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## UNHRC Resolution 26/9: Is a New International “Red Card” Enough to Keep FIFA and Others Accountable?

Griffin A. Clark

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# UNHRC Resolution 26/9: Is a New International “Red Card” Enough to Keep FIFA and Others Accountable?

Griffin A. Clark\*

## Abstract

*The lead-up to the 2022 FIFA World Cup in Qatar has generated significant controversy due to the host country's exploitative labor system and sub-standard human rights record. While FIFA has not remained completely insulated from criticism for its involvement, the sport's principal governing body has avoided all serious threats of liability for its connection to human rights violations associated with the 2022 World Cup. This immunity largely stems from limitations on domestic courts in adjudicating domestic corporations' foreign business activities. Yet, the ongoing development of a new treaty under the U.N. offers a different approach to liability for transnational business activities. Using U.N. Human Rights Council Resolution 26/9 and its proposed legally binding instrument as a new avenue for transnational corporate accountability, this Comment examines FIFA's liability for human rights violations in Qatar connected to the World Cup. Further, this Comment concludes that FIFA can be held liable in its domicile for its transnational business activities in Qatar. The organization's business relationship with Qatar, through the tournament, establishes a sufficient link to attach liability for the related human rights violations. Although questions persist as to exactly how this treaty will operate, it is apparent that FIFA's absolute immunity is fading. Finally, this Comment shifts away from the 2022 World Cup as a case study for liability and explores the practical implications of expanding corporate liability for FIFA and other transnational corporations' future business activities. The expansion of a hard law regime in this area raises issues surrounding the chilling of foreign investment by increasing compliance costs. While the appropriate balancing of these considerations is contentious, this Comment argues that, in FIFA's case, the expansion of transnational corporate liability likely will not produce significant adverse effects on its investment in developing countries through “the beautiful game.”*

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## I. INTRODUCTION

On December 2, 2010, Fédération Internationale de Football Association (FIFA) shocked fans around the world when it announced that Qatar had won the hosting rights to the 2022 FIFA World Cup (World Cup).<sup>1</sup> FIFA, the international governing body of soccer, is a nongovernmental organization (NGO) incorporated in Switzerland and comprised of a single member association from each participating country. FIFA's mission is to support the development and promotion of soccer.<sup>2</sup> In addition, FIFA awards, organizes, and implements the FIFA World Cup, a quadrennial international soccer tournament in which national teams from around the globe compete. Before FIFA awards World Cup hosting rights, however, it requires each country to submit a formal bid and hosting agreement to FIFA for evaluation.<sup>3</sup> When FIFA's Executive Committee voted to award the 2022 World Cup to Qatar, initial concerns about the integrity of the voting process bled into concerns about Qatar's ability to successfully host the tournament.<sup>4</sup> Now, it is well established that a corrupt bidding process influenced the 2022 World Cup host selection.<sup>5</sup> Yet, the purpose of this Comment is not to address FIFA's inadequate corporate governance structure that enabled corruption at the bidding stage; rather, this Comment seeks to evaluate a new avenue for liability for FIFA due to the organization's involvement in human rights violations in Qatar during the lead-up to the World Cup.

In order to host the 2022 World Cup, the Persian Gulf nation needed to construct significant infrastructure, including stadiums, hotels, and

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<sup>1</sup> See Press Release, FIFA, 2022 FIFA World Cup Awarded to Qatar (Dec. 2, 2010), <https://perma.cc/HF3Z-97LZ>.

<sup>2</sup> See Fédération Internationale de Football Association (FIFA), FIFA STATUTES 10 (June 2019), <https://perma.cc/6W6A-R35G> (adding that its objectives are to promote soccer "in light of its unifying, educational, cultural, and humanitarian values"). *But see* Rachael E. Bandeira, Note, *FIFA: For the Game or For-Profit?*, 51 *NEW ENG. L. REV.* 423, 423–24 (2017) (stressing that a breakdown of FIFA's expenses and revenues shows that the organization focuses on turning a profit rather than promoting social values through sport).

<sup>3</sup> See FIFA, 2022 FIFA WORLD CUP BID EVALUATION REPORT: QATAR 4–6 (2010), <https://perma.cc/8BWU-MVLL>.

<sup>4</sup> See Jere Longman, *Russia and Qatar Win World Cup Bids*, *N.Y. TIMES* (Dec. 2, 2010), <https://perma.cc/CR7G-X9N9> (pointing out that the U.S. lost despite having a "technically superior bid"); FIFA, EVALUATION REPORTS ON THE BIDS FOR THE 2018 AND 2022 FIFA WORLD CUP 9 (2010), <https://perma.cc/5DGN-YGZT> (denoting Qatar as the only bid to carry a "high" operational risk) [hereinafter EVALUATION REPORTS].

<sup>5</sup> See Tariq Panja & Kevin Draper, *U.S. Says FIFA Officials Were Bribed to Award World Cups to Russia and Qatar*, *N.Y. TIMES* (Apr. 6, 2020), <https://perma.cc/GMY6-C7EF> ("[R]epresentatives working for Russia and Qatar had bribed FIFA officials to secure hosting rights for the World Cup.").

transportation.<sup>6</sup> To satisfy the increased labor demand for large-scale infrastructure projects, Qatar has relied on migrant workers who have traditionally flocked from “South and South-East Asia, including Bangladesh, India, Indonesia, Nepal, Pakistan, the Philippines and Sri Lanka” to take advantage of promising economic opportunities outside of their own countries.<sup>7</sup> But Qatar’s grossly inadequate labor standards and exploitative *Kafala*—meaning sponsorship—system restricted worker freedoms and allowed employers to exert significant control over migrant laborers.<sup>8</sup> Issues such as inhumane working conditions, unpaid or late wages, and passport confiscation frequently plagued migrant workers in Qatar.<sup>9</sup> Although a facial distinction between legal and illegal practices exists with respect to Qatar’s labor system, in practice, the two coexist in an intertwined relationship that bars any meaningful line-drawing. For example, delayed or unpaid wages to workers are prohibited under Qatari law; however, weak labor protection laws, ineffective judicial oversight, and the *Kafala* system perpetuate these abuses by prioritizing employer control over migrant rights.<sup>10</sup> Although Qatar signed a technical agreement with the International Labour Organization (ILO) on November 8, 2017 to implement sweeping labor reforms throughout the country, recent reports suggest that the reforms have not fully addressed Qatar’s restrictive labor governance system.<sup>11</sup>

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<sup>6</sup> See FIFA, *supra* note 3, at 9 (“[T]he bid is largely based on projected generic and event-specific infrastructure.”).

<sup>7</sup> François Crépeau (Special Rapporteur on the human rights of migrants), *Report of the Special Rapporteur on the Human Rights of Migrants 4*, U.N. Doc. A/HRC/26/35/Add.1 (Apr. 23, 2014); AMNESTY INT’L, REALITY CHECK: THE STATE OF MIGRANT WORKERS RIGHTS WITH FOUR YEARS TO GO UNTIL THE QATAR 2022 WORLD CUP 5 (2019), <https://perma.cc/2HMB-2KHW> (noting that Qatar’s migrant worker population has increased since 2010 in part because of the construction boom in preparation for the World Cup) [hereinafter REALITY CHECK].

<sup>8</sup> See Paula Renkiewicz, Comment, *Sweat Makes the Grass Grow Greener: The Precarious Future of Qatar’s Migrant Workers in the Run up to the 2022 FIFA World Cup under the Kafala System and Recommendations for Effective Reform*, 65 AM. U. L. REV. 721, 733–34 (2016) (noting that the *Kafala* system serves as an employer sponsorship system for migrant workers in which the sponsor controls the workers’ ability to enter Qatar, transfer employment, and leave Qatar).

<sup>9</sup> See Michael B. Engle, Note, *A CN Tower over Qatar: An Analysis of the Use of Slave Labor in Preparation for the 2022 FIFA Men’s World Cup and How the European Court of Human Rights Can Stop It*, 32 HOFSTRA LAB. & EMP. L.J. 177, 181–84 (2014).

<sup>10</sup> See Law No. (14) of the Year 2004 – Qatar Labor Law art. 50 (requiring employers to pay earned wages to employees). See also François Crépeau, *supra* note 7 (“Exploitation [in Qatar] is frequent and migrants often work without pay and live in substandard conditions.”).

<sup>11</sup> Compare *Dismantling the Kafala System and Introducing a Minimum Wage Mark New Era for Qatar Labour Market*, INT’L LAB. ORG. (Aug. 30, 2020), <https://perma.cc/82JK-EXNC> (noting that Qatar’s recent labor reforms including eliminating the exit permit requirement and enabling greater employment mobility within the county), with *Qatar: Significant Labor and Kafala Reforms*, HUM. RTS. WATCH (Sept. 24, 2020, 8:00 AM), <https://perma.cc/VJ95-5LC3> (emphasizing that, even with the reforms, remaining factors such as the prohibition against unions for migrant workers facilitate labor abuse).

Due to the difficulty in obtaining accurate labor information from Qatar, the exact scope of migrant worker labor and human rights abuses is unknown. In June 2020, an investigative report by Amnesty International revealed that around 100 migrant workers at the Al Bayt World Cup Stadium project “had not been paid for up to seven months,” with the delays leading to “great hardship amongst the workers.”<sup>12</sup> Furthermore, an article published in 2019 in the periodical, *Cardiology*, examined the relationship between 571 cardiovascular-related deaths among Nepalese migrant laborers in Qatar from 2009 to 2017 and heat exposure from working outside on infrastructure projects during the same time period.<sup>13</sup> The researchers ultimately concluded that the dramatic increase in cardiovascular mortality rates during the summer among Nepalese migrant workers in Qatar “is most likely due to severe heat stress.”<sup>14</sup> During the summer months in Qatar, prolonged exposure to the heat while outdoors increases the risk of heat stress, especially for those engaging in physically demanding construction labor.<sup>15</sup> The article concluded that “as many as 200 [deaths] . . . could have been prevented if effective heat protection measures had been implemented.”<sup>16</sup> Thus, with the World Cup less than two years away, the issue of human rights violations in Qatar in connection to the tournament persists.

While some groups have made efforts to impose liability on FIFA in connection to World Cup human rights violations, no party has successfully litigated the issue in court.<sup>17</sup> Under current international law, FIFA’s activities are practically immune from liability claims. This is likely because international human rights law neither imposes an affirmative obligation on nations to police the foreign business activities of their domestic corporations nor mandates jurisdiction to hear these claims.<sup>18</sup> This immunity, however, may be short-lived; in 2014, the United Nations Human Rights Council (UNHRC) mandated the development of a legally binding instrument to regulate the business activities of

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<sup>12</sup> AMNESTY INT’L, REALITY CHECK 2020: COUNTDOWN TO THE 2022 WORLD CUP 28 (2020), <https://perma.cc/UPN8-NFMK>.

<sup>13</sup> Bandana Pradhan et al., *Heat Stress Impacts on Cardiac Mortality in Nepali Migrant Workers in Qatar*, 143 *CARDIOLOGY* 37, 37–48 (2019).

<sup>14</sup> *Id.* at 47.

<sup>15</sup> *See Qatar: Take Urgent Action to Protect Construction Workers*, HUM. RTS. WATCH (Sept. 17, 2017), <https://perma.cc/G7LJ-2QRW>.

<sup>16</sup> *Id.* *See also* AMNESTY INT’L, ALL WORK, NO PAY (2019), <https://perma.cc/39PB-8FXH>.

<sup>17</sup> *See* Press Release, FIFA, Swiss Court Rejects Labour Unions’ Claim against FIFA concerning Qatar 2022 (2017), <https://perma.cc/2A5Q-2KXC>.

<sup>18</sup> *See* U.N. OFFICE HIGH COMM’R, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS “PROTECT, RESPECT AND REMEDY” FRAMEWORK 3–4 (2011), <https://perma.cc/45JG-SPQR>.

transnational entities.<sup>19</sup> With the completion of the third draft version of the Transnational Corporate Liability Treaty (TCLT), the expansion of liability for transnational business activities may be on the horizon. FIFA will not be able to continue turning a blind eye to its involvement in the perpetuation of human rights and labor abuses in Qatar. Therefore, this Comment seeks to answer two questions: (1) Whether, under the UNHRC Resolution 26/9 and the proposed treaty, FIFA can be held liable for human rights violations in connection with the 2022 World Cup; and, if so, (2) whether expanding corporate liability under international law, as it relates to FIFA's involvement in the World Cup and other transnational corporate business activities, is a desirable outcome.

