

## NOTE

### RESTRICTING COMPETITION: HOW FIFA'S BAN ON THIRD PARTY OWNERSHIP IS NOT THE FIX THE 'BEAUTIFUL GAME' NEEDS

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#### INTRODUCTION

Football, also known as soccer in the United States,<sup>1</sup> is overwhelmingly the world's most popular sport.<sup>2</sup> Over three billion people tuned in to watch at least a minute of the recent 2014 Fédération Internationale de Football Association (FIFA)<sup>3</sup> World Cup held in Brazil.<sup>4</sup> By any metric, viewership of and engagement in the past World Cup set records both worldwide and in the United States.<sup>5</sup> The stars that capti-

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1. This Note will exclusively use the term "football."

2. See Matthias Kunz, *265 Million Playing Football*, FIFA MAG., July 2014, at 10 (large-scale FIFA survey shows that approximately 4% of the world's population is actively involved in football).

3. The *Fédération Internationale de Football Association* (FIFA) is the worldwide organization of football nations, headquartered in Switzerland. *About FIFA*, FIFA, <http://www.fifa.com/about-fifa/index.html>.

4. *2014 FIFA World Cup Reached 3.2 Billion Viewers, One Billion Watched Finals*, FIFA (Dec. 16, 2015), <http://www.fifa.com/worldcup/news/y=2015/m=12/news=2014-fifa-world-cuptm-reached-3-2-billion-viewers-one-billion-watched--2745519.html>.

5. Germany and Belgium, for instance, each set viewership records during their run in the World Cup (Germany in the final, Belgium in the victory against the U.S.). Thomas Campbell, *World Cup Final Breaks Records Worldwide for TV Broadcasters*, IP&TV NEWS (July 14, 2014), <http://www.ipvtv-news.com/2014/07/world-cup-final-breaks-records-worldwide-for-tv-broadcasters/>. Even non-participating countries such as Romania set viewership records, with 43% of the country watching the final match between Germany and Argentina. *Id.* Not only did viewership increase worldwide, fan engagement did as well; 35 million tweets were sent during Germany's semifinal rout of Brazil, the largest number of tweets sent for any sporting event. *Id.* Domestically, the United States set viewership records nearly every round of the World Cup, peaking with 26.5 million people watching the final—a record for any broadcasted soccer match. *World Cup Final Sets U.S. TV Record*, ESPN (July 15, 2014), <http://www.espnfc.com/fifa-world-cup/story/1950567/world-cup-final-most-watched-soccer-game-in-us-history-more-than-26-million-viewers>. Notably, the average Nielsen rating of all 64 World Cup games increased 39%

vated billions of viewers during the World Cup—Lionel Messi, Luis Suárez, James Rodríguez, Mario Götze, and Alexis Sánchez—play for major European football clubs in Spain, Germany, and England.<sup>6</sup> These players are multi-million dollar human commodities that clubs in the major European football leagues fight to sign and make the faces of their clubs.<sup>7</sup>

Unlike in American sports, where athletes often become free agents after playing out their contracts, it is unusual for a football player to become a free agent.<sup>8</sup> Instead, players usually transfer between clubs while still under contract, with the new club compensating the former club with a transfer fee.<sup>9</sup> This “transfer” is akin to an NBA team trading a player to another team; but instead of receiving another player or future draft pick as compensation, the trading team receives financial compensation alone.<sup>10</sup> For example, this past summer the Spanish football club giant Real Madrid paid Monaco \$108 million for the rights to James Rodríguez, a young Colombian football superstar.<sup>11</sup>

However, not all transfers are as simple as two clubs negotiating a fee for a player that reflects his market value.<sup>12</sup> There are usually complications involving the player’s contract, the agent’s fees, and even third

over the previous World Cup. *Id.*

6. See *Lionel Messi*, TRANSFERMARKT.COM, <http://www.transfermarkt.com/lionel-messi/profil/spieler/28003> (last visited Mar. 30, 2016); *Luis Suárez*, TRANSFERMARKT.COM, <http://www.transfermarkt.com/luis-suarez/profil/spieler/44352> (last visited Mar. 30, 2016); *James Rodríguez*, TRANSFERMARKT.COM, <http://www.transfermarkt.com/james-rodriguez/profil/spieler/88103> (last visited Mar. 30, 2016); *Mario Götze*, TRANSFERMARKT.COM, <http://www.transfermarkt.com/mario-gotze/profil/spieler/74842> (last visited Mar. 30, 2016); *Alexis Sánchez*, TRANSFERMARKT.COM, <http://www.transfermarkt.com/alexis-sanchez/profil/spieler/40433> (last visited Mar. 30, 2016).

