The constitutional review of the 2014 World Cup Law by Brazil’s Federal Supreme Court

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Introduction

On 7 May 2014, the Brazilian Federal Supreme Court (STF) declared that the General World Cup Law was constitutional. In this unprecedented decision, the Court dismissed the claim filed on 17 June 2013 by the Brazilian public prosecutor, Roberto Gurgel. The Attorney-General sought the suspension of four articles of the General World Cup Law: art. 23 in which the State assumed liability for damages relating to the event; art. 37 and 43 that authorized the payment of prize money to former players from the Brazilian World Cup winning squads of 1958, 1962 and 1970; and art. 53 exempting FIFA from paying costs on lawsuits relating to the tournament. In his filing, Gurgel questioned the articles of the General World Cup Law and contended that the law violates the citizens’ constitutional guarantee to equal treatment. The purpose of the legislation was to implement specific guarantees in relation to hosting the World Cup which Brazil promised to FIFA at the bidding stage.

Government guarantees

In June 2007, when the Brazilian Football Confederation presented its bid to host the 2014 World Cup, the Federal Government announced its support for the candidacy through a signed letter from the President of the Republic, Luiz Inacio Lula da Silva, and his Ministers of State. The government offered FIFA a series of guarantees regarding the organization and staging of the event to enable the successful operation of the tournament. Fulfillment of the following eleven government guarantees was required by FIFA as a condition for holding the event:

1. unconditional entry visas and exit permits for members of FIFA’s delegations, its commercial and operational partners, and ticket-holding spectators;
2. unconditional issue of work permits to foreigners and suspension of any legislation that might restrict any FIFA members, commercial and operating partners from carrying out their FIFA-related activities;
3. import and export of goods necessary to organize the World Cup is to be allowed and exempt from federal, state, and local taxes;
4. general tax exemption for FIFA and its commercial and operational partners;
5. the adoption of all necessary measures to ensure security at the World Cup;
6. unrestricted entry and exit of foreign currency along with unrestricted exchange of US dollars, euros and Swiss francs for FIFA, and its commercial and operational partners;
7. expedited priority treatment in immigration, customs, and check-in procedures for members and management of FIFA, FIFA’s confederations, the member associations of FIFA, referees, and national teams;
8. protection and exploitation of commercial rights related to the World Cup;
9. the national anthems of all participating countries will be played before each of their games and flags will be raised;
10. all necessary measures will be taken to ensure compensation to FIFA for damages resulting from the organization and staging of the event;
11. availability of a telecommunications infrastructure that meets FIFA’s requirements and is compatible with the most advanced technology in the field.

When Brazil was selected to host the 2014 World Cup in October 2007, only part of these commitments was covered by the national legislation in force. Seven of the specified measures required the approval of the Brazilian Congress through legislation. Although formally signed by the Federal Government (the executive branch), the set of guarantees required authorization and approval of the legislature to become enforceable. The Government, which held and still holds a majority in the Congress, needed to secure the passage of a specific law.

World Cup Law

The Federal Government submitted the bill on the fiscal guarantees 3 and 4 to the Chamber of Deputies in 2010. The bill was passed as Law No. 12,350/2010, referred to as the FIFA Tax Exemption and Recopa Law. It ensures federal tax exemptions for FIFA and its domestic and foreign commercial partners, FIFA’s confederations, foreign associations, and members of FIFA. Wages paid to non-residents with temporary visas to work at the World Cup are tax exempted. Special customs rights apply to imports of goods or products and the acquisition of domestic products, provided that the respective goods and products are used solely for organization of the World Cup. No exemptions are provided for ticket sale revenues and hotel and tourist packages.

This law further implements a special tax

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regime known as Recopa, aimed at companies responsible for approved stadium construction, expansion, renovation, or modernization contracts or projects intended for use as official World Cup venues. The law requires the submission, by 1 August 2016, of the accountability statements on the full tax break, increased revenues, job creation, the number of foreign nationals entering the country to attend matches, and the total cost of all stadium work subject to the tax incentives granted under the Recopa.