FIFA's liability for human rights violations from the World Cup raises broader implications for transnational corporations and their business activities. FIFA's situation is unique due to its pervasive involvement and control over almost every aspect of the World Cup. A typical transnational corporate business activity will likely involve far less investment, control, and oversight. Still, the application of the TCLT to FIFA provides a valuable framework for assessing how a transnational corporation may find itself subject to liability for its activities in a foreign nation. Expanding liability and access to remedies could affect all companies engaged in business activities in areas with sub-standard human rights protections. This places these entities at a crossroads—factor in the risk of liability as a cost of business, avoid the opportunity altogether, or mitigate the risk of human rights violations through greater internal governance and explicit bargaining with the associated sovereign. Using the 2022 World Cup in Qatar as a case study delineates the treaty's likely procedural and substantive effects while also providing valuable insight into how the TCLT could facilitate, or at least incentivize, behavioral changes among many transnational corporations.

In Section II, this Comment begins with an assessment of the current international framework for human rights and labor protections. Next, Section III introduces UNHRC Resolution 26/9 and the establishment of the Open-Ended Intergovernmental Working Group (OEIGWG). Section III also focuses on the OEIGWG's proposed legally binding instrument and how the instrument delineates a new framework for international corporate liability and human rights protections. Section IV then analyzes the nexus between FIFA, Qatar, and migrant workers in the lead up to the World Cup. The analysis centers on the contractual relationships between the three parties. Finally, Sections V, VI, and VII explore the viability of using the proposed treaty to impose liability on FIFA for the 2022 World Cup and the potential effects of the treaty's application.

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<sup>19</sup> See Human Rights Council Res. 26/9, U.N. Doc. A/HRC/Res/26/9, at 2 (June 26, 2014) (establishing a working group to develop the legally binding instrument) [hereinafter Human Rights Council Res. 26/9].

## II. THE RELEVANT INTERNATIONAL HUMAN RIGHTS FRAMEWORK

Facially, international law recognizes and purports to protect human rights through a myriad of multilateral treaties, conventions, and specialized intergovernmental agencies. The United Nations (U.N.) has fostered the development of this human rights framework by facilitating international cooperation toward a common understanding of certain rights. Yet, this cooperative framework is not perfect. Limitations on jurisdiction and nations' varying standards and degrees of implementation of safeguards have diminished accountability for entities engaging in transnational business activities that carry significant human rights risks. International cooperation toward the development of a consistent and effective system for preventing, eliminating, and punishing human rights violations is limited by considerations of territoriality and state sovereignty. States may wish to police their internal affairs in a manner different from others. Imposing a standardized adjudicatory framework infringes upon an individual state's right to regulate conduct occurring within its borders as it sees fit.

This Section assesses the current international framework for human rights and identifies gaps in the framework that hinder effective protection against violations occurring in the context of transnational business activities.

### A. U.N. Human Rights Council

In 2006, the U.N. established the UNHRC to serve as the world's intergovernmental entity for addressing and resolving human rights issues.<sup>20</sup> Buttressed by a broad mandate to promote "universal respect for the protection of all human rights," the Council's oversight extends to any human rights issue in any state.<sup>21</sup> The Council consists of forty-seven member states, each elected to three-year terms, that vote on the adoption of resolutions involving particular states, regions, or human rights issues. Notably, Qatar's seat expired on December 31, 2020, and Switzerland's seat expired in 2018. Council resolutions are significant expressions of political pressure by members but do not impose legal obligations upon any state. The Council's primary enforcement powers consist of "naming and/or shaming a State that is engaged in human rights abuses."<sup>22</sup> Although this process often places substantial compliance pressure on the

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<sup>20</sup> See Sarah Joseph & Eleanor Jenkin, *The United Nations Human Rights Council: Is the United States Right to Leave This Club*, 35 AM. U. INT'L REV. 75, 76 (2019) (adding that the Council replaced the U.N. Commission on Human Rights as the governing entity for human rights issues at the international level).

<sup>21</sup> G.A. Res. 60/251, ¶¶ 2, 5 (Apr. 3, 2006).

<sup>22</sup> See Joseph & Jenkin, *supra* note 20, at 83–84.

targeted state, the Council cannot legally bind the state to the Council's decisions. If a state refuses to cooperate and resolve these issues, the Council lacks enforcement capabilities.

Furthermore, critics have called into question the Council's effectiveness at addressing human rights issues. The Council's selectivity towards certain states and politicization of human rights issues to further national interests threaten to undermine the Council's overall credibility and effectiveness.<sup>23</sup> Qatar, a nation that has perpetuated human rights abuses against migrant laborers over the last decade, held a seat on the Council for the last three years, suggesting an acute hypocrisy between the Council's purported objectives and its members' individual national policies. These broader criticisms undermine the idea that the Council's general oversight is the appropriate mechanism for addressing human rights violations in the context of transnational business activities.

## B. International Labour Organization

Created in 1919 as a part of the Treaty of Versailles,<sup>24</sup> the International Labour Organization (ILO) is a specialized agency of the U.N. that works to promote internationally recognized labor rights. The tripartite organization brings together governments, employers, and workers' organizations to set labor standards and develop appropriate labor policies and programs.<sup>25</sup> The ILO Governing Body has passed eight fundamental conventions regarding principles and rights at work. Most notably, the Right to Organise and Collective Bargaining Convention guarantees protection against anti-union discrimination and ensures that employees are not subject to conditional employment based on union membership.<sup>26</sup> Further, the Protocol of 2014 to the Forced Labor Convention requires each state to develop a national policy to suppress forced or compulsory labor and protect migrant workers from possible abuses and fraudulent practices during the recruitment and placement process.<sup>27</sup> With these conventions and protocols, the ILO purports to promote an international commitment to labor protection and respect for all workers.

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<sup>23</sup> See *id.* at 103 (“States routinely direct excessive scrutiny at some countries, altogether ignore other abusers, and shield yet others from action.”).

<sup>24</sup> See, e.g., Treaty of Versailles, arts. 387–88, June 28, 1919.

<sup>25</sup> See *About the ILO*, INT'L LAB. ORG. (ILO), <https://perma.cc/C6EP-RPM7>.

<sup>26</sup> See ILO, Right to Organise and Collective Bargaining Convention art. 1, ILO Doc. CO/98 (July 1, 1949).

<sup>27</sup> See ILO, Protocol of 2014 to the Forced Labor Convention, 1930 art. 1, ILO Doc. PO/29 (June 11, 2014).

Yet, the ILO has received criticism for being ineffective in actually enforcing the standards it adopts.<sup>28</sup> For example, countries do not have to record and report to the ILO how they are implementing these standards.<sup>29</sup> Nations can also record certain reservations when adopting ILO Conventions.

In conjunction with setting labor standards and policies, the organization investigates complaints filed by member states, delegates of labor organizations, or the ILO Governing Body on its own motion. In this process, the ILO can establish an independent Commission of Inquiry to investigate complaints.<sup>30</sup> The ILO reserves this inquiry for the most serious and persistent labor violations. What constitutes serious and persistent labor violations is context-specific; for example, the most recent Commission of Inquiry investigated “acts of violence, other attacks, harassment, aggression . . . as well as interference by the authorities” against workers’ organizations in Venezuela.<sup>31</sup> Thus, the threshold for formal investigation by the Commission of Inquiry does not turn necessarily on the type of labor violations but rather on the scope and pervasiveness of the violations and associated government involvement—or lack thereof. If the Commission of Inquiry decides to take action, it may issue recommendations to remedy the labor violations in the offending country. In the event that the nation does not comply, the ILO Governing Body can ask the International Labor Conference—the annual meeting of governments’, workers’, and employers’ delegates that sets the ILO’s broader policies, adopts international labor standards, and discusses key “social and labour questions”<sup>32</sup>—to take measures against the non-compliant nation.<sup>33</sup> This action may result in member states taking direct action to force

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<sup>28</sup> See Alan Hyde, *The International Labor Organization in the Stag Hunt for Global Labor Rights*, 3 L. & ETHICS HUM. RTS. 153, 158 (noting that the ILO’s one attempt to impose sanctions on a country was largely ineffective).

<sup>29</sup> *Id.* at 158–59.

<sup>30</sup> See Constitution of the International Labour Organization, June 28, 1919, pmb1, 49 Stat. 2712, 2713–14, 225 Consol. T.S. 373 [hereinafter ILO Constitution].

<sup>31</sup> See REPORT OF THE COMMISSION OF INQUIRY APPOINTED UNDER ARTICLE 26 OF THE CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANIZATION TO EXAMINE THE OBSERVANCE BY THE GOVERNMENT OF THE BOLIVARIAN REPUBLIC OF VENEZUELA OF THE MINIMUM WAGE FIXING MACHINERY CONVENTION, 1928 (NO. 26), THE FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE CONVENTION, 1948 (NO. 87), AND THE TRIPARTITE CONSULTATION (INTERNATIONAL LABOUR STANDARDS) CONVENTION, 1976 (NO.144) 161–91 (2019), <https://perma.cc/ZHY6-478J>.

<sup>32</sup> *International Labour Conference*, ILO, <https://perma.cc/VZ58-4MNQ>.

<sup>33</sup> See ILO Constitution, *supra* note 30, art. 33 (highlighting that non-compliance with the Commission’s recommendations can lead to direct measures by member states against the offender).

compliance through state sanctions. To date, the ILO has only established thirteen Commissions of Inquiry.<sup>34</sup>

Although the ILO maintains avenues to address and resolve labor violations on the international stage, ensuring compliance among its members is an elusive goal. Moreover, the ILO deals directly with state actors, and often insufficient labor protections in states shield transnational entities that benefit from exploitative labor systems from liability. The perpetuation of labor violations at the corporate level is a natural result of inadequate or adverse labor policies at the national level. The absence of corporate accountability for transnational business activities means there are zero incentives for profit-maximizing firms to incur significant costs for implementing human rights protections in their transnational operations.

### III. LIABILITY FOR TRANSNATIONAL BUSINESS ACTIVITIES

The previous Section focuses on international human rights protections, such as obligations created by international treaties and intergovernmental organizations, and their interaction with state governments. These broader state obligations do not adequately translate to regulatory efforts at the corporate level; state sovereignty leads to inconsistencies in the implementation of domestic human rights protections and hinders effective compliance. A transnational corporation may choose to carry out a significant portion of its operations in a foreign nation that disregards compliance with certain labor standards and does not police human rights violations. If a corporation answers to no one for its actions within a country, it likely will not possess any incentive to restructure its business activities in that region. Increased oversight and compliance costs serve as a natural deterrent to organizational change at the corporate level. This Section examines recent efforts to align human rights protections at the national and corporate level, including the development of the Transnational Corporate Liability Treaty (TCLT) to govern this relationship.

#### A. U.N. Guiding Principles for Business and Human Rights

On July 6, 2011, the UNHRC officially endorsed the Guiding Principles for Business and Human Rights (GPs)—a non-binding framework to address the relationship between the corporate responsibility with respect to human rights and

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<sup>34</sup> More importantly, the Governing Body has invoked Article 33 only once in response to Myanmar's failure to take measures to end forced labor within its borders. *See Complaints*, ILO, <https://perma.cc/94KZ-UZ33>.

the state's duty to regulate these entities.<sup>35</sup> This framework responded to a growing concern that weak national legislation was inadequate to effectively regulate and prevent transnational corporations from adversely impacting human rights in vulnerable markets and economies.<sup>36</sup> Nations with deficient labor laws provided an exploitative opportunity for corporations seeking to profit off of these deficiencies and escape stronger regulatory scrutiny within their own domiciles. The GPs grew out of an earlier U.N. mandate to "identify and clarify" standards and practices across business and human rights stakeholders.<sup>37</sup> Yet, after the Council's official endorsement, the GPs gained an authoritative stamp and became the focal point for assessing the impacts that business activities can have on human rights. The GPs are based on three foundational pillars: (1) the state has a duty to protect against human rights abuses within its territory by third parties;<sup>38</sup> (2) business enterprises should avoid activities that negatively impact human rights and seek to mitigate these adverse effects;<sup>39</sup> and (3) the state must take appropriate action to ensure remedies are available to victims.<sup>40</sup> Using this foundation, the GPs expand upon the principles by providing policy and regulatory suggestions to operationalize the proposed framework. The GPs now serve as the widely accepted framework for evaluating the relationship between states, corporations, and human rights.<sup>41</sup>

Unfortunately, there are two significant impediments to achieving effective, wide-spread compliance with the GPs. First, the GPs are not legally binding. Rather, they serve as the foundational principles with which both states and business entities *should* structure their affairs. The corporate responsibility to respect human rights does not equate to an affirmative duty. As a result, states must create laws to regulate human rights effects within business activities, if desired.<sup>42</sup> Second, transnational corporate entities may avoid domestic enforcement because the state is unable or unwilling to regulate extraterritorial

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<sup>35</sup> Human Rights Council Res. 17/4, 2 (July 6, 2011) [hereinafter Human Rights Council Res. 17/4]. See John Ruggie (Special Representative of the Secretary-General), *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/17/31, at 2–4 (Mar. 21, 2011).