7. The race between two English Premier League clubs, Arsenal and Liverpool, for star player Alexis Sánchez is a prime example of the competition between European clubs for star players. See, e.g., Joe Prince-Wright, *Arsenal and Liverpool to Battle it out for \$50 Million Alexis Sanchez*, NBCSPORTS.COM (July 3, 2014), <http://prosoccertalk.nbcsports.com/2014/07/03/arsenal-and-liverpool-set-to-battle-it-out-for-50-million-alexis-sanchez/>.

8. See KEA EUROPEAN AFFAIRS & CTR. OF LAW & ECON. OF SPORT, THE ECONOMIC AND LEGAL ASPECTS OF TRANSFERS OF PLAYERS 1–2 (2013), <http://ec.europa.eu/sport/library/documents/cons-study-transfers-final-rpt.pdf>.

9. *Football Transfer System Must Change, Says World Players’ Union*, BBC (Dec. 17, 2013), <http://www.bbc.com/sport/0/football/25418135>.

10. This is a simplified explanation of how a transfer works. The mechanism of transfers will be explored in greater detail later in this Note. See Graham MacAree, *On the Economics of Transfers*, SB NATION (June 25, 2013, 10:13 AM), <http://www.sbnation.com/soccer/2013/6/25/4462180/football-transfer-economics>.

11. Marissa Payne, *Real Madrid is Getting World Cup Superstar James Rodriguez from Monaco FC in \$108 Million Deal*, WASH. POST (July 22, 2014), <http://www.washingtonpost.com/blogs/early-lead/wp/2014/07/22/real-madrid-is-getting-world-cup-superstar-james-rodriguez-from-monaco-fc-in-108-million-deal/>.

12. MacAree, *supra* note 10.

parties.<sup>13</sup> These third parties can take the form of individual investors who own a portion of the players' economic rights, or even companies that specialize in third party ownership.<sup>14</sup> The presence of an interested investor is known as "Third party Ownership" (TPO)<sup>15</sup> and is the subject of this Note.

This Note analyzes the recent decision by FIFA to ban the practice of TPO. FIFA's justification for the prohibition of TPO is that third party investors wield too much influence over the autonomous decisions of clubs and players, and therefore threaten the integrity of the sport.<sup>16</sup> This Note argues that this recent decision by FIFA should be challenged in the European Court of Justice because it restricts freedom to provide services, free movement of capital, and freedom of competition, guaranteed respectively under Articles 56, 63, and 101 of the Treaty on the Functioning of the European Union (TFEU).<sup>17</sup> Specifically, a worldwide ban of the practice of third party ownership is an overreaching mandate by FIFA in order to quell discontent by critics, including the president of the European football association. The ban, while benefiting the top clubs in Europe, could have a disproportionate impact on young, low-income football players in South America. This Note will analogize FIFA's ban to other cases of sporting organizations' attempts to restrict investment and free trade in contravention of European Union competition law.<sup>18</sup>

Part I of this Note will contextualize the problem of third party ownership and how FIFA's recent ban intersects with European Union competition law. Part II analyzes how FIFA's proposed ban might be overturned by the European Court of Justice as a violation of said competition law by examining the following: (1) which parties would be best equipped to bring a legal challenge, and (2) which articles under the TFEU the proposed ban violates. This Section also considers how third party ownership could be regulated if the blanket ban is overturned, and the broader implications of a successful challenge against

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13. *See id.*

14. *See* Luis Villas-Boas Pires, *Third Party Ownership – To Ban or Not to Ban?*, LAWINSPOORT (Dec. 10, 2013), <http://www.lawinsport.com/articles/regulation-a-governance/item/third-party-ownership-to-ban-or-not-to-ban>.

15. *Id.*

16. Owen Gibson, *Sepp Blatter Says FIFA Will Ban Third-Party Ownership*, GUARDIAN (Sept. 26, 2014, 9:44 AM), <http://www.theguardian.com/football/2014/sep/26/sepp-blatter-fifa-ban-third-party-ownership>.