The draft legislation corresponding to non-fiscal guarantees offered to FIFA (guarantee 1 – entry and exit permits; guarantee 2 – work permits; guarantee 3 — security and protection; guarantee 4 — protection and use of FIFA’s exclusive commercial rights; and guarantee 10 — liability compensation) was introduced in 2012 as Law No. 12,663/2012, referred to as the General World Cup Law.

The General World Cup Law ensures:

a a special registration procedure within the National Intellectual Property Institute (INPI) in Brazil, to protect marks and symbols related to the event against unauthorized uses;

b restricted commercial areas for advertising and publicity activities along the access roads to event venues and adjacent locations, as well as collaboration between the Federal Government, states, federal district and municipalities to ensure exclusivity for FIFA in commercial activities and commercial promotion in event venues;

c exclusive FIFA ownership of event-related broadcast images, audio, and other forms of expression at the event, as well as the delivery, negotiation, authorization, and prohibition of broadcasts and rebroadcasts, in addition to specific terms and conditions for accreditation to event venues, including members of the press and news media;

d application of civil sanctions and criminal penalties to conduct and practices that violate the protection of marks and symbols related to the events, including unauthorized advertising and publicity activities (“ambush marketing”);

e simplified (and free of charge) entry visa procedures for members of FIFA’s delegation, employees of FIFA’s confederations, foreign member associations of FIFA, referees, and other professionals assigned to work at the event, in addition to national team players and personnel, staff members of FIFA’s commercial partners, FIFA’s authorized broadcasting team, FIFA service providers, FIFA hospitality service clients, representatives of the news media, and ticketholders;

f simplified access to work permits for foreign professionals who will work in the event;

g rules for the civil liability of the Federal Government for acts related to the events, security-related damages or accidents at event venues;

h the authority to set ticket prices and cancellation, return, and reimbursement policies for event tickets;

i terms and conditions for full access to official event venues;

j provision of voluntary, safety, health, sanitary surveillance, customs and immigration services by the Federal Government during the events;

k rules for the Office of the Attorney-General’s participation in lawsuits involving FIFA. Federal Attorney’s Office (AGU) may provide extrajudicial conciliation in cases of conflicting interests between FIFA and the Federal Government. It may also intervene in legal processes per request of the Federal Union with a view to preventing financial losses to the Brazilian State, among others;

l exemption from legal and court fees charged by the federal justice system.

The law was approved by the Brazilian Congress following several rounds of discussions on the draft proposal between the pertinent Ministers of State and FIFA’s representatives. It stirred significant controversy in the Chamber of Deputies and was amended several times, primarily due to the unprecedented inclusion of so many concessions to FIFA for the sole purpose of organizing the World Cup and provisions with a direct impact on the population and spectators. The demands from FIFA to allow for the sale of alcohol, not offer discounted tickets to students and the elderly and restrict non-sponsors from trading in specially designated areas around the stadium have also caused contention.

Constitutional claim

On 17 June 2013, the Brazilian public prosecutor, Roberto Gurgel, filed a complaint (ADI 4976) to the Brazilian Supreme Court alleging that four articles of the General World Cup Law violated Brazil’s constitution. In his filing, the Federal Attorney’s Office (AGU), questioned the articles of the General World Cup Law and contended that the law violates citizens’ constitutional guarantee to equal treatment on the following grounds.

Civil liability

Pursuant to art. 23 of the General World Cup Law, the State will assume civil liability on behalf of FIFA, its legal representatives, employees or consultants for any losses or damages resulting from any incidents or accidents related to the security of the event unless such incidents or accidents were as a result of an act or omission by FIFA or the victims themselves. The article not only applies to the 2014 World Cup and the 2013 Confederations Cup but would also apply to any related events taking place in Brazil, such as banquets, seminars or cultural activities. It will also cover bombings, or natural disasters.

Under this provision, the concurrence or exclusive fault of FIFA for damages suffered by the entity or its agents would exempt the Government from the duty to indemnify. In other words, the State is fully liable for any loss except if FIFA directly contributes to the occurrence of the damage. Such scope of liability is called “the theory of integral risk”, under which the Government is required to indemnify any and all losses sustained by third parties, even if it is the result of negligence or willful misconduct of the victim. The only situation currently where this theory is applied is when there are environmental damages. Under Brazil’s constitution, the State can only assume liability where damage is caused by the performance of a public service; this includes instances where a service is performed directly by a public entity or where public services have been provided by a private entity. The provision is intended to provide a remedy for victims who have suffered damage caused by the State or an agent of the State. Therefore, the Government cannot become a sort of universal insurance when the offending and the injured are mixed in the same person.