<sup>36</sup> See Human Rights Council Res. 17/4, *supra* note 35, at 1.

<sup>37</sup> See Ruggie, *supra* note 35, at 3 (noting that, in 2005, shared knowledge across business and human rights stakeholder groups was minute).

<sup>38</sup> See U.N. OFFICE HIGH COMM'R, *supra* note 18, at 4.

<sup>39</sup> See *id.* at 14.

<sup>40</sup> See *id.* at 17–18.

<sup>41</sup> See Larry Cata Backer, *Moving Forward The UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law That Might Bind Them All*, 38 FORDHAM INT'L L.J. 457, 458 (2015).

<sup>42</sup> See David Weissbrodt, *Human Rights Standards Concerning Transnational Corporations and Other Entities*, 23 MINN. J. INT'L L. 135, 154 (2014).

business activities.<sup>43</sup> The primary concern of a state in the regulation of overseas activities is the infringement upon another state's sovereignty. For example, the United States Supreme Court has expressed the view that unrestrained extraterritorial application of U.S. law "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs."<sup>44</sup> In the context of Qatari courts consistently failing to provide migrant laborers access to justice, a hands-off approach to foreign affairs can leave aggrieved, marginalized parties without adequate alternative forums in which to bring suit. To be sure, the presumption that foreign nations can adequately handle their own internal affairs is a correct one;<sup>45</sup> however, there is enough evidence to rebut that presumption in Qatar's.

## B. U.N. Human Rights Council Resolution 26/9

On July 14, 2014, the UNHRC passed Resolution 26/9 and took concrete steps toward ensuring adequate state protection of human rights in transnational business activities.<sup>46</sup> Resolution 26/9, although separate from the GPs, seeks to govern the same relationship between human rights, corporations, and the state as do the GPs. With this action, the Council acknowledged the important role that transnational corporations play in fostering economic well-being and investment in developing markets, while also calling attention to their potentially adverse impacts on human rights.<sup>47</sup> The mandate purported to take a firmer stance toward state responsibility for preventing and mitigating human rights violations. Thus, the Council called for the development of a legally binding instrument with the intention of imposing new, international legal obligations within this sphere.<sup>48</sup> This treaty, however, is not undermining the GPs. Rather, it is strengthening and improving the existing business and human rights responsibility framework at the international level—a move that the GPs actually emphasized in their third pillar, access to remedies.<sup>49</sup> By improving access to effective remedies, the treaty aims to

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<sup>43</sup> See *id.* at 484 (noting that practical issues such choice of law, statute of limitations, and standards of proof may hinder effective state enforcement).

<sup>44</sup> *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004). See also *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 824–27 (7th Cir. 2015) (refusing to apply U.S. antitrust laws to anticompetitive corporate behavior occurring overseas).

<sup>45</sup> *AU Optronics Corp.*, 775 F.3d at 824–25.

<sup>46</sup> Human Rights Council Res. 26/9, *supra* note 19.

<sup>47</sup> *Id.* at 2.

<sup>48</sup> *Id.* (establishing a working group to develop the legally binding instrument).

<sup>49</sup> See Emilio Rafael Izquierdo Miño (Chair-Rapporteur), *Report on the Fifth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, U.N. Doc. A/HRC/43/55 (Jan. 9, 2020).

achieve greater corporate accountability for associated injuries caused by business activities<sup>50</sup>

Under Resolution 26/9, the Council established the Open-Ended Intergovernmental Working Group on Transnational Corporation and Other Business Enterprises with Respect to Human Rights (Working Group). In the Working Group's fifth session report, the Chair-Rapporteur noted that most delegations stressed the necessity of a legally binding instrument at the international level, regardless of domestic developments in business and human rights laws.<sup>51</sup> Although a final treaty does not yet exist, the Working Group has engaged in significant negotiations with stakeholders during the drafting process, including commencement of its sixth session and the recent production of the second draft version of the TCLT. As it stands, the Working Group has submitted its report on the seventh session to the UNHRC and completed a third draft. The Working Group's progress provides a roadmap for how the new instrument will bolster state regulation of transnational business activities and affect parties such as FIFA.

The Working Group's proposed legally binding instrument, the TCLT, acknowledges both a corporate responsibility to prevent, mitigate, and address human rights abuses caused by the entity's business activities as well as the state's role in ensuring compliance.<sup>52</sup> The TCLT provides the framework for a more expansive liability regime for transnational corporations. Under Article I, the TCLT defines business activities as "any economic or other activity" by a natural or legal person, such as a corporation, joint venture, state-owned enterprise, or other business enterprise.<sup>53</sup> Additionally, transnational business activities are defined as business activities that extend across multiple states through planning, preparation, design, and/or implementation.<sup>54</sup> This determination focuses on the "nexus between the activity and the effect it generates."<sup>55</sup> The TCLT guarantees each individual the rights delineated in the Universal Declaration of Human Rights (UDHR) and ILO Conventions and Protocols.<sup>56</sup> These include the right to life,

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<sup>50</sup> See *id.* at 2.

<sup>51</sup> See *id.* at 4.

<sup>52</sup> OPEN-ENDED INTERGOVERNMENTAL WORKING GROUP, LEGALLY BINDING INSTRUMENT TO REGULATE, IN INTERNATIONAL LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES 2–3 (August 17, 2021), <https://perma.cc/82PJ-SLY7> [hereinafter OEIGWG].

<sup>53</sup> *Id.* art. 1.3.

<sup>54</sup> *Id.*

<sup>55</sup> OPEN-ENDED INTERGOVERNMENTAL WORKING GROUP, LEGALLY BINDING INSTRUMENT TO REGULATE, IN INTERNATIONAL LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES EXPLANATORY NOTES ¶ 6 (2020), <https://perma.cc/AZK4-3NSD>.

<sup>56</sup> OEIGWG, *supra* note 52, art. 3.

liberty, free movement, and association.<sup>57</sup> Moreover, the TCLT guarantees victims the right to access effective legal aid. States must ensure that cost barriers for victims bringing a claim are not prohibitive and that the courts do not use the doctrine of *forum non conveniens* to dismiss relevant claims.<sup>58</sup>

In addition to ensuring fair access to the judicial system, the TCLT delineates broader adjudicative jurisdiction for domestic courts. This addresses concerns involving enforcement limitations on transnational business activities occurring in foreign nations. This expansion opens the door for domestic courts to adjudicate some foreign business activities carried out by domiciled corporations. Under this treaty, jurisdiction to hear claims will vest in the courts of the states where: (1) the human rights abuses occurred; (2) an act or omission contributing to the abuses occurred; or (3) the domiciliary of the legal or natural person alleged to have contributed or caused the human rights abuse in the context of business activities is located.<sup>59</sup>

The jurisdiction provision raises one of the most important lines of analysis for the treaty. Victims can circumvent foreign judicial systems in regions where human rights abuses are prevalent and bring claims in the transnational corporation's domicile.<sup>60</sup> Overall, the TCLT places an affirmative obligation on states to carve out legal protection for human rights victims in the context of transnational business activities. The corporate responsibility to respect human rights looks more like a corporate duty, with external consequences for noncompliance. In contrast to the UNHRC and ILO's national-level approach to protecting human rights, the TCLT directly regulates the relationship between corporations and victims of human rights violations.

Hurdles to the treaty's effectiveness still exist. States may not want to adopt a treaty that involves adjudicating claims occurring in a different nation, citing scarcity of domestic judicial resources or evidentiary issues. States may also exhibit bias against foreign victims bringing suit in domestic courts, and an economic incentive to protect a state's domiciled corporations from suits originating outside its borders may minimize judgements in favor of the victims. To align these sovereign interests and overcome any hurdles, signatories must police each other during the treaty's implementation and operation. As international law advances

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* For more information on the doctrine of *forum non conveniens*, see Jeffrey E. Baldwin, *International Human Rights Plaintiffs and the Doctrine of Forum Non Conveniens*, 40 CORNELL INT'L L.J. 749, 754–56 (2007).

<sup>59</sup> OEIGWG, *supra* note 52, art. 9.

<sup>60</sup> It is important to note that the jurisdiction provision raises questions about potential strategic gamesmanship by FIFA or other corporations. For example, FIFA could establish a subsidiary corporation in a country that is not a signatory to this treaty and escape liability. At this point, it is unclear whether courts would impute the subsidiary's liability to the parent organization in light of the obvious, evasive tactics.

toward a new reality, an important question persists: How does FIFA fit into this framework?

#### IV. THE WORLD CUP-RELATED RELATIONSHIP BETWEEN FIFA, QATAR, AND MIGRANT WORKERS

##### A. FIFA's Contractual Relationship with Qatar

Although the exact details of the agreement between FIFA and Qatar to host the World Cup are not publicly available, the contractual, business relationship between the two entities consists of three parts: (1) the tournament bidding and selection process; (2) the stadium agreements between FIFA and Qatar; and (3) the government guarantees granted to FIFA. Furthermore, the implementation of the hosting agreement in prior World Cups helps illustrate commonalities in FIFA's involvement with the tournament.

At the beginning of the tournament bidding process, each nation submits a formal bid to FIFA to receive the coveted hosting rights. At this stage, FIFA evaluates the feasibility of hosting the World Cup in that country before making a final selection.<sup>61</sup> This selection results in a legally binding contract between FIFA and the winning bidder.<sup>62</sup> In the present case, FIFA has worked with Qatar's Local Organising Committee (LOC) and the Supreme Committee for Delivery & Legacy (SC) to execute the agreements between host cities and private authorities for tournament-related infrastructure.<sup>63</sup> In order to host the World Cup, FIFA requires the host nation to satisfy substantial hosting prerequisites.<sup>64</sup> For example, for the 2014 World Cup in Brazil, FIFA received eleven guarantees from the Brazilian government in order for Brazil to host the World Cup. Brazil codified these guarantees into law as the *Lei Geral da Copa*, meaning World Cup Law, and provided legal protections and benefits to FIFA and its corporate partners during the World Cup.<sup>65</sup> The guarantees included tax exemptions for FIFA and its

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<sup>61</sup> See FIFA, FIFA REGULATIONS FOR THE SELECTION OF THE VENUE FOR THE FINAL COMPETITION OF THE 2026 FIFA WORLD CUP 26–41, <https://perma.cc/43ZR-HF9E>. See also Abby M. Henderson, Comment, *Mega Sporting Events Procedures and Human Rights: Developing an Inclusive Framework*, 41 AM. INDIAN L. REV. 367, 370 (2017) (pointing out that the bidding process for the World Cup is much less methodical and formal compared to the International Olympic Committee's process).

<sup>62</sup> See JOHN RUGGIE, "FOR THE GAME AND FOR THE WORLD." FIFA & HUMAN RIGHTS 18 (2016), <https://perma.cc/N9FU-FW2Q>.

<sup>63</sup> See *id.* at 18 (2016). See also *Supreme Committee for Delivery & Legacy*, FIFA, <https://perma.cc/Y77S-C7P5> (stating that the Supreme Committee for Delivery and Legacy (SC) will be responsible for ensuring the delivery of essential tournament infrastructure and service for the World Cup).

<sup>64</sup> See FIFA, *supra* note 3, at 3 (noting that the evaluation report assesses the extent to which the country has or will meet FIFA's World Cup hosting requirements).

<sup>65</sup> Lei. No. 12.633, de 5 de junho de 2012, Diário Oficial da União [D.O.U.] de 6.6.2012 (Braz.).

partners, Brazil's assumption of civil liability ahead of FIFA for damages related to the event, and an assurance that Brazil would be able to establish special adjudicatory courts for World Cup-related matters.<sup>66</sup>

FIFA's demands in Qatar's case are no different. Before Qatar could host the World Cup, the country needed to construct nine stadiums and improve three existing ones; this is in addition to the accompanying transportation and hospitality infrastructure needed to support the influx of fans from around the world.<sup>67</sup> The awarding of the World Cup to Qatar was contractually predicated on Qatar meeting the requisite hosting demands.<sup>68</sup> By itself, the pressure to host the mega-event and meet FIFA's demands can create adverse incentives to cut corners.<sup>69</sup> This pressure, in return, increases the risk of human rights violations in these projects.

