CAS 2017/O/5264 Miami FC & Kingston Stockade FC v. FIFA
CAS 2017/O/5265 Miami FC & Kingston Stockade FC v. CONCACAF
CAS 2017/O/5266 Miami FC & Kingston Stockade FC v. USSF

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President:	Mr Efraim **Barak**, Attorney-at-Law, Tel Aviv, Israel
Arbitrators:	Mr J. Félix **de Luis y Lorenzo**, Attorney-at-Law, Madrid, Spain
	Mr Jeffrey **Mishkin**, Attorney-at-Law, New York, USA
Ad hoc Clerk:	Mr Dennis **Koolaard**, Attorney-at-Law, Arnhem, the Netherlands

in the arbitration between

MIAMI FC, Miami, Florida, USA

as First Claimant

and

KINGSTON STOCKADE FC, Kingston, New York, USA

as Second Claimant

Both represented by Dr. Roberto Dallafior and Mr Simon Bisegger, Attorneys-at-Law, Nater Dallafior Rechtsanwälte AG, Zurich, Switzerland, and Ms Melissa Magliana, Attorney-at-Law, Lalive, Zurich Switzerland

and

FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION (FIFA), Zurich, Switzerland

Represented by Mr Antonio Rigozzi, Attorney-at-Law, Lévy Kaufmann-Kohler, Geneva, Switzerland

as First Respondent

and

CONFEDERATION OF NORTH, CENTRAL AMERICAN AND CARIBBEAN ASSOCIATION FOOTBALL, INC. (CONCACAF), Nassau, Bahamas

Represented by Mr John J. Kuster, Esq., and Mr Samir A. Gandhi, Esq., Sidley Austin LLP, New York, USA

as Second Respondent

and

UNITED STATES SOCCER FEDERATION (USSF), Chicago, Illinois, USA

Represented by Mr Russel F. Sauer, Esq., Mr Michael Jaeger, Esq. and Ms Sarah F. Mitchell, Esq., Latham & Watkins LLP, Los Angeles, California, USA

as Third Respondent

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I. PARTIES

1. Miami FC (or "Claimant 1") is a soccer club with its registered office in Miami, Florida, USA. Miami FC last competed in the North American Soccer League (the "NASL"), which was granted Division 2 status by the United States Soccer Federation until September 2017. The NASL utilizes a split-season format similar to the *apertura / clausura* system in certain Latin American countries. In the last season, which ended in 2017, Miami FC was both spring and fall champion, winning the combined standings by a total of 15 points. Miami FC was registered, through its affiliation with the NASL, with the United States Soccer Federation when it lodged its claim in the present proceedings. However, in September 2018 (i.e. during these proceedings), Miami FC formally withdrew from the NASL.

2. Kingston Stockade FC (or "Claimant 2") is a soccer club with its registered office in Kingston, New York, USA. Kingston Stockade FC last played in the National Premier Soccer League (the "NPSL"). The NPSL is a member organisation of the United States Adult Soccer Association (the "USASA"), which in turn is a member organisation of the United States Soccer Federation. Although the divisional status of the NPSL is uncertain, it is undisputed that it is not one of the top three professional leagues in the USA sanctioned directly by the United States Soccer Federation, but only indirectly. In the last season, which ended in 2017, Kingston Stockade FC won the Atlantic White Conference Division of the NPSL.

3. The *Fédération Internationale de Football Association* ("Respondent 1" or "FIFA") is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the global governing body of soccer. It exercises regulatory, supervisory and disciplinary functions over national federations, clubs, officials and players at the international level.

4. The Confederation of North, Central American and Caribbean Association Football, Inc. ("Respondent 2" or "CONCACAF") is the continental governing body of soccer in North America, including Central America and the Caribbean region. CONCACAF is a not-for-profit entity with its legal domicile in Nassau, Bahamas, and its headquarters in Miami, Florida, USA.

5. The United States Soccer Federation ("Respondent 3" or "USSF"), is the governing body of soccer in the USA and has its registered office in Chicago, Illinois, USA. USSF governs, professional and amateur soccer in the USA. USSF is a member of FIFA.

6. Miami FC and Kingston Stockade FC are jointly referred to as the "Claimants". FIFA, CONCACAF and USSF are jointly referred to as the "Respondents". All parties together are jointly referred to as the "Parties".

II. FACTUAL BACKGROUND

7. Below is a summary of the main relevant facts, as established on the basis of the written submissions of the Parties, the hearing and the evidence examined in the

course of the proceedings. This background information is given for the sole purpose of providing a synopsis of the matter in dispute. Additional facts are set out, where relevant, in connection with the legal discussion.

8. On 29 and 30 May 2008, the FIFA Congress adopted Article 9 of the FIFA Regulations Governing the Application of the FIFA Statutes (the "RGAS"). This provision (headed "*Principle of promotion and relegation*") provides as follows:

> "*1. A club's entitlement to take part in a domestic league championship shall depend principally on sporting merit. A club shall qualify for a domestic league championship by remaining in a certain division or by being promoted or relegated to another at the end of a season.*
>
> *2. In addition to qualification on sporting merit, a club's participation in a domestic league championship may be subject to other criteria within the scope of the licensing procedure, whereby the emphasis is on sporting, infrastructural, administrative, legal and financial considerations. Licensing decisions must be able to be examined by the member association's body of appeal.*
>
> *3. Altering the legal form or company structure of a club to facilitate its qualification on sporting merit and/or its receipt of a license for a domestic league championship, to the detriment of the integrity of a sports competition, is prohibited. This includes, for example, changing the headquarters, changing the name or transferring stakeholders between different clubs. Prohibitive decisions must be able to be examined by the member association's body of appeal.*
>
> *4. Each member association is responsible for deciding national issues, which may not be delegated to the leagues. Each confederation is responsible for deciding issues involving more than one association concerning its own territory. FIFA is responsible for deciding international issues involving more than one confederation.*"

9. When the Claimants filed their claim before CAS, the only Division 1 professional soccer league in the United States was Major League Soccer (the "MLS"). The NASL and the United Soccer League ("USL") were both USSF-sanctioned Division 2 professional soccer leagues. The sanctioning of professional soccer leagues is subject to periodic review by USSF. At present, the MLS remains the Division 1 professional soccer league, while the United Soccer League Championship (the "USLC") is the Division 2 league, and USL League One – a second league created by the USL – and the National Independent Soccer Association (the "NISA") are Division 3 leagues.

10. The NASL, to which Miami FC was affiliated, is no longer sanctioned by USSF as a professional league and is currently inactive.

11. All these leagues, as well as the NPSL, are so-called "closed leagues", i.e. no system of promotion and relegation is in force among these leagues.

12. In order for a soccer club to be able to compete in the highest division, i.e. the MLS, a franchise must be obtained from the MLS. Acquiring a franchise requires, *inter alia*, an investment in the range of USD 150,000,000 – USD 200,000,000.

13. The present arbitration concerns a claim filed by the Claimants with the Court of Arbitration for Sport ("CAS"), whereby it is argued that the Respondents, by operating

the MLS (or allowing the MLS to operate) as a "closed league", deprive the Claimants of any (realistic) chance to "climb the ladder", as teams from lower divisions have no chance to gain access to the MLS through sporting merit. Consequently, teams from lower divisions have *de facto* no realistic chance to qualify for any international club competition. The Claimants argue that the disregard of the principle of promotion and relegation based on sporting merit has the effect of depriving the Claimants of any right to access the USA, CONCACAF and FIFA premium club markets and causes severe financial damage to the Claimants.

14. The Claimants request CAS to declare i) that by not enforcing the principle of promotion and relegation, the Respondents violate Swiss law on associations and Swiss competition law; ii) that the implementation of such principle is mandatory pursuant to Article 9 RGAS; iii) that the Respondents be ordered to adopt such principle immediately; and iv) that the Respondents be ordered to take all measures necessary to implement such principle in US professional soccer.

15. The Respondents request that the Claimants' claims be denied, principally because they submit that Article 9 RGAS does not require them to adopt or implement the principle of promotion and relegation in the United States.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

16. On 9 August 2017, the Claimants lodged three joint Requests for Arbitration with CAS against FIFA, CONCACAF and USSF respectively, pursuant to Article R38 Code of Sports-related Arbitration (the "CAS Code"). In this submission, the Claimants requested the three separate proceedings to be consolidated and nominated Mr J. Félix de Luis y Lorenzo, Attorney-at-Law in Madrid, Spain, as arbitrator.

17. On 14 August 2017, the Respondents agreed to consolidate the proceedings and drew the attention of the CAS Court Office to the fact that the Claimants had repeatedly breached the confidentiality of the arbitration proceedings.

18. On 15 August 2017, the CAS Court Office informed the Parties that the President of the Ordinary Arbitration Division had decided to consolidate *CAS 2017/O/5264, CAS 2017/O/5265* and *CAS 2017/O/5266*.

19. On 18 August 2017, the CAS Court Office reminded the Parties of the wording of Article R43 of the CAS Code regarding the confidentiality of the proceedings and requested the Parties to comply with such provision at all times.

20. On 21 and 22 August 2017 respectively, USSF, FIFA and CONCACAF nominated Mr Jeffrey Mishkin, Attorney-at-Law in New York, USA, as arbitrator.

21. On 30 August 2017, the Claimants challenged the appointment of Mr Mishkin as arbitrator.

22. On 31 August 2017, the CAS Court Office informed the Parties that Mr Mishkin had in the meantime accepted his nomination, and had made certain disclosures. The Claimants were invited to confirm whether they wished to maintain their challenge.

23. On 4 September 2017, FIFA, CONCACAF and USSF each filed an Answer to the Request for Arbitration, in accordance with Article R39 of the CAS Code.

24. On 7 September 2017, the Claimants informed the CAS Court Office that they maintained their challenge to the appointment of Mr Mishkin.

25. On 13 September 2017, the CAS Court Office informed the Parties that it appeared that USSF's Answer to the Request for Arbitration was filed by email on 4 September 2017, but not by courier until 11 September 2017 and invited USSF to comment in this respect.

26. Also on 13 September 2017, USSF apologised for the misunderstanding of the process, as it understood that the submission of the Answer to the Request for Arbitration by email was sufficient. USSF also argued that no prejudice was suffered by the Claimants as they had received the document on 4 September 2017 and requested that this technical oversight be forgiven.

27. Also on 13 September 2017, Mr Mishkin filed his comments in respect of the Claimants' challenge.

28. On 18 September 2017, the Claimants informed the CAS Court Office that they had no comments on the formal requirements of USSF's Answer to the Request for Arbitration.

29. On 18 September 2017, upon being invited to file its comments, FIFA filed a reasoned submission, also on behalf of CONCACAF and USSF, inviting the International Council of Arbitration for Sport ("ICAS") to reject the Claimants' challenge of Mr Mishkin.

30. On 26 September 2017, the CAS Court Office informed the Parties that it would be for the Panel, once constituted, to decide on the admissibility of USSF's Answer to the Request for Arbitration.

31. Also on 26 September 2017, Mr J. Félix de Luis y Lorenzo filed his comments in respect of the Claimants' challenge of Mr Mishkin.

32. On 2 October 2017, upon being invited to express whether they wished to maintain or withdraw the challenge of Mr Mishkin and it being clarified that no further submissions on the challenge were expected, the Claimants' confirmed that they maintained their challenge of Mr Mishkin and filed further arguments and evidence that they considered to be in support of the challenge, which they alleged had become known to them in the meantime.

33. On 9 October 2017, upon being invited to express their position in this respect, FIFA, also on behalf of CONCACAF and USSF, commented on the new arguments and evidence filed by the Claimants in respect of the challenge of Mr Miskin, inviting ICAS

not to admit on file the unsolicited submission of the Claimants and, in any event, to render a decision rejecting the challenge of Mr Mishkin.

34. On 29 November 2017, the Board of ICAS rendered its decision in respect of the Claimants' challenge of Mr Mishkin, with the following operative part:

> "*1. The petition for challenge to the nomination of Mr Jeffrey Mishkin filed on 30 August 2017 and 7 September 2017 by Miami FC & Kingston Stockade FC, is dismissed.*
>
> *2. The costs of the present order, which will be fixed in the final award or in any other final disposition of this arbitration, shall be borne by the Applicants.*"[1]

35. On 22 December 2017, pursuant to Article R40.3 of the CAS Code, and on behalf of the President of the CAS Ordinary Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to decide the present matter was constituted as follows:

- Mr Efraim Barak, Attorney-at-Law in Tel Aviv, Israel;
- Mr J. Félix de Luis y Lorenzo, Attorney-at-Law in Madrid, Spain; and
- Mr Jeffrey Mishkin, Attorney-at-Law in New York, USA, as arbitrators

36. On 11 January 2018, following a detailed disclosure made by Mr Barak, the Claimants requested Mr Barak to disclose further information regarding a few other previous arbitration proceedings in which he served as arbitrator with FIFA as a party.

37. On 15 January 2018, the CAS Court Office provided the Parties with the further information disclosed by Mr Barak.

38. On 24 January 2018, the Claimants requested the Panel to hold a case management conference with all Parties before issuing directions as regards the written submissions. The Claimants further clarified that they intended to make document production requests.

39. On 26 January 2018, the CAS Court Office, on behalf of the Panel, informed the Parties that they were encouraged to reach an agreement as to a proposed timetable for the proceedings. The Claimants were also requested to clarify whether they intended to file a request for production of documents at this stage of the proceedings or only upon having examined the submissions filed by the Respondents.

40. On 29 January 2018, the CAS Court Office informed the Parties that Mr Dennis Koolaard, Attorney-at-Law in Arnhem, the Netherlands, was appointed as *Ad hoc* Clerk.

[1] Following the decision of the ICAS Board, the Claimants reiterated their objection to Mr Mishkin serving as arbitrator in the present appeal arbitration proceedings on various occasions. The Panel consistently referred the parties to the decision of the ICAS Board.

41. On 2 February 2018, the Claimants informed the CAS Court Office that the Parties had been unable to agree on a procedural timetable and reiterated their request for a case management conference.

42. On 12 February 2018, a case management conference was held with the participation of the members of the Panel, the *Ad hoc* Clerk and at least one legal representative for each of the Parties.

43. On 14 February 2018, the CAS Court Office informed the Parties on behalf of the Panel that the Claimants were invited to file their Statement of Claim, including a list of documents that they request be produced by the Respondent(s), following which the Respondents would be invited to file their Responses as well as to address the Claimants' requests for production of documents. Finally, following the Claimants' confirmation during the case management conference that they did not object to the admissibility of USSF's Answer to the Request for Arbitration, such document was admitted to the file.

44. On 21 March 2018, the Claimants filed a joint Statement of Claim, in accordance with Article R44.1 of the CAS Code. Upon being invited to do so by the Panel, and in order to better and more efficiently handle their requests for production of documents, the Claimants categorised their requests in 14 separate categories in a so-called "Redfern Schedule".

45. On 2 May 2018, the MLS filed a request for leave to file an *amicus curiae* brief and enclosed thereto the suggested *amicus curiae* brief itself.

46. On 4 May 2018, FIFA, CONCACAF and USSF each filed its Response, in accordance with Article R44.1 of the CAS Code. The Respondents also addressed the Claimants' requests for production of documents in the Redfern Schedule and produced a portion, but not all of the documents sought.

47. On 11 May 2018, having become aware of the identity of counsel representing the MLS in the request for leave to file an amicus curiae brief, Mr Mishkin disclosed certain information concerning a prior affiliation with such counsel.

48. On 17, 18 and 23 May 2018 respectively, upon being invited to do so by the Panel, the Parties commented on MLS's request to file an *amicus curiae* brief. The Claimants requested that such request be dismissed, whereas the Respondents indicated to have no objection.

49. On 4 June 2018, the Claimants' referred to the MLS's argument that it had a "*vital interest*" in these proceedings. Although the Claimants disputed this allegation, they indicated that they would not oppose a request from the MLS to participate as a party to these proceedings with all procedural rights and duties pursuant to Article R41.3 of the CAS Code, should the MLS wish to do so.

50. On 26 June 2018, following an invitation from the Panel to comment on the Claimants' suggestion that the MLS join the proceedings as a party, the MLS declined such suggestion and reiterated its request to file an *amicus curiae* brief.

51. On 24 July 2018, the CAS Court Office informed the Parties that the Panel had decided to deny the MLS's request to file an *amicus curiae* brief. The MLS was informed as follows:

> "[…] *In this regard, the Panel notes that (i) in its motion MLS stated that it had a "vital interest" in these proceedings; (ii) in view of this statement and based on the agreement of the Claimants and the non-objection of the Respondents, the Panel granted MLS the opportunity to join the proceedings as a party, pursuant to Article R41.3 of the CAS Code; (iii) however, MLS declined the invitation to join the proceedings as party while maintaining its motion to file an amicus curiae; and (iv) having had the opportunity to read the statement of claim and the answers, the Panel is of the opinion that it is sufficiently well informed in respect of the relevant facts and arguments to decide on these proceedings; and (v) the Panel is of the opinion that in its motion MLS did not establish that it could provide either by means of written submissions or at a hearing any additional information of significant relevance that may be of assistance to the Panel. In view of the above, your motion to file an amicus curiae brief in these matters has been denied by the Panel.*"

52. On 6 and 20 August 2018 respectively, upon being invited to indicate their position in this respect, FIFA and CONCACAF indicated that they did not consider it necessary to hold a hearing, whereas the Claimants indicated that a hearing was required.

53. On 20 August 2018, upon being invited to indicate whether they were satisfied with the documents produced by the Respondents and/or the arguments presented by the Respondents as to why the other documents sought could not be produced, the Claimants' indicated that they were not satisfied and requested the Panel to order the Respondents to disclose any and all documents set out in the Redfern Schedule.

54. On 24 August 2018, the CAS Court Office informed the Parties that the Panel had decided to hold a hearing.

55. On 31 August 2018, USSF requested that the hearing be bifurcated, with the initial hearing focusing on the meaning of Article 9 RGAS, so as to limit the number of witnesses that would be required to testify during such initial hearing.

56. On 31 August and 3 September 2018 respectively, upon being invited to do so, the Respondents commented on the Claimants' letter dated 20 August 2018.

57. On 3 September 2018, FIFA indicated that it had no objection to USSF's proposal to bifurcate the hearing.

58. On 6 September 2018, the Claimants objected to bifurcating the hearing.

59. On 19 September 2018, the CAS Court Office provided the Parties with procedural directions from the Panel. The Panel, *inter alia*, (i) rejected USSF's request to bifurcate the hearing; (ii) rejected objections filed by CONCACAF and USSF to witness statements filed by the Claimants; (iii) invited USSF to file witness statements for three

specific witnesses it had identified (i.e. Mr Mark Abbot, President and Deputy Commissioner of the MLS, Mr Carlos Cordeiro, Current President of USSF, and Mr Daniel Flynn, USSF's Chief Executive Officer and Secretary General); (iv) invited the Claimants' to provide translations into English of all the legal authorities presented; (v) ordered USSF to submit a "privilege log" (i.e. a chart that identifies each document claimed to be privileged by date, the identity of its author and recipients (if any), a very brief summary of the nature of the document and a specific basis on which it is claimed that each such document is privileged); (vi) invited FIFA to produce two categories of documents that were requested by the Claimants; (vii) identified 9 individuals that would attend the hearing as witnesses; and (viii) indicated that further instructions with respect to the hearing dates and venue would follow in due course.

60. On 28 September 2018, USSF indicated that it had not withheld any documents from its production that it believed were otherwise responsive on the ground of privilege. As to the witness statements to be produced, USSF indicated that, upon further consideration, it was withdrawing its previously-stated intention to rely on the testimony of these three witnesses.

61. On 1 October 2018, FIFA provided the documents it was instructed to produce by CAS Court Office letter dated 19 September 2018.

62. On 16 October 2018, the CAS Court Office informed the Parties that the Panel had decided to hold a four-day hearing in New York, USA.

63. On 18 October 2018, the Claimants provided translations into English of the exhibits to their written submissions that were not filed in such language.