According to the Attorney-General’s filing, the General World Cup Law violates the constitution by requiring the State to assume civil responsibility – instead of FIFA – for any damages during the event, i.e. for damages that were not caused by the State’s agents. FIFA is neither a public entity nor is it providing a public service
so the State’s promise to assume civil liability for FIFA, even when the State is not at fault, is unconstitutional.

**Price money to former players**

Art. 37 and 43 of the General World Cup Law award special one-off payments, as well as a monthly stipend to players who were part of Brazil’s 1958, 1962 and 1970 World Cup winning teams. These prizes, amounting to R$ 100,000 for each of the players or their family members, if they have already died, will be financed from the public budget to reward them for winning those tournaments. Separate salary benefits are granted to those players who receive less than R$ 4,390.24 in social security retirement payments. The legislation sets this amount as minimum salaries of those athletes. In cases of players receiving less than this value, the State will complement the income with monthly assistance until it reaches the ceiling. The players with higher pensions will not receive the salary benefit.

The AGU’s complaint states that payments which favour some individuals over others can only be made when it is in the public interest. Since the money awards to former soccer players are private in nature and do not benefit the public in any way, such payments are against the constitutional principle of equal treatment. Consequently, it is not justified to use public money to make them. For the prosecution, the fact of having acted in victorious teams does not justify burdening the public purse.

**Exemptions from legal costs and expenses**

Art. 53 exempts FIFA, its Brazilian subsidiaries, legal representatives, consultants and employees from paying certain costs and legal expenses on lawsuits relating to the tournament. According to the Public Prosecutor’s filing, this special treatment manifestly violates art. 150 (II) of Brazil’s constitution, which guarantees the taxpayers’ equal status under Brazilian law and prohibits the legislator from favouring a taxpayer to the detriment of another, unless there are differences that justify different treatment. Gurgel argued that there is no reason to justify the differential treatment of FIFA and its associates. According to him, the exemption does not qualify as a constitutionally adequate benefit, but as a true illegitimate favoritism, according to the prosecutor.

**Tax**

In August 2013, the Office of the Attorney-General of the Republic also challenged the exemptions granted to FIFA, its suppliers, sponsors and national football federations from paying any income taxes, import taxes and industrial taxes for up to four years after the World Cup. Brazil’s federal prosecutor filed a Direct Action of Unconstitutionality (ADI 5030) before the Federal Supreme Court, seeking immediate suspension of the tax breaks authorized under the FIFA Tax Exemption Law and Recopa Law. In his filing, Gurgel argues that the tax exemptions are unconstitutional as they favour foreign taxpayers over Brazilian ones without justification, thus breaching the principle of tax fairness and equity, which bars unequal treatment for taxpayers in identical circumstances. According to Gurgel, in this instance, FIFA is favoured in relation to other foreign institutions and FIFA’s commercial partners domiciled in Brazil in relation to other Brazilian companies. The filing contends that the broad exemption was granted in express consideration of a specific person for purposes of benefiting FIFA, rather than on behalf of a strategic sector or in the greater public interest.

**Defense of the World Cup legislation**

On 27 August 2013, the State’s legal representation filed a defence to the complaint concerning the General World Cup Law. The rapporteur, Minister Ricardo Lewandowski, disagreed with the arguments of the prosecution, and argued that the safety of the event should be the full responsibility of the Union. In relation to art. 23, he argued that the duty of the State to indemnify for losses or damages would only be unconstitutional if the source of the actions or omissions that caused such losses or damages was unknown as the constitution is intended to prevent the State from an uncertain burden. As the Law names FIFA as the party on behalf of which the State will indemnify, i.e. it will only indemnify where FIFA would otherwise be liable, this eliminates the uncertainty. Moreover, Brazil volunteered to host the event and should honor the contract signed with FIFA in the sense that the Brazilian State has assumed an international obligation of great importance, considerable economic and social impact on the country. Consequently, it is necessary to ensure the safety of the event, especially in view of violent public demonstrations, and any acts of terrorism, even if it requires enlarging the limits set out in the constitution. Lewandowski said that in situations of serious risk and significant public interest, the State can enlarge the beacons of constitutional limits in art. 37 of the constitution, and recalled the recent street demonstrations against the holding of the World Cup (“not known whether spontaneous or provoked”). He stressed that the responsibility is not, therefore, integral risk, but “social risk”, i.e. a constitutional guarantee taken by the Union.