Moreover, FIFA and the LOC enter into stadium agreements for each stadium. These agreements lay out the specific contractual relationship between FIFA and the stadium authorities.<sup>70</sup> For stadiums requiring full development or improvements, FIFA retains the right to monitor the operation's progress and has the final say on the completion of the project for World Cup purposes.<sup>71</sup> These stadium agreements must also meet strict and ambitious technical requirements for seating capacity and spacing.<sup>72</sup> Not only does FIFA have strict requirements

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<sup>66</sup> See Sarah Longhofer, Note, *Contracting Away Sovereignty: The Case of Brazil, FIFA, and the Agreement for the Right to Host the 2014 World Cup*, 23 *TRANSNAT'L L. & CONTEMP. PROBS.* 147, 155–59 (2014) (emphasizing that, collectively, these laws have “put Brazil in the position of having, by agreement, giving away its rights as a sovereign”). These laws are clear evidence of FIFA's ability to generate favorable conditions in exchange for World Cup rights. Interestingly, FIFA was able to secure these guarantees even though Brazil was the only nation to submit a formal bid. This result appears to be completely at odds with the notion that the parties would have had equal bargaining power during the selection process. *Id.* at 156.

<sup>67</sup> See FIFA, *supra* note 3, at 13–14. See also *Qatar Spending \$500m a Week on World Cup Infrastructure Projects*, BBC (Feb. 8, 2017), <https://perma.cc/REN4-626J> (“More than \$200,000,000,000 (£160,000,000,000) will be spent in total by the gas-rich emirate.”).

<sup>68</sup> See Azadeh Erfani, Comment, *Kicking Away Responsibility: FIFA's Role in Response to Migrant Worker Abuses in Qatar's 2022 World Cup*, 22 *JEFFREY S. MOORAD SPORTS L.J.* 623, 632–33 (2015) (“The pressure to create the infrastructure of the magnitude of the World Cup is costly across the board.”).

<sup>69</sup> See Henderson, *supra* note 61, at 368.

<sup>70</sup> See, e.g., *STADIUM AGREEMENT COVER BETWEEN FIFA, LOC, AND STADIUM AUTHORITY* (2021), <https://perma.cc/U63K-PYUY>.

<sup>71</sup> See *id.* at 10–11.

<sup>72</sup> See *id.* at 17, 25–26 (requiring forty-thousand capacity stadiums for the group stage and subsequent rounds, sixty thousand capacity stadiums for the semi-final matches, and eighty thousand for the opening and final match). See also FIFA, *INSPECTION REPORT FOR THE 2014 FIFA WORLD CUP* 38 (Oct. 30, 2007) (estimating that one billion dollars would be required to complete the necessary stadium developments for the tournament).

for these venues, it also exerts considerable pressure on the host country to satisfy its contractual demands.<sup>73</sup>

These stadium requirements make sense. Host nations see a massive influx of tourists from all over the world to watch the World Cup. Ensuring that the venues are up to par for the tournament is understandable. Yet, an issue arises when FIFA—as a controlling party to these agreements—fails to ensure the work on these developments meets adequate labor standards and instead shifts the blame for these violations onto the host nation. FIFA cannot take a vested, controlling interest in the stadium developments and, simultaneously, evade any responsibility for persistent labor and human rights violations occurring at these sites.

One likely consequence of requiring higher labor standards for host nations such as Qatar is the increased cost of monitoring and compliance. It is unclear whether these expense increases for host nations would make future World Cups cost prohibitive for certain countries. For Qatar, this almost certainly is not the case. With the nation spending almost \$500 million each week on World Cup infrastructure projects, it is difficult to argue that increases in labor compliance and monitoring costs would inflict financial hardship relative to its current expenditures.<sup>74</sup> Even for countries incapable of bearing these increased costs in exchange for hosting the World Cup, the prohibitive effect of this tradeoff is arguably a normatively desirable outcome. Should a country that cannot implement higher labor standards and compliance mechanisms due to concerns over cost even undertake the already-costly process of hosting a World Cup? The nation's time and resources may provide greater, long-term benefits to the country if applied to something other than a soccer tournament.

Finally, Qatar's exchange with FIFA of favorable government guarantees for hosting rights, akin to that between FIFA and Brazil, suspiciously resembles a quid pro quo.<sup>75</sup> FIFA has pushed for considerable legal exemptions and guarantees for it and its corporate partners during the 2022 World Cup. This includes commercial exclusivity zones around the stadium, substantial tax breaks, and absolute control over ticket pricing and sales.<sup>76</sup> For example, Qatar has already guaranteed a corporate tax exemption for FIFA and its corporate partners during the

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<sup>73</sup> See Longhofer, *supra* note 66, at 163 (noting that tensions arose between FIFA and Brazil over the pace of construction for World Cup infrastructure).

<sup>74</sup> BBC, *supra* note 67.

<sup>75</sup> See Ian Pollock, *World Cup: To Tax or Not to Tax?*, BBC (May 11, 2010), <https://perma.cc/T8Q7-SJVQ> (suggesting that a successful bid is predicated on tax exemptions for FIFA and its partners).

<sup>76</sup> See Longhofer, *supra* note 66, at 160, 163–66 (“[T]he hosting agreement has the effect of changing Brazil's relationship with its own laws.”).

implementation of the World Cup and related activities.<sup>77</sup> Therefore, the stadiums serve as an important point of control and revenue driver for the event. From the awarding of the tournament to the final match, FIFA takes a hands-on approach to the World Cup; Qatar 2022 is no exception.

## B. Migrant Workers, the World Cup, and Who's to Blame?

Due to Qatar's small labor force, the nation has relied on migrant workers to construct the requisite infrastructure for the World Cup.<sup>78</sup> Unfortunately, Qatar's grossly inadequate labor standards and exploitative employee sponsorship system has perpetuated human rights violations against these laborers.

Prior to recent reform efforts, Qatar's *Kafala* system severely restricted the mobility of workers through employee work sponsorship.<sup>79</sup> The sponsorship system aided in the perpetuation of human rights abuses, such as forced labor, unpaid or delayed wages, inhumane working conditions, and prohibitively expensive recruitment fees that inevitably led to unpayable debts.<sup>80</sup> Although the system has undergone significant changes in the last two years in response to serious international pressure, reform efforts have failed to eliminate the risk of migrant worker abuses and rectify past abuses.<sup>81</sup> While these labor abuses are largely prohibited under Qatari law, the sponsorship and judicial systems do not afford adequate protection and remedies for these violations.<sup>82</sup> This is primarily because a lack of enforcement fosters poor labor accountability, and the current labor system provides little incentive for Qatari nationals, the beneficiaries of this labor, to advocate for reform.<sup>83</sup>

In reality, Qatar only modified existing labor laws due to pressure from the ILO.<sup>84</sup> The ILO focused on reforming five labor issues in Qatar: (1) minimum

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<sup>77</sup> See *Qatar: Concessionary Statement of Practice for Specific Entities Involved in FIFA Competitions*, PwC (Dec. 30, 2019), <https://perma.cc/D4PJ-4Y83>.

<sup>78</sup> See Erfani, *supra* note 68, at 22 (“Qatar will rely on the labor of approximately one million foreign laborers to build the stadiums and infrastructure necessary to hold the World Cup.”).

<sup>79</sup> See Renkiewicz, *supra* note 8, at 728–30.

<sup>80</sup> See HUM. RTS. WATCH, “HOW CAN WE WORK WITHOUT WAGES?,” 38–45 (2020), <https://perma.cc/G2XY-UYL9>; Pete Pattison, *Revealed: Qatar's World Cup 'Slaves'*, GUARDIAN (Sept. 25, 2013, 12:46 AM), <https://perma.cc/AUA3-M5KY>.

<sup>81</sup> See *Qatar: Reform Efforts Fail to Remedy Rights Abuses*, HUM. RTS. WATCH (Jan. 14, 2020). *But see* Press Release, ILO, Dismantling the Kafala System and Introducing a Minimum Wage Mark New Era for Qatar Labour Market (Aug. 30, 2020), <https://perma.cc/W34L-BDYR>.

<sup>82</sup> See Erfani, *supra* note 68, at 635–36.

<sup>83</sup> See *id.*

<sup>84</sup> See ILO, Complaint Concerning Non-Observance of the Forced Labour Convention, 1930 (No. 29), and the Labour Inspection Convention, 1947 (No. 81) 1–3, ILO Doc. GB.331/INS/13(Rev.) (Oct. 31, 2017); Press Release, ILO, ILO Governing Body Welcomes Qatar's Commitment to Bolster Migrant Workers Rights (Nov. 8, 2017), <https://perma.cc/B4YN-J5EH>.

wage, (2) the *Kafala* system, (3) forced labor, (4) labor inspections, and (5) access to justice.<sup>85</sup> For example, Qatar eliminated the exit visa requirement and the No Objection Certificate—a certificate granted by the employer and required before a worker could switch jobs before the end of the employment contract.<sup>86</sup> Even though issues with implementation and enforcement have plagued the effectiveness of these reforms, these labor changes suggest that external pressure can be a driver of reform in Qatar. This point is especially relevant when the external actor maintains significant economic leverage and political bargaining power over Qatar.

Despite, Qatar still does not allow non-nationals to form labor unions, a fundamental worker's right under the ILO Freedom of Association and Protection of the Right to Organise Convention.<sup>87</sup> Qatar's unionization-related reservation to this Convention reveals existing tension between the ILO's objectives and Qatar's desire to maintain some control over its labor force. This restriction is especially damaging in a nation where migrant workers struggle to access effective remedies through the domestic court system. Without avenues for redress or unionization, laborers are in a distinctly disadvantageous position when faced with violations of their rights. Thus, human rights abuses in Qatar have gone unchecked due to a lack of necessary internal and external safeguards.<sup>88</sup>

The current international legal framework has completely shielded FIFA from any liability in connection with both migrant worker abuses in Qatar and the World Cup. FIFA initially emphasized that it believed the monitoring and prevention of human rights violations should be left to Qatar.<sup>89</sup> This refusal to take responsibility is quite bold given the nexus between FIFA's substantial involvement in the implementation of the World Cup and the ensuing human rights abuses in Qatar. In recent years, FIFA has taken proactive steps toward accepting its role and responsibility to prevent human rights abuses within the context of its business activities. These steps include recognizing the GPs in 2015, issuing a statement in 2015 that it would require a commissioned, independent study on human rights risk by the bidding country in its formal bid for future

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<sup>85</sup> See *Overview of Qatar's Achievements Supported by the ILO*, ILO, <https://perma.cc/4KE4-MYH2>.

<sup>86</sup> See Press Release, ILO, ILO Governing Body Welcomes Qatar's Commitment to Bolster Migrant Workers Rights (Nov. 8, 2017), <https://perma.cc/B4YN-J5EH>.

<sup>87</sup> ILO, Freedom of Association and Protection of the Right to Organise Convention art. 2, Doc. CO/87 (July 9, 1948); REALITY CHECK, *supra* note 7 (pointing out that when Qatar ratified two important human rights treaties, it entered a reservation disallowing migrant workers to unionize).

<sup>88</sup> For an extensive investigation into migrant worker abuses on Qatar World Cup projects, see Pattison, *supra* note 80.

<sup>89</sup> See Erfani, *supra* note 68 (stressing that FIFA initially did not acknowledge any responsibility for the abuses in Qatar).

World Cups, and adopting human rights clauses in its governing statutes in 2016.<sup>90</sup> In response to criticism over Qatar’s labor and human rights track record, FIFA established the Human Rights Advisory Board (Board) to provide recommendations to FIFA for addressing human rights issues. In a recent report, the Board acknowledged FIFA’s responsibility for the human rights impacts in Qatar and provided recommendations to FIFA for minimizing negative effects on workers, including for the 2022 World Cup.<sup>91</sup> These recommendations included the “creation of a shared set of labor standards across all construction projects in [Qatar]” and support for a “discussion involving all the key actors in the construction sector in Qatar.”<sup>92</sup> Yet, both recommendations lack any meaningful substance.

Even if FIFA had convinced Qatar to establish uniform labor standards across all construction projects, consistent failures to fully enforce labor standards would have left workers in the same helpless position. For example, a recent audit by the Supreme Committee (SC) demonstrated “ongoing compliance issues among contractors” related to working and living conditions of contracted workers.<sup>93</sup> Moreover, an investigative report by Amnesty International in June 2020 detailed around 100 instances of migrant workers on World Cup stadium projects not receiving wages for up to seven months.<sup>94</sup> In this instance, FIFA claims it was not aware of these violations until Amnesty International brought it to the SC’s attention, showing a disconnect between FIFA’s policy statements and actions.<sup>95</sup> FIFA’s internal recommendations to support conversations about worker reform in Qatar appear superficial, as evidenced by the continual flow of reports surrounding labor violations connected to the World Cup.