64. Also on 18 October 2018, FIFA indicated that it had no objection to the proposed location of the hearing, but that it considered a four-day hearing excessive, particularly in view of the fact that USSF had withdrawn three witnesses, bringing the total number of witnesses to be heard to six.

65. On 19 October, USSF objected to the translations provided by the Claimants as it considered that only self-selected partial translations were made and requested that the Claimants be precluded from relying on these legal authorities.

66. On 22 October 2018, the CAS Court Office informed the Parties that the Panel had decided to reject USSF's objection to the translations provided by the Claimants. The Panel also considered that three days should be sufficient for the hearing, but decided to invite the Parties to also reserve the fourth day, in case it would be needed.

67. On 22 October 2018, the Claimants objected to the hearing being held in New York, USA.

68. On 23 October 2018, the CAS Court Office informed the Parties that the decision on the hearing location was reaffirmed by the Panel and set out the issues taken into consideration by the President of the Panel when proposing to hold the hearing in New York, USA.

69. On 26 November 2018, FIFA indicated that counsel for the Respondents agreed to waive the cross examination of the witnesses identified by the Claimants, provided they would not testify at the hearing and would not present any additional statements. With the agreement of the Claimants, the Parties therefore considered that, as there were only four remaining witnesses, this would justify shortening the length of the hearing to two days, with a day in reserve.

70. On 28 November 2018, following a consultation of the parties regarding the dates of the hearing, the CAS Court Office informed the Parties on behalf of the Panel that the hearing would be held in New York, USA, on 7 and 8 May 2019, with 9 May 2019 in reserve.

71. On 12 and 17 December 2018 respectively, USSF, FIFA, CONCACAF and the Claimants' returned duly signed copies of the Order of Procedure to the CAS Court Office.

72. On 18 December 2018, USSF raised the question of the Claimants' standing to pursue their claim based on information recently received and requested that the Panel either ask for the position of the Claimants or permit the Respondents to file a formal motion to dismiss these proceedings. USSF indicated, *inter alia*, that, at the time these proceedings were initiated in August 2017, Miami FC was a professional soccer club playing in the NASL, then recognized as a Division 2 professional league member of USSF. USSF also explained that when the proceedings were initiated, USSF knew that Kingston Stockade FC was not a member, either directly or indirectly, of USSF, but yet USSF decided not to challenge the standing of the Claimants, nor of Kingston Stockade FC alone, because at the time, Miami FC remained a member of the NASL. Recently, in connection with another unrelated legal proceeding, Miami FC advised USSF that it had formally withdrawn from the NASL in September 2018. In view of the foregoing, USSF indicated that it wished to challenge the standing of the Claimants to maintain these consolidated proceedings.

73. On 19 December 2018, the CAS Court Office informed USSF that it was not for the Panel to advise or give guidance to the Parties about how to proceed, but indicated that, to the extent USSF's intent was to bring a procedural challenge or objection, it was invited to do so.

74. Also on 19 December 2018, FIFA requested the Panel to (i) order a short exchange of written submission on this issue; and (ii) rule on such issue in a separate award.

75. On 21 December 2018, USSF filed a "*Motion to Dismiss Arbitration Due to Claimants' Lack of Standing*" (the "Motion") and a witness statement of Ms Anna M. Rathbun, Attorney-at-Law, Latham & Watkins LLP, Washington, District of Columbia, USA, in support thereof.

76. On 10 January 2019, upon being invited to do so by the CAS Court Office, FIFA and CONCACAF filed written submissions in support of USSF's motion.

77. On 11 February 2019, upon being invited to do so by the CAS Court Office, the Claimants' filed a written submission, requesting that USSF's Motion not be considered, or, alternatively, that it be denied.

78. On 15 and 18 February 2019 respectively, USSF and FIFA sought leave from the Panel to file a rebuttal on the issue of standing.

79. On 27 February 2019, the CAS Court Office informed the Parties that the Panel directed them to make one further written submission in respect of the Motion, however, limited to a restricted number of issues.

80. On 8, 15 and 18 March 2019 respectively, USSF, CONCACAF and FIFA filed written submissions on the issues raised by the Panel in the CAS Court Office letter dated 27 February 2019.

81. On 5 April 2019, the Claimants filed their written submission on the issues raised by the Panel in the CAS Court Office letter dated 27 February 2019.

82. On 12 April 2019, USSF informed the CAS Court Office as follows:

> "[…] [A]*ll parties to these proceedings have agreed as follows, subject, of course, to the views of the CAS Panel:*
>
> 1. *None of the witnesses will be required to attend the hearing or otherwise be subject to examination by any of the parties;*
> 2. *All witness statements submitted by the parties with their main submissions, as well as the two witness statements recently submitted by Claimants in connection with the Rejoinder on the Issue of Standing, shall be admitted into evidence in these proceedings. For the avoidance of doubt, Claimants' objection to the admissibility of the witness statements of Ms. Anna M. Rathbun is maintained. The parties shall not be deemed to have agreed to the correctness of the content of any of the witness statements, which shall be given such weight as the Panel may determine;*
> 3. *No inference shall be drawn in favour of or against any party as a consequence of this agreement; and*
> 4. *The hearing shall take place despite the absence of witness examinations.*"

83. On 24 April 2019, the CAS Court Office informed the Parties as follows:

> "*1. The Panel took note of the agreement on evidence reached by the Parties as informed in the letter of the Third Respondent dated 12 April 2019. However the Panel needs clarification in respect of the witness statement of Ms. Rathbun; The Panel took note of the Parties' statement that the Claimants maintain their objection to the admissibility of this witness statement. A decision on this matter will be rendered and informed by the Panel at the outset of the hearing and the Parties are requested to clarify and inform the CAS Court Office by 29 April 2019 if in case that the objection is denied, the Claimants will ask to cross examine her or that the agreement on all the witness statements will apply also to this witness statement if admitted.*
>
> *2. The Panel considered and took note of all the submissions of the parties on the issue of the admissibility, including the submission of amended prayers for relief as made by the Claimants. At the outset of the hearing the Panel will hear the comments of the Respondents, as far as they may have any comments, on the amended prayers for relief (including in respect of the time and the way the amendments were made), and*

will thereafter adjourn for a short period to decide whether to admit or deny the amended prayers for relief.

3. Once a decision will be taken on the issue of the amended prayers for relief, the Panel will move to hear oral clarifications (in response to questions from the Panel) on the issue of the Standing. Thereafter the Panel will again adjourn to decide on the way to proceed (the possibilities being (1) granting the motion on no-admissibility (2) denying the motion on no-admissibility and continue the hearing or (3) informing that the decision on the admissibility will be part of the final award and continue the hearing)."

84. On 29 April 2019, the Claimants informed the CAS Court Office that they would not cross-examine Ms Rathbun if the Panel denied the objection.

85. On 7 May 2019, a hearing was held in New York, USA. Although the hearing was initially scheduled to last two days, during the hearing it emerged that one day would be sufficient. With the consent of the Parties, the Panel therefore decided to limit the hearing to one day. At the outset of the hearing, all Parties confirmed not to have any objection as to the constitution and composition of the Panel. In particular, when the President of the Panel asked the Parties whether they had "*any comments or objections with respect to the composition of the Panel*", counsel for the Claimants answered "*No we don't, Mr Chairman*".

86. In addition to the Panel, Mr Antonio De Quesada, Head of Arbitration to the CAS, and Mr Dennis Koolaard, *Ad hoc* Clerk, the following persons attended the hearing with the permission of all Parties involved:

a) For the Claimants:

1) Mr Antonio D'Addio, representative for the Claimants;
2) Mr Anthony Pilch, representative for the Claimants;
3) Mr Mario Roitman, representative for the Claimants;
4) Mr Dennis Crowley, representative for the Claimants;
5) Mr Roberto Dallafior, Counsel;
6) Ms Melissa Magliana, Counsel;
7) Mr Simon Bisegger, Counsel

b) For FIFA:

1) Mr Emilio Garcia, FIFA representative;
2) Mr Antonio Rigozzi, Counsel

c) For CONCACAF:

1) Mr Guilherme Carvalho, CONCACAF representative;
2) Mr John J. Kuster, Counsel

d) For USSF:

1) Ms Lydia Wahlke, USSF representative;

2) Mr Russell F. Sauer, Counsel;
3) Ms Sarah Mitchell, Counsel;
4) Mr Sunil Gulati, Observer

87. Also with the permission of all Parties involved, Ms Kate Porter, Attorney-at-Law in New York, USA, who works with Mr Mishkin at the same law firm, attended the hearing as an observer.

88. Pursuant to the Parties' agreement, and with the approval of the Panel, the witnesses called by each party were not cross-examined, but their witness statements remained part of the case file. The case file contains witness statements of the following persons:

1) Mr Gregory Michael Griffin, Chairman of the Australian Professional Football Clubs Association (the "APFCA"), witness called by the Claimants;
2) Mr Michel Zen-Ruffinen, respectively former Head of the Legal Division, Deputy to the General Secretariat and General Secretary of FIFA, witness called by the Claimants;
3) Mr Sunil Gulati, Former President of USSF (2006-2018), witness called by USSF;
4) Mr Thomas King, Former Chief Operating Officer and Former Managing Director of Administration of USSF, witness called by USSF;
5) Mr Alan Rothenberg, Former President of USSF (1990-1998), witness called by USSF;
6) Dr. S. Robert Contiguglia, Former President of USSF (1998-2006), witness called by USSF

89. As will be set out in more detail below, the witness statement of Ms Anna M. Rathbun was ultimately not admitted to the case file.

90. USSF initially also identified as witnesses Mr Mark Abbot, President and Deputy Commissioner of the MLS, Mr Carlos Cordeiro, Current President of USSF, and Mr Daniel Flynn, USSF's Chief Executive Officer and Secretary General. However, as indicated by letter dated 28 September 2018, USSF withdrew its previously-expressed intention to potentially rely on testimony from these witnesses.

91. As communicated to the Parties by letter dated 24 April 2019, at the start of the hearing, the Panel granted the Respondents the opportunity to comment on the Claimants' proposed modification of their prayers for relief.

92. When granted this opportunity, the Respondents all contended that the Claimants' proposed modification of their prayers for relief as submitted in the Statement of Claim – by reverting to the original wording of the prayers for relief as submitted in the Request for Arbitration – was to be disregarded. The Respondents chiefly argued that this issue had a direct bearing on the question of the Claimants' standing to sue, because the prayers for relief in the Claimants' Statement of Claim expressly referred to "professional soccer", while neither of the two Claimants is a member of a professional soccer league.

93. The Claimants were subsequently provided the opportunity to rebut the Respondents' submissions.

94. After having adjourned the hearing to deliberate on this preliminary issue, the Panel informed the Parties as follows:

> "*The Panel observes that no motion was made to amend the prayers for relief in the Statement of Claim. The Claimants explained today in detail that no motion was necessary because, in their view, it was just a clarification of the prayers for relief in the Statement of Claim.*
>
> *For reasons that will be covered in the final award, the Panel concludes and finds that this is more than simply a clarification of the prayers for relief. The purported clarification will be disregarded by the Panel and the hearing will proceed in accordance with the prayers for relief as set forth in Statement of Claim.*"

95. Also as announced to the Parties by CAS Court Office letter dated 24 April 2019, the Parties were subsequently given full opportunity to make oral submission on the issue of the Claimants' standing to sue.

96. The Claimants presented a new document during the hearing. This new document was a letter from NISA to Miami FC dated 6 May 2019 that allegedly confirmed that NISA had decided to admit Miami FC as a member, with the consequence, according to Miami FC, that it would again be affiliated with a professional league sanctioned by USSF and had therefore reacquired its standing to sue, insofar as it would be deemed to have been lost by its resignation from the NASL.

97. Following objections to the admissibility of this document by the Respondents, the Panel indicated that it would decide on the admissibility of this document in the final award on the merits.

98. After having adjourned the hearing to deliberate on the issue of the Claimants' standing, the Panel informed the Parties as follows:

> "*Considering the fact that it is undisputed between the parties that standing is a matter of substance and in view of all arguments presented, the issue of standing will be decided in the final award as part of the merits.*"

99. The Parties were subsequently afforded full opportunity to present their case, submit their arguments and answer the questions posed by the Panel.

100. Before the hearing was concluded, all Parties expressly stated that they did not have any objection with the procedure adopted by the Panel and that their right to be heard had been respected. In particular, when the President of the Panel asked the Parties whether they were "*satisfied with the right to be heard*", counsel for the Claimants answered "*Yes, we are*".

101. On 10 May 2019, the Claimants filed additional evidence on standing, which was treated by the Panel as a request for leave to file such additional material. Given that the Parties agreed that standing had to be determined at the time the Panel would issue

its arbitral award and because the facts regarding the status of Miami FC apparently continued to evolve, and despite objections received from the Respondents, the Claimants' request was granted, and the Respondents were invited to respond. The Claimants also provided an unsolicited brief containing the arguments delivered orally at the hearing.

102. On 20 May 2019, following an objection raised by FIFA, the Claimants' brief containing the arguments delivered orally at the hearing was rejected by the Panel as unnecessary and untimely and the Parties were informed that such brief would not be considered by the Panel.

103. On 27 May 2019, FIFA, CONCACAF and USSF responded to the material presented by the Claimants' during and after the hearing.

104. On 5 June 2019, upon being invited to do so in a submission limited to five pages, the Claimants filed their final comments to the Respondents' respective responses.

105. On 6 June 2019, USSF objected to the length of the Claimants' submission dated 5 June 2019 because it exceeded five pages and requested that such submission be rejected and not considered by the Panel.

106. On 7 June 2019, CONCACAF joined USSF's objection.

107. On 7 June 2019, the CAS Court Office informed the Parties as follows:

> "*The Panel noted that indeed the submission of the Claimants did not respect the Panel order, however considering the length of the substantive part of the submission the Panel finds no reason to disregard the submission. Therefore the Panel decided that the last documents submitted by the Claimants are admitted to the file and the Panel will assess their content also in consideration of the last submissions of all the parties. Furthermore, the Parties will be informed that the record is now closed, no further submissions are allowed and the Panel will now proceed to issue the award.*"

108. The Panel confirms that it carefully reviewed and took into account in its discussions and subsequent deliberations all of the submissions, evidence, and arguments presented by the Parties, even if they have not been specifically summarised or referred to in the present award.

IV. SUBMISSIONS OF THE PARTIES

109. The Claimants provided the following summary and conclusions in their Statement of Claim:

- "*Respondent 2 and 3 repeatedly fail to comply with Respondent 1's statutes and regulations;*
- *Respondent 3 has failed to compl*[y] *with Article 9* [RGAS] *since the enactment of this provision in 2008 by not implementing a "pyramid" system of soccer leagues, within which soccer clubs are promoted and/or relegated based on their sporting merits, but*

rather maintains a system of leagues which it sanctions in various divisions based on arbitrary rules, completely and utterly unrelated to sporting merit;

- *Respondents 1 and 2 have tolerated such non-compliance;*
- *Respondent 1, with the enactment of Article 9 RGAS in 2008, intended to introduce the principle of promotion and relegation in all of its member associations;*
- *Respondent 1's intention, by the enactment of Article 9 RGAS, was to prohibit all action allowing soccer clubs to purchase access to the top division league and, therefore, not for primarily sporting merits;*
- *the current league system in* [the United States] *is clearly contrary to Article 9 RGAS since all soccer clubs earned their right to play in MLS not by (primarily) sporting merits but by meeting MLS' business criteria, in particular by paying a franchise fee of up to USD 150,000,000;*
- *Respondents continue to tolerate the US* [soccer league] *model by allowing further soccer clubs to join MLS based on purely financial criteria;*
- *neither Respondent 2 nor Respondent 3 were exempt by Respondent 1 from implementing the principle of promotion and relegation;*
- *the current system in* [USSF] *has anti-competitive effects in various sporting and non-sporting markets.*"
- "[…] *It results from the above that, by not applying and/or enforcing the principle of promotion and relegation contained in its own statutes and regulations, Respondent 1 violates the Claimant 1's right to access the sports competitions organised by Respondent 1 as well as the principle of equal treatment of its members.*"
- "[…] *It results from the above that, by not applying and/or enforcing the principle of promotion and relegation contained in their own statutes and regulations, FIFA, CONCACAF and the USSF restrict competition, affecting Claimants and having effects also in Switzerland.*
- *As a result, Respondents each abuse their respective dominant position in the sense of Article 7 CartA. They are, pursuant to Article 7 CartA and in particular in light of the FIFA Club World Cup, not allowed to set up or tolerate national, continental or global soccer championships that are not organised based on the principle of promotion and relegation, i.e. mainly on sporting merits.*"

110. USSF provided the following introduction to its Response:

- "*The Statement of Claim is a "house of cards" built on a false foundation. And, without that foundation, the house must fall as must Claimants' claim.*
- *Claimants' entire claim is based on their assertion that, when Article 9* [RGAS] *was enacted by the FIFA Executive Committee in December 2007 and endorsed by the FIFA Congress 5 months later, Article 9 was intended to require that all FIFA member associations implement the system of promotion and relegation within their professional league systems – including member association like* [USSF] *which had never before applied that system to professional soccer in their countries. But, Claimants' proclamations about the background of Article 9 and the intent of its drafters are simply wrong. As discussed in Sections IV and V below, Article 9 was specifically designed to address certain abuses of the promotion and relegation system in FIFA member*

associations where the system was already in place. It was never intended to require the implementation of the promotion and relegation system in FIFA member associations, like U.S. Soccer, where the system had never been adopted.