17. *See* Consolidated Version of the Treaty on the Functioning of the European Union arts. 56, 63, 101, Oct. 26, 2012, 2012 O.J. (C 326) 47.

18. Although FIFA is headquartered in Switzerland and this Note will take a European-centric view of this legal challenge, this Note also examines the worldwide effects of this ban, particularly focusing on South America.

FIFA, before concluding.

## I. BACKGROUND

### A. *Origin of Third Party Ownership*

Third party ownership<sup>19</sup> emerged as a way for smaller football clubs<sup>20</sup> to receive outside financing assistance (similar to a loan) in order to stay competitive with larger clubs.<sup>21</sup> Players possess two types of rights: federative and economic.<sup>22</sup> Federative rights are what allow a player to register and play competitively in a league (or federation).<sup>23</sup> Economic rights, on the other hand, are the ability to receive income from the transfer of a player from one club to another.<sup>24</sup> Unlike federative rights, which can only be owned by one club at a time, economic rights can be split up, allowing third party investors to own a portion of the player's economic rights, even if the player registers and has an employment contract with one club.<sup>25</sup> By owning a portion of a player's economic rights, the third party owner is able to profit when that player transfers clubs.<sup>26</sup>

The benefit of third party owners for smaller clubs is that they are able to minimize the risk of purchasing players who may or may not become quality players.<sup>27</sup> In particular, the practice of utilizing third party owners emerged out of South America, specifically Brazil and Argentina, in the 1990s in order for clubs to retain their best players and for investors to capitalize on the large number of domestic players transferred into the international football market.<sup>28</sup> An illustrative example is James Rodríguez, who was a promising teenage prospect playing for the

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19. "Third party owners" and "third party investors" refer to the same group of people and are used interchangeably throughout this Note.

20. "Football clubs" or "clubs" is how the international football community refers to the term "professional team" and will be used throughout this Note.

21. See generally Ezechiel Abatan, *An Overview of Third Party Ownership in European Professional Football*, 10 SPORTS L. BULLETIN 22 (2012), <http://epfl-publications.com/slb10/index.html> (highlighting how clubs benefit from third party ownership).

22. See Victoriano Melero & Romain Soiron, *The Dilemma of Third-Party Ownership of Football Players*, 10 SPORTS L. BULLETIN 41, 41 (2012), <http://epfl-publications.com/slb10/index.html>.

23. *Id.*

24. *Id.*

25. *Id.* at 41–42.

26. See *id.*

27. See *id.* at 42.

28. Roberto de Palma Barracco, *Attachment of Economic Rights: A New Solution for Brazil's Indebted Football Clubs?*, LAWINSPO (Aug. 13, 2014), <http://www.lawinsport.com/articles/contract-law/item/attachment-of-economic-rights-a-new-solution-for-brazil-s-indebted-football-clubs>.

Argentinean club, Banfield, before he was transferred to Europe.<sup>29</sup> Banfield is relatively small compared to the big clubs in Europe.<sup>30</sup> It could only retain a prospect like James Rodríguez with a third party investor subsidizing the costs of keeping him on the team.<sup>31</sup> Without a third party investor, small South American clubs like Banfield would have little to no bargaining power and would be forced to sell their star players if a European club came knocking.<sup>32</sup> Banfield eventually received a transfer fee of €5.1 million for Rodríguez, a substantial amount for an Argentinean club.<sup>33</sup>

In Brazil, an estimated 90 percent of players are owned by a third party—usually an agent or a relative.<sup>34</sup> This is significant because according to a 2014 FIFA Transfer Matching Study, nearly 20 percent of world transfer players start in Brazil and Argentina.<sup>35</sup> These statistics reflect how pervasive and prevalent the practice of third party ownership is to Brazilian and Argentinean football. It should be noted that the transfer practice does not only exist in South America. A titan in third

29. Stefan Coerts, *Official: Porto Sign Colombian Wonderkid James Rodriguez From Banfield*, GOAL.COM (July 6, 2010, 11:41 AM), <http://www.goal.com/en/news/91/portugal/2010/07/06/2012099/official-porto-sign-colombian-wonderkid-james-rodriguez-from>.