Although these oversight mechanisms signal a positive change, it is unclear whether this *ex ante* approach is sufficient to address the totality of risks associated with these mega-events. When awarding the World Cup, FIFA’s disproportionate bargaining power and immense influence place it in a position to both prevent human rights abuses and face liability for a failure to do so. On the surface, FIFA masquerades as a pioneer for human rights protections and reform in Qatar;

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<sup>90</sup> See RUGGIE, *supra* note 62, at 17; ERGON, INDEPENDENT REPORT: HUMAN RIGHTS IN CANADA, MEXICO, AND THE USA IN THE CONTEXT OF A POTENTIAL FIFA 2026 WORLD CUP COMPETITION 2 (2018), <https://perma.cc/C2XK-SJS8>.

<sup>91</sup> See FIFA HUM. RTS. ADVISORY BD., THIRD REPORT BY THE FIFA HUMAN RIGHTS ADVISORY BOARD 9–10 (2019), <https://perma.cc/944E-5F8E> (“The strategy represents the first time that FIFA has clearly articulated its responsibility in connection with impacts that are linked to the construction and operation of FWC stadia and facilities.”).

<sup>92</sup> *Id.* at 10.

<sup>93</sup> AMNESTY INT’L, *supra* note 12, at 27 (2020).

<sup>94</sup> “I Have Worked Hard – I Deserve to be Paid” *Exploitation on Qatar World Cup Stadium*, AMNESTY INT’L (June 10, 2020), <https://perma.cc/922K-YFUT>.

<sup>95</sup> See AMNESTY INT’L, *supra* note 12, at 29.

however, no one can hold the organization liable under current international law and it enjoys protection from any claims arising from its own business activities. FIFA's human rights track record for the World Cup does not align with its published human rights policies, the same policies that invoke fundamental, international human rights treaties.<sup>96</sup> To deter absolute hypocrisy, "any organization that willingly commits itself to human rights and claims to operate within the international legal framework must be held fully accountable by the states within which it operates."<sup>97</sup>

## V. FIFA AS THE BEST PROBLEM SOLVER

This Section argues that, due to FIFA's powerful bargaining position when deciding to award a World Cup, the organization has a unique duty to mitigate and prevent human rights abuses arising out of its business activities in connection with the tournament. Yet, without adequate incentives to alter FIFA's behavior, the organization's positional advantage remains unused.

### A. FIFA's Positional Advantage

Each of the aforementioned elements places FIFA in a uniquely powerful position to prevent and rectify the adverse human rights impacts associated with its operations. The organization's consistent failure to do so suggests a stronger liability regime is necessary to incentivize more effective safeguards and achieve actual accountability through victim redress.

The World Cup infrastructure developments often entail labor-intensive projects that carry a substantial risk for human rights violations within FIFA's network of contractors and subcontractors.<sup>98</sup> These risks are often exacerbated by pressures to finish the projects on time.<sup>99</sup> Without the stadiums, for example, there can be no World Cup. It is no surprise that host countries fail to adequately protect human rights during these periods, especially considering that these negative effects "disproportionately impact minority, impoverished, and indigenous populations."<sup>100</sup> As a repeat player, FIFA should possess a deep understanding of certain recurring human rights risks inherent in a World Cup bid, primarily labor rights implicated in large-scale World Cup infrastructure projects, and foresee the

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<sup>96</sup> See Haley Ferguson, *Sporting Institutions Turned a Blind Eye to China's Human Rights Abuses, But They Have Potential to Drive Global Change*, 24 HUM. RTS. BRIEF 109, 111 (2020).

<sup>97</sup> *Id.*

<sup>98</sup> See RUGGIE, *supra* note 62, at 22–23.

<sup>99</sup> See *id.* at 22.

<sup>100</sup> Henderson, *supra* note 61, at 368.

likelihood that its actions will contribute to these abuses.<sup>101</sup> When a complete World Cup bid is contingent on new stadium developments or improvements, a consistent theme in the 2010, 2014, and 2018 World Cups, labor rights inevitably come into play. If used appropriately, FIFA's expertise and insights can prove valuable in reducing or eliminating these social costs. Evidence of social costs, however, are often overshadowed by the purported benefits of hosting the World Cup. In many ways, the perceived benefits of the World Cup mask the inevitable social costs associated with this mega-event.

Even so, short and long-term economic benefits from hosting a World Cup are debatable. Nations incur heavy expenditures when putting on the tournament. But why? Bidding countries tout the creation of jobs and a sharp increase in output to arouse public support for their bids.<sup>102</sup> These claims, typically bolstered by a commissioned *ex ante* consulting report, run contrary to *ex post* economic studies finding that, in most cases, there is "no statistically significant effect on employment or income" stemming from a World Cup.<sup>103</sup> Even more troubling is the idea that countries will incur significant opportunity costs by spending money on stadiums that could go to other, more pressing infrastructure needs.<sup>104</sup> In the long-term, however, host countries may stand to benefit from the "positive residue of . . . a handful of constructive infrastructure investments," potential positive psychological effects on citizens of the host country, and improved international perception.<sup>105</sup> Regardless, the exact reasons countries use to justify hosting a tournament only matter to a certain extent. Countries still line up to submit bids for future tournaments, and FIFA gladly welcomes this competition.

Due, in part, to the perceived tangible and intangible short-term and long-term economic benefits derived from hosting the tournament, countries often engage in a race to the bottom, competing to offer increasingly favorable terms in order to influence FIFA's selection.<sup>106</sup> This relationship stands to benefit FIFA because it owns a monopoly on the hosting rights. Many bids include favorable commercial exclusivity deals for FIFA and its partners; in advance of the 2010 World Cup, for example, FIFA required Brazil to alter its laws to allow alcohol consumption in stadiums for the World Cup in order to benefit FIFA's corporate

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<sup>101</sup> See *id.* at 401 (discussing how FIFA should have foreseen the infrastructure developments in Brazil—a country that is no stranger to political corruption—would give rise to human rights violations for workers).

<sup>102</sup> See ANDREW S. ZIMBALIST, *CIRCUS MAXIMUS* 35 (2016).

<sup>103</sup> *Id.* at 40–43.

<sup>104</sup> See *id.* at 73–74. It is important to note that countries with pre-existing stadium infrastructure will likely not bear the same degree of long-term costs associated with these projects.

<sup>105</sup> *Id.* at 57–58, 69.

<sup>106</sup> See Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 268–70 (1997) (noting that the relationship between the needs of the government and the capabilities of the NGO create a "political supply and demand").

partners who were supplying alcohol at the event.<sup>107</sup> The considerable influence of the organization on host countries cannot be ignored. FIFA can clearly take proactive steps to utilize its unique leverage to aggressively bargain for more favorable human rights protections as it relates to the World Cup.<sup>108</sup>

As history shows, however, FIFA has largely used its influence to secure profitable deals for itself and to offload any tournament liability risk. Admittedly, FIFA has taken concrete steps to implement procedural safeguards and has acknowledged its responsibility in preventing human rights abuses.<sup>109</sup> The organization officially adopted the GPs and added a human rights assessment to its bidding criteria. FIFA's adoption of the GPs represents the organization's recognition of its role in human rights but has not aided the organization's transition from recognition to action, with reports of unpaid wages, forced labor, and extortionary recruitment fees still arising out of Qatar in the last year.<sup>110</sup> While these steps signal a positive change within the organization, these internal mechanisms may require additional support from external pressures to create effective internal change.<sup>111</sup> A greater threat of external liability for FIFA due to the organization's failure to protect human rights within its activities may lead FIFA to include contractual terms that better respect human rights or to leverage its position with LOCs to induce the host government to fulfill its obligation to respect human rights.<sup>112</sup> In this way, external liability can serve as a natural incentive for FIFA to restructure its World Cup activities to minimize adverse human rights impacts.

This positional advantage warrants consideration when applied more broadly to corporations investing in projects in foreign nations. At the outset, a firm that wishes to invest substantial capital into a foreign market likely has multiple options. Therefore, attractive benefits of increased economic investment open the door for negotiations over human rights protections and guarantees between the firm and sovereign. Different localities can function as a competitive

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<sup>107</sup> See Lei. No. 12.633 art. 3–10, de 5 de Junho de 2012, Diário Oficial da União [D.O.U.] de 6.6.2012 (Braz.); Henderson, *supra* note 61, at 403.

<sup>108</sup> FIFA certainly can bargain for broader guarantees beyond the scope of the World Cup. This idea, however, is outside of the scope of this Comment but should not be ignored.

<sup>109</sup> It is important to note that FIFA's ability to assess these risks is entirely undermined in a corrupted bidding process. The lack of financial integrity at the outset can influence operational risks at later stages. See RUGGIE, *supra* note 62, at 21.

<sup>110</sup> See HUM. RTS. WATCH, *supra* note 80, at 34–45.

<sup>111</sup> See Bruce W. Bean, *The Perfect Crime? FIFA and the Absence of Accountability in Switzerland*, 32 MD. J. INT'L L. 68, 124–25 (2017) (questioning whether internal mechanisms for enacting change can be effective in an organization with a “culture or equilibrium of corruption [that] pervades the entire FIFA ecosystem”).

<sup>112</sup> See RUGGIE, *supra* note 62, at 32–33.

market; sovereigns may guarantee these protections to not lose out on a valuable investment opportunity for its economy.

## B. The Current Absence of Accountability Back Home

Because FIFA is incorporated in Switzerland, the association is subject to Swiss laws and the Swiss judicial system. Swiss law offers little regulatory oversight for FIFA and has allowed FIFA to enjoy a “century of corruption” under the “unique, protective culture of Swiss hospitality to sports crime.”<sup>113</sup> Moreover, Switzerland is hesitant to take any concrete actions against FIFA due to the “economic significance” international sports organizations have within the country’s economy.<sup>114</sup> Thus, the lack of accountability has affected FIFA’s approach to the World Cup. Because FIFA’s stakeholders, such as fans, teams, and sponsors, have yet to effectively apply pressure on the organization to reform, FIFA conforms only to the wishes of its own directors.<sup>115</sup> The decades of organizational corruption and scandals without meaningful reform bolster this proposition.<sup>116</sup>

External accountability has not successfully influenced FIFA’s actions. This insulation illuminates a particularly troubling aspect of FIFA’s role as a “supra-national institution.”<sup>117</sup> It can impose its will on other sovereigns without significant pushback for its own actions. Without strong governmental accountability, the public at large must rely on FIFA’s goodwill implemented through its own internal corporate governance to avoid, prevent, and remedy the negative effects of its decisions. But without the consistent threat of external accountability, FIFA has not shown a willingness to enact organizational change on its own. Although FIFA’s responsibility to address human rights issues “exists independently”<sup>118</sup> from the Swiss government’s willingness to uphold its own “primary obligation to respect, protect, and fulfill human rights,” a supervening international treaty may break the mutually beneficial stalemate and spur action on both sides.<sup>119</sup>

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<sup>113</sup> Bean, *supra* note 111, at 80. For more information on Switzerland’s “implicit complicity,” see *id.* at 120.

<sup>114</sup> Switzerland is home to at least sixty-five international sporting associations that contribute, in aggregate, over one billion dollars to the economy. See *id.* at 120.

<sup>115</sup> See *id.* at 84 (noting that FIFA is not accountable to its stakeholders because “there is no obvious means of doing so”).

<sup>116</sup> See *id.* at 107.

<sup>117</sup> *Id.* at 108–09.

<sup>118</sup> RUGGIE, *supra* note 62, at 36.

<sup>119</sup> *Id.* (adding that the social expectation of FIFA is greater accountability and transparency).

## VI. A NEW AVENUE FOR ACCOUNTABILITY

Because FIFA falls under the purview of the TCLT created via Resolution 26/9, it is liable for failing to adequately fulfill its duty. Without the threat of actual liability, FIFA does not have any incentive to ensure that these abuses do not persist. Its contractual relationship with host countries has kept the organization's foreign business activities away from the extraterritorial reach of Swiss courts, assuming Swiss courts possess the desire to exercise jurisdiction in the first place, which appears unlikely given Switzerland's history of complicity with FIFA's internal corruption.<sup>120</sup> The organization's unsatisfying track record involving human rights issues and subsequent lack of actual organizational change or accountability is especially problematic when viewed in light of three elements: (1) the foreseeability of human rights risks invariably associated with mega sporting events;<sup>121</sup> (2) FIFA's ability to leverage hosting rights for temporary legal exceptionalism;<sup>122</sup> and (3) FIFA's organizational mission and values.<sup>123</sup>

## A. Transitioning to Hard Law

Ascertaining FIFA's liability under the TCLT requires examining whether FIFA's actions fall within the scope of the treaty. First, it is important to note that the transition from a "soft law" regime that invokes general principles and declarations to a "hard law" regime imposes greater obligations upon the state to enforce its commitments, including by enacting direct legal changes within its national jurisdiction.<sup>124</sup> Hard law effectiveness results from external pressure for organizations to act within the confines of the law. Admittedly, the advancement of a hard law system for governing corporations can create substantial costs:

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<sup>120</sup> See PRAKKEN D'OLIVEIRA, FNV & NADIM SHARIFUL ALAM VERSUS FIFA: CASE SUMMARY 1–9 (Oct. 3, 2016), <https://perma.cc/4KY6-KURW> (alleging that FIFA acted wrongfully by selecting Qatar to host the World Cup but not taking action to assure workers' rights would be protected); Press Release, FIFA, Swiss Court Rejects Labour Union's Claim Against FIFA Concerning Qatar 2022 (Jan. 6, 2017), <https://perma.cc/8AJU-3X6H>.