- *To eliminate any doubt on this issue at the very outset, the Panel is directed to Exhibit USSF-5, the minutes of the December 15, 2007, FIFA Executive Committee meeting when Article 9 was adopted. There, Angel Maria Villar Llona, FIFA Executive Committee member and Chairman of the FIFA Legal Bureau, addressed a concern about whether the wording of Article 9 could be misinterpreted to "affect leagues that did not have promotion and relegation" – a concern raised by the CONCACAF Secretary General at the prior FIFA Executive Committee meeting when the regulation was first proposed. Mr. Villar Llona responded to this previously expressed concern, stating that:*

  > *He felt that making specific reference to leagues where the principle of promotion and relegation did not exist such as those in the USA and Australia was not necessary since the article's title already made it clear that the requirements could only apply where these concepts existed.*

- *[See Exhibit USSF-5 (emphasis supplied).] Then, to ensure there was no misunderstanding about the intent and scope of Article 9, the FIFA Executive Committee made clear that Article 9 was not intended to apply to U.S. Soccer and its professional league system. Indeed, the minutes of that meeting provide as follows:*

  > *Nevertheless, in order to avoid any misunderstanding, the Executive Committee unanimously agreed that the existing set-up of the leagues in the USA and Australia would not be affected by the new provisions.*

- *[Id. (emphasis supplied).] There are numerous other FIFA communications which make this clear, but none quite so stark as the above. And, this is precisely the reason why FIFA has never sought to require U.S. Soccer to impose the promotion and relegation system on its professional league members – because Article 9 was never intended to apply to U.S. Soccer.*

- *Simply put, wishful thinking and speculation aside, the background, context and history of Article 9, including post-passage statements and conduct of FIFA, could not be more clear – Article 9 was never intended to apply to U.S. Soccer and other FIFA member associations which had not already adopted the system of promotion and relegation. Accordingly, Claimants' claims must be dismissed.*

- *Claimants also raise a number of arguments under European Union ("EU") and Swiss competition laws, all of which assume Article 9 applies to U.S. Soccer. Because it does not, all of these arguments fail. And, in any event, both EU and Swiss legal authorities make clear that there is no basis for the extraterritorial application of such laws to U.S. Soccer in this case.*

- *Finally, in an effort to bolster their misguided claim, Claimants also raise a number of other issues concerning U.S. Soccer, many of them unrelated to Article 9 and the system of promotion and relegation and designed to paint U.S. Soccer as a "bad actor" in the hope that such allegations will bias this Panel. This "everything but the kitchen sink" approach is not only inappropriate and wasteful, the assertions are sometimes based on misleading references and characterizations and more often based on facts which are demonstrably false and which echo false assertions made by the* [NASL] *(of which claimant Miami FC is a member) in pending U.S. litigation including U.S. antitrust litigation. Although these issues are each addressed later in this Response, a few examples of the Claimants' false and misleading claims are set forth below.*

Allegation	***Fact***
Claimants allege that [MLS] *controls U.S. Soccer. [Statement of Claim at ¶¶27-28 and 98]*	*MLS controls only 14% of the vote at the U.S. Soccer National Counsel and, at most, can appoint 2 members of U.S. Soccer's 15 member Board (13.33%).*
Claimants allege that "… the Professional League Standards Task Force … is dominated by people from MLS. MLS, therefore, fully controls the content of the PLS…" [Statement of Claim at ¶105 and Exhibit C-71][2]	*No member of the Professional League Standards Task Force (a U.S. Soccer task force comprised of soccer-knowledgeable individuals, none of whom are U.S. Soccer directors, who make recommendations on professional league and team standards) has ever been affiliated with MLS when serving on the task force.* *Further, after soliciting comments from all professional leagues on any proposed amendments to the standards, such amendments are then submitted to the U.S. Soccer Board for consideration. All Board members affiliated with any of the professional leagues, including MLS, are recused from voting on the standards and any amendments.*
Claimants allege that "[t]he Lamar Hunt U.S. Open Cup is conducted in several rounds…The winning soccer club after the third round – i.e., one single club – enters into the fourth round where MLS soccer clubs enter into the competition." [Statement of Claim at ¶126]	*In 2016, 15 teams which survived the third round of the competition were joined in the fourth round by 17 MLS teams.* *In 2017, 13 teams which survived the third round of the competition were joined in the fourth round by the MLS teams.*
Claimants allege that U.S. Soccer "was faced with a world ban" since FIFA "accused the NASL of violating the rules in setting an arbitrary offside line" and suggest that this occurred recently – in February 2018. [Statement of Claim at 37 and Exhibit C-19]	*The incident occurred 37 years ago – not in 2018. And, U.S. Soccer was not facing a world ban, a then-existing professional was. Indeed, U.S. Soccer was actively supporting FIFA's efforts to force the professional league to comply with the FIFA Laws of the Game.*

[2] Footnote in USSF's Response: "*Claimants rely on statements in various news articles, such as Claimants' Exhibit C-71, to support certain assertions. The individuals quoted in these articles usually either lack first-hand knowledge of what they are saying or, more often, are overtly hostile to U.S. Soccer which motivates them to state untruths. Claimants and their counsel cannot simply rely on second-hand statements as "facts". They have an affirmative duty to investigate and assure themselves that the claims made in such articles are accurate before representing them as "facts" to this Panel.*"

- *These are just a few of the many false and misleading assertions which pervade the Statement of Claim.*

- *In any event, and for all of the reasons discussed in detail below, U.S. Soccer respectfully requests that the Claimants' claims be dismissed. U.S. Soccer further requests that Claimants be directed to pay all administrative costs of these proceedings and to reimburse U.S. Soccer and the other Respondents for all of their legal fees and costs incurred in defending against these claims.*" (emphasis in original)

111. FIFA provided the following summary of its Response:

- "*The current case is not a complicated one. It concerns the (mis)interpretation of Article 9* [RGAS] *an article that was adopted in 2008 and has remained totally uncontentious for 10 years.*[3]

- *As much as the Claimants would have the Panel believe otherwise, the origins and the implications of this article have never been mysterious or controversial.*

- *In keeping with the dominant sporting traditions across most sports in the territories of the majority of FIFA member associations, the concept of promotion and relegation on a sporting merit format with respect to the organisation of domestic football leagues is commonplace.*

- *The two most notable exceptions are, and have been for a long time, the United States and Australia where the concept of promotion and relegation have simply not been part of the sports landscape.*[4]

- *In their submission, the Claimants, both clubs in lower ranked divisions playing in the United States, are seeking to advance a case based on a misinterpretation of Article 9 RGAS.*

- *It was well known and well documented in 2007/2008 that the European football infrastructure had been threatened by an incident in Spanish football known as the Granada case which prompted FIFA to legislate on sporting integrity by adopting Article 9 RGAS to avoid such an incident reoccurring.*

- *In so doing, FIFA sought to introduce rules which both confirm the importance of sporting merit (primarily through the mechanics of promotion and relegation systems) as the determining factor for a team securing its place in a specific league whilst at the same time taking due note of the "closed" league traditions that existed in some of its member associations.*

- *FIFA has never suggested anything other than its long-term ideal that promotion and relegation is applied across all member associations. What is important for FIFA, which has a responsibility to oversee and manage the growth of the game, is that this is achieved in a manner which does not jeopardise the development of the game,*

[3] Footnote in FIFA's Response: "*At the time that the relevant article was endorsed by Congress in 2008 it appeared as Article 19 RGAS.*"
[4] Footnote in FIFA's Response: "*Indeed, contrary to what the Claimants suggest in their Statement of Claim (paras. 6/7) it is simply untrue that the remaining '209 of the 211 members' of FIFA follow a promotion and relegation format including 'the smallest international federation'. In CONCACAF alone, which has 35 member associations, one member (Montserrat) has no league whatsoever and 10 more simply do not use promotion and relegation.*"

particularly in areas such as the United States which has a comparatively fragile and embryonic football culture and difficult legal and economic environment.

- *In effect, the Claimants are seeking through these CAS ordinary proceedings to force seismic (and potentially fatal) change to the infrastructure of football in the United States.*

- *As shall become clear in this submission, this risk was something that the drafters of Article 9 RGAS were not oblivious to and something which they were keen to carefully and willingly avoid.*"

112. CONCACAF provided the following introduction to its Response:

- "*Claimants argue that Article 9* [RGAS]*, enacted by the FIFA Executive Committee in December 2007 and endorsed by the FIFA Congress in May 2008, was intended to require that all FIFA member associations implement the system of promotion and relegation within their professional league systems. In their 76 page submission, Claimants direct a mere 26 paragraphs to CONCACAF, Respondent 2. The crux of Claimants' allegations against CONCACAF is that CONCACAF violated its duty to* [FIFA] *"to ensure that* [USSF] *as its member complies with* [FIFA's] *statutes and regulations." (Statement of Claim at ¶ 19, 28, 33).*

- *Claimants' case against CONCACAF therefore rises and falls as to whether Article 9 mandates that all FIFA member associations adopt promotion and relegation, including those in the CONCACAF region. However, because Article 9 does not do so on its face, because Article 9's history supports the opposition* [sic] *conclusion, and because FIFA has never had any communication with CONCACAF where such an interpretation of Article 9 was pronounced, Claimants have no valid claim against CONCACAF and their case must be dismissed. Indeed, as Claimants themselves concede, "Respondent 1 has refrained from enforcing Article 9 RGAS [in the manner in which Claimants argue the provision should be enforced] in US professional soccer for over 10 years…." See Statement of Claim, ¶19.*

- *CONCACAF fully adopts and incorporates Sections II-III of Respondent FIFA's Response and Sections IV-V of Respondent USSF's Response, which demonstrate that Article 9 does not, in fact, mandate the imposition of promotion and relegation in the CONCACAF region, or in the United States more particularly.*

- *Finally, we note that the sole basis for ascribing wrongdoing against CONCACAF is that it did not enforce Article 9, as it is alleged to be required to do pursuant to Article 2(e) of CONCACAF's statutes. But since Claimants are wrong about what Article 9 requires with respect to imposing promotion and relegation on USSF's sanctioned professional football leagues, it necessarily follows that Claimants are wrong that CONCACAF violated that provision of its own statutes. Importantly, Claimants have not and cannot argue that CONCACAF otherwise fails to follow CONCACAF's own Statutes and Regulations as CONCACAF's Statutes and Regulations* ***do not*** *and* ***have never*** *required its member associations to implement promotion and relegation.*

- *For these reasons, CONCACAF respectfully requests that this Court of Arbitration for Sport ("CAS") Panel dismiss Claimants' claims. CONCACAF further requests that CAS direct Claimants to pay all costs of these proceedings and to reimburse CONCACAF and the other Respondents for all of their legal fees and costs incurred in defending against these claims.*" (emphasis added in original)

V. REQUESTS FOR RELIEF

113. The Claimants submit the following requests for relief in their Requests for Arbitration:

> "*1. That it be declared that by not enforcing the principle of promotion and relegation as set forth in Article 9 of* [FIFA's] *regulations governing the application of the statutes in US football, Respondent violates Swiss law on associations and Swiss competition law;*
>
> *2. That it be declared that it is mandatory for Respondent and for its members to implement the principle of promotion and relegation as set forth in Article 9 of* [FIFA's] *regulations governing the application of the statutes in US football;*
>
> *3. That Respondent be ordered to implement the principle of promotion and relegation so that the champion of each national football league of the season during which this award is rendered shall be promoted to the next higher division;*
>
> *in the alternative, that Respondent be ordered to implement the principle of promotion and relegation so that the champion of each national football league of the season following the one during which this award is rendered shall be promoted to the next higher division;*
>
> *4. That Respondent be ordered to take all measures necessary in order to implement the principle of promotion and relegation in US football;*
>
> *5. That Respondent be ordered to bear all fees, costs and expenses of the arbitration proceedings and to fully indemnify Claimants for all costs incurred by them in connection with these proceedings (including the costs and expenses of the CAS and of the arbitrators as well as attorneys' fees, expert costs, if any, and lost executive time);*"

114. The Claimants submit the following requests for relief in their joint Statement of Claim:

> "*1. That it be declared that by not enforcing the principle of promotion and relegation as set forth in Article 9 of Respondent 1's Regulations Governing the Application of the Statutes in US professional soccer, Respondents 1 to 3 violate Swiss law on associations and Swiss competition law;*
>
> *2. That it be declared that it is mandatory for Respondents 1 to 3 and for their members to implement the principle of promotion and relegation as set forth in Article 9 of Respondent 1's Regulations Governing the Application of the Statutes in US professional soccer;*
>
> *3. That Respondents 1 to 3 be ordered to implement the principle of promotion and relegation set forth in Article 9 of Respondent 1's Regulations Governing the Application of the Statutes in US professional soccer immediately, i.e. for the season during which this award is rendered onwards, or – in the alternative – for each season following the one during which this award is rendered onwards, by establishing a system of hierarchical national soccer leagues in which at least the champion of each national division soccer league, except for the top division league, shall be promoted to the next higher national division soccer league, and as at least the worst soccer club by sporting merit shall be relegated to the next lower national division soccer league for the following season;*
>
> *4. That Respondents 1 to 3 be ordered to take all measures necessary in order to implement the principle of promotion and relegation in US professional soccer;*

5. That Respondents 1 to 3 be ordered to bear all fees, costs and expenses of the arbitration proceedings and to fully indemnify Claimants for all costs incurred by them in connection with these proceedings (including the costs and expenses of the CAS and of the arbitrators as well as attorney's fees, expert costs, if any, and lost executive time)."

115. FIFA submits the following requests for relief in its Response:

"*i. Dismissing the Claimants requests for relief.*

ii. Condemning the Claimants to pay FIFA the costs of arbitration and legal costs."

116. CONCACAF submits the following requests for relief in its Response:

"*1. That it be declared that Article 9 of FIFA's Regulations Governing the Application of the Statutes does not require that CONCACAF revise its Statutes to impose a system of promotion and relegation on professional leagues playing soccer (Prayer for Relief No. 1);*

2. That both Claimants, jointly and severally, be ordered to bear all fees, costs and expenses of these arbitration proceedings including, but not limited to, all costs and expenses of CAS and each of the arbitrators (Prayer for Relief No. 2); and

3. That both Claimants, jointly and severally, be ordered to pay all other costs and expenses incurred by CONCACAF, including attorney's fees, in responding to the Claimants' claims and these arbitration proceedings (Prayer for Relief No. 3)."

117. USSF submits the following requests for relief in its Response:

"*1. That it be declared that Article 9 of FIFA's Regulations Governing the Application of the Statutes does not require that U.S. Soccer impose a system of promotion and relegation on professional leagues playing soccer (football) under its auspices (Prayer for Relief No. 1);*

2. That both Claimants, jointly and severally, be ordered to bear all fees, costs and expenses of these arbitration proceedings including, but not limited to, all costs and expenses of CAS and each of the arbitrators (Prayer for Relief No. 2); and

3. That both Claimants, jointly and severally, be ordered to pay all other costs and expenses incurred by U.S. Soccer, including attorney's fees, in responding to the Claimants' claims and these arbitration proceedings (Prayer for Relief No. 3)."

VI. JURISDICTION

118. The jurisdiction of CAS to adjudicate and decide the matter at hand is not disputed by the Respondents.

119. The Claimants rely on Article 57(1) of the FIFA Statutes (edition 2016) and Bylaw 707(3) of the USSF Bylaws (edition 2017) in conferring jurisdiction on CAS vis-à-vis FIFA.

120. Article 57(1) of the FIFA Statutes provides as follows:

> "*FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents.*"

121. Bylaw 707(3) of the USSF Bylaws provides as follows:

> "*All disputes between FIFA and any Organization Member, member of an Organization Member, official, league, team, player, coach, administrator, or referee shall be submitted to CAS, which shall have sole and exclusive jurisdiction over such disputes.*"

122. The Claimants rely on Articles 52(1) and 53(1) of the CONCACAF Statutes (edition 2016) in conferring jurisdiction on CAS vis-à-vis CONCACAF.

123. Articles 52(1) and 53(1) of the CONCACAF Statutes provide respectively as follows:

> "*CONCACAF recognizes the jurisdiction of CAS.*"
>
> "*CAS shall have jurisdiction, to the exclusion of any ordinary court or any other court of arbitration, to deal with the following disputes in its capacity as an ordinary court of arbitration:*
>
> *a) disputes between CONCACAF and Member Associations, Leagues, Clubs, Players and Officials;*
>
> *b) disputes between Member Associations, Leagues, Clubs, Players and Officials.*"

124. The Claimants rely on Bylaws 103 and 212(1) of the USSF Bylaws, and Articles 50(1), 51(1), 53(1), and 55(c) of the CONCACAF Statutes in conferring jurisdiction on CAS vis-à-vis USSF.

125. Bylaw 103 of the USSF Bylaws provides, *inter alia*, as follows:

> "[…] *The Federation and its members are, to the extent permitted by governing law, obliged to respect the statutes, regulations, directives, and decisions of FIFA and of CONCACAF, and to ensure that these are likewise respected by their members.* […]"

126. Bylaw 212(1) of the USSF Bylaws provides, *inter alia*, as follows:

> "*As a condition for obtaining and maintaining membership in the Federation, each Organization Member shall satisfy all of the following requirements:*
>
> *(1) except as otherwise required by applicable law, comply with all Bylaws, policies and requirements of the Federation, and all statutes, regulations, directives and decisions of FIFA and CONCACAF, each as they may be amended or modified from time-to-time, to the extent applicable to that classification of Organization Member.*"

127. Article 50(1) of the CONCACAF Statutes provides as follows:

> "*Each Member Association shall include in its statutes a provision whereby it, its Leagues, Clubs, Players and Officials agree to respect at all times these Statutes, Regulations and decisions of CONCACAF (including the Code of Ethics), and to recognize the jurisdiction of CAS, as provided in these Statutes.*"

128. Article 51(1) of the CONCACAF Statutes provides as follows:

> "*Member Associations shall insert a clause in their statutes or regulations, stipulating that it is prohibited from seeking adjudication of disputes in the Association or disputes affecting Leagues, Clubs, Players and Officials by ordinary courts of law, unless specifically provided for in these Statutes or FIFA regulations, or if laws of the respective country or territory specifically provide for or stipulate recourse to ordinary courts of law. Instead of recourse to ordinary courts of law, provision shall be made for arbitration. Such disputes shall be taken to an independent and duly constituted Arbitration Tribunal recognized by CONCACAF and the Member Association or to CAS.*"

129. FIFA agrees that the present dispute should be adjudicated by CAS, an independent arbitral tribunal as recognised by Article 57(1) of the FIFA Statutes, but that its explicit agreement to arbitrate the present dispute shall not be considered as an acceptance of the Claimants' contentions in this respect, which are contested.

130. CONCACAF acknowledges the language of Article 52 and 53 of the CONCACAF Statutes, which in appropriate circumstances grants CAS jurisdiction over disputes as an ordinary court of arbitration. CONCACAF further states that Article 52(2) of the CONCACAF Statutes also expressly provides that "[d]*isputes may only be brought before CAS after all other internal procedures and remedies have been exhausted,*" and Claimants have failed to do so before filing their Request for Arbitration. Nonetheless, CONCACAF will accept jurisdiction of CAS over this dispute for purposes of this proceeding only, which shall in no circumstances be deemed a waiver or otherwise prejudice CONCACAF in future legal actions concerning matters raised in the Request for Arbitration of the Claimants or any other person(s). Except as otherwise provided, CONCACAF denies the Claimants' contentions in this respect.

131. USSF acknowledges the plain language of Articles 50(1), 51(1), 53(1) and 55(c) of the CONCACAF Statutes. USSF accepts the jurisdiction of CAS over the particular dispute before it, but, in doing so, USSF is not waiving any rights to (a) make jurisdictional challenges in future legal actions concerning the matters raised in the Request for Arbitration, should any such future legal actions be brought in fora other than CAS or (b) require that any future disputes between USSF and the Claimants or any other member of USSF (or member of a member), whether related to the matters raised in the Request for Arbitration or otherwise, be arbitrated as required by Bylaw 703 of the USSF Bylaws.

132. Article R27 of the CAS Code provides the following:

> "*These Procedural Rules apply whenever the parties have agreed to refer a sport-related dispute to CAS. Such reference may arise out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings)* […]."

133. The Panel notes that while it is disputed between the Parties whether CAS would be competent to adjudicate this dispute on the basis of the various rules and regulations relied upon by the Claimants, the jurisdiction of CAS for this specific ordinary arbitration is explicitly confirmed in the written submissions of the Respondents, as well as in the duly signed Order of Procedure.

134. Consequently, the Panel finds that CAS is competent to adjudicate and decide the present case.

VII. APPLICABLE LAW

135. The Claimants argue that CAS should decide the dispute based on the Statutes and regulations of FIFA, CONCACAF and USSF and, in addition, according to Swiss law.

136. In its Answer to the Request for Arbitration, FIFA initially objected to the application of Swiss law to all aspects of the present dispute. In its Response, FIFA takes the position that the FIFA Statutes and regulations and, subsidiarily, Swiss law apply. However, FIFA objects to the applicability of the Swiss Cartel Act.

137. In its Answer to the Request for Arbitration, CONCACAF objected to the Claimants' contention that Swiss law should apply. It submitted that the dispute was to be resolved solely in accordance with the Statutes and regulations of CONCACAF, FIFA and USSF, and that, should external guidance be needed, US law, or, in the alternative, the laws of the Bahamas, govern. In its Response, CONCACAF made no submission on the applicable law.

138. In its Answer to the Request for Arbitration, USSF disagreed with the Claimants' contention that Swiss law was to be applied. It submitted that this dispute, at its core, is between Claimants and USSF. Based on USSF's by-laws, the Statutes, regulations, directives and decisions of FIFA and CONCACAF, as applied by and to USSF and its member organisations, are subordinate to US law. The Claimants, in becoming and remaining members of USSF, agreed to be governed by US law in the context of their relationship with USSF. In its Response, USSF did not devote any specific section of its submissions to applicable law. However, in such submission it relies on Swiss law in interpreting Article 9 RGAS, while it objects to the application of EU and Swiss competition law.

139. Article R45 of the CAS Code provides as follows:

> "*The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide ex aequo et bono.*"

140. Article 57(2) of the FIFA Statutes provides as follows:

> "*The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law.*"

141. The Panel finds that, in accordance with Article R45 of the CAS Code and Article 57(2) of the FIFA Statutes, insofar the present dispute concerns the application and interpretation of provisions incorporated in FIFA's Statutes and regulations, the various regulations of FIFA are primarily applicable, and subsidiarily, Swiss law.