The Federal Government’s civil responsibility is laid down in art. 37, § 6º of the Federal Constitution, pursuant to which the State should only pay for eventual damages caused by its own agents during the event. However, FIFA is still a private entity and the defense does not deal with the notion that the State should only indemnify for the performance of public services. Should an incident related to security come to be objectively attributed to FIFA, unless FIFA itself actually contributed to the incident, the Federal Government may assume the responsibility and subsequently seek reimbursement from the offender.

Brazil’s Government defended the payments to players by arguing that they comply with art. 217 of the constitution, namely that such payments promote and encourage the development of sport. Lewandowski argued that football as fully incorporated into the national tradition must be protected, preserved and enhanced. In his opinion, the payment of benefits to former players is fair because at the time when they played, playing football for Brazil brought no financial return to the athlete. However, even though Gurgel recognised that such payments are allowed, he argued that the private nature of these payments means that there is no evidence to support the idea that they will benefit the development of sport in Brazil. To Lewandowski, the constitution does not specifically prohibit preferential treatment, but the granting of benefits indiscriminately. He cited tax exemptions, which cannot be considered unconstitutional in all cases. He referred to a number of laws that gave annuities to “heroes” and people who had excelled in certain sectors, such as the Villas Boas brothers and actor Grande Otelo. He also invoked art.
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violate the constitution. The Court voted of the General World Cup Law did not ruled that the controversial provisions missed the complaint on all grounds and The Federal Supreme Court's ruling the internal movement of tourists and of infrastructure to meet the demands of the Government invested U.S.$ 17.6 billion in ing to the Attorney General, the Federal R$ 47.5 billion are direct gains. Accord estimated to have an impact of R$ 183.2 bil tion of large-scale events such as the World Cup. In his opinion, Lewandowski cited a technical study commis sioned by the Brazilian Ministry of Sport. According to the study, the gains from job creation, tourism and other indirect rev enues from the World Cup will offset the tax exemption. The 2014 World Cup is estimated to have an impact of R$ 183.2 bil lion on the Brazilian economy, of which R$ 47.5 billion are direct gains. Accord ing to the Attorney General, the Federal Government invested U.S.$ 17.6 billion in infrastructure to meet the demands of the event. The World Cup is expected to create 50,000 jobs. 600,000 foreign tourists are expected for the tournament, besides the internal movement of tourists and of three million Brazilians.

The Federal Supreme Court’s ruling

On 7 May 2014, the Supreme Court dismissed the complaint on all grounds and ruled that the controversial provisions of the General World Cup Law did not violate the constitution. The Court voted unanimously to approve the legality of the Brazilian State assuming full liability for damages due to safety failures. This decision clarifies which party would be responsible for any damage caused by the incidents akin to those which erupted at the protests during the Confederations Cup in 2013.

The Court also validated the articles of the law granting premiums paid with public money to the former Brazilian champions. Regarding the exemptions granted to FIFA on court and legal costs, the Court voted ten in favour, one against.

Though the approval was effectively a formality, it was notable in that it gave some of the judges the opportunity to express their opinions about the management of the tournament. The Supreme Court president, Joaquim Barbosa, said that the law ensured FIFA “would earn billions” while Brazilians “would be left to pick up the bill”. Barbosa cast the vote against exempting FIFA from the payment of costs in any legal proceedings, calling the ex emptions “the tip of the iceberg of the huge exemptions that are being granted” to FIFA. He considered unconstitutional the measure that gives tax exemption to FIFA:

“All private entities involved in the event are known to be endowed with an enormous ability to pay. The exploitation of football nowadays generates wealth. Given this enormous potential of private wealth, it seems to me that the relief cannot be based simply on inaccurate and inconsistent estimates of the direct or indirect return to the population. Many Brazilian and foreign companies, that do not participate in the exploitation of professional football, also generate huge amounts of jobs and not really receive relief in their tax burden.”