30. See *infra* note 33.

31. Cf. Burgess Williams, *The Fate of Third Party Ownership of Professional Footballers' Rights: Is a Complete Prohibition Necessary?*, 10 TEX. REV. ENT. & SPORTS L. 79, 84 (2008) (outlining similar arrangement between Brazilian club Corinthians and player Carlos Tévez).

32. See *id.*

33. Coerts, *supra* note 29. According to <http://www.transfermarkt.co.uk/>, Banfield's market value in November 2014 was €21.26 million. See *Club Atlético Banfield*, TRANSFERMARKT, <http://www.transfermarkt.co.uk/club-atletico-banfield/startseite/verein/830> (providing current market values by club). Adjusting for inflation, James Rodríguez's transfer fee would have been €5.37 million in 2015, which was approximately 25% of Banfield's total market value. In comparison, as of April 1, 2016, Real Madrid (Rodríguez's current club) has a current market value of €707.3 million and a €5.37 million transfer would only have accounted for 0.76 percent of the club's market value. TransferMarkt.co.uk, *Real Madrid*, <http://www.transfermarkt.com/real-madrid/startseite/verein/418> (last visited Apr. 1, 2016). All inflation-adjusted figures were calculated through StateBureau.org.

34. See KPMG, *Project TPO*, EUR. CLUB ASS'N 33 (Aug. 8, 2013), <http://www.ecaeurope.com/Research/External%20Studies%20and%20Reports/KPMG%20TPO%20Report.pdf>; see also KEA EUROPEAN AFFAIRS & CTR. OF LAW & ECON. OF SPORT, *THE ECONOMIC AND LEGAL ASPECTS OF TRANSFERS OF PLAYERS* 146–47 (2013), <http://ec.europa.eu/sport/library/documents/cons-study-transfers-final-rpt.pdf> (discussing the importance of Brazilian players in global soccer market).

35. TRANSFER MATCHING SYS., FED'N INT'L DE FOOTBALL ASS'N, BRAZIL, A KEY PLAYER IN THE INTERNATIONAL TRANSFER MARKET 2 (2014), <http://www.fifatms.com/Global/MarketInsights/Brasil/Market%20Insights%20-%20Brazil%20EN.pdf> (exploring the role Brazil plays in exporting players to foreign countries). The data support the notion that Brazil is home to a great collection of football players, and that European countries, especially Portugal, have been reliant on a steady influx of Brazilian talent. See *id.*

party ownership is Doyen Sports Investment, which is heavily involved in third party ownership in Europe, as well as in Africa and East Asia.<sup>36</sup>

### B. *Third Party Ownership in Europe*

Third party ownership eventually made its way across the Atlantic into the major European football leagues, primarily thanks to one man: Kia Joorabchian.<sup>37</sup> His involvement in the controversial 2006 transfer of the Argentinean duo Carlos Tévez and Javier Mascherano brought the practice of third party ownership to the attention of the sports world.<sup>38</sup> In the summer of 2006, Tévez and Mascherano, two stars of the title-winning Corinthians club (a Brazilian club) were transferred to the British club West Ham United (West Ham).<sup>39</sup> The move left many scratching their heads, wondering how a middling club like West Ham could attract two of the most promising young football players in the world.<sup>40</sup> It was later revealed that Media Sports Investments, a London-based investment company founded by Joorabchian, had purchased a 51 percent stake in Corinthians<sup>41</sup> and orchestrated the move of the club's two biggest stars to the English Premier League (EPL).<sup>42</sup>

Soon after the transfer, it came to light that Joorabchian retained third party rights to the two players, a fact that West Ham attempted to cover up.<sup>43</sup> The next year, both Tévez and Mascherano left for greener pastures with other clubs and the EPL fined West Ham for a record £5.5 million for their misconduct.<sup>44</sup> The EPL found that West Ham had violated the EPL Handbook,<sup>45</sup> which is the authoritative collection of rules with which every club within the EPL must comply.<sup>46</sup> Specifically, the

36. *Gambia: Revealed – Bakau Utd Agree Investment Deal With Football Agency*, ALL AFRICA (Oct. 20, 2014), <http://allafrica.com/stories/201410211060.html>.

37. See David Conn, *Chelsea Stake in Third-Party Ownership Leaves Premier League on Shaky Ground*, GUARDIAN (Sept. 23, 2014, 8:08 AM), <http://www.theguardian.com/football/blog/2014/sep/23/premier-league-high-ground-third-party-ownership>.