VIII. PRELIMINARY ISSUES

A. The admissibility of the Claimants' amendment of their prayers for relief

142. As mentioned *supra*, during the hearing the Panel informed the Parties, *inter alia*, as follows:

> "*For reasons that will be covered in the final award, the Panel concludes and finds that this is more than simply a clarification of the prayers for relief.*"

143. Accordingly, the Panel hereby sets out the reasons for dismissing the Claimants' request to amend their requests for relief.

144. The Panel notes that the key difference[5] with the prayers for relief as submitted in the Request for Arbitration is the addition of the word "professional" to paras. 1-4 of the prayers for relief as submitted in the Statement of Claim:

> "*1. That it be declared that by not enforcing the principle of promotion and relegation as set forth in Article 9 of Respondent 1's Regulations Governing the Application of the Statutes in US **professional** soccer, Respondents 1 to 3 violate Swiss law on associations and Swiss competition law;*
>
> *2. That it be declared that it is mandatory for Respondents 1 to 3 and for their members to implement the principle of promotion and relegation as set forth in Article 9 of Respondent 1's Regulations Governing the Application of the Statutes in US **professional** soccer;*
>
> *3. That Respondents 1 to 3 be ordered to implement the principle of promotion and relegation set forth in Article 9 of Respondent 1's Regulations Governing the Application of the Statutes in US **professional** soccer immediately, i.e. for the season during which this award is rendered onwards, or – in the alternative – for each season following the one during which this award is rendered onwards, by establishing a system of hierarchical national soccer leagues in which at least the champion of each national division soccer league, except for the top division league, shall be promoted to the next higher national division soccer league, and as at least the worst soccer club by sporting merit shall be relegated to the next lower national division soccer league for the following season;*
>
> *4. That Respondents 1 to 3 be ordered to take all measures necessary in order to implement the principle of promotion and relegation in US **professional** soccer;*
>
> *5. That Respondents 1 to 3 be ordered to bear all fees, costs and expenses of the arbitration proceedings and to fully indemnify Claimants for all costs incurred by them in connection with these proceedings (including the costs and expenses of the CAS and of the arbitrators as well as attorney's fees, expert costs, if any, and lost executive time).*" (emphasis added by the Panel)

145. The Panel finds that the addition of the word "professional" in the prayers for relief in the Statement of Claim, in comparison with the prayers for relief in the Request for Arbitration, resulted in the legitimate belief of the Respondents that the Claimants only wanted promotion and relegation to be implemented in professional soccer in the United

[5] There are however other differences as well. See para. 113-114 *supra*.

States. The scope of the Claimants' claims would be significantly wider if they also wanted such principle to be implemented in amateur soccer. Accordingly, the Claimants' modification of their prayers for relief is much more than a mere clarification, as argued by the Claimants.

146. There is also no reason to assume that the Claimants actually desired the principle of promotion and relegation to be implemented in the United States beyond professional soccer leagues, because no meaningful reference is made to amateur, youth or collegiate soccer in the Claimants' submissions whatsoever. Indeed, the Claimants specifically clarified during the hearing that its prayers for relief did not encompass collegiate soccer.

147. Article R44.1 of the CAS Code provides as follows:

> "[…] *The parties may, in the statement of claim and in the response, raise claims not contained in the request for arbitration and in the answer to the request. Thereafter, no party may raise any new claim without the consent of the other party.*"

148. The Claimants' narrowing of the scope of their prayers for relief in the Statement of Claim in comparison with the Request for Arbitration was undoubtedly permissible and reflected a deliberate choice made by the Claimants. The Panel finds that this amendment was binding on the Claimants and constituted a waiver of the claims not reiterated in the Statement of Claim. Having submitted different prayers for relief before the filing of the Statement of Claim does not grant parties the right to subsequently – after the filing of the Statement of Claim, and even more so after the filing of the Answers – suddenly rely again on the initial prayers for relief as submitted in the Request for Arbitration (but deliberately altered in the more comprehensive Statement of Claim) and request that the Panel decide the case on such basis. Accepting such conduct would put Respondents at a loss against which claims they would have to defend themselves. The Panel finds that the Claimants failed to advance any valid argument that would justify modifying the prayers for relief to their original wording, given that those initial prayers for relief were subsequently changed and partially abandoned when Claimants submitted their Statement of Claim.

149. The Claimants' desire to revert to their original prayers for relief appears to have been motivated solely to avoid any potential problems with their standing to sue, given that they were no longer affiliated with any professional league. This cannot be accepted as a valid argument to modify prayers for relief after the filing of the Statement of Claim.

150. The Panel also considered it problematic that the Claimants' request was made on 5 April 2019 – shortly before the hearing and after the close of written submissions – thereby effectively barring the Respondents from addressing the substance of the Claimants' expanded requests for relief until the hearing itself. The Claimants should at least have made a request to modify their prayers for relief within a reasonable period after being served with USSF's objection to the admissibility of the appeal due to the Claimants' alleged lack of standing, filed on 21 December 2018, but they did not.

151. Consequently, the Panel decided to deny the Claimants' attempt (even if the Panel would consider it as a request) to rely on the prayers for relief as originally submitted in the Request for Arbitration.

B. The admissibility of Ms Anna M. Rathbun's witness statement

152. USSF relies on Ms Rathbun's witness statement to explain how it became aware of the fact that Miami FC had withdrawn from the NASL.

153. In her witness statement, Ms Rathbun indicates, *inter alia*, that counsel for Miami FC had informed her in the context of a domestic litigation involving the NASL and USSF before the United States District Court for the Eastern District of New York (the "NASL Antitrust Litigation") that Miami FC had withdrawn from the NASL. Counsel for Miami FC confirmed this in writing the following day (7 December 2018), which document was subsequently designated as "Confidential" according to the terms of a protective order in the NASL Antitrust Litigation (the "Protective Order").

154. The Claimants submit that USSF claimed that it was barred from sharing the documents it had obtained from the NASL due to a confidentiality issue while at the same time producing a witness statement which itself disclosed confidential information. The Protective Order confirms that the information contained in documents designated as confidential cannot be disclosed. The Claimants conclude that because Ms Rathbun's witness statement constitutes a violation of the Protective Order, it must be considered to be an illegally obtained source of evidence. In CAS proceedings, illegally obtained evidence is inadmissible.

155. During the hearing, Claimants indicated that they maintained their objection to the admissibility of Ms Rathbun's witness statement, but did not dispute that Miami FC was no longer affiliated with the NASL and therefore did not ask for a formal decision.

156. The Panel notes that given that it is not disputed between the parties that Miami FC withdrew from the NASL, Ms Rathbun's witness statement became moot.

157. Consequently, the Panel decided to exclude Ms Rathbun's witness statement from the file.

IX. MERITS

A. Main Issues

158. The main issues to be resolved by the Panel are:

i. Do the Claimants have standing to sue the Respondents?
ii. Does Article 9 of the FIFA Regulations Governing the Application of the Statutes require that the principle of promotion and relegation be implemented in US professional soccer?
iii. Do the Respondents violate Swiss law on associations by not enforcing the principle of promotion and relegation?

iv. Do the Respondents violate Swiss competition law by not enforcing the principle of promotion and relegation?

i. Do the Claimants have standing to sue the Respondents?

a) The Positions of the Parties

1) First Round of Submissions on Standing to Sue

159. USSF provided the following introduction of its submission dated 21 December 2018 on the Claimants' standing, supported by the witness statement of Ms Rathbun:

> - "*By this Motion,* [USSF] *respectfully requests that this Panel determine that neither Claimant has standing to pursue the pending claim, and, therefore, order that the proceedings be dismissed.*
>
> - *In their Statement of Claim filed in March 2018, Claimants 1 and 2 contend that (a) Article 9* [RGAS] *requires that U.S. Soccer implement the concept of promotion and relegation within its professional league system; (b) U.S. Soccer should be compelled to implement promotion and relegation within its professional league system; and (c) both FIFA and CONCACAF* […] *should be compelled to ensure U.S. Soccer's compliance with Article 9. As a matter of well-established CAS jurisprudence and Swiss Law, however, the Claimants may only seek the relief requested if they have standing to maintain the claim, i.e. if they have a direct and sufficient interest in the outcome of the proceeding. Of course, this means that the Claimants must be active participants in the U.S. Soccer professional league system which they now essentially seek to restructure.*
>
> - *At no time during these proceedings has* [Kingston Stockade FC] *been a member of a professional league sanctioned by U.S. Soccer.* [Kingston Stockade FC] *is a soccer club which plays in the* [NPSL]. *The NPSL is not a professional league member of U.S. Soccer. Rather, the NPSL is a member of the* [USASA], *which governs adult amateur soccer in the United States, and, which in turn, is a member of U.S. Soccer. Thus,* [Kingston Stockade FC] *does not have and never had standing to pursue the pending claim.*
>
> - *Presumably to avoid a standing challenge at the outset,* [Kingston Stockade FC] *"partnered" with* [Miami FC] *in filing the Request for Arbitration and the Statement of Claim. And, as U.S. Soccer acknowledged in its Response to the Request for Arbitration and in its Response to the Statement of Claim Part A,* [Miami FC] *was a member of the* [NASL], *a professional league member of U.S. Soccer which, had been historically sanctioned as a Division II men's' outdoor professional league. Thus, since it appeared that* [Miami FC] *had standing to pursue the pending claim, it did not make sense to require that the Panel invest its time and resources addressing a challenge to* [Kingston Stockade FC's] *standing, when the outcome of such a challenge would have had no bearing on the need for a hearing on the underlying merits given the presumed-standing of* [Miami FC].
>
> - *Everything changed a few weeks ago. As described in more detail below, in connection with a pending litigation between U.S. Soccer and the NASL, U.S. Soccer was advised, for the first time, that* [Miami FC] *had recently <u>withdrawn</u> from the NASL and, therefore, was no longer a member of any sanctioned professional league within the U.S. Soccer professional league system. Once* [Miami FC] *chose to withdraw from the professional league system, it no longer had any interest in the outcome of this proceeding and, therefore, lost its standing to pursue the pending claim.*

- *Since* [Kingston Stockade FC] *never had standing, U.S. Soccer promptly brought* [Miami FC's] *withdrawal from the NASL to the attention of the Panel. By letter dated 19 December 2018, U.S. Soccer was given the opportunity to formally address the standing issue which it now does by this motion.*

- *Simply put, and for the reasons discussed in more detail below, as a matter of CAS jurisprudence and Swiss law, neither* [Miami FC] *nor* [Kingston Stockade FC] *has standing to pursue the pending claim and, therefore, it should be dismissed.*"

160. The CONCACAF provided the following introduction of its submission dated 10 January 2019 on the Claimants' standing:

- "*The USSF brought its Motion to Dismiss this Proceeding because neither Claimant has standing to pursue the claims for relief they seek. In their Statement of Claim against USSF, the Claimants both assert that Article 9* [RGAS] *requires that USSF implement the concept of promotion and relegation within its professional league system, seek to compel USSF to implement such a system, and require both FIFA and CONCACAF to enforce compliance with Claimants' interpretation of Article 9 to compel USSF to implement that system.*

- *The USSF contends that* [Kingston Stockade FC] *never had standing because it is not, and never has been, a member of a professional league sanctioned by the USSF. The USSF further contends that although* [Miami FC] *was a member of the* [NASL]*, a professional league that was sanctioned by the USSF historically,* [Miami FC] *recently has withdrawn from the NASL and as such is no longer a member of a professional league sanctioned by USSF. (See Motion, at pp. 3-4).*

- *The USSF has set forth compelling authority from CAS and under Swiss law that establishes a claimant must have standing in order to pursue a claim and seek relief from CAS, such that the claimant has a sufficient legal interest or substantive right in the matter being appealed. Motion, at 10-11. CONCACAF has reviewed this authority and believes it compels the dismissal of this arbitration proceeding, not only against the USSF, but also with respect to CONCACAF and FIFA as the arbitration was consolidated because the relevant facts and issues were substantially identical. For these reasons, CONCACAF joins the USSF Motion and respectfully submits that the Claimants' lack of standing applies with equal force to each of the claims and prayers for relief Claimants have asserted against it.*"

161. In its submission dated 10 January 2019, FIFA argues, *inter alia*, the following in respect of the Claimants' standing:

- "[…] [T]*he Panel should decide the Motion based on the Swiss notion of standing generally referred to as "legitimation active/passive". In the present matter, the relevant concept is the Claimants' legitimation active, which is given when the claimant is entitled to the substantive right pursued by the claim.*

- *As a matter of Swiss law, the issue of legitimation active must be analysed sua sponte by the adjudicatory body.*

- […] *In the present case, as correctly identified by U.S. Soccer, the Claimants are seeking recognition, implementation and enforcement of the (alleged) right of promotion/relegation "in US professional soccer".*

- *The (alleged) right of promotion/relegation in US professional soccer can, by definition, only belong to clubs participating in US professional soccer.*

- *To the extent that it is established that the Claimants do not participate in US professional soccer, they are not entitled to the (alleged) right to be promoted to the* [MLS]*; they thus have no standing to claim the relief they are seeking.*

- *The fact that* [Miami FC] *had such a right (and thus standing to sue) when the Request for arbitration was filed is irrelevant given that standing is a requirement that must be met when the decision is rendered.*

- […] *The issue of standing to sue being substantive in nature, FIFA invites the Panel to dismiss the Claimants' claims on the merits. As lack of standing to sue is a preliminary issue clearly independent from the main substantive issues of the case, FIFA respectfully invites the Panel to dismiss the Claimants' claim without entertaining the main issues on the merits.*" (emphasis added in original)

162. Claimants' Reply on standing, filed on 11 February 2019, in essence, may be summarised as follows:

- Article R44.1 of the CAS Code stipulates that, as a general rule, each party shall submit one written submission. A party may only file a second submission in exceptional circumstances. Here, USSF does not offer sufficient justification for not bringing this issue to the attention of the Panel earlier. If USSF believed that one of the Claimants did not have standing, it was supposed to discuss this in its statement of defence. Raising the issue now – just weeks before the hearing – is not just belated but also a downright abuse of law.

- With regard to Miami FC, USSF claims that it had learned only recently that Miami FC had withdrawn from the NASL and that it therefore now lacked standing as it was no longer a member of a sanctioned US professional soccer league. However, USSF denied the NASL league sanctioning since September 2017, and the NASL has not been an operational professional soccer league since the season of 2018. Thus, when Miami FC withdrew, the NASL had already ceased to be a professional soccer league sanctioned by USSF for a long time. Yet, until now it never argued that not being a member of a sanctioned US professional soccer league was (in their wrong opinion) an issue of standing. Rather, USSF in its Motion even expressly acknowledges that Miami FC had standing initially although it knew when submitting its statement of defence that the NASL was no longer an operational and sanctioned professional soccer league in the United States. Raising the issue of Miami FC's standing now is belated, and USSF's Motion is therefore inadmissible.

- The same holds true for FIFA's and CONCACAF's submissions in support of USSF's Motion. Neither of the Respondents offers a sufficient excuse for not raising the issue of standing earlier.

- Claimants considered it peculiar that USSF claimed that it was barred from sharing the documents it had obtained from the NASL due to a confidentiality issue while at the same time producing a witness statement in which the contents of the very same confidential documents are disclosed. Claimants therefore reasonably assumed that USSF acted in violation of the protective court order when disclosing the contents of confidential documents through Ms Anna M. Rathbun's witness statement. Upon having procured the protective court order, the suspicion was confirmed. USSF violated the court order when disclosing facts it had obtained through confidential documents in the on-going litigation in the United States District Court for the Eastern District of New York. The Panel is requested not to consider the witness statement as it is illegally obtained evidence.

- The issue of standing has nothing to do with Claimants' right to sue the Respondents in a CAS arbitration. Rather, the question of standing is relevant to determine whether the Panel has to uphold or deny the Claimants' prayers for relief. USSF confuses the issue of "standing" pursuant to Swiss law with the interest that needs to be shown for filing an appeal in appeal proceedings before the CAS. The correct test to assess standing is whether or not the Claimants are indirect members of the Respondents and hence can rely on the statutes. It is therefore contradictory when FIFA requests that the Panel treat the issue of standing as a preliminary issue. A question of substantive law – which always concerns the merits of the case – can *per definitiorem* – not be a preliminary issue.

- Kingston Stockade FC has standing because it is a member of a league sanctioned by USASA, which in turn is a member of USSF. Kingston Stockade FC therefore is an indirect member of USSF. As an indirect member, Kingston Stockade FC has the right to sue the Respondents to force them to act in line with their statutes and by-laws. The fact that Kingston Stockade FC does not yet have a professional soccer team does not lead to Kingston Stockade FC not having a direct interest in the outcome of the case. The whole point of introducing the concept of promotion and relegation is to offer clubs the opportunity to be promoted due to sporting merit and at some point be able to compete in a professional soccer league rather than having to buy its way into professional soccer.

- Miami FC has standing. First, it is important to note that before Miami FC withdrew from the NASL it played in the NPSL, in which one of Miami FC's teams now plays under the name of Miami FC 2. Hence, Miami FC like Kingston Stockade FC is an indirect member of all three Respondents and therefore has – in line with the jurisprudence of the Swiss Federal Supreme Court and the CAS – the right to sue the Respondents. Moreover, Miami FC still has to register professional players of its team that competes in the NPSL with USSF. Hence, there is no clear divide between amateur and professional soccer in the US as the Respondents want the Panel to believe. Furthermore, when arguing that Miami FC has lost its standing due to not being a member of an active professional soccer league sanctioned by USSF, the Respondents completely ignore the reasons why Miami FC was forced to withdraw from the NASL. In September 2017, USSF stripped the NASL of its Division II professional status. The criteria on which this assessment was based are, however, purely arbitrary. Unlike what USSF claims on page 6 of its Motion, USSF's league classification into divisions currently has nothing to do with the level of play. In the case of the NASL, the abuse of the sanctioning power of USSF had drastic consequences. Not receiving sanctioning has led to the NASL being forced to cancel the soccer seasons of 2018 and 2019. Hence, Miami FC has not been an active participant in the professional league system since December 2017. To summarise, it is impossible for Miami FC to be an active participant in a professional league which is not active. As the seasons of 2018 and 2019 were cancelled, the clubs concerned were no longer able to generate revenue while still having to pay salaries and other expenses. In the case of Miami FC, this has led to a critical financial situation which left Miami FC no choice but to withdraw from the NASL. Hence, Miami FC did not withdraw from the NASL by choice. When Miami FC left the NASL, it did so with the belief that there were only three teams remaining in the NASL. In a pyramidal system, USSF would not just decide over the fate of whole leagues. Rather, USSF would have to make sure that there is an operational league in each division. Hence, it is highly abusive for the Respondents to argue that Miami FC has lost its standing due to withdrawing from the NASL when USSF's (deliberate) actions are the very reason why the NASL has ceased to operate, which in turn forced Miami FC to withdraw.

- Although Miami FC is not competing in an active, sanctioned professional soccer league at the moment, it still intends to join professional soccer again as soon as possible. However, until now Miami FC has not been able to do so due to the high entry fees and the arbitrary criteria in force to join a US professional soccer league. Consequently,

Miami FC's interests in the outcome of this arbitration is even higher now than when these arbitral proceedings were initiated.