Barbosa expressed concern about further action, which is not yet ready for trial, questioning other tax reliefs granted to FIFA. The President recommended that the Court abandon “a romantic vision” of football and alerted to the fact that the World Cup is just “business”.

Background of the case

The Brazilian Supreme Court ruled that the General World Cup Law does not violate the National Constitution. The special treatment offered to FIFA is not in breach of the principle of equality. Brazil exercised its sovereignty when it signed the guarantees and so far none of the regulatory amendments has been found to go against the country’s legal order. The Court seems to have accepted that the questioned legislation aims only to help the Federal Government fulfill the guarantees it offered to FIFA. It is also important to note that the staging of a World Cup is in itself an extraordinary act that creates new demands not foreseen in the country’s internal legislation. Other countries that hosted World Cups also signed similar guarantees and approved specific laws for the occasion.

However, it should also be noted that the constitutionality of the General World Cup Law was challenged after Gurgel reviewed a pre-commissioned report, conducted by a task force created in 2009, which had been monitoring the implementation of the law and the public spending associated with the event. The complaint was filed two days after the start of the Confederations Cup – the test event for the World Cup. The Confederations Cup was hosted amidst mass protests on the streets of Brazil, as Brazilians demonstrated in record numbers against a range of issues, including the estimated U$14 billion spent on developing infrastructure for the World Cup, Brazil’s poor public services, such as hospitals, education and public transport. About $ 3.3 billion of that money will go towards stadiums and approximately 90 percent of the financing is public, although when Brazil won the bid, it claimed that no public money would be needed to finance stadium construction. Opponents of FIFA’s demands observe that soccer stadiums are being massively transferred to private management through concession contracts.

The Articulação Nacional dos Comitês Populares da Copa issued a statement, in which it criticized the Government’s ac tions and characterized their position as political allegiance:

“The General Law of the World Cup is a response to FIFA’s demands. The argument that the Brazilian Government made these decisions alone is unacceptable because the Government has no authority to make international agreements without the Legislature. This is in direct opposition to our Constitution and laws. In the name of business and profits, we sense political favoritism towards FIFA, which harms our sover-

The tournament’s unpopularity has been exacerbated by such FIFA demands as the requirement to temporarily suspend the ban on the sale of alcoholic beverages in stadiums, refusal to give a 50% discount on match tickets to students, pensioners, the disabled and people on social welfare, and restricting local businesses from trading in spaces around the stadiums within a radius of two kilometers. In addition, the General World Cup Law suspends Brazilian laws that guarantee citizens’ freedom of movement, and restricts workers’ rights to strike. The law allows anyone FIFA chooses and anyone with tickets to enter the country which limits Brazil’s power to control incoming foreigners. Such demands have resulted in FIFA being accused of a lack of willingness to understand the national interest and culture. For their part, FIFA insist such restrictions are necessary to ensure the proper staging of the event and adequate investment from sponsors.

Conclusion
Challenges against the constitutionality of new laws are actually a regular occurrence in Brazil; indeed, 21 other challenges against various laws were filed on that same day. However, such challenges have not sparked the heated debates that this one has. Still, the Federal Government was of the opinion that the lawsuit “won’t have any decisive impact in the organization of the World Cup and will not affect any of the national federations that qualify for the event”. Given that Brazil was not willing to risk upsetting FIFA and creating legal uncertainty so close to the World Cup, the lawsuit was unlikely to be successful.

However, Judge Barbosa’s words are likely to increase the general levels of dissatisfaction with the management of the event. The anti-tournament protesters believe that the World Cup money should be put into developing basic public services. The Supreme Court decision will certainly turn the world’s eyes to the peoples’ criticism of the World Cup. It may also make FIFA better understand the sensibility and complexity of local politics in the host country. Interestingly, however, in 2013, FIFA’s top administrative official, Jerome Valcke, said it can be more difficult to host the World Cup in countries with strong democratic traditions. “Less democracy is sometimes better for organizing a World Cup,” Valcke said at a symposium in Zurich. Indeed, hosted by a country where the game is more of a religion than a sport, the 2014 FIFA World Cup in Brazil suffered an unprecedented side effect of democracy.