38. See *id.*

39. See *West Ham Sign Tévez & Mascherano*, BBC (Aug. 31, 2006, 4:08 PM), [http://news.bbc.co.uk/sport2/hi/football/teams/w/west\\_ham\\_utd/5301068.stm](http://news.bbc.co.uk/sport2/hi/football/teams/w/west_ham_utd/5301068.stm).

40. See Donal Lucey, *9 Years On from West Ham, Tevez and Mascherano Meet in the Champions League Final*, YAHOO.COM (June 2, 2015), <https://uk.sports.yahoo.com/news/nine-years-west-ham-tevez-mascherano-meet-again-173019002--sow.html>.

41. See Williams, *supra* note 31, at 84.

42. *Id.*

43. *Id.*

44. *Id.* at 85.

45. See BARCLAYS PREMIER LEAGUE, PREMIER LEAGUE HANDBOOK SEASON 2007/08 19–20 (2007), <http://www.premierleague.com/content/dam/premierleague/site-content/News/publications/handbooks/premier-league-handbook-2007-08.pdf>.

46. See Barclays Premier League, *Premier League Chairmen's Charter*, in PREMIER

EPL found that West Ham violated Rule U18 (now Rule I.7) of the EPL Handbook, which states that “[n]o Club shall enter into a contract which enables any other party to that contract to acquire the ability materially to influence its policies or the performance of its teams in League Matches [...] or in any of the competitions set out in Rule L.9.”<sup>47</sup> The Tévez and Mascherano saga sparked such public outcry and internal discord at the English Football Association<sup>48</sup> that it became the first major football association to ban the practice of third party ownership.<sup>49</sup>

Before the blanket ban, the English Football Association regulated third party ownership indirectly through a “material influence” standard.<sup>50</sup> Other European football associations used similar “material influence” provisions as a way to prevent third party owners from influencing autonomous decisions by clubs.<sup>51</sup> Among the European countries, Portugal in particular has developed a symbiotic relationship with third party owners.<sup>52</sup> For example, the top three clubs in Portugal—FC Porto, Benfica, and Sporting Lisbon—only own the full economic rights of less than half of their players.<sup>53</sup> In essence, the Portuguese clubs became the intermediaries between South America and England or Spain for players who went on to become football stars under third party ownership.<sup>54</sup> Radamel Falcao, Ramires Santos do Nascimento, and James Rodríguez are just a few examples of players who followed that particular trajectory.<sup>55</sup>

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LEAGUE HANDBOOK SEASON 2014/15 (2014),  
<http://premierleague.com/content/dam/premierleague/site-content/News/publications/handbooks/premier-league-handbook-2014-15.pdf>.

47. *Id.* at 126.

48. The English Football Association is the governing body of all levels of organized football in England, not just the Premier League. See *The FA Strategic Plan 2011–15*, FOOTBALL ASSOC., <http://www.thefa.com/about-football-association/strategy> (last visited Jan. 2, 2015).

49. See Williams, *supra* note 31, at 94.

50. See *id.*

51. See Daniel Geey, *Third Party Player Ownership: The Regulations for Premier League and Football League Clubs for the 2009/10 Season*, ENT. & SPORTS L. J., Jan. 2010, ¶¶ 7–11 (2009), <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume7/number2/geey/geey.pdf>.

52. See Steve Menary, *Controversies over How to Enforce TPO Ban*, PLAYTHEGAME.ORG (Oct. 17, 2014), <http://playthegame.org/news/news-articles/2014/controversies-over-how-to-enforce-tpo-ban/>.

53. *Id.*

54. See Geey, *supra* note 51, ¶ 57 (explaining that only non-registered Football Association players could be third-party owned before transferring into the Premier League or Football League).

55. See, e.g., Harvey Taylor, *Premier League Clubs Can Learn from Portugal's Profit Centres*, GUARDIAN (Jan. 20, 2014, 5:09 PM), <http://www.theguardian.com/football/blog/2014/jan/20/nemanja-matic-move-portugal-profit-centre>.