2) Second Round of Submissions on Standing to Sue

163. On 27 February 2019, the Panel permitted a second round of written submissions on the issue of standing to sue, but limited to the following issues:

> "*1. The Parties are requested to further elaborate on the question of whether, under Swiss law, the concept of standing to sue is applicable (and, if so, to what extent)), when the arbitration is not an appeal arbitration proceeding but rather an ordinary arbitration proceeding.*
>
> *2. The Parties are requested to address **the legal effect** or consequences of the fact that the Respondents were aware that at least one of the Claimants that is a party to the arbitration agreement is not involved in professional football in the USA.*
>
> *3. The Respondents are requested to comment on the Claimants' submission that the motion on the issue of the standing is belated.*
>
> *4. The Respondents are requested to comment on the Claimants' request not to admit the witness statement and the arguments presented by the Claimants in support of their request.*
>
> *5. The Respondents are requested to comment on the Claimants' submission regarding the existence of a direct and legitimate interest of the Claimants even if they are not involved at present in professional football. In this respect, the Respondents are referred to and expected to address the allegation made by the Claimants according to which the fact that they are not involved at present in professional soccer in the USA is, inter alia, a consequence of the decisions taken by the USSF and the fact that the present "closed league" structure of soccer in the USA (which is challenged by the Claimants) is by itself one of the reasons for the fact that the Claimants do not participate at present in professional soccer in the USA.*
>
> *6. The Respondents, specifically CONCACAF and FIFA, are requested to address the question whether the Claimants, or non-professional soccer clubs in the USA in general, are considered by the Respondents as indirect members of CONCACAF and FIFA.*
>
> *7. The USSF is requested to comment on the Claimants' submission regarding the registration of the Claimants' players with the USSF.*
>
> *8. The Respondents are requested to comment on the First Claimant's submission that its withdrawal from the NASL cannot be invoked against its standing right due to the alleged circumstances of the withdrawal.*
>
> *9. The Respondents are permitted to respond to any alleged incorrect allegations, accusations and contentions in Claimants' Reply that was filed on 11 February 2019, and in particular to respond to any alleged factual misrepresentations. Afterwards, the Claimants are expected to comment on the Respondents' submissions in this respect.*"

164. In its submission dated 8 March 2019, US Soccer provided the following introduction and summaries:

- "*In their Reply on the Issue of Standing (the "Reply"), Claimants raise a host of issues which they argue compel this Panel to reject Respondent U.S. Soccer's assertion that*

they lack standing to pursue the pending claim. As a consequence, in its letter dated 27 February 2019 this Panel requested that Respondents address nine separate issues raised by Claimants in their Reply. U.S. Soccer addresses each of these issues below in the order presented, except that it has combined its responses to Issues 2 and 3 and Issues 5 and 8 because it appears that the issues and, therefore, the responses are closely aligned.

- *Simply put, and as discussed in detail below, the issues raised by Claimants are premised on a combination of misrepresented facts and a misunderstanding or misapplication of CAS jurisprudence and applicable principles of Swiss law. Indeed, when the authorities and legal principles are properly applied, they lead to the inescapable conclusion that Claimants lack the required "standing to sue" on the alleged claim – i.e., the allegation that Article 9* [RGAS] *was intended to prohibit U.S. Soccer from maintaining "closed" professional leagues.*

- *As a review of their Statement of Claim makes abundantly clear, the relief requested by Claimants relates solely to the professional league system in the United States.* […] *But, neither Claimant is currently a member of any professional league member recognized by U.S. Soccer. Indeed, as Claimants admit, both clubs are participants in an adult amateur league which is a member of an adult amateur association affiliated with U.S. Soccer. As a consequence, Claimants lack the type of interest required to satisfy the element of "standing" – a necessary prerequisite to the maintenance of a claim under CAS jurisprudence and Swiss law. And, try as they might to confuse the issue, none of the arguments raised by Claimants in their Reply are sufficient to overcome this fundamental legal hurdle.*

- *Accordingly, Respondent U.S. Soccer respectfully requests that the Claimants' claim and these proceedings be dismissed.*

- Summary response to Issue 1: "*The concept of standing is a fundamental and substantive principle of CAS jurisprudence and Swiss law which is applicable to both ordinary and appellate arbitration proceedings.*"

- Summary response to Issues 2 and 3: "*U.S. Soccer's Motion is neither impacted by its prior knowledge that Claimant 2 was not involved in professional football nor "belatedly" filed as argued by Claimants.*"

- Summary response to Issue 4: "*Claimants' argument is incorrect. The information provided in the Witness Statement of Ms Anna Rathbun does <u>not</u> violate the Protective Order.*" (emphasis in original)

- Summary response to Issues 5 and 8: "*For multiple reasons, Claimants may not avoid the fundamental requirement of "standing to sue" by incorrectly blaming their lack of standing on the "decisions" of U.S. Soccer.*"

- Summary response to Issue 6: "*U.S. Soccer assumes, but does not admit, the Claimants are indirect members of CONCACAF and FIFA. But, this only relates to the "capacity to sue", a procedural requirement, not their "standing to sue", which is a substantive requirement under both CAS jurisprudence and Swiss law – a requirement that Claimants do not meet.*"

- Summary response to Issue 7: "*U.S. Soccer requires that all players participating in soccer, be they professional, adult amateur or youth amateur players, register with it as <u>required by FIFA</u>. This FIFA-mandated requirement does nothing to confer standing on Claimant clubs which participate in an adult amateur league which is a member of a U.S. Soccer adult amateur affiliate.*" (emphasis in original)

- Summary response to Issue 9: "*U.S. Soccer has addressed Claimants' many significant misstatements of fact and law in its substantive Responses to Issue 1 through 8 above.*"

165. In its submission dated 15 March 2019, CONCACAF provided the following introduction:

- "*CONCACAF has reviewed the submission of U.S. Soccer in response to the Panel's letter dated 27 February 2019 requesting that Respondents address nine separate issues raised by Claimants in their Reply. CONCACAF fully adopts and incorporates the positions set forth in the U.S. Soccer Submission, except that CONCACAF supplements those responses where it has additional arguments or positions in further support of the Motion to Dismiss due to Claimants' lack of standing.*

- *Fundamentally, there is no dispute that the relief requested by Claimants against CONCACAF relates solely to the professional league system in the United States, and an alleged failure by CONCACAF to require promotion and relegation upon U.S. Soccer pursuant to Article 9* [RGAS]. […] *Although CONCACAF does not concede Swiss law applies to issues concerning its statutes and governance* […], *even if it did, Claimants have not demonstrated they have the requisite standing to pursue their claims under Swiss law for the reasons Respondents collectively already have articulated to the Panel, and as U.S. Soccer further explained in its Response to the Panel's 27 February 2019 Letter. In addition to those reasons, Article 75 of the Swiss Civil Code* [the "SCC"], *upon which Claimants exclusively rely, does not permit Claimants to pursue these claims. Article 75* [SCC] *requires Claimants to challenge a decision by Respondents within one month of the decision being made. Here, although Claimants failed to identify a decision of CONCACAF (or any other Respondent) they are challenging with any specificity, Claimants acquired football clubs in 2015 for at least two years before commencing this proceeding that Respondents decided not to impose promotion and relegation pursuant to Article 9 RGAS. Because Article 75* [SCC] *precludes challenges to any decision of Respondents if such challenge is not made within one month of such a decision, the Claimants waited far too long to raise the Claims in their Statement of Claim, thereby forfeiting them under Article 75* [SCC]."

166. FIFA's responses to the Panel's individual questions in its submission dated 18 March 2019 may be summarised as follows:

- Issue 1: The concept of standing to sue is applicable in any kind of proceedings, although the terminology may vary. Standing to sue has a procedural aspect and a substantive aspect. The lack of the procedural aspect of standing leads to the inadmissibility of the requested relief, while the lack of the substantive aspect leads to the dismissal of the claim on the merits. The Claimants do not hold any right to obtain the relief they are seeking. They therefore lack both the procedural and the substantive aspect required to have standing. In appeals proceedings, CAS panels insisted on the additional requirement of a legitimate interest. The Claimants' plainly lack such interest. While they might one day qualify as a professional club for which the issue of accession to a higher professional league is conceivable, at the moment such prospect is merely hypothetical and speculative.

- Issue 2: The moment in time when the issue of standing to sue is raised is irrelevant as this is a question that shall be addressed by the Panel *sua sponte*. The only potential consequence could be related to the allocation of the costs of the arbitration assuming that a party should reasonably have been aware that Miami FC had relinquished its NASL membership. In the present matter there should be no such consequence as no procedural step was taken between the filing of the Responses and the filing of the motion to dismiss for lack of standing.

- Issue 3: The Swiss Federal Tribunal (the "SFT") considers that the claimant party must have/maintain standing to sue until the moment in which the decision on the merits is rendered. As a result, the respondent party is entitled to bring a motion for lack of standing until the end of the proceedings.

- Issue 4: FIFA is not in a position to opine, as a matter of US law, on the alleged "illegality" of Ms Rathbun's witness statement. Even if it was, this would not necessarily mean that it should be disregarded in the present proceedings. According to Swiss procedural law and CAS jurisprudence, illegally obtained evidence is not automatically inadmissible and a balance of interests is always necessary.

- Issue 5: FIFA is not aware of any precedent or authority of Swiss law where it has been suggested that the lack of standing would not prevent a claim on the ground that the claimant party alleges that such lack is the result of an action by the respondent party. The claimant party would have had standing to sue with respect to that underlying action but this does in no way cure the lack of standing in a separate and subsequent action. FIFA can only note that the Claimants did not rely on any authority in support of their contention.

- Issue 6: To the extent that a club is a member or an indirect member of USSF, that club is also an indirect member of FIFA. However, the fact a club (or even a player) is an indirect member of FIFA does not confer it a general standing to sue FIFA in any kind of dispute. The notion of "indirect member" has been developed by the jurisprudence of the SFT to give standing only on an exceptional basis and only in cases concerning the challenges of the association's decisions. As the present case is certainly not an action to set aside a decision, the exception in favour of indirect members is ruled out as a matter of principle. Even if the Claimants were challenging a FIFA decision, the exception applies restrictively only to cases where the indirect member is directly affected. It has not been demonstrated by the Claimants that this is the case here.

- Issue 7: FIFA fully supports the position of USSF.

- Issue 8: This has been addressed in the responses to Issues 1 to 5 above. Standing is an objective notion. Either it exists or it does not exist and the arbitrators must verify it irrespective of the reasons why it does or does not.

- Issue 9: These issues have already been identified and FIFA fully endorses and refers to USSF's position.

167. The Claimants' submission dated 5 April 2019 may be summarised as follows:

- Contrary to what the Respondents appear to argue, the Claimants never stated that maintaining closed leagues would *per se* constitute a violation of Article 9 RGAS. USSF is not barred from maintaining the current closed leagues. Rather, USSF is free to maintain such closed leagues in parallel to the pyramidical system of leagues that it is required to establish pursuant to Article 9 RGAS, provided that the winners of any closed league championship i) do not qualify as the champions of the "domestic league championship" and ii) be ineligible to participate in international competitions organised by FIFA or CONCACAF.

- It is irrelevant whether or not the Claimants are members of USSF. USSF makes clear on several occasions throughout its most recent submission that if the Claimants were members of a league that it considers a US professional soccer league, the Claimants would not lack standing. It is disputed that the question of whether a club plays professional soccer depends on whether that club is a member of a league designated by USSF to be a professional soccer league. The Claimants maintain that their membership

in the NPSL meets the requirement of "professional" soccer, were any such requirement to apply.

- USSF criticizes Miami FC for failing to join another professional soccer league and therefore takes the position that it created the issue of standing. However, in Swiss doctrine, the relevant time to determine standing is the time when the judgment (or award) is issued. Miami FC reiterates that it is in the process of becoming a member of a so-called US professional soccer league and confirms that it will have joined such a league by the time the Panel issues its award in these proceedings. Miami FC is currently assessing three offers made to it in this respect.

- USSF argues that Miami FC could have joined the USL after the NASL was denied sanctioning for 2018 and suggests that Miami FC is to blame for not having done so. This is a disingenuous representation of the facts. Miami FC has been in discussions with USL regarding the possibility of joining. These discussions could not commence with the USL while still a member of the NASL because of restrictive covenants contained in the operating agreement between Miami FC and the NASL prohibiting negotiating possible membership with other leagues such as USL.

- The Claimants rebut USSF's argument that Miami FC does not currently play professional soccer. USSF expressly acknowledges that it registers Miami FC's players as professional players. FIFA regulations – and not USSF's league designations – are decisive in determining whether a club players "professional soccer'. Miami FC's players have a written contract and earn more than the expenses they incur for playing soccer.

- Issue 1: In ordinary arbitration proceedings, "standing to sue" means that a claimant must invoke a substantive right of his own. By contrast, in CAS appeals proceedings, the rules of Swiss administrative law are applicable (*per analogiam*). In this context, "standing to sue" means that the appellant must have an interest in demanding that the challenged decision be amended. In the present context, the Claimants must invoke a right of their own and that is exactly what they did. By contrast, the Claimants are not required to show that they are "aggrieved" or that they are "sufficiently affected by the appealed decision". USSF misunderstands the concept of "capacity to sue". Based on Article 53 SCC, both Claimants are without any doubt legal entities and therefore have legal capacity to sue. The Claimants do not base their claim entirely on Article 75 SCC. Rather, the Claimants primarily request the Panel to issue a declaratory judgement. Such a suit is permissible under Swiss law. It is not contested that the Claimants were aware that the MLS was a closed league when they acquired their soccer teams and when Miami FC joined the NASL, but this does not change the fact that the Respondents have failed to implement the FIFA rules and that the Claimants can request the Panel to issue a declaratory judgment regarding this failure.

- Issues 2, 3 and 4: USSF claims it learned of Miami FC's withdrawal from the NASL in December 2018. There can be no doubt that this is not the case, because USSF must register players in accordance with its policies and the FIFA rules. If USSF wanted to bring this motion, it would have had to do so at the time Miami FC withdrew from the NASL. Now, the motion is belated.

- Issues 5 and 8: Contesting that Miami FC currently is not a member of a so-called professional league while at the same time preventing it from joining the only relevant and active league, USL, by allowing the USL to make Miami FC's membership in the league subject to Miami FC withdrawing this CAS lawsuit against USSF is a manifest abuse of law. No less abusive is the Respondents' position that Miami FC could just have remained a NASL league member if it had wanted to be considered a professional soccer club. Miami FC simply wanted to play soccer and earn money in doing so. This, however,

was simply impossible in a league that has ceases to be active and that has almost no prospect of reassuming business operations in the near future. What makes things worse is that the reason for which the NASL is no longer active is at least in part due to USSF's actions.

- Issue 6: It is undisputed that the Claimants' teams play in the NPSL, a league member of USASA, which in turn is a member of USSF. Hence, both clubs are indirect members of CONCACAF and therefore also of FIFA. The fact that CONCACAF's statutes do not provide for "indirect members" does not change that fact.

3) New Evidence on Standing to Sue Tendered at the Hearing

168. The Claimants presented new evidence during the hearing (a letter from the Commissioner of NISA to Miami FC dated 6 May 2019, i.e. one day before the hearing) from which it allegedly followed that NISA confirmed Miami FC's membership. Since NISA had allegedly been approved as a Division 3 professional league by USSF, the Claimants submitted that Miami FC was to be considered member of a professional league, as a consequence of which it had standing to sue.

169. The letter provides as follows:

> "*Your application for membership has been accepted by the League, pending Federation review and approved by the Board of Governors. As you know, USSF Policy 202-1 Section 2(e), prohibits professional leagues from admitting new members prior to their certification by the Federation as a "professional team". As such, we must await Federation approval before taking further action.*
>
> *We expect the Federation review process to be completed in the coming weeks, and are optimistic that your club will be playing as a part of our professional league beginning in the fall of 2019. We look forward to working with you to continue Miami FC's strong history in the game.*"

170. USSF objected to new documents being presented on the day of the hearing. USSF further argued that the letter makes clear that the admission was still subject to the approval of the Board of Governors of NISA, which was subsequently confirmed by the Claimants.

171. FIFA maintained that it was not familiar with USSF's policy and that it was therefore difficult for it to comment on the substance of the letter. FIFA however indicated that, on its face, this letter does not appear to confirm that Miami FC was a member of NISA on the day of the hearing. CONCACAF adhered to the positions of USSF and FIFA.

172. The Panel indicated that it would decide on the admissibility of this document in its final award.

173. By means of the present arbitral award, the Panel decides to admit the NISA letter dated 6 May 2019 on file given that it could not have been submitted by the Claimants before and because it provides relevant information for the Panel's assessment on the Claimants' standing to sue. The Respondents objection to the Claimants standing to sue is primarily premised on the argument that neither of the Claimants is affiliated to a professional league, whereas, if Miami FC would be admitted as a member of NISA it

would again be affiliated to a professional league. The Panel finds that these are exceptional circumstances within the meaning of Article R44.1 of the CAS Code.

4) Post-Hearing Submissions on Standing to Sue

174. On 10 May 2019, the Claimants provided additional documentation supporting their arguments made at the hearing, including a second letter from the Commissioner of NISA to Miami FC, dated 9 May 2019, providing as follows:

> "*The Board of* [NISA] *has voted to approve Miami FC as a member in accordance to our By-Laws, and subject to final certification by* [USSF] *following their due diligence which should take place in the next few weeks.*
>
> […] [W]*e are pleased to have Miami FC in the league and look forward to your full participation as the season approaches.*"

175. On 27 May 2019, upon being invited to address the admissibility and the substance of any new evidence – either tendered at the hearing or included in Claimants' post-hearing submission, that relates to the issue of standing, FIFA filed a submission that may be summarised as follows:

- Contrary to what the Claimants stated at the hearing, the case law cited by the Claimants in their submission dated 5 April 2019 does not support their view that it is irrelevant whether or not they had standing throughout the proceedings. The SFT has made clear that standing must be examined *sua sponte* "*at all stages of the proceedings*".

- As to whether the Claimants have reacquired standing, the NISA letter dated 9 May 2019 does not, on its face, establish that Miami FC is a member of NISA and thus falls short from conferring standing on Miami FC. The letter only shows that Miami FC's affiliation with NISA remains subject to review by USSF.

- Be that as it may, FIFA believes that the Panel does not need to make a conclusive ruling on the issue of standing as it is clear that Article 9 RGAS was never meant to impose promotion/relegation in the US and that even the entirely new case put forward by the Claimants at the hearing does not change that obvious conclusion.

- Commenting on the additional documents produced by the Claimants on 10 May 2019, more specifically the "Australia letters", the Claimants had to accept that the inclusion of Article 9 RGAS was triggered by the so-called "Granada case". Hence, what provoked what the Claimants called the "outrage" that led to the introduction of Article 9 RGAS is not, as wrongly submitted at the hearing, the idea that a club could buy its way into a higher league, but the idea that a club (as Granada) could circumvent the principle of promotion / relegation (as applicable in a country like Spain). If FIFA's concern was the fact that the principle of promotion / relegation did not apply in the United States it would have addressed the issue independently of the Granada case. There is no evidence on record that regulation to that effect was ever contemplated. The adoption of Article 9 RGAS was not intended to impose the principle of promotion / relegation in countries where it did not exist. This is distinctly clear from the contemporaneous minutes of both the Legal Commission and the Executive Commission.

- The fact that, as part of the newly produced FIFA documents, there is a letter from Mr Valcke describing the principle of promotion / relegation as being a "*mandatory principle binding on all FIFA Member Associations as provided in art. 9 par. 1*" does not change this conclusion. One isolated letter sent to another federation (the situation of

which is not comparable to the case at hand) is certainly not sufficient to disregard the clear intention of FIFA when adopting Article 9 RGAS. Indeed, most tellingly, the letter of Mr Valcke was never followed up either by Mr Valcke nor by anyone else at FIFA.

- It therefore did not come as a surprise that the Claimants have sought to use a "new story" at the hearing. The Claimants now submit that the decision not to apply Article 9 RGAS to the United States was limited to the "closed" MLS as it existed at the time but does not apply anymore since the MLS has now more members. In substance, the Claimants contend that the MLS has proven to be an "open league" and that the original rationale for the decision not to apply Article 9 is now somehow obsolete. This attempt is deemed to fail. If it had any merit, one would certainly have found a discussion or at least a reference to the concept of "closed league" that FIFA had in mind at the relevant time, but the reality is that there is not.

