independent human rights expertise and involve meaningful consultation with potentially affected groups. It should also include all internationally recognised human rights as a reference point. It would require a thorough review of the existing regulatory framework of ISOs.
3. Encouraging social dialogue and collective bargaining in sport, including through the development of free and democratic organisations to represent both athletes and the interests of the employers of athletes in connection with ISOs and MSEs.
4. Encouraging and facilitating mediation where the human rights of athletes may be perceived to have been breached, or in conflict with the specific needs of a sport.
5. Investigating allegations over the breach of the human rights of athletes including through inspections.

6. Assisting in the review and tailoring of sports-specific dispute resolution mechanisms to ensure they adequately handle and remedy human rights issues in relation to athletes and, in particular, in connection with ISOs and MSEs. Such a function could also sit independently within the MSE Centre.
7. Monitoring outcomes of cases involving athletes submitted to judicial and non-judicial grievance mechanisms where they have been invoked in connection with an ISO or a MSE, and build a knowledge base of such cases.
8. Acting as a forum for the promotion and exchange of best practice for ISOs, businesses, human rights bodies and other sports and human rights stakeholders in the operation of MSEs and commercial partnerships related to them, including in relation to the position of athletes in the context of MSEs.
9. Acting as a primary point of contact for expertise on remedy of the interface between sporting regulations, athletes' rights and international human rights standards.
10. Finally, the MSC Centre could assist ISOs in carrying out industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards.



Annex: Overview of the UN Guiding Principles on Business & Human Rights

The UN Guiding Principles on Business & Human Rights state that business should “respect” human rights, “avoid infringing on the human rights of others” and “address adverse human rights impacts with which they are involved. This responsibility “exists over and above compliance with national laws and regulations protecting human rights”.¹

Level of involvement and appropriate action

UN Guiding Principles 13 identifies three ways in which a company may be associated with a human rights issue: (1) by causing an adverse human rights impact; (2) by contributing to an adverse impact; or (2) being directly linked² to it. The actions that a company is expected to take will vary depending on which level of involvement applies (UN Guiding Principle 19).

| Involvement | Appropriate Action |
|---|---|
| Causing an adverse human rights impact | A company may “cause” an adverse human rights impact “through their own activities” (UNGP 13). Such companies are expected to try to “avoid” causing that impact and “address such impacts when they occur” (UNGP 13). This requires: <ul style="list-style-type: none"> • “Taking the necessary steps to cease or prevent the impact” (UNGP 19) • “Provide for or cooperate in their remediation through legitimate processes” (UNGP 22) |
| Contributing to an adverse human rights impact | A company may “contribute to” an adverse human rights impact “through their own activities” (UNGP 13). Such companies are expected to try to “avoid” that contribution and “address such impacts when they occur” (UNGP 13). This requires: |

1 UN Guiding Principle 11, p13.

2 The definition of “direct linkage” has proven difficult to apply in practice across a number of industries. The issue is discussed further in the context of the Broadcasting White Paper 3.2.

| | |
|---|--|
| | <ul style="list-style-type: none"> • “Taking the necessary steps to cease or prevent its contribution” (UNGP 19) • “Using its leverage to mitigate any remaining impact to the greatest extent possible” (UNGP 19) • “Provide for or cooperate in their remediation through legitimate processes” (UNGP 22) |
| <p>Impacts directly linked to a company’s operations, products, or services by a business relationship</p> | <p>A company’s operations, products, or services may be directly linked to an impact by a business relationship (UNGP 13). Such companies are expected to seek to “prevent or mitigate” the impact, “even if they have not contributed to those impacts” (UNGP). This requires:</p> <ul style="list-style-type: none"> • Using or increasing its leverage over the entity at cause to seek to prevent or mitigate the impact (UNGP 19). • Where directly linked, the responsibility to respect human rights does not require that the enterprise itself provide for remediation, “though it may take a role in doing so” (UNGP 22). <p>UNGP 19 commentary explains that this situation “is more complex”. In order to determine the “appropriate action”, companies should consider:</p> <ul style="list-style-type: none"> • “[Its] leverage over the entity concerned”. • “How crucial the relationship is”. • “The severity of the abuse”. • “Whether terminating the relationship ... would have adverse human rights consequences”. |

Meeting the Responsibility: Policies and Procedures

UN Guiding Principle 15 states that a company’s responsibility to respect human rights – whether involved through causing, contributing to, or being directly linked to an impact – should be met by having in place policies and processes, including:

- A **policy commitment** to meet their responsibility to respect human rights (elaborated on further in UN Guiding Principle 16);
- A **human rights due diligence** process to identify, prevent, mitigate and account for how they address their impacts on human rights (elaborated on further in UN Guiding Principles 17-21);
- Processes to enable the **remediation** of any adverse human rights impacts they cause or to which they contribute (elaborated on further in UN Guiding Principles 22 and 29-31).