### C. FIFA Bans Third Party Ownership

In the aftermath of the Tévez and Mascherano scandal, FIFA enacted Article 18bis, which states that: “[n]o club shall enter into a contract which enables the counter club/counter clubs, and vice versa, or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams.”<sup>56</sup> Article 18bis echoed the “material influence” standard (though it eliminated the “material” component) that predominated in Europe.<sup>57</sup> The “material influence” standard allowed third party ownership as long as the third party did not influence the club’s autonomous decision making.<sup>58</sup> The regulation was intended to protect the integrity of the sport and ensure that a powerful third party investment group could not dictate when a player played or was sold.<sup>59</sup> Player selection and player transfers are two areas a club is supposed to handle autonomously, without outside influence.<sup>60</sup> Essentially, the “material influence” standard was meant to ensure that third party investors were seen but not heard.<sup>61</sup>

However, the standard never gained traction and was rarely enforced.<sup>62</sup> It was too general and vague to effectively govern a practice as opaque as third party ownership.<sup>63</sup> Additionally, and primarily, the lack of a registration requirement meant the “material influence” standard was rarely enforced.<sup>64</sup> No league in Europe keeps records of which players are owned by third parties.<sup>65</sup> In a survey conducted by the European Professional Football League Sports Bulletin, Belgium was the only football association that kept any records relating to third party ownership.<sup>66</sup> Without such records, it was difficult to find out whether a

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56. REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS art. 18bis, FIFA (2015), [http://resources.fifa.com/mm/document/affederation/administration/02/70/95/52/regulationsstatusandtransfer\\_2015\\_e\\_v051015\\_neutral.pdf](http://resources.fifa.com/mm/document/affederation/administration/02/70/95/52/regulationsstatusandtransfer_2015_e_v051015_neutral.pdf).

57. See Geey, *supra* note 51, ¶¶ 8–14.

58. See *id.*

59. See *id.*

60. See *id.*

61. See *id.*

62. See Ariel Reck, *Third Party Player Ownership: Current Trends in South America and Europe*, 10 SPORTS L. BULLETIN 50, 51–52 (2012), <http://epfl-publications.com/slb10/index.html>.

63. See *id.* at 52 (“One particular aspect to consider for further improvement is that the notion of influence is not clearly defined.”).

64. See, e.g., *id.* at 51–52 (citing the decision rendered in *Genoa Cricket and Football Club S.p.A. v. Club Deportivo Maldonado*, in which the Court of Arbitration for Sport found that the existence of a TPO contract was irrelevant to a transfer agreement because under registration requirements, only a club may transfer a player to another club).

65. See Abatan, *supra* note 21, at 28.

66. See *id.*

third party owner materially influences a player, as the football association cannot be aware that a third party owner exists in the first place.

FIFA recognized that the “material influence” standard was insufficient and announced on September 26, 2014 that it planned to ban the practice of third party ownership worldwide.<sup>67</sup> FIFA's ban took effect on May 1, 2015, but existing contracts with third parties would be allowed to run until they naturally expire by their terms.<sup>68</sup> The grace period from September to May was supposed to allow countries such as Portugal, Brazil, and Argentina to adapt to the outlawing of a practice that is so endemic to the functioning of their respective leagues.<sup>69</sup> But many felt that May 1, 2015 was an extremely close deadline,<sup>70</sup> especially in light of FIFA President Sepp Blatter's assurances in September 2014 that the ban would follow a much lengthier transition period.<sup>71</sup>

FIFA's ban was in response to the demonization of third party ownership by prominent members in the international football community, including Union of European Football Associations (UEFA)<sup>72</sup> former President Michel Platini.<sup>73</sup> Platini has claimed that third party ownership “shows a blatant disregard for human dignity, threatens the integrity of our competitions, and even the financing of grassroots sport.”<sup>74</sup> Additionally, some argue that the ban is a response to the actions of specific investors, namely, Kia Joorabchian, Jorge Mendes,<sup>75</sup> and Doyen

67. See Gibson, *supra* note 16.

68. FIFA, THIRD-PARTY OWNERSHIP OF PLAYERS' ECONOMIC RIGHTS 2 (Apr. 2015), [http://www.fifa.com/mm/document/affederation/footballgovernance/02/59/55/80/third-partyownershipofplayerseconomicrights-backgroundinformation\\_neutral.pdf](http://www.fifa.com/mm/document/affederation/footballgovernance/02/59/55/80/third-partyownershipofplayerseconomicrights-backgroundinformation_neutral.pdf).