176. Also on 27 May 2019, CONCACAF filed a submission with respect to the new documentation provided, with the following introduction:

- "*In accordance with the Panel's instructions that "Respondents need only address the admissibility of any new evidence – either tendered at the hearing or included in Claimants' post-hearing submission – that relates to the issue of standing and which has not yet been accepted as part of the record," CONCACAF's response accordingly first addresses the two exhibits relating to Claimants' standing,* […] *a letter from* [NISA] *to* [Miami FC] *dated 6 May 2019 and* […], *a letter from NISA to* [Miami FC] *dated 9 May 209. CONCACAF then addresses the additional exhibits* […] *which were submitted after the hearing was closed. Because the Panel properly rejected Claimants' untimely written submission and advised the parties it would not be considered by the Panel in its 20 May 2019 letter to the parties, CONCACAF has not addressed it here.*

- *Claimants have not demonstrated, and cannot demonstrate, they have the requisite standing to pursue their claims under Swiss law for the reasons Respondents collectively already have articulated to the Panel. Claimants failed to show that Article 75* [SCC], *upon which Claimants exclusively relied, permits Claimants to pursue these claims. The Claimants did not challenge a decision by the Respondents within one month, and this one-month period cannot be waived or otherwise avoided. On the contrary, the Claimants waited years to raise the issue of promotion and relegation. As such, Swiss legal authority statutorily bars the Claimants from now being able to assert such claims under Swiss law.* [The NISA letters dated 6 and 9 May 2019] *do not affect this conclusion. Moreover, Claimants' late submissions post-hearing do not comply with the clear procedures set forth in CAS Rule R44.1, and therefore should not be considered as they are not only prejudicial to Respondents, but also do not change the fundamental shortcoming of their argument about Article 9* [RGAS]*: it was never a mandate for all Member Associations to impose promotion and regulation* [sic] *on their leagues, and in particular FIFA intended to exempt U.S. Soccer from it.*"

177. Also on 27 May 2019, USSF filed a submission with respect to the new documentation provided, with the following introduction:

- "[…] *U.S. Soccer renews its objection to the new evidence which Claimants proffered at the hearing. U.S. Soccer further objects to the submission of Claimants' proposed new Exhibit,* […], *a letter dated 9 May 2019 – two days <u>after</u> the Hearing was deemed "closed." And in any event, U.S. Soccer demonstrates that the new evidence does nothing to advance the merits of their claim. Finally, U.S. Soccer understands the Panel has rejected, and will not consider, the proposed submission of "Claimants' Hearing Statement" as improper and a violation of CAS Rule 44.2.*

- *Accordingly, U.S. Soccer respectfully requests the Panel determine that Article 9* [RGAS] *was not intended to apply and does not apply to the U.S. Soccer professional league system, determine that Claimants lack standing to pursue their claim, and order Claimants to reimburse U.S. Soccer for its substantial legal fees and costs incurred in connection with these proceedings.*"

- USSF further submits that Miami FC "*now seeks to include additional new evidence to support its standing by its alleged admission to membership in NISA through the submission of proposed* […] *letter dated 9 May 2019* […]. *Even if accepted in violation of Rule 44.1, this new exhibit still fails to confer standing on* [Miami FC] *as its admission to NISA still remains subject to review by U.S. Soccer.*

- *Further, this belated effort by* [Miami FC] *to create standing, both at the hearing and now after the hearing, deprived U.S. Soccer and the other Respondents of the opportunity to fully respond to* [Miami FC's] *effort. For example, while NISA was granted a "provisional sanction" as a Division III men's outdoor professional league by U.S. Soccer on February 15, 2019, the "provisional sanction" itself is contingent on NISA raising a $25 million "sustainability fund" prior to the commencement of its fall 2019 season. In other words,* [Miami FC's] *efforts to create standing is premised on an alleged contingent admission to a league whose status itself is provisional and contingent.*"

- Mr Valcke's statement that the principle of promotion / relegation was a "*mandatory principle binding on all FIFA Member Associations as provided in art. 9 par. 1*" is directly contrary to the entire history of Article 9 and the intent of its drafters. Mr Valcke's statement is also wholly inconsistent with the statements of both the key proponent of Article 9 RGAS, Mr Villar, and Mr Valcke's boss, FIFA's then-President Mr Blatter, on the very day the FIFA Congress affirmed the FIFA Executive Committee's enactment of Article 9 RGAS.

- It is helpful to consider the language in Mr Marco Villiger's letter dated 30 May 2016, where he notes the general importance of the promotion and relegation system in the context of the FFA's repeated indications that it planned to introduce the system when it believed doing so would benefit the development of soccer in Australia. But, in this letter Mr Villiger does not assert that Article 9 RGAS is mandatory for all FIFA member associations. Instead, Mr Villiger specifically noted that the "*principle of promotion and relegation* […] *must take into consideration the specific nature of club football in each country*". And, it is worth noting that Mr Villiger is the same FIFA executive who several years earlier had specifically advised USSF that Article 9 RGAS was never intended to apply to it.

178. The Claimants' submission dated 5 June 2019 may be summarised as follows:

- The Panel instructed the Respondents to limit their comments to any new evidence that relates to the issue of standing. The Panel did not authorise the Respondents to comment on the "Australia letters", which were originally submitted by FIFA and which are completely unrelated to the standing issue. The Respondents have ignored these instructions. The Respondents' inadmissible pleadings on the merits must be disregarded by the Panel.

- As to the admissibility of the "NISA letters", in legal doctrine it is undisputed that exceptional circumstances in the meaning of Article R44.1 of the CAS Code exist where the evidence at issue was not available to the party submitting it during the written phase. The two letters in question are dated 6 and 9 May 2019. Hence, both documents are clearly new. Furthermore, the Respondents only questioned the Claimants' standing after the end of the written phase. The Claimants also placed the Respondents on notice that potential new facts of relevance would arise. The Claimants indicated in their submission

dated 5 April 2019 that the Respondents' application would be rendered moot because Miami FC would be a member of such a league by the decisive period in time, i.e. the time at which the Panel would render an award.

- Contrary to what the Respondents claim, the SFT has repeatedly held that standing need only be established at the time the judgment is rendered. Whether a claimant has standing when filing a suit or whether it had standing when suing but lost standing thereafter is not relevant as long as its standing is established when the award is rendered. In NISA's letter dated 9 May 2019, it is confirmed that Miami FC's request for membership had been approved and was subject only to final certification by USSF. This clearly establishes Miami FC's standing. If USSF's approval were a pre-condition for Miami FC's standing, then USSF would essentially be able to itself determine who is allowed to sue it. This makes it highly abusive in the sense of Article 2(2) SCC to claim that the Claimants lack standing as long as USSF does not certify Miami FC's membership in NISA, especially since USSF's approval is a mere formality.

- The Respondents now argue that joining the NISA is not sufficient for Miami FC to regain standing because the NISA is only provisionally sanctioned. The Respondents in their previous submissions argued that the NASL, while no longer sanctioned, continues to be a professional league member of USSF and that Miami FC would not have lost standing if it had not withdrawn from the NASL. Now that Miami FC has joined a league that is – unlike the NASL – actually sanctioned, even if provisionally, the Respondents have suddenly changed their argument and argue that provisional sanctioning is not sufficient. Such self-serving and contradictory argumentation is contrary to both good faith and the objectives of USSF and should not be condoned.

- The Claimants submit that it was not them who submitted the Australia letters onto the record. These letters were submitted by FIFA with its submission of 1 October 2018. All the Claimants did was assign a number to each letter for ease of reference. The Respondents also err when they state that the Claimants should have indicated earlier that they wished to rely on the Australia letters. The Panel decided that each party should only file one written submission, meaning that the first opportunity for the Claimants to address the documents filed by the Respondents was at the hearing. It is thus ridiculous for the Respondents to allege that the Claimants should have addressed the Australia letters earlier.

- The Respondents in their submissions finally acknowledge that the Australia letters cannot be reconciled with their interpretation of Article 9 RGAS. Indeed, in those letters FIFA left no doubt – and even expressly stated – that promotion and relegation was a principle binding on all member federations. However, the Respondents now try to play down the significance of these letters by claiming that they are isolated letters that did not reflect FIFA's position or by arguing that the fact that promotion and relegation was binding on Australia did not mean that it would also be binding on the US (CONCACAF and USSF). None of these arguments is convincing. Notably, the Australia letters were written over a period of more than two years. Furthermore, these letters were not all written by one single FIFA executive who went rogue. Rather, these letters – although connected – were all signed by different top executives of FIFA (Deputy Director General, Secretary General, Director of Legal Affairs, Head of Professional Football). Consequently, these letters clearly evidence how FIFA has interpreted Article 9 RGAS in the past and how this provision must be understood. One cannot seriously argue that Article 9 RGAS stipulates something different for Australia then it does for the United States. Despite the best efforts of Mr Blazer to secure exempting language in Article 9 RGAS, there is no language that gives the United States an exemption. Even the drafting history contradicts the Respondents' position. Indeed, in the 15 December 2015 Executive Committee minutes state that the "*existing set-up of the leagues in the USA and Australia would not be affected*" by the proposed Article 9 RGAS. They thus confirm

> that i) the United States and Australia were indeed considered equally, and ii) there was no blanket exemption for any jurisdiction. If anything, there could only have been an exemption for the then-existing set-up of leagues which, as explained at the hearing, is entirely different for the United States set-up of leagues today.

b) The Findings of the Panel on Standing to Sue

179. The Panel considers the NISA letter dated 9 May 2019 to be a follow-up on the events that occurred during the hearing and NISA's letter dated 6 May 2019. The letter may also be relevant to the Panel's decision on the Claimants' standing to sue. Given that the latter dated 9 May 2019 was not available to the Claimants on the occasion of the hearing and given the Claimants' indication that they would be updating the Panel on future developments, the Panel is satisfied that exceptional circumstances within the meaning of Article R44.1 of the CAS Code have been established. It also is important to note that the Respondents were granted full opportunity to address both NISA letters.

180. The additional documentation provided by the Claimants on 10 May 2019, more specifically the "Australia letters", were already on file and are therefore not excluded from the case file.

181. The Claimants' objection to the Respondents' post-hearing submissions insofar as they addressed the substance of the "Australia letters" is dismissed, for the Panel invited the Respondents to address the admissibility and the substance of any new evidence – either tendered at the hearing or included in Claimants' post-hearing submission, that relates to the issue of standing. The "Australia letters" were presented in the Claimants' post-hearing submission and the Panel finds that the Respondents could legitimately understand that they were permitted to address these letters in their post-hearing briefs. Moreover, the Claimants were provided with the opportunity to rebut the Respondents' submissions in this regard.

182. In any event, the Panel finds that the Respondent's Motion against the Claimants' standing is admissible. The Respondents could not have raised this objection before having become aware of the fact that Miami FC withdrew from the NASL. This occurred after the filing of the Respondents' Responses. Also, unlike for instance an objection to jurisdiction, an objection to standing is not required to be made prior to addressing the substance of the case.

183. Having addressed these procedural issues and having considered the numerous extensive and evolving submissions of the Parties on the issue of the Claimants' standing to sue, the Panel finds that the questions before it in this respect are not easily resolved.

184. On the one hand, the Panel sees the force of the Respondents' objection to the Claimants' standing to sue when Miami FC withdrew from the NASL, because at that moment in time neither of the Claimants was affiliated with any professional league sanctioned by USSF. Respondents maintain that once standing is lost, it cannot be regained. Accordingly, neither of the Claimants could be said to have an interest in having the principle of promotion / relegation implemented in US professional soccer because they could not benefit from a favourable judgment and hence lacked standing.

185. On the other hand, the Panel sees the force of the Claimants' arguments. If the RGAS require member associations to implement a certain principle in their respective countries, but USSF refuses to comply with that requirement, the members of USSF who at one point clearly were – and may well in the future once again be – adversely affected by USSF's failure to comply with FIFA's regulations (and FIFA's own failure to enforce those regulations) should have the opportunity to take legal action. In this case, it appears that the only formality that currently stands in the way of Miami FC being admitted as member of a professional league in the United States, and therefore arguably regaining its standing to sue, is the authorisation of USSF, because NISA already accepted Miami FC as a member subject to this condition.

186. For the sake of the discussion on the Claimants' standing, the Panel also would have had to consider the Claimants' argument that the situation the Claimants are challenging (the alleged non-application of Article 9 RGAS) is one of the reasons why they will never be able to join the highest professional league which actually opens the door to participation in continental and worldwide tournaments.[6]

187. Finally, on this point, the Panel finds it difficult to reconcile the Respondents' non-objection to the standing of Kingston Stockade FC at the outset of the present arbitration proceeding in spite of having been well aware that Kingston Stockade FC was not a professional club. Arguably, such allegation was not raised because the Respondents acknowledged at that point in time, without delving into the issue of standing, that the essence of the dispute was of such nature and importance as to prevail over the strict question of standing. In this respect – and while the Panel of course does not ignore the distinction between the legal concepts of jurisdiction and standing to sue (more specifically that an objection to jurisdiction must be raised at the outset of an arbitration, whereas the issue of standing to sue must be addressed *ex officio* by the Panel) – the Panel considers that the Respondents' decision to accept the jurisdiction of CAS for this specific case at the outset of the proceedings enhances the complexity of the question of the Claimants' standing to sue in these specific ordinary arbitration proceedings.

188. Intriguing as the discussion may be, the Panel finally considers that it is not required to adjudicate and decide on the issue of the Claimants' standing to sue, because it finds that the Claimants' claim shall, in any event, be dismissed on the merits, as set out in more detail below.

189. The plea relating to the lack of standing to sue, is – according to settled jurisprudence of the CAS (*cf.* CAS 2009/A/1869; CAS 2015/A/3959; CAS 2015/A/4131) and the SFT (see SFT 128 II 50, 55) – a question related to the merits of the case. Accordingly, the Panel finds that the issue of the Claimants' standing to sue does not necessarily have to be addressed first. Indeed, an arbitral tribunal is free to determine how to address the sequence of the different substantive questions at stake in legal proceedings. The Panel

[6] The Panel notes that even without being affiliated to the MLS, the Claimants apparently have at least a potential chance to participate in international professional competitions by qualifying for such competitions through the Lamar Hunt U.S. Open Cup as indicated in para. 48 of all three Requests for Arbitration and the table in para. 110 *supra* as to the structure of the Lamar Hunt U.S. Open Cup.

notes that this approach is consistent with CAS jurisprudence (CAS 2016/A/4903, para. 81-82 of the abstract published on the CAS website).

190. Consequently, given that the Panel finds that the Claimants' claim is in any event to be dismissed on the merits, a decision on the issue of the Claimants' standing to sue is not required and thus may be regarded as moot.

ii. Does Article 9 of the FIFA Regulations Governing the Application of the Statutes require that the principle of promotion and relegation be implemented in US professional soccer?

191. The Claimants' prayers for relief are premised on the argument that Article 9 RGAS requires that each of FIFA's member associations is obliged to implement a system of promotion and relegation in its territory and that such system is to be principally based on sporting merit.

192. The argument of the Claimants is disputed by the Respondents, who assert that the principle of promotion and relegation is not mandatory, but rather that, in case a system of promotion and relegation is implemented by a member association, then such system is to be based principally on sporting merit. Member associations that have not implemented the principle of promotion and relegation are however not required to do so.

193. It is consistent CAS jurisprudence that Swiss associations have a large degree of autonomy in managing their own affairs:

> "*Recognized by the Swiss federal Constitution and anchored in the Swiss law of private associations is the principle of autonomy, which provides an association with a very wide degree of self-sufficiency and independence. The right to regulate and to determine its own affairs is considered essential for an association and is at the heart of the principle of autonomy. One of the expressions of private autonomy of associations is the competence to issue rules relating to their own governance, their membership and their own competitions. However, this autonomy is not absolute.*" (CAS 2011/O/2422, para. 55 of the abstract published on the CAS website; see also CAS 2014/A/3828, para. 143 of the abstract published on the CAS website)

194. The Panel finds that a considerable amount of deference is to be afforded to FIFA's interpretation of its own rules and regulations and therefore to FIFA's position that Article 9 RGAS does not apply to USSF. Accordingly, the Panel finds that the threshold for the Claimants to establish that FIFA's interpretation or conduct in respect of the enforcement of Article 9 RGAS was unreasonable and thereby exceeded the limits of its authority is rather high.

195. Against this background, the Panel observes that the core of the dispute between the Parties comes down to an interpretation of what Article 9 RGAS brings about or is supposed to bring about.

196. Article 9 RGAS (headed "*Principle of promotion and relegation*") provides as follows:

"*1. A club's entitlement to take part in a domestic league championship shall depend principally on sporting merit. A club shall qualify for a domestic league championship by remaining in a certain division or by being promoted or relegated to another at the end of a season.*

2. In addition to qualification on sporting merit, a club's participation in a domestic league championship may be subject to other criteria within the scope of the licensing procedure, whereby the emphasis is on sporting, infrastructural, administrative, legal and financial considerations. Licensing decisions must be able to be examined by the member association's body of appeal.

3. Altering the legal form or company structure of a club to facilitate its qualification on sporting merit and/or its receipt of a license for a domestic league championship, to the detriment of the integrity of a sports competition, is prohibited. This includes, for example, changing the headquarters, changing the name or transferring stakeholders between different clubs. Prohibitive decisions must be able to be examined by the member association's body of appeal.

4. Each member association is responsible for deciding national issues, which may not be delegated to the leagues. Each confederation is responsible for deciding issues involving more than one association concerning its own territory. FIFA is responsible for deciding international issues involving more than one confederation."

197. In determining the appropriate interpretative tool to ascertain the meaning of Article 9 RGAS, it is necessary to clarify the legal nature of this provision.

198. In this respect, it is not in dispute among the Parties that their relationship is not contractual in nature. Therefore, Article 9 RGAS is not to be interpreted according to the general rules of interpretation of contracts, but rather by the methods of interpretation applicable to statutes and articles of by-laws of legal entities.

199. Although the starting point is the literal interpretation of the text, there is no hierarchy among the different methods of interpretation. The Panel finds that the CAS panel in CAS 2013/A/3365 & 3366 succinctly describes the method of interpretation to be applied and the hierarchy among the different forms of interpretation under Swiss law as follows, particularly regarding the interpretation of regulations issued by FIFA:

"*According to the SFT, the starting point for interpreting is indeed its wording (literal interpretation). There is no reason to depart from the plain text, unless there are objective reasons to think that it does not reflect the core meaning of the provision under review. This may result from the drafting history of the provision, from its purpose, or from the systematic interpretation of the law. Where the text is not entirely clear and there are several possible interpretations, the true scope of the provision will need to be narrowed by taking into account all the pertinent factors, such as its relationship with other legal provisions and its context (systematic interpretation), the goal pursued, especially the protected interest (teleological interpretation), as well as the intent of the legislator as it is reflected, among others, from the drafting history of the piece of legislation in question (historical interpretation) (SFT 132 III 226 at 3.3.5 and references; SFT 131 II 361 at 4.2). When called upon to interpret a law, the SFT adopts a pragmatic approach and follows a plurality of methods, without assigning any priority to the various means of interpretation (SFT 133 III 257 at 2.4; SFT 132 III 226 at 3.3.5).*

[…]

> *According to the SFT, the statutes of a private legal entity are normally interpreted according to the principle of good faith, which is also applicable to contracts (SFT 4A_392/2008, at 4.2.1 and references). However, the method of interpretation may vary depending on the nature and dimension of the legal person involved. As regards the statutes of larger entities, it may be more appropriate to have recourse to the method of interpretation applicable to the law, whereas in the presence of smaller enterprises, the statutes may more legitimately be interpreted by reference to good faith. The subjective interpretation will be required only when a very little number of stakeholders are concerned (SFT 4A_235/2013, at 2.3 and 4C.350/2002, at 3.2).*
>
> *FIFA is a very large legal entity with over not only two hundred affiliated associations, but also far more numerous indirect members who must also abide by FIFA's applicable regulations (SFT 4P.240/2006). It is safe to say that FIFA's regulations have effects which are felt worldwide, and should therefore be subject to the more objective interpretation principles.*" (CAS 2013/A/3365 & 3366, para. 139 and 143-144 of the abstract published on the CAS website)

200. The Panel fully adheres to these findings and concurs that the regulations of FIFA, and more particularly Article 9 RGAS, is to be interpreted objectively given that FIFA is a large scale legal entity.

a) The Literal Interpretation

201. The Panel finds that the wording of Article 9(1) RGAS is clear in that the system of promotion and relegation shall ***principally*** depend on sporting merit. The provision however does not say that all FIFA member associations are obliged to implement a system of promotion and relegation, nor that certain member associations are exempted. Furthermore, Article 9(2) RGAS gives guidance as to other factors that may be taken into account in a system of promotion and relegation besides the principal factor of sporting merit.