<sup>121</sup> See MAURICE ROCHE, MEGAEVENTS AND MODERNITY: OLYMPICS AND EXPOS IN THE GROWTH OF GLOBAL CULTURE 1 (2000) ("Mega-events' are large-scale cultural (including commercial and sporting) events which have a dramatic character, mass popular appeal and international significance."); RUGGIE, *supra* note 62, at 20 (stressing that major international sporting events "invariably pose human rights risks").

<sup>122</sup> See Longhofer, *supra* note 66, at 166; Megan Corrarino, Note, "Law Exclusion Zones": Mega-Events as Sites of Procedural and Substantive Human Rights Violations, 17 YALE HUM. RTS. & DEV. L.J. 180, 182–86 (2017).

<sup>123</sup> Compare FIFA, FIFA'S HUMAN RIGHTS POLICY 8–9 (2017), <https://perma.cc/KXV8-FRFL>, with Bandeira, *supra* note 2, at 427–35 (2017) (documenting the contrast between FIFA's organizational values and the actual adverse human rights impacts in relation to each World Cup since 2010).

<sup>124</sup> Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 717–18 (2010).

It can create formal commitments that restrict the behavior of states, infringing on national sovereignty in potentially sensitive areas. . . . Additionally, hard-law agreements can be more difficult to adapt to changing circumstances. Hard law is particularly problematic, socio-legal scholars contend, where it presupposes a fixed condition when situations of uncertainty demand constant experimentation and adjustment, where it requires uniformity when a tolerance of national diversity is needed, and where it is difficult to change when frequent change may be essential.<sup>125</sup>

But context is crucial to this assessment. The current soft law regime for corporate accountability on the international stage, primarily the GPs, provides a foundation upon which hard law is developing.<sup>126</sup> For example, the TCLT's expansion of court jurisdiction over business activities and relationships occurring in foreign nations naturally follows from the state's primary duty to protect human rights embedded in the GPs. FIFA's unique position under current Swiss law necessitates reevaluation as to whether a soft law regime is the most effective means of regulating FIFA's activities.<sup>127</sup> Therefore, even though FIFA has adopted the GPs and established an Ethics Committee to review internal processes, liability under a hard law instrument can provide an effective enforcement mechanism for FIFA's future actions.

## B. Mapping FIFA's Liability under Resolution 26/9 and the Proposed Legally Binding Instrument

A major concern under the current framework is that FIFA has successfully skirted any responsibility under the soft law regime for respecting human rights by blame-shifting and turning a blind eye. However, the proposed TCLT, mandated by Council Resolution 26/9, offers a new avenue for holding FIFA liable for human rights abuses in Qatar connected to the 2022 World Cup. This treaty promises accountability for the current tournament and will likely ensure future tournaments do not perpetuate the same abuses prevalent in the previous four World Cups. But to achieve accountability for FIFA under this hard law regime, FIFA's actions must fall under the purview of the treaty.

### 1. The World Cup as a Transnational Business Activity

Concerned with attaching liability to a wide swath of corporate activities, the scope of the TCLT applies to all "business enterprises . . . that undertake business

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<sup>125</sup> *Id.* at 718–19.

<sup>126</sup> *See id.* at 722–23. *See also* Miño, *supra* note 49, at 2 (“[T]he Guiding Principles on Business and Human Rights and the new treaty could and should be mutually reinforcing and complementary.”).

<sup>127</sup> *See* RUGGIE, *supra* note 62, at 36 (emphasizing that the organization's unchecked, “self-regulation” in Switzerland no longer exists).

activities of a transnational character.”<sup>128</sup> Even though FIFA is incorporated as an association under Swiss law, the organization carries out its business activities through a vast global network of contractual relationships.<sup>129</sup> The size and scope of these activities support the notion that FIFA is operating like a business enterprise. Furthermore, the activities conducted in connection with the World Cup, including brand licensing, procurement, and ticket sales support the conclusion that FIFA also operates as a business enterprise within the TCLT’s scope. Moreover, the mega-event’s broad commercialization and advertising appeal have allowed FIFA to profit considerably from the tournament. For example, in 2018, FIFA secured \$1.8 billion in net revenue, driven in part by licensing, broadcasting, and marketing revenues from the 2018 World Cup in Russia.<sup>130</sup> The tournament consistently nets FIFA a substantial profit.<sup>131</sup>

In order for the World Cup to qualify as a transnational business activity, the event must occur in one state but include substantial “preparation, planning, direction, [and] control” in another state.<sup>132</sup> This requirement is clearly satisfied as FIFA is headquartered in Switzerland yet maintains significant control and involvement in its business relationships with the LOC and host government.<sup>133</sup> Additionally, the TCLT protects all internationally recognized human rights in the UDHR and fundamental ILO Conventions and Protocols that arise during transnational business activities.<sup>134</sup> The labor abuses connected to the World Cup in Qatar, such as unpaid wages and inhumane working conditions, undoubtedly fall within the TCLT’s scope, and, in turn, implicate FIFA as a principal actor. Characterizing FIFA’s actions as transnational business activities under this treaty, however, means little without an understanding of the mechanisms for imposing liability *ex post*.

## 2. Examining Jurisdiction

Under Article VIII of the TCLT, states must provide an effective system of legal liability for legal or natural persons causing or contributing to human rights

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<sup>128</sup> OEIGWG, *supra* note 52, art. 3. FIFA’s decision to embed the Guiding Principles into its statutes further supports the claim that FIFA operates as a business enterprise.

<sup>129</sup> See RUGGIE, *supra* note 62, at 16.

<sup>130</sup> FIFA, FINANCIAL REPORT 2018 70 (2018), <https://perma.cc/GJ95-NLJ3> [hereinafter FINANCIAL REPORT].

<sup>131</sup> Some have argued that FIFA’s heavy spending on the World Cup in relation to actual development projects shows how the organization is more focused on making a profit and operating like a business. See Bandeira, *supra* note 2, at 436–42.

<sup>132</sup> OEIGWG, *supra* note 52, art. 1.4.

<sup>133</sup> See *id.* (defining business relationship to include activities conducted through subsidiaries, suppliers, agents, or any other contractual relationship to conduct business activities).

<sup>134</sup> See *id.* art 3.

abuses in their business activities or business relationships.<sup>135</sup> This system must include legal liability for transnational business activities conducted by legal persons domiciled in that state.<sup>136</sup> Because FIFA is incorporated in Switzerland, the organization is considered domiciled in that state.<sup>137</sup> Therefore, this treaty will require Switzerland to provide a system of liability for FIFA's activities or relationships occurring outside of its borders. The possibility exists that Switzerland may decide to not ratify the final treaty and, thus, absolve itself of any obligation to establish this system of liability. This action appears unlikely given Switzerland's continued involvement in each drafting and negotiating session held by the OEIGWG, while countries such as the United States not participated in these sessions.<sup>138</sup> Even if Switzerland does decide not to ratify the treaty, Article IX vests courts with jurisdiction to hear claims against non-domiciled legal or natural persons when "no other effective forum guaranteeing a fair trial is available."<sup>139</sup> Thus, although the clearest route to victim remedy is contingent on Switzerland's ratification, alternative means of adjudicative jurisdiction do exist.

### 3. Connecting FIFA's Involvement in the World Cup to the Human Rights Violations in Qatar

With FIFA's actions constituting transnational business activities and there being a clear case for Switzerland's jurisdiction over FIFA, the remaining consideration is whether there is a sufficient nexus between FIFA's actions and the human rights abuses in Qatar. Article VIII liability for human rights abuses linked to the World Cup can be established through FIFA's business activities and relationships in Qatar. If the implementation of the World Cup constitutes a single transnational business activity, FIFA's involvement during the lead-up to the tournament through contractual relationships with the LOC is a sufficient connection for liability.<sup>140</sup> Assuming the relevant business activity is constrained to the development of the World Cup infrastructure—a primary driver behind the substantial human rights violations—FIFA's stadium agreements with the LOC and host cities, public authorities, and private entities responsible for the

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<sup>135</sup> See OEIGWG, *supra* note 52, art. 8.

<sup>136</sup> See *id.* art. 8.

<sup>137</sup> See *id.* art. 9.

<sup>138</sup> See Emilio Rafael Izquierdo Miño (Chair-Rapporteur), *Report on the Sixth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights* 11, U.N. Doc. A/HRC/46/73 (Jan. 14, 2021) (listing the nations that participated in the sixth session).

<sup>139</sup> OEIGWG, *supra* note 52, art. 9.

<sup>140</sup> For an example of the contractual relationship between FIFA and the LOC, see Press Release, FIFA, FIFA and Qatar Announce Joint Venture to Deliver 2022 FIFA World Cup (Feb. 5, 2019), <https://perma.cc/3WST-ZT9U> (announcing the establishment of a joint venture, FIFA World Cup Qatar 2022 LLC, between FIFA and Qatar).

tournament-related stadiums establish a sufficient nexus between FIFA and the stadium infrastructure developments.<sup>141</sup> FIFA's contractual requirements and retention of oversight rights, including the organization's exertion of pressure on the host country to meet its timely demands, implicates FIFA in the ensuing human rights abuses.

Yet, even if FIFA's direct involvement in the stadium development is legally insufficient, the scope of the TCLT also calls for liability for failure to prevent another entity, with whom FIFA has a business relationship, from committing human rights abuses.<sup>142</sup> This liability, however, hinges on the foreseeability of these abuses in the context of the business relationship.<sup>143</sup> Surely, this qualification—a business relationship that contains a foreseeable adverse human rights risk—is satisfied in this case, where FIFA's primary foreign business relationship is with the LOC and stadium authorities. Two factors establish the foreseeability of human rights risks associated with this project.

First, previous World Cups and other mega-events, such as the Olympics, have produced similar negative impacts on human rights.<sup>144</sup> In Brazil, the demand for mega-event infrastructure before the 2014 World Cup led to the eviction of communities across Rio de Janeiro.<sup>145</sup> These displacements were particularly problematic given the urban housing deficit for poor individuals, the relaxation of due process for mass evictions, and the fear that the World Cup facilitated the mass evictions of low-income communities.<sup>146</sup> Yet, the pressure to finish labor-intensive projects and follow through with specified government guarantees created the same perverse incentives to complete the project at all cost.<sup>147</sup> Even in the wake of a World Cup construction death in Brazil, FIFA threatened to strip hosting status from a city if it did not adequately progress on the stadium development.<sup>148</sup>

Second, assuming FIFA did not foresee the harms it contributed to in prior tournaments, the circumstances surrounding the World Cup in Qatar alone necessitate a conclusion of foreseeability. At the outset, Qatar received the bid

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<sup>141</sup> See RUGGIE, *supra* note 62, at 18, 22–23 (“FIFA and the LOC can be linked to such human rights risks and abuses through their networks of contracts and subcontracts for the delivery of projects.”). For a comprehensive look at a stadium contract, see generally, STADIUM AGREEMENT COVER, *supra* note 70.

<sup>142</sup> See OEIGWG, *supra* note 52, art. 8.6.

<sup>143</sup> See *id.*

<sup>144</sup> See Henderson, *supra* note 61, at 401.

<sup>145</sup> See Corrarino, *supra* note 122, at 195–97.

<sup>146</sup> See *id.*

<sup>147</sup> See Dantam Le, *Leveraging the ILO for Human Rights and Workers' Rights in International Sporting Events*, 42 HASTINGS COMM. & ENT. L.J. 171, 187–88 (2020).

<sup>148</sup> See Shasta Darlington & Sarah Holt, ‘No Stadium, No Match’ – FIFA Issues Threat to Brazil World Cup City, CNN (Jan. 22, 2014), <https://perma.cc/72P3-6YPP>.

even though it was the only country to receive a “high” operational risk assessment in its bid evaluation.<sup>149</sup> Qatar’s need to construct significant tournament infrastructure, the country’s reliance on migrant laborers to complete these projects, the *Kafala* system, and inadequate labor standards perpetuated the human rights abuses of migrant workers. The resulting labor abuses caused by a bureaucratically-endorsed, exploitative labor system are certainly foreseeable. Therefore, supported by differing theories, the conclusion remains the same: FIFA’s involvement in the World Cup human rights violations falls within the TCLT’s scope.