69. See Gibson, *supra* note 16; Sam Borden, *A Contentious Source of Income Is Set to Dry Up*, N.Y. TIMES (Jan. 1, 2015), <http://www.nytimes.com/2015/01/02/sports/soccer/fifa-will-ban-third-party-ownership-in-may.html>; see also James Young, *Brazilian Football Faces Battle to Emerge from Third Party Ownership*, ESPN (Oct. 8, 2014), <http://www.espnfc.com/blog/espnfc-united-blog/68/post/2067455/brazilian-football-faces-battle-to-emerge-from-third-party-ownership>.

70. See Borden, *supra* note 69.

71. See Gibson, *supra* note 16.

72. “UEFA – the Union of European Football Associations – is the governing body of European football. It is an association of associations, a representative democracy, and is the umbrella organisation for 54 national football associations across Europe.” *About UEFA*, UEFA.ORG, <http://www.uefa.org/about-uefa/index.html> (last visited Feb. 8, 2015).

73. Marc Bisson, *Platini Calls for EU Legal Framework to Stamp Out Third-Party Ownership*, WORLD FOOTBALL INSIDER (Oct. 23, 2014), <http://www.worldfootballinsider.com/Story.aspx?id=37345>. In December 2015, Michel Platini was banned from football for eight years by the FIFA ethics committee for conflict of interest violations and dereliction of duty. Platini is currently appealing the decision to the Court of Arbitration for Sport. *Michel Platini Files Appeal Against Ban to Court of Arbitration for Sport*, GUARDIAN (Mar. 2, 2016), <http://www.theguardian.com/football/2016/mar/02/michel-platini-appeal-ban-court-of-arbitration-for-sport-uefa>.

74. Bisson, *supra* note 73.

75. Jorge Mendes is arguably the top sports agent in international football. He represents

Sports Investment.<sup>76</sup> Some, like journalist Gabriele Marcotti, believe that the ban was in part an attempt to limit the power of those individuals.<sup>77</sup> Notwithstanding the motivations behind FIFA's decision to ban third party ownership, the question remains whether FIFA has the legal authority to do such a thing.

#### D. *Treaty for the Functioning of the European Union*

The legal framework under which FIFA's actions should be analyzed is the Treaty for the Functioning of the European Union (TFEU), which "establishes the rights of EU nationals to work on a non-discriminatory basis in any Member State."<sup>78</sup> Effective since 1958, the TFEU is one of two core treaties outlining how the collection of Member States known as the European Union (EU) functionally operates.<sup>79</sup> The pertinent sections are Article 56, Article 63, and Article 101 of the treaty, which cover freedom to provide services, free movement of capital, and freedom of competition respectively.<sup>80</sup>

##### 1. Article 56

A primary purpose of the TFEU is to ensure the EU labor force can freely move within the EU to work and provide services.<sup>81</sup> Article 56 of the TFEU directly addresses this objective as follows:

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services

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Cristiano Ronaldo, Ángel di María, James Rodríguez, and José Mourinho, among others. See David Conn, *Jorge Mendes: The Most Powerful Man in Football?*, GUARDIAN (Sept. 22, 2014), <http://www.theguardian.com/football/2014/sep/22/-sp-jorge-mendes-agent-third-party-ownership-players>.

76. Doyen Sports Investment Group might be the largest third party investment group in world football based on known owned players and reported transfer interest rates. See, e.g., Jonathan Howard, *Realities of Third Party Ownership*, BUS. OF SOCCER (Apr. 18, 2013), <http://www.businessofsoccer.com/2013/04/18/the-realities-of-third-party-ownership/> (discussing Doyen's players and its role in a €40 million deal between Porto and Atletico Madrid).

77. Gabriele Marcotti, *The Challenge FIFA Faces Regarding Third-party Ownership*, ESPN (Mar. 30, 2016), <http://www.espnfc.com/blog/marcotti-musings/62/post/2840253/the-challenge-fifa-faces-regarding-third-party-ownership>.

78. Simon Gardiner & Roger Welch, *Bosman—There and Back Again: The Legitimacy of Playing Quotas under European Union Sports Policy*, 17 EUR. L. J. 828, 828 (2011).

79. See generally TFEU (outlining the history and function of the TFEU).

80. *Id.* arts. 56, 63, 101.