202. The absence of any wording stating that all FIFA members must utilize a system of promotion and relegation or that exemptions may apply to such general rule is of paramount importance in the context of the question at stake due to the fact that Article 9 RGAS was enacted when there were FIFA members that did not utilize such system. Considering the implications of the imposition of a system of promotion and relegation on FIFA members that did not utilize such system (if this was indeed the intention as the Claimants suggest), such a result would not be consistent with the silence of Article 9 RGAS in this respect. The Panel therefore finds that other methods of interpretation must be used to determine the meaning of Article 9 RGAS.

203. The Panel finds that, on its face, while Article 9(1) RGAS gives the impression that any club, i.e. regardless of the member association it is affiliated to, may take part in the domestic league championship if entitled to do so by sporting merit, still a club may be prevented from playing in such league if the club does not comply with other criteria in the licensing procedure such as sporting, infrastructural, administrative, legal and financial considerations, as set out in Article 9(2) RGAS. Accordingly, sporting merit alone is not decisive in determining whether a club is entitled to take part in a domestic league championship, but it should be the ***principal*** criterion.

204. The Panel notes that it is clear that the premier soccer league in the United States is the MLS, but that this is a so-called closed league, i.e. there is no relegation from the MLS to lower divisions and there is no promotion from the lower divisions to the MLS. The MLS is however open in the sense that clubs can apply to be admitted to the MLS. The admission of new members is subject to a variety of criteria, including the payment of a fee in the range of USD 150,000,000 – USD 200,000,000.

205. The Panel finds that, in the case of the MLS, the payment of such fee takes precedence over the importance of sporting merit. Indeed, a club without sporting merit (a newly established club) can be admitted to the MLS if it complies with the prerequisites established by the MLS, which might be viewed as inconsistent with the wording of Article 9 RGAS.

206. Consequently, the Panel acknowledges that the wording of Article 9 RGAS could arguably lead one to believe that Article 9 RGAS is universally applicable and that the system implemented in the United States is not compliant with Article 9 RGAS.

207. However, as set out above, this is not necessarily decisive. The relations between Article 9(1) and Article 9(2) RGAS, the fact that this provision does not state that utilizing a system of promotion and relegation is mandatory upon all FIFA members, and that the provision was enacted when there were FIFA members that did not utilize a system of promotion and relegation, while the imposition of such system on them would entail massive implications, warrants a further process of interpretation and the Panel should proceed in the attempt to find the true meaning and intention of the provision by using other interpretative tools. Indeed, the true meaning of the provision in question may derive from other methods of interpretation in case they show that the text does not correspond in all respects to the true meaning and leads to results which the legislator could not have wanted.

b) The Historical / Purposive Interpretation

208. The purposive interpretation of Article 9 RGAS may be relevant in the matter at hand. Indeed, the submissions of the Respondents chiefly focus on this method of interpretation. The Respondents maintain that this provision was only implemented to prevent "Granada-like" situations[7] from being repeated, but never to require member associations to implement a system of promotion and relegation.

209. In an attempt to ascertain the purpose of the draftsman in adopting a certain provision, guidance is particularly to be sought in the period prior to the adoption of the provision, rather than the purpose given to it after its adoption and implementation. Indeed, the principle of so-called "compliant interpretation" is examined below as a separate method of interpretation.

210. When it comes to establishing the purposive interpretation of a provision, the Panel finds that it is hard to imagine a category of documents that could more accurately establish the intention of the draftsman than the working documents (*travaux*

[7] See para. 211 *infra* for a recap of the Granada case.

préparatoires). The Panel notes that a significant body of working documents of FIFA are available on the implementation of Article 9 RGAS, i.e. minutes of FIFA's Strategic Committee, the FIFA Legal Committee, the FIFA Executive Committee and the FIFA Congress, various documents distributed by FIFA to its members (i.e. a Circular, an interview with the FIFA President after the 2008 FIFA Congress, a communication published on 12 March 2008). The content of these documents is set out below in chronological order.

1) The Working Documents on File concerning the Implementation of Article 9 RGAS

211. On 9 October 2007, a meeting of the FIFA Strategic Committee took place during which Mr Ángel María Villar Llona provided details of the Granada case, following which the FIFA Strategic Committee reached a conclusion:

> "*Giving details of a specific case that had caused concern in his home country, Ángel María Villar Llona explained that the shares in a Spanish second division club had recently been sold to a listed company, which had subsequently decided to move the club 400km to a different town and to change its name from Ciudad de Murcia to Granada 74, yet at the same time retain Murcia's second-division status. Although Spanish company law permitted a listed company to change domicile and registered name, the Spanish football association was appealing against the switch on the grounds that sporting status had to* [sic] *achieved on the pitch and not by acquisition. Upon learning the details of the situation, FIFA had immediately extended the Spanish football association's decision to suspend the club from football activities. However, the league had failed to fulfil its duty to enforce the suspension and the dispute had subsequently been referred to the Court of Arbitration for Sport (CAS), which had ruled in favour of the club. While no detailed reasoning for the decision had thus far been distributed by CAS, the club supported by the Spanish league had already lodged a claim for compensation from the Spanish football association. In the light of the CAS ruling, Ángel María Villar Llona congratulated the chairman in his capacity as UEFA President for writing to the governments of the 28 member states of the European Union to remind them of the special status of football and the risk posed by the over-commercialisation of the game. The letter had underlined that clubs had roots in their local communities and should therefore not simply be uprooted.*
>
> *In view of the potentially dangerous and complicated repercussions of CAS's decision, for example, the risk of the management of a club in one country within the European Union buying up the shares of a club in another EU country and moving its domicile across a national border, and in order to prevent a repeat of this case, the President pointed out that an amendment to the relevant FIFA regulations would be submitted to the Executive Committee for approval when it convened at the end of October.*"

212. On 28 October 2007, a meeting of FIFA's Bureau of the Legal Committee took place. The minutes of this meeting provide, *inter alia*, as follows:

> "[…] *With regard to the Granada case, the President mentioned that FIFA was not at all satisfied with the decision passed by CAS and had drafted a provision that would prevent similar situations from recurring in the future. The President then left the meeting.*
>
> […]
>
> *3. Buying league status*

The chairman explained the reasons for the article under review. It would first be sent to the associations as a circular and then incorporated into the [RGAS]. *The background to the matter was a decision recently passed by CAS on Granada, in which the Spanish association was involved, backed by FIFA. The Spanish association had been trying to stop a Spanish club from buying its way into a higher division by changing its name and domicile. In this connection, the Spanish association had decided that such changes in name and domicile were unlawful. CAS had judged the transactions as legal but for FIFA such action infringed principles, which allow promotion only on sporting merit. FIFA's current legal norms would therefore be supplemented with a new article that would do justice to this sporting principle. The Strategy Committee had endorsed FIFA's basic argument and proposed solution on 8 October 2007.*

The article was to be sent to all of the associations after the Executive Committee meeting with the remark that it would be debated and passed at the 2008 Congress. The associations would then be directed to incorporate the article into their own regulations.

After a prolonged discussion, the members agreed that the proposal was an initial milestone in preventing future "Granada" cases. They decided to recommend that the Executive Committee accept the proposal without any amendments."

213. On 29 October 2007, a meeting of the FIFA Executive Committee took place. The minutes of this meeting provide, *inter alia*, as follows:

"[…] [T]*he bureau of the Legal Committee had also drafted a new article concerning the promotion and relegation of clubs for inclusion in the* [RGAS] *in order to ensure clubs were promoted on sporting merit alone and to prevent a repeat of the recent case in Spain where a listed company had bought a second division club, moved it to another city 500km away and changed its name from Ciudad de Murcia to Granada 74, but at the same time retained Murcia's second-division status. The Executive Committee approved the principles of the proposed new article, but,* ***following a comment from Chuck Blazer, it was agreed that the wording would be reviewed to ensure that it did not have any effect on the movement of clubs within leagues that did not have promotion and relegation****. The redrafted wording would be presented to the Executive Committee for ratification at its meeting on 15 December.*" (emphasis added by the Panel)

214. On 15 December 2007, another meeting of the FIFA Executive Committee took place. The minutes of this meeting provide, *inter alia*, as follows:

"[…]

11.1 Promotion and relegation

Angel Maria Villar Llona said that, following on from the discussions at the Executive Committee's last meeting on 29 October, the existing wording of the proposed new article of the [RGAS] *concerning the promotion and relegation of clubs had been reviewed and* ***it had been concluded that it would not affect leagues that did not have any promotion and relegation. He felt that making specific reference to leagues where the principle of promotion and relegation did not exist such as those in the USA and Australia was not necessary since the article's title already made it clear that the requirements could only apply where these concepts existed. Nevertheless, in order to avoid any misunderstandings, the Executive Committee unanimously agreed that the existing set-up of the leagues in the USA and Australia would not be affected by the new provisions. Despite the fact that Chuck Blazer indicated he would prefer the words "where promotion and relegation exists" to be added at the start of the first paragraph of the proposed article since the Statutes would be a permanent record that was clear to outside parties and would***

> ***avert any chance of a future dispute if this decision, recorded only in the minutes of the meeting, was forgotten over time, the Executive Committee endorsed the existing proposal for the wording of the article without amendment.***
>
> ***Following on from this discussion, Michel Platini asked if FIFA intended to encourage leagues without promotion and relegation to introduce this practice. The President said that this was a separate matter that could be discussed at a later date.***" (emphasis added by the Panel)

215. On 27 December 2007, FIFA issued Circular no. 1132 to its members. This Circular provides as follows:

> "*In accordance with article 2 (e) of the FIFA Statutes, FIFA is committed to preventing all methods or practices which might jeopardise the integrity of matches or competitions or give rise to abuse of association football.*
>
> *One corollary of this objective is the principle that entitlement to take part in a domestic league championship must depend primarily on sporting merit. This entitlement can also be made conditional upon the fulfilment of particular financial criteria set as part of club licensing procedures.*
>
> ***There have recently been cases of attempts to facilitate qualification for a particular competition and/or the issue of a licence through the implementation at short notice of procedures permitted under company law. Pursuant to the above-mentioned provisions of the FIFA Statutes, such practices, which comprise the sporting integrity of competitions, must be combated and prevented****. To this end, the FIFA Executive Committee passed the following decision at its last meeting:*
>
> [wording of Article 9 RGAS]
>
> *The FIFA Executive Committee further decided to introduce the above provisions with immediate effect. Consequently,* ***member associations and leagues are requested to take immediate and concerted action to prevent such practices*** *should they become aware of them.*" (emphasis added by the Panel)

216. On 12 March 2008, following the establishment of a task force that adopted certain principles, and following the approval of nine subjects by the FIFA Executive Committee in October 2017, FIFA published a document on its website outlining "*the decisions taken by the Executive Committee, the objectives of those measures which came into force on 1 January 2008 and the expected dates on which they will be implemented, as well as giving actual examples of what they should help avoid in the future*". One of these decisions concerned "*protecting the promotion and relegation system for clubs*". Specifically on this topic, this communication provides as follows:

> "*Concept: Results on the pitch decide whether a club goes up or down a level in every championship around the world except in the United States and Australia, where there are "closed" leagues. Recently it has been possible to achieve promotion artificially by buying or moving a club. FIFA wishes to make sure that this cannot happen again.*
>
> *Objective: To protect the traditional promotion and relegation system for clubs based purely on sporting criteria – which is the very essence of football.*

Application: The decision was taken at the FIFA Executive Committee meeting on 15 December in Tokyo. The article will now be submitted to the Congress next May for approval and implementation as a "new article" within the [RGAS].

Example: In Spain, the president of fourth division club Granada bought second-flight Murcia then moved the club near to Granada, allowing Granada 74 to move up artificially into the second tier."

217. On 14 March 2008, in preparation for the FIFA Congress, a meeting of the FIFA Executive Committee took place. The minutes of this meeting provide, *inter alia*, as follows:

"[…]

The Executive Committee agreed to request the approval of the 2008 FIFA Congress for amendments to the FIFA Statutes and the [RGAS] *regarding the following topics:*

- *Principle of promotion and relegation*

New article in the [RGAS] *(as approved by the Executive Committee on 15 December 2007)*"

218. On 25 April 2008, the Agenda for the upcoming FIFA Congress in Sydney, Australia was circulated and it contained the wording of the proposed new Article 9 RGAS (which was identical to the wording circulated in Circular no. 1132).

219. On 29 and 30 May 2008, the FIFA Congress took place in Sydney, Australia. The minutes of the FIFA Congress provide, *inter alia*, as follows:

"*13.2.2. Sporting integrity – principle of promotion and relegation*

The chairman of the Legal Committee began his explanation of this proposal by pointing out that article 2 of the FIFA Statutes stated that the objectives of FIFA included preventing all methods or practices which might jeopardise the integrity of matches or competitions or give rise to abuse of association football. With this in mind and in order to safeguard the integrity of the game in the fact of attempts by some clubs around the world to secure a place in a higher league by financial and other means, the Executive Committee had confirmed its support in December 2007 for the proposal that a new article (article 19) be added to the [RGAS], *explicitly stating that the promotion or relegation of a team was to be decided on sporting merit alone.* ***He added that, in view of the fact that a number of closed leagues that did not have promotion or relegation existed around the world, some of the members of the Executive Committee had requested that the words "where the principle existed" be added, but this proposal had been dismissed as superfluous.***

John Collins, a member of the Legal Committee, requested on behalf of CONCACAF that the proposal be amended slightly. While recognising that the proposed wording had been prompted by abuses in some leagues around the world, he said CONCACAF was concerned that the it [sic] *would pose an obstacle to new professional leagues since it would discourage potential club investors due to the risk of losing their investment if a club were relegated. CONCACAF therefore proposed the addition of the words "where applicable" at the start of the second sentence of article 19 paragraph 1 ("A club shall qualify for a domestic league by remaining in a certain division or being promoted or relegated to another at the end of a season"), since it would then be clear that associations would have the right to do what was best for the game in their territory.*

> *In response, the chairman of the Legal Committee underlined that none of the members of his committee, which comprised members from all six confederations, had opposed the proposed wording originally presented during its discussions. He added that the reference to investors underlined the growing problem of third parties coming into football purely to make money and he stressed that the Executive Committee had already considered and rejected the inclusion of these words. Furthermore, amendments to the agenda were not permitted at this stage of the Congress, but had to be presented for decision under item 4 of the agenda as had been the case with those agreed by the Executive Committee at its meeting on 26-27 May.*
>
> *The proposal to introduce a new article 19 of the* [RGAS] *with the wording included in the agenda and not the proposed amendment from John Collins was therefore put to the vote and approved with the following result:*
>
> ***156 votes in favour and 23 against.***" (emphasis added by the Panel)

220. On 30 May 2008, after the conclusion of the FIFA Congress, Mr Sepp Blatter, then-FIFA President, gave a press conference, where he stated, *inter alia*, as follows, as published on the FIFA website on the same date:

> "[…]
>
> *On promotion and relegation*
>
> *Joseph S. Blatter:* ***We have clearly said that the decision taken by Congress will not affect existing leagues*** *although it will send a strong indication for them to adapt. It is an important principle for the Executive Committee and the Congress to maintain. If this is not clearly defined we could have a repetition of the situation in Spain with* [sic] *the CAS overruled the Spanish Federation and a 4th Division team went to the 2nd Division.*" (emphasis added by the Panel)

2) FIFA's Post Passage Conduct

221. Another category of documents that may aid in interpreting Article 9 RGAS is the interpretation given to this provision by FIFA after its implementation. Indeed, the Panel agrees with the Claimants' argument that the interpretation of a provision can change over time and that, if the practical application of the provision is different from the initial interpretation, the more contemporaneous interpretation may prevail (e.g. CAS 2017/A/5063). In this respect, the "Australia letters" are particularly relevant and these letters are addressed in this section.

222. On 19 February 2014, Mr Zaitman, then Chairman of a Standing Committee of Football Federation Victoria ("FFV"), a member of Football Federation Australia (the "FFA"), informed FIFA about news that it had been announced that A League clubs in Australia would effectively be granted extended A League licences to remain A League clubs until 2034 and that this would effectively lock out any promotion and relegation system in Australia, despite the introduction of a second-tier league in Australia that had become known as the National Premier League (the "NPL").

223. On 10 March 2014, Mr Marcus Kattner, FIFA's Deputy Secretary General informed Mr Zaitman that "[t]*he principle of promotion and relegation is indeed of fundamental*

importance to FIFA as provided in art. 9 par. 1 [RGAS]", however, recommending him to contact the FFA through the FFV.

224. Also on 10 March 2014, FIFA's Deputy Secretary General, forwarded Mr Zaitman's letter to the FFA, informing it, *inter alia*, as follows:

> "[…] *As you are no doubt aware, the principle of promotion and relegation is of fundamental importance to FIFA as provided in art. 9 par. 1* [RGAS]. *For this reason and in order for our offices to get a clearer picture, you are requested to provide us with a report on the situation by no later than 24 March 2014. In particular, this report should elaborate on the purported decision to extend each A-League club's license and inform us whether the principle of promotion and relegation can still be achieved given that decision.* […]"

225. On 11 March 2014, Mr David Gallop, the CEO of the FFA informed FIFA as follows:

> "[…] *I can confirm that* [FFA] *has announced the extension of the current licences held by Hyundai A-League clubs to 2034.*
>
> *However, this extension does not, as suggested by Mr Zaitman, have the result of "effectively locking out any promotion and relegation system in Australia".*
>
> *To the contrary, the licences granted to the A-League clubs expressly provide that the licensee's club's "continued participation in the A-League is subject to any promotion and relegation system introduced by FFA in relation to eligibility to participate in the A-League". Further the licence also expressly provides that "FFA may review and vary the structure of the A-League during the Term including the introduction of a system for promotion and relegation as a criterion for participation in the A-League".*
>
> *FFA remains committed to the introduction of a promotion and relegation system at the appropriate time in the future. To this end, FFA has in recent times undertaken a number of important initiatives to improve the standards of the clubs and leagues that underpin the professional national league. These include the conduct of a major national competition review which has led to the introduction of the National Premier League in each state (as referred to in Mr Zaitman's letter) and which will ensure the continued professionalisation of the second tier of football throughout the country. We have also announced the introduction of a national knock-out cup – the "FFA Cup" – which is set to commence in July this year and will involve clubs from the state leagues as well as the Hyundai A-League clubs.* […]"

226. From the evidence submitted by the Parties, it appears that no further correspondence was exchanged between FIFA and the FFA between 11 March 2014 and 6 May 2015.

227. On 6 May 2015, Mr Jérome Valcke, FIFA Secretary General, informed the FFA as follows:

> "*We refer to the attached media article dated 5 May 2015 in relation to* [FFA's] *release of the Whole of Football Plan. The article suggests that FFA have ruled out any possibility of the A-League moving to a promotion and relegation system.*
>
> *In line with our earlier correspondence on this matter,* ***we remind you that the principle of promotion and relegation is of fundamental importance to FIFA and is a mandatory principle binding on all FIFA Member Associations as provided in art. 9 par. 1*** **[RGAS].** *In your correspondence dated 11 March 2014, you informed us that FFA was committed to the introduction of a promotion and relegation system at the appropriate time and that all*

> *licenses awarded to A-League clubs were subject to the introduction of this principle. The attached media article appears to be inconsistent with the position contained in your correspondence dated 11 March 2014. For this reason, we kindly request you to explain the position of FFA as suggested in the media article and whether the position in your correspondence dated 11 March 2014 remains the same. Please ensure that your reply reaches our offices by no later than 15 May 2015.*" (emphasis added by the Panel)

228. On 11 May 2015, Mr Gallop, informed FIFA as follows:

> "[…] *I confirm that, as set out in our letter dated 11 March 2014, FFA remains committed to the introduction of a promotion and relegation system at the appropriate time in the future and to that end has expressly provided for that in the licenses granted to the clubs in the A-League.*
>
> *The Whole of Football Plan is a broad far-reaching document that addresses the whole landscape of football in Australia. While it has a long term time horizon of approximately twenty years it expressly acknowledges that the particular initiatives and strategies discussed in the Plan will have different implementation points and the Plan itself does not contain prescriptive deadlines.*
>
> *In relation to promotion and relegation, the Plan provides the foundation for this to occur in the future by identifying the underpinning priorities that are necessary to support its successful introduction. This is an important element of managing the expectations of the Australian football community and ensuring that focus and resources are dedicated to achieving the necessary conditions that a promotion and relegation system will require in Australia. To this end the Plan recognises that while there is no professional second tier in Australia, a promotion and relegation system based purely on sporting results is not a viable option in this country in the immediately foreseeable future. The important priorities to build the platform for promotion and relegation at the appropriate time in the future include:*
>
> - *Ensuring the financial stability of the existing ten team competition;*
> - *Expanding the competition beyond ten teams; and*
> - *Building the capacity of the amateur/semi-professional clubs in the tier below the A-League, noting that this is a key objective of the National Premier Leagues initiative across the country (being the amateur/semi-professional tier in each state beneath the A-League) as well as of the FFA Cup which was introduced in 2014.*"

229. From the evidence submitted by the Parties, it appears that no further correspondence was exchanged between FIFA and the FFA on this topic. The communication between Mr Zaitman and FIFA however continued.