#### 4. Removing Procedural Hurdles and Expanding Access to Remedies

Perhaps the most important provision of the TCLT involves the expansion of adjudicative jurisdiction for domestic courts. Under Article IX, jurisdiction for claims by victims shall vest in the courts where the natural or legal person contributing to such abuses is domiciled.<sup>150</sup> In the present case, Swiss courts will have jurisdiction to hear claims from migrant workers who suffered human rights violations in Qatar. Concerns about the practicality of individual migrant workers in Qatar bringing suit in Switzerland are not pressing. Article IV of the TCLT grants victims the right to submit claims through a representative.<sup>151</sup> Therefore, international human rights organizations can represent these workers in Switzerland, if necessary. Finally, the victim’s choice of forum, if consistent with the treaty’s other provisions, imposes obligatory jurisdiction upon the court.<sup>152</sup> This provision prevents a court from declining to hear the case on the grounds of *forum non conveniens*.<sup>153</sup> Under this doctrine, a Swiss court could theoretically decline to hear a migrant worker’s case on the theory that Qatari courts would be a more appropriate forum to adjudicate the claim.<sup>154</sup> When a law explicitly subverts this doctrine, as the U.S. Second Circuit Court of Appeals explained in a case applying the Tort Victims Protection Act to foreign affairs, it “communicate[s] a policy that such suits should not be facily dismissed on the assumption that the ostensibly foreign controversy is not our business.”<sup>155</sup> The inclusion of this provision in the TCLT can best be understood as a decision to promote domestic interests in the

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<sup>149</sup> EVALUATION REPORTS, *supra* note 3, at 9; RUGGIE, *supra* note 62, at 21 (adding that a lack of financial integrity associated with a bid, through bribery or other forms of corruption, is a “foundational source of human rights risks”). It appears easy, then, to draw a connection between the corrupted World Cup bidding process and the ensuing human rights abuses in Qatar.

<sup>150</sup> OEIGWG, *supra* note 52, art. 9.

<sup>151</sup> *Id.* art. 4.

<sup>152</sup> *Id.* art. 9.

<sup>153</sup> *Id.*

<sup>154</sup> *See* Baldwin, *supra* note 58, at 754–57.

<sup>155</sup> *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2nd Cir. 2000).

foreign controversies that domiciled, transnational corporations carry out in other nations.

This is especially important for claims arising out of countries with ineffective judicial systems for marginalized populations, such as Qatar. Certainly, adverse concerns weigh against the beneficial effects of expanding judicial reach in Switzerland. Eliminating *forum non conveniens* in these situations will likely lead to greater costs on the Swiss judicial system through an increased case load. Additionally, allowing migrant workers to seek remedy outside of Qatar could create greater problems for gathering and collecting evidence or ensuring institutional competence in adjudicating foreign labor claims; ultimately, this may unfairly prejudice FIFA in its ability to defend itself in an inappropriate venue.

Although these are valid issues, the benefits of discarding *forum non conveniens* are far greater. Under the current soft law framework, transnational corporations can strategically operate in regions with exploitative labor systems at lower costs thanks, in part, to substandard regulatory enforcement. These actions would not be possible in their domicile. Foreclosing the doctrine's application in these cases will provide a safeguard for migrant workers who are effectively shut out of the judicial system in Qatar. While bringing a claim against FIFA in Switzerland sidesteps the national bias pervasive in Qatar, it admittedly opens the door for Swiss bias in favor of the nation's pre-existing status as a refuge for international sports governing bodies.<sup>156</sup> Greater accountability for FIFA and guaranteed protections for migrant laborers provide a compelling justification for not allowing *forum non conveniens* to hinder necessary remedies.

The TCLT also requires states to implement due diligence laws under which businesses must conduct human rights due diligence "proportionate to their size, risk of severe human rights impacts, and the nature and context of their operations."<sup>157</sup> This is especially important in FIFA's context because of the organization's global reach and the level of risk associated with mega-events.<sup>158</sup> As a result, FIFA's due diligence will be substantial. This provision also ensures, at the very minimum, FIFA's failure to prevent human rights abuses in its business activities and relationships cannot be undermined by foreseeability defenses. The human rights due diligence requirement plays a necessary role in governing corporate entities. While corporations may already commit to engaging in such preventative, proactive measures, a liability regime involving state sanctions for

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<sup>156</sup> See Erfani, *supra* note 68, at 636.

<sup>157</sup> OEIGWG, *supra* note 52, art. 6. See, e.g., California Transparency in Supply Chains Act of 2010, Cal. Civ. Code § 1714.43.

<sup>158</sup> See RUGGIE, *supra* note 62, at 21–24; Corrarino, *supra* note 122, 183–84.

noncompliance provides stronger incentives for corporations to actually conduct a thorough assessment of their human rights impacts.<sup>159</sup>

### 5. Imposing the Penalty

A finding of liability pursuant to the TCLT can lead to two results. First, under Article VIII, Swiss courts must provide for a system of “effective, proportionate, and dissuasive criminal/administrative sanctions” against FIFA when the organization contributed to or caused human rights violations.<sup>160</sup> These sanctions serve punitive and deterrent functions in hopes of aligning the organization with the international community’s expectations for respecting human rights. This provision would require Switzerland to deviate from its *laissez faire* approach to governmental oversight for FIFA.<sup>161</sup> It is uncertain the extent to which Switzerland would seek to punish FIFA due to the country’s economically beneficial relationship with the organization. Yet, the size and scope of the abuses committed in Qatar may persuade the state’s courts to impose substantial financial penalties on the organization.<sup>162</sup> Second, in conjunction with punitive sanctions, victims will also be able to seek reparations for abuses caused by FIFA in its transnational business activities.<sup>163</sup> Due to the variety and degrees of abuses suffered in Qatar, it is unclear how the Swiss courts will navigate this area. Claims such as unpaid wages are easier to resolve than forced labor, inhumane working conditions, or worker death. While the exact intricacies of the TCLT’s implementation in Switzerland are uncertain, the TCLT would provide an expansive system focusing on both *ex ante* and *ex post* mechanisms to ensure FIFA’s compliance. Under this regime, third parties may finally hold FIFA accountable for its disregard of the adverse human rights impacts caused by its business activities and relationships.

## VII. IMPLICATIONS, CONSIDERATIONS, AND UNANSWERED QUESTIONS

The implementation of the TCLT imposes heftier obligations upon both FIFA and Switzerland. This Section addresses the potential effects of this treaty on FIFA and explores broader implications on transnational business activities in general.

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<sup>159</sup> This due diligence report will not, however, absolve FIFA from liability. *See* OEIGWG, *supra* note 52, art. 8.

<sup>160</sup> *Id.*

<sup>161</sup> *See* Bean, *supra* note 111, at 119–22.

<sup>162</sup> *See* OEIGWG, *supra* note 52, art. 8.8 (“Regardless of the nature of the liability, States Parties shall ensure that the applicable penalties are proportionate with the gravity of the offense.”).

<sup>163</sup> *Id.* art. 8.4.

## A. Investment-Liability Tradeoff

The prior analysis concluded that, under the TCLT and Council Resolution 26/9, FIFA is liable for human rights abuses connected to the World Cup in Qatar. There are two concerns, however, about a hard law regime and how it affects investment. These concerns include that (1) the crystallization of international obligations through a treaty may be an inappropriate method for addressing the inherent complexities in global supply chains and networks of contractual relationships; and that (2) increased organizational costs associated with increasing human rights protections and increasing risk of liability may cause transnational corporations to avoid economically beneficial ventures in developing nations with inadequate labor standards or safeguards against abuse.

Hard law obligations will create greater costs for noncompliance. Although this may seem like a valuable outcome, an international legal obligation fixes corporate duties based on current circumstances. States may not possess the flexibility to deal with factual uncertainties and evolve their understanding of how to regulate transnational business activities.<sup>164</sup> A concern exists that state oversight for transnational corporate activity is not the most effective way of ensuring compliance; rather, entrusting an organization's internal competencies to address these risks with the GPs and corporate governance may provide a more effective means of resolving the issue. But over the last four World Cup cycles, FIFA has perpetuated a culture of corruption within its organization, engaged in business activities carrying a high degree of adverse human rights risks, and eschewed responsibility for its actions.<sup>165</sup> In this case, relying on internal corporate governance to address and remedy these issues is not sufficient; external state pressure will provide the necessary push toward better compliance.

Moreover, there is a concern that increasing FIFA's liability for human rights abuses connected to the World Cup will lead the organization to avoid awarding the World Cup to developing nations with inadequate human rights protections. This risk-mitigation strategy could lead to a Euro-centric preference for mega-events and foreclose investment opportunities in developing countries.<sup>166</sup> Beyond that, this strategy would run "counterproductive" to "FIFA's mission of promoting values through competition" and "be an evasion of responsibility" by undermining "the advancing of human rights through sport by inadvertently ignoring human rights entirely, especially to the detriment of developing countries."<sup>167</sup> For countries like Qatar, the awarding of the World Cup can provide

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<sup>164</sup> See Shaffer & Pollack, *supra* note 124, at 719.

<sup>165</sup> See Bean, *supra* note 111, at 106–09.

<sup>166</sup> See Le, *supra* note 147, at 181–82.

<sup>167</sup> *Id.* at 182.

substantial economic opportunity for migrant laborers.<sup>168</sup> The demand for labor increased because FIFA gave the hosting rights to a nation where significant infrastructure development was a prerequisite for a successful tournament. Foreclosing these opportunities could place these laborers in an even worse position. Alternate options for work may not exist and, assuming opportunities do exist, there is no guarantee that the labor conditions would be any better.

A related adverse effect of FIFA's refusal to award the World Cup to nations that rely on migrant workers involves the global redistribution of wealth.<sup>169</sup> By providing ample economic opportunities to some of the poorest individuals in the neighboring regions, Qatar has subsequently spurred large-scale wealth redistribution. Thus, large-scale spending on World Cup infrastructure facilitates the flow of wealth to neighboring countries given the tendency for migrant workers to remit payments back home. A hard law regime that incentivizes FIFA to not award tournaments to nations with subpar human rights standards ignores the benefits of economic opportunities for migrant workers who would not otherwise have access to such.

This example illustrates a broader concern for firms seeking to conduct operations in foreign nations. Corporate risk-mitigation strategies will likely consider increased organizational liability in transnational business activities as a significant deterrence. The benefits of investing in projects in developing nations—whether due to cheaper labor or favorable government guarantees—may be offset by an increased cost of doing business in these nations. Uncertainty in risk lessens the likelihood of pursuing a transnational business venture in the first place. This could ultimately lead to a general aversion toward transactional, economically beneficial business activities in nations that stand to benefit the most from them, further advancing wealth disparities between established and developing nations.

The TCLT places FIFA in a precarious position. Organizational accountability and transparency are no longer optional under this proposed treaty regime. Although the risk of incentivizing FIFA to divest in developing countries exists, external influence may make this reality unlikely. If FIFA shied away from hosting tournaments in these regions, its actions would be inconsistent with its core organizational strategy to grow and develop the game around the world.<sup>170</sup> Yes, FIFA's history of weak corporate governance offers little to suggest that, in the face of liability, it will remain consistent with its purported strategy. External factors, however, mitigate this concern. In order to retain its favorable tax status in various jurisdictions, FIFA cannot deviate from its statutory objective to

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<sup>168</sup> See Sarath K. Ganji, *Leveraging the World Cup: Mega Sporting Events, Human Rights Risk, and Worker Welfare Reform in Qatar*, 4 J. MIGRATION & HUM. SEC. 221, 226 (2016).

<sup>169</sup> See Glen E. Weyl, *The Openness Equality Trade-Off in Global Redistribution*, 128 ECON. J. 1, 14–18 (2018).

<sup>170</sup> See *Making Football Truly Global*, FIFA, <https://perma.cc/WN92-ZYGR>.

promote the game in all parts of the world.<sup>171</sup> Completely avoiding investments in developing countries may suggest a reevaluation of its status as an association under Swiss law, for example.<sup>172</sup> This monetary incentive may push FIFA in the right direction.