230. On 12 May 2016, Mr Zaitman informed FIFA, *inter alia*, as follows:

> "[…] *The reason for my correspondence is to again draw attention to the failure of* [FFA] *to properly instigate or plan for a system of Promotion & Relegation in Australian football and address club and player compensation issues in relation to youth development.* […]
>
> *I have previously provided newspaper copy on this matter. Now over two year later,* [FFA] *are still attempting to convince us that the matter of Promotion & Relegation is again on the table but say that "we now have structural issues as we have got 10 clubs with A League Licences and they are for 18 more years." **The reality therefore is that no discernible action is being taken in this regard and Australia is operating a closed competition which may***

> ***be contrary to FIFA statutes – of which I would request clarification from FIFA.*** […]" (emphasis added by the Panel)

231. On 10 May 2016, Mr Marco Villiger, FIFA Director of Legal Affairs, and Mr James Johnson, FIFA Head of Professional Football, informed Mr Zaitman as follows:

> "[…] *In the above regard, we would like to reiterate our position communicated to you in our correspondence dated 10 March 2014 that the principle of promotion and relegation is of fundamental importance to FIFA as provided in art. 9 par. 1* [RGAS] *We understand and are sympathetic about the benefits promotion and relegation can bring in terms of incentivizing clubs in the A-League and the National Premier Leagues to perform both on and off the field. However, the principle of promotion and relegation needs to be implemented at the right time and must take into consideration the specific nature of club football in each country.*
>
> *Given that* [FFA] *has already committed to the introduction of this principle at the appropriate time and, in particular, that the licences granted to A-League clubs expressly provide that the licensee club's continued participation in the A-League is subject to any promotion and relegation system implemented by FFA, we shall not intervene in this matter at this point in time.* […]"

232. While the Claimants mainly rely on the above "Australia letters", the Respondents rely on other documents issued by FIFA representatives after the introduction of Article 9 RGAS to show that this provision did not require the principle of promotion and relegation to be implemented in the United States.

233. On 28 August 2013, in a context that was not entirely made clear to the Panel, but certainly unrelated to the "Australia letters", Mr Villiger informed Mr Sunil Gulati, Former President of USSF (2006-2018), as follows:

> "***Good news, attached the ExCo minutes of December 2007 and under 11.1 you are safe regarding promotion and relegation***.
>
> *Also attached the Congress minutes (item 13.2.2), but if you read them with the ExCo minutes all is fine for you.*" (emphasis added by the Panel)

234. In September 2014. the FIFA Associations Committee made a proposal regarding cross-border leagues. This initiative resulted in a document titled "*Draft Regulations Governing Leagues and Competitions with Participating Clubs from Different Associations and Closed Leagues*". Following a question from Mr Gulati about the draft regulations, Mr Thierry Regenass of FIFA answered him on 4 September 2014, *inter alia*, as follows:

> "[…] *I guess it aims more at new regional leagues (there are a number of projects in discussion) than existing ones.* ***In any case mls is so to speak already an "exception" for the fifa statutes (promotion relegation principle)…***" (emphasis added by the Panel)

235. The draft regulation intended to regulate cross-border leagues also contained a section addressing closed leagues, in an attempt to limit their existence and to require the introduction of the principle of promotion and relegation in such leagues over time. USSF submits that the draft "closed league" regulations would have been completely unnecessary if, in fact, Article 9 RGAS was intended and understood by FIFA's

members to eliminate the existence of closed leagues and require the implementation of promotion and relegation. These draft regulations were never approved by the FIFA Associations Committee, nor were they even presented to the FIFA Executive Committee for consideration.

3) The Findings of the Panel in respect of the Historical / Purposive Interpretation

236. The Panel finds that the working documents are clear as to the intention of the draftsman with implementing Article 9 RGAS, i.e. FIFA wanted to prevent "Granada"-like situation from reoccurring.

237. It becomes clear from the working documents that FIFA considers the principle of promotion and relegation important; however, it also becomes clear from the working documents that FIFA is sympathetic to the specific situations in some countries where promotion and relegation has not been implemented. In this respect, reference is specifically made to the United States and Australia. Although the Panel is aware that FIFA asserts that other countries have not implemented a system of promotion and relegation, the Panel accords little weight to this fact since it was not provided with any explanation for the cause of the situation in these countries. It may well be due to the size of the population in these countries or because there are not enough football clubs in their leagues.

238. The Panel finds that the minutes of the FIFA Congress are of particular relevance, because this is the body that ultimately implemented Article 9 RGAS, but as submitted by FIFA, the minutes of the meetings of the FIFA Strategic Committee, the FIFA Legal Committee and the FIFA Executive Committee are also relevant in determining the purpose and intention of FIFA in the adoption of Article 9 RGAS.

239. Indeed, for instance in the minutes of the FIFA Executive Committee meeting of 29 October 2007, Mr Blazer was assured that the wording of Article 9 RGAS "*would be reviewed to ensure that it did not have any effect on the movement of clubs within leagues that did not have promotion and relegation*". It is therefore apparent that the FIFA Executive Committee did not have the intention to impose a duty on all of its members to implement the principle of promotion and relegation. Rather, the principle was only mandatory for those member associations that had already implemented the principle.

240. It was further confirmed in a meeting of the FIFA Executive Committee on 15 December 2007 that "*the Executive Committee unanimously agreed that the existing set-up of the leagues in the USA and Australia would not be affected by the new provisions*" and that "[f]*ollowing on from this discussion, Michel Platini asked if FIFA intended to encourage leagues without promotion and relegation to introduce this practice. The President said that this was a separate matter that could be discussed at a later date.*" The Panel finds that this does not leave any doubt about the exemption created for the United States and Australia and that FIFA was, at least at that moment in time, not even committed to encourage leagues without promotion and relegation to introduce this principle, let alone to oblige them to do so.

241. Finally, at the FIFA Congress held on 29 and 30 May 2008, Mr Villar Llona informed the member association that "[…] *in view of the fact that a number of closed leagues that did not have promotion or relegation existed around the world, some of the members of the Executive Committee had requested that the words "where the principle existed" be added, but this proposal had been dismissed as superfluous.*" The Panel finds that it follows from this statement of Mr Villar Llona that he agreed that existing closed leagues would be exempted from the obligation to implement the principle of promotion and relegation, but that this was already clear from the wording of Article 9 RGAS.

242. The Panel finds that, should no such assurances have been made, a sudden obligation for USSF to implement the principle of promotion and relegation would have caused a significant upset in US professional soccer. It is a fact of common knowledge that the United States has a different tradition of sport and is not accustomed to promotion and relegation in professional sports in general. The Respondents informed the Panel that significant investments were made in MLS clubs based on the assurance that such clubs would participate in the MLS. A sudden implementation of the possibility to relegate would put these investments at risk and could very well have triggered law suits from the clubs prejudiced by this sudden change of rules.

243. The assurances given to USSF and CONCACAF in the meetings of the FIFA Legal Committee, the FIFA Executive Committee and the FIFA Congress prevent FIFA from suddenly changing its course of action and to act contrary to such assurances. In this respect, the Panel finds that such conduct would have been contrary to the principle of "estoppel" or *venire contra factum proprium*. The latter doctrine, recognised by Swiss law, provides that where the conduct of one party has induced legitimate expectations in another party, the first party is estopped from changing its course of action to the detriment of the second party (CAS 2008/O/1455, para. 16 of the abstract published on the CAS website) and amounts to a prohibition of inconsistent behaviour.

244. Consequently, the Panel finds that while FIFA surely could have been more precise in drafting its rules, still the purpose of FIFA in adopting Article 9 RGAS is clear that it was only intended to apply to member associations that had already traditionally and consistently implemented the principle of promotion and relegation and therefore not to USSF because that member association had not implemented such principle.

245. Turning to the issue of the "Australia letters". The Panel indeed considers these letters relevant in understanding what interpretation was given to Article 9 RGAS by FIFA after its implementation.

246. In this respect, it must be concluded that there are indications on file suggesting that the intended interpretation of Article 9 RGAS was somewhat lost and that Mr Blazer's concern that led him to propose the addition of the words "*where promotion and relegation exists*" to the wording of Article 9(1) RGAS so as to "*avert any chance of a future dispute if this decision, recorded only in the minutes of the meeting, was forgotten over time*" indeed became reality.

247. This is demonstrated in particular by Mr Valcke's letter dated 6 May 2015 where he indicated to the FFA that "*the principle of promotion and relegation is of fundamental importance to FIFA and is a mandatory principle binding on all FIFA Member Associations as provided in art. 9 par. 1* [RGAS]". This interpretation is misconceived, because Article 9 RGAS was not intended to apply as a mandatory principle to all FIFA member associations. In fact, the United States and Australia were specifically exempted from the scope of application, just like any other member associations that had not already implemented the principle of promotion and relegation.

248. The Panel notes that the above statement of Mr Valcke is the only evidence on file supporting the Claimants' interpretation of Article 9 RGAS. The Panel however finds that one statement of a FIFA executive cannot take precedence over the entire legislative process that preceded the implementation of Article 9 RGAS.

249. Furthermore, the Panel considers it important that, despite Mr Valcke's suggestion that the FFA was obliged to implement the principle of promotion of relegation, FIFA never undertook any concrete action against the FFA when it became clear that it was not going to implement the principle of promotion and relegation on short notice.

250. Mr Valcke's interpretation is also contradictory to Mr Villiger's interpretation as communicated to Mr Gulati on 28 August 2013. Although the context in which Mr Villiger's email was sent is not entirely clear, the Panel finds that it appears from this correspondence that FIFA's then Head of Legal Affairs informed the President of USSF that there was no need for USSF to undertake any action as to promotion and relegation.

251. The Panel finds that Mr Valcke's statement should rather be seen as an attempt to exercise certain (undue) pressure on the FFA to implement the principle of promotion and relegation, because it is clear that – even though not required – FIFA considered the principle of promotion and relegation to be important and would prefer to see this principle implemented worldwide. However, having a preference to see the principle implemented, is quite different from actually requiring a constituent to implement the principle.

252. Mr Regenass's email dated 4 September 2014 also indicates that FIFA still accepted that USSF was exempt from the principle of promotion and relegation, and that it did not intend to change this position.

253. The interpretation of Article 9 RGAS put forward by Mr Zen-Ruffinen in his witness statement that the principle of promotion and relegation has "*always been seen by FIFA as absolutely crucial*" and that "*I know that this principle has finally been integrated into the* [RGAS] *as a written and compulsory rule*", does not prove anything, particularly because Mr Zen-Ruffinen admitted in the same witness statement that "*I was not working for FIFA anymore at that last period*". Accordingly, the Panel notes that Mr Zen-Ruffinen has no direct knowledge about the intended purpose of Article 9 RGAS and about the discussions that took place prior to its implementation.

254. It has been maintained in CAS jurisprudence that "[…] *constant practice within FIFA can help in interpreting how FIFA, as an association, and its direct and indirect*

members, understood and applied FIFA Regulations." (CAS 2007/A/1320-1321, para. 44 of the abstract published on the CAS website)

255. The Panel finds that the constant practice of FIFA as to Article 9 RGAS underpins the conclusion that such provision does not require that the principle of promotion and relegation be implemented in professional soccer in the United States.

256. Considering the above, the Panel finds that FIFA's conduct subsequent to the implementation of Article 9 RGAS cannot lead to the conclusion that its purpose significantly changed over time such that a certain consistent practice of FIFA now warrants a different interpretation of Article 9 RGAS.

c) Conclusion

257. Given the size of FIFA, an objective interpretation prevails over any subjective good faith interpretation. In ascertaining the meaning and scope of Article 9 RGAS, the Panel finds that, in this particular matter, the working documents are the most valuable evidence at the disposal of the Panel that allows to interpret Article 9 RGAS.

258. The Panel finds that, viewed in its entirety, the evidence in this record supports only one conclusion: that Article 9 RGAS was only intended to apply to member associations that had already implemented the principle of promotion and relegation and to avoid, *inter alia*, within such existing systems, cases like the "Granada Case".

259. Given that the principle of promotion and relegation had neither been implemented in the United States when Article 9 RGAS was enacted, nor afterwards, and consistent with a clear notification made to this affect by a high officer of FIFA to the President of USSF, the Panel finds that it was never the intention of FIFA that Article 9 RGAS would be applicable to USSF. Accordingly, USSF was not required to implement a system of promotion and relegation on the basis of sporting merit in the United States.

260. The argument of the Claimants that the exemption created for the United States and Australia only applied to the league structures that were in place at that time, but that no such exemption is warranted anymore because the league structure in professional soccer had changed significantly over time, must be dismissed.

261. This argument appears to be largely premised on the statement in the minutes of the FIFA Executive Committee meeting of 15 December 2007 where it was recorded that "*the Executive Committee unanimously agreed that the existing set-up of the leagues in the USA and Australia would not be affected by the new provisions*".

262. The Panel however finds that there is no indication on file that it was agreed by the members of the FIFA Executive Committee that such exemption would be retracted upon a certain change in the set-up of the leagues in the United States. Rather, the FIFA Executive Committee and the FIFA Congress considered that adding the words "*where the principle existed*" to the wording of Article 9 RGAS would be superfluous because they already considered it clear that such principle only applied to countries where the principle had already been implemented. Accordingly, before the principle of

promotion and relegation on sporting merit would have to be implemented by USSF, the principle of promotion and relegation should have been introduced in USSF in the first place, which never happened.

263. Claimants argue that at the time that FIFA adopted Article 9 RAGS, the MLS was the only professional league in the United States, but that, in the years following the adoption of this provision (i) USSF sanctioned additional professional leagues below the MLS, (ii) several new teams joined the MLS and, (iii) USSF allowed teams to move up and down the pyramid by joining and withdrawing from leagues in different divisions. Claimants therefore assert that the US has, in effect, implemented the principle of promotion and relegation. The Panel disagrees. No *de facto* system of promotion and relegation was ever implemented in the United States. It is true that clubs (some of which previously had competed in lower division league) can gain entry to the MLS by paying an expansion fee and meeting other criteria established by the league, but that does not describe a system of promotion and relegation based on sporting merit. Rather, given that the MLS is and has always been a closed league – which the Claimants do not contest – such a practice is well known to FIFA and not prohibited by Article 9 RGAS.

264. Moreover, Claimants' argument that Article 9 RGAS requires all member association to implement the principle of promotion and relegation was unambiguously refuted by the FIFA Executive Committee at its meeting of 15 December 2007, because when Michel Platini asked whether FIFA intended to encourage leagues to implement the principle of promotion and relegation, Mr Blatter answered that "*this was a separate matter that could be discussed at a later date*", from which it can be inferred that this was certainly not the intention of Article 9 RGAS.

265. As indicated *supra*, the Panel finds that a considerable amount of deference is to be afforded to FIFA's interpretation of its own rules and regulations. The Panel finds that FIFA has been conclusive during the entire proceedings and at the hearing about the purpose and intention of Article 9 RGAS and why it does not apply to USSF.

266. Accordingly, the Panel finds that the Claimants did not succeed in establishing that FIFA's interpretation or conduct in respect of the enforcement of Article 9 RGAS was unreasonable and thereby exceeded the limits of its authority.

267. Turning briefly to the situation of CONCACAF, the Panel finds that the various rules and regulations implemented by CONCACAF do not require the principle of promotion and relegation to be implemented in soccer in the United States. CONCACAF is required to comply with the Statutes and regulations of FIFA, but given that the Panel finds that Article 9 RGAS does not require the implementation of the principle of promotion and relegation in member associations where this had not been done, it also does not require CONCACAF to require its member associations to do so.

268. As a consequence of the above, USSF is not required to implement the principle of promotion and relegation between its professional leagues, while FIFA and CONCACAF are not required to undertake any action against USSF in this respect.

269. Consequently, the Panel finds that neither Article 9 RGAS nor any other provision incorporated in the rules and regulations of FIFA, CONCACAF and/or USSF require that the principle of promotion and relegation be implemented in professional soccer in the United States.

iii. Do the Respondents violate Swiss law on associations by not enforcing the principle of promotion and relegation?

270. In view of the conclusion reached above, the Panel finds that the Respondents were not required to enforce the principle of promotion and relegation in the United States, because the United States was exempted from the scope of application of Article 9 RGAS.

271. Consequently, the Panel finds that Swiss law on associations was not violated.

iv. Do the Respondents violate Swiss competition law by not enforcing the principle of promotion and relegation?

272. Again, in view of the conclusion reached above, the Panel finds that the Respondents were not required to enforce the principle of promotion and relegation in the United States, because the United States was exempted from the scope of application of Article 9 RGAS.

273. The Claimants did not reiterate their arguments based on a competition law violation at the hearing and appear to have abandoned such line of reasoning. The Claimants also have not presented any evidence from expert witnesses in this regard.

274. Insofar as the Claimants invoke the competition law argument on a stand-alone basis, i.e., regardless of the Panel's conclusion that Article 9 RGAS does not say what the Claimants submit that it says, the Panel finds that it must still be dismissed.

275. The Panel concludes that Claimants have failed to establish that maintaining a closed league system in the United States is a violation of competition law. The Claimants have not established that, assuming they meet MLS's criteria for membership, they are prevented from gaining access to the league. Also, closed leagues are commonplace in professional sports in the United States and the Claimants did not argue why such practice could not be maintained in soccer, if it were not for Article 9 RGAS.

276. Although FIFA may not like closed leagues, it condones closed leagues in member associations as long as such member has not previously implemented the principle of promotion and relegation in its professional leagues. Accordingly, unlike in member associations with open leagues, clubs in the United States do not have a right to participate in the MLS even if sporting merit would justify that they do.

277. A competition law violation can only be established if the Claimants could establish any unfavourable treatment in comparison with others. The Claimants however failed to establish any such unfavourable treatment.

278. Consequently, the Panel finds that Swiss competition law was not violated.

B. Conclusion

279. Based on the foregoing, and after taking into due consideration all the evidence produced and all arguments made, the Panel finds that:

    i. Neither Article 9 RGAS nor any other provision incorporated in the rules and regulations of FIFA, CONCACAF and/or USSF requires that the principle of promotion and relegation be implemented in professional soccer in the United States.
    ii. The Respondents did not violate Swiss law on associations or Swiss competition law.

280. Any other and further motions or prayers for relief are dismissed.

281. Pursuant to Article R43 of the Code, the present award is confidential, unless all Parties agree to publish it or the Division President so decides.

X. COSTS

(…).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The claims filed by Miami FC and Kingston Stockade FC against the *Fédération Internationale de Football Association*, the Confederation of North, Central American and Caribbean Association Football, Inc., and the United States Soccer Federation on 9 August 2017 are dismissed.

2. (…).

3. (…).

4. (…).

5. All other and further motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 3 February 2020

THE COURT OF ARBITRATION FOR SPORT

Efraim **Barak**
President of the Panel

J. Félix **de Luis y Lorenzo**
Arbitrator

Jeffrey **Mishkin**
Arbitrator

Dennis **Koolaard**
Ad hoc Clerk