Assuming FIFA does not wish to neglect certain nations in the future, the organization could employ two strategies to mitigate its own impacts on human rights, while also avoiding neglecting entire regions out of fear of liability. For example, extensive pre-tournament analysis and preparation could substantially reduce human rights impacts. FIFA can use its economic bargaining power and political leverage over host countries to extract government guarantees to respect and protect international human rights standards. For the 2022 World Cup, FIFA was in an excellent position to predicate hosting rights on actual labor reforms. The bidding process for the tournament was quite competitive, with technically superior bids from nations such as the United States and Australia receiving significant support. FIFA could have used the external pressure from other bids to leverage more comprehensive human rights protections from Qatar. Instead, FIFA's complicit passivity morphed into liability.

In a similar manner, companies looking to invest in business activities in foreign nations can use their economic and political leverage to demand change. These companies arguably possess as much bargaining power as FIFA due to the likelihood of a long-term relationship and repeat interactions with the foreign nation. FIFA's presence, on the other hand, vanishes after the completion of the tournament.

To be sure, the implementation of the TCLT brings forth serious considerations about how to enforce greater protections for human rights without deterring regional investment, including investments that could contribute to reducing global inequality.<sup>173</sup> The rise in the global economy has allowed corporations to extend their reach into every region on earth, and transnational business activities result in economic impacts beyond a corporation's domicile. Companies may operate in other countries for low-cost labor, lax regulations, or favorable tax regimes. But this is a two-way street. Corporations should internalize more of the social costs of their business activities to incentivize actual change. A stricter liability regime in a corporation's domicile may lead the organization to a

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<sup>171</sup> See FIFA, FIFA STATUTES: MAY 2021 EDITION 10 (2021), <https://perma.cc/Y557-32HK>.

<sup>172</sup> See ADRIAN W. KAMMERER & THOMAS SPRECHER, SWISS ASSOCIATION 17 (2011), <https://perma.cc/462C-RQQF> ("Notably, associations may well run commercial enterprises and still be granted a tax exemption provided that the business is subordinated and ancillary to the charitable objectives and serves to meet the latter's goals.").

<sup>173</sup> Eric A. Posner & Glen E. Weyl, *A Radical Solution to Global Inequality: Make the U.S. More Like Qatar*, NEW REPUBLIC (Nov. 6, 2014), <https://perma.cc/4KAW-JVV7>.

crossroads: develop better internal procedures to mitigate or eliminate these risks or avoid the business opportunity together.

For a corporation entirely focused on maximizing profits—that is not to imply that FIFA has not taken this same route—the cost of ensuring compliance and avoiding liability may outweigh the benefits of a foreign business investment. On the other hand, countries may also refuse to change their behavior due to nationwide costs associated with re-evaluating labor and human rights standards. Yet, this dichotomy in decision-making does not have to be the default. A large corporation will have considerable political and economic power when deciding where to invest. In a similar manner to World Cup host-nation selection, a corporation can utilize its positional advantage to mitigate social costs from its operations. For example, a transnational corporation may choose to alter or give up certain government guarantees such as tax breaks in exchange for guarantees surrounding higher labor standards or worker protections.

Likewise, transnational business entities can develop internal strategies to reduce the threat of liability from the harmful impacts of their business activities. This may include extensive pre-investment analysis of human rights risks or contract provisions allowing the parties to unilaterally rescind the agreement if the other party fails to meet pre-determined human rights standards. These strategies may be a more attractive alternative to foregoing the investment opportunity altogether. Furthermore, courts can hold accountable companies that wish to cultivate the benefits of foreign business opportunities without a human rights strategy.

## B. Unanswered Questions

Due to the novelty of the TCLT, substantial questions remain regarding the treaty's procedure and effect. These considerations will likely shape how the treaty functions. For example, under Article IV, victims retain the right to submit claims through a representative or a class action.<sup>174</sup> It remains to be seen how NGOs will influence the litigation of these cases. Because many of these migrant laborers do not have access to adequate legal resources, and because the process for bringing claims in a foreign court is a high barrier to entry, these laborers may rely on NGOs to represent them in court.<sup>175</sup> This is especially necessary in countries like Qatar where migrant workers cannot form trade unions to represent their interests.

For example, in *FNV & Nadim Shariful Alam v. FIFA*, a Nepalese migrant laborer brought a claim in Zurich, Switzerland against FIFA for human rights

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<sup>174</sup> See OEIGWG, *supra* note 52, art. 4.

<sup>175</sup> See *Who We Are?*, INT'L FED'N HUM. RTS., <https://perma.cc/QFS5-UZFD> (explaining that one of the organization's roles is to defend human rights through means such as litigation).

abuses connected to World Cup infrastructure development.<sup>176</sup> A Nepalese trade union and Dutch law firm represented the worker. Bringing this claim required substantial support from third parties, such as the trade union. Even though the TCLT calls for domestic laws that provide victims adequate access to remedies, practical considerations of a migrant laborer bringing a claim in a different state limits that access. Additionally, the use of class action litigation may work in the laborer's favor against large organizations like FIFA. For significant projects like the World Cup, it may be easier to aggregate the claims under the same operative facts, such as construction on a stadium, and threaten significant liability against FIFA. The aggregate value of all the claims may incentivize FIFA to settle these harms before litigation and structure its future affairs to avoid liability.

Furthermore, FIFA's status as an association under Swiss law may affect the limits of the TCLT's reach. FIFA may try to argue for exemption from the treaty's scope because it operates as an association rather than a traditional business enterprise, and the latter is what the TCLT purportedly aims to regulate.<sup>177</sup> This is not a winnable argument. FIFA's organizational structure lends itself to two functions, one as an association and the other as a business enterprise. The organization conducts licensing, sponsorship deals, and tournament activities that bring in substantial revenue.<sup>178</sup> These functions, given the size and scope of FIFA's operations, look much more like business activities of a typical corporation.<sup>179</sup> The TCLT defines business activity as "any economic or other activity."<sup>180</sup> This means that, even though FIFA is an association, it is still engaging in economic activities to fund its operations.

An analysis of FIFA's financial statements shows that a majority of its expenses go directly to the implementation of the World Cup. Therefore, it may be the case that FIFA is not utilizing its funds to adequately fund its own purported organizational goal. Rather, the organization is expending a majority of its cash flow on the World Cup.<sup>181</sup> Yes, successfully implementing the World Cup involves substantial expenditures. These costs, however, ultimately generate a large profit for FIFA. The lack of human rights safeguards during the tournament cycle in Qatar suggests that a crossover between hosting the World Cup and improving social welfare through the sport does not necessarily exist. The World Cup, as a profit-driven mega-event, appears to exist independently of socially

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<sup>176</sup> See generally D'OLIVEIRA, *supra* note 120.

<sup>177</sup> See OEIGWG, *supra* note 52, art. 1.3.

<sup>178</sup> See FINANCIAL REPORT, *supra* note 130, at 70.

<sup>179</sup> See Henrik Böhme, *FIFA's Controversial Business Model*, DW (May 25, 2015), <https://perma.cc/B2VQ-66L7>. See also *FIFA's Reserves Soar to Record \$2.7bn, Revenue at \$6.4bn*, ESPN (Mar. 6, 2019), <https://perma.cc/B2KG-NCF2>.

<sup>180</sup> OEIGWG, *supra* note 52, art. 1.3.

<sup>181</sup> See Bandeira, *supra* note 2, at 438.

beneficial programs and investments by FIFA. If FIFA's organizational goal is to address social welfare concerns, incurring substantial expenditures to implement tournaments that are plagued with human rights abuses certainly fails to reach that goal.<sup>182</sup>

On a related note, FIFA's recent endorsement of the GPs and stated commitment to implement the GPs within its statutory framework suggests that the enterprise considers its operations to fall under the purview of business activities covered by the GPs. FIFA's activities as a business entity led to its voluntary adoption of an adverse human-rights mitigation framework designed for corporations. These elements place FIFA squarely within the scope the TCLT. However, it is still unclear exactly how Switzerland will apply this law to associations. Because the nation is host to a plethora of international sporting organizations, the implementation of the TCLT could have broader effects on these governing bodies.

Another potential question surrounding the TCLT's reach is whether FIFA's World Cup corporate partners are exposed to any liability. FIFA's corporate partners, such as Adidas and Visa, "provide vital services and product support for the entire event's operations."<sup>183</sup> This agreement also grants the partners advertising exposure in and around the stadium.<sup>184</sup> This relationship is even more powerful given the stadium commercial "exclusion zones" and corporate tax breaks conceded by the government during the event.<sup>185</sup> Although these corporations are not involved in the actual development or construction of the stadiums, the corporate partners reap the benefits of a contractual relationship with FIFA and receive special legal protections granted by the host government to protect their commercial interests.<sup>186</sup> Here, the strongest defense against liability claims will focus on the degree of separation and lack of direct involvement in the perpetuation of these abuses. Yet, it can be argued that it was reasonably foreseeable that FIFA, the organization with which these companies have a business relationship, would cause or contribute to human rights abuses. These corporations may be in an even greater position to alter FIFA's actions because of their influence as substantial stakeholders in the tournament implementation. This idea, however, assumes FIFA is susceptible to stakeholder pressure, a notion that the organization's history seems to dispel. Yet, in the face of legal consequences, corporate risk aversion may overcome FIFA's resiliency against stakeholders. These outside stakeholders are likely more susceptible to social pressures to adhere to corporate social responsibility than FIFA is. It is important

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<sup>182</sup> *See id.* at 445.

<sup>183</sup> *FIFA Partners*, FIFA, <https://perma.cc/7468-QZA5>.

<sup>184</sup> *See id.*

<sup>185</sup> Corrarino, *supra* note 122, at 191–92.

<sup>186</sup> *See id.* at 189.

to note that, even though the corporate partners may be able to escape liability, the potential threat of litigation may change the corporate risk calculus for partnering with FIFA and influence how these entities contractually structure their partnerships to mitigate adverse human rights impacts.

Lastly, a few key questions involving the TCLT's implementation remain unanswered. Because the TCLT is only in the proposal stage, it is unclear exactly when the Working Group will finalize the treaty. Thus, FIFA's liability under this treaty is on hold until the TCLT goes into effect. This also means that the TCLT could undergo significant structural changes during the next Working Group negotiation session. After ratification, will migrant workers be able to sue for claims arising before the instrument was enacted? For the most serious abuses, the statute of limitations will perhaps not apply. However, this may operate differently for smaller claims. Retroactive claims also present evidentiary problems for migrant workers looking to bring suit years after a violation. Structuring and presenting adequate claims in Swiss court may require NGOs to sort and assess claims on the front end. These uncertainties will play an important role in when and how migrant laborers will be able to seek remedies for past abuses.

## VIII. CONCLUSION

This Comment argues that, under the proposed legally binding instrument set out by Council Resolution 26/9, FIFA is liable for contributing to human rights violations connected to the 2022 FIFA World Cup in Qatar. Moreover, the Comment balances countervailing considerations of regulation and overdeterrence. Under the current international legal framework, domestic court systems are ill-equipped to address human rights violations in foreign nations, even when a domiciled entity perpetuates these violations. However, the expansion of a domestic liability regime for transnational business activities could deter organizations from investing in these regions. For example, FIFA may decline to award World Cup hosting rights to regions with substandard human rights records. Facially, this seems like a good idea: countries refusing to address these issues will never receive a World Cup. Yet, this line of thinking misses two critical considerations. First, countries that heavily rely on migrant labor, such as Qatar, are providing substantial economic opportunities to those who would not otherwise be able to reap the benefits of this labor demand. It may be the case that countries like Qatar are contributing to global wealth redistribution to laborers from the poorest countries in the world. Second, because of FIFA's economic and political leverage over these countries, the organization should be able to bargain for improved human rights conditions as pre-requisites to hosting the tournament. FIFA can and should utilize this leverage to enact greater social change; if FIFA shies away from these types of countries when deciding to award

the tournament, it loses the potential to utilize its leverage in places where it carries the most weight.

The trade-off between increased international regulation and deterring foreign investment poses a difficult problem with respect to transnational business activities. Under the proposed legally binding instrument, third parties can hold FIFA accountable for its contributions to human rights abuses in Qatar. Although implementing a hard law regime may threaten FIFA's investment, this Comment argues that the legally binding instrument will provide the appropriate incentives for FIFA to respect human rights during the World Cup process without drastically affecting the organization's risk calculus for the tournament. Yes, there is a concern that this liability will cause FIFA to avoid granting World Cups to "riskier" nations. This concern also extends to any firm's approach to foreign activities. Yet, an increased risk of liability does not equate to an increase in liability. These organizations are in a great position to proactively mitigate these issues through better internal social cost reduction strategies, government guarantees, and mandated contractual structures that provide protection for human rights. These factors will allow companies to respect human rights, limit their exposure to liability, and still conduct transnational business activities in developing nations. The treaty provides a push in the right direction.