81. See Gardiner & Welch, *supra* note 78.

and who are established within the Union.<sup>82</sup>

“Services” is further defined to include “activities of the professions.”<sup>83</sup> That vague category is meant to encompass the professions that are subject to regulation within the European Union.<sup>84</sup> Football players fall within this category because their federative rights are registered and monitored by the European Union Member States.<sup>85</sup> The second paragraph of Article 56 expands the protection to nationals of non-Member States,<sup>86</sup> opening the door to South American players challenging the ban on the grounds that it restricts their freedom to provide services within Europe.

## 2. Article 63

Third party owners and third party investors are used interchangeably throughout this Note, as the practice can also be described as third party investment. The third party invests in the economic rights of a club's player, or in other terms, the club's asset.<sup>87</sup> Thus, this practice not only involves the movement of labor but also involves capital investment.<sup>88</sup> The relevant article on capital and payments in the TFEU is Article 63. Article 63 succinctly states that “[w]ithin the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.”<sup>89</sup>

Owners utilized this provision to challenge UEFA's actions in Case Comp/37 806 ENIC/UEFA (2002).<sup>90</sup> UEFA had limited the number of stakes one owner could have in multiple teams in the same competition.<sup>91</sup> Understandably, UEFA was concerned about potential match-

82. TFEU art. 56.

83. TFEU art. 57(d).

84. See, e.g., IDA E. WENDT, *EU COMPETITION LAW AND LIBERAL PROFESSIONS: AN UNEASY RELATIONSHIP?* 4, n. 20 (Fabian Amtenbrink & Ramses A. Wessel eds., 2013) (ebook) (stating that “liberal professions are regulated professions” in the European Union).

85. See *THE ECONOMIC AND LEGAL ASPECTS OF TRANSFERS OF PLAYERS*, *supra* note 8, at 26. The profession of football player might also qualify under the more restrictive category of “liberal professions” because the profession is not open to non-licensed individuals. In order to compete within a domestic football league a player must be registered and licensed within that country. Cf. WENDT, *supra* note 84, at 5–6 (while “liberal professions” often refer to professions such as physicians and attorneys, the relevant commonality is their regulatory environment).

86. TFEU art. 56.

87. See *THE ECONOMIC AND LEGAL ASPECTS OF TRANSFERS OF PLAYERS*, *supra* note 8, at 91.

88. See *id.*

89. TFEU art. 63(1).

90. See Case Comp/37 806, ENIC/UEFA ¶¶ 1, 6–8 (2002), [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/37806/37806\\_7\\_3.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/37806/37806_7_3.pdf).

91. See *id.* ¶¶ 7–8.

fixing and corruption if adverse teams shared a partial owner.<sup>92</sup> The owners argued that the restriction of stakes violated Article 81 of the European Community Treaty (now Article 101 of the TFEU), which prohibits practices that restrict investment between member states.<sup>93</sup> But the European Court of Justice (ECJ) ruled in favor of UEFA, asserting that the regulation protected the integrity of competition and that it was justified on grounds of public policy.<sup>94</sup> It is unclear whether the ban on third party ownership would equally be “justified on grounds of public policy.”<sup>95</sup> The effect that third party ownership has on the integrity of football is much more attenuated than it was in Case Comp/37 806 ENIC/UEFA.<sup>96</sup> This distinction is likely the strongest claim a potential challenge to the ban would have against FIFA.

### 3. Article 101

Article 101 is the relevant provision on E.U. competition law and has been the subject of the most litigation against FIFA.<sup>97</sup> The relevant section provides as follows:

The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which . . .

(b) limit or control production, markets, technical development, or investment; . . .<sup>98</sup>

For many years it was uncertain whether the TFEU’s competition laws applied to a sports entity like FIFA.<sup>99</sup> However, that ambiguity was resolved in Case T-193/02, *Piau v. Commission*, E.C.R. 2005 II-209.<sup>100</sup> There, the Court held that FIFA qualified as an “association of undertakings” within the meaning of Article 101.<sup>101</sup> The court reasoned as

92. See THE ECONOMIC AND LEGAL ASPECTS OF TRANSFERS OF PLAYERS *supra* note 8, at 91–92 (analyzing the reasoning behind the court’s decision in 37 806 ENIC/UEFA).

93. See Case Comp/37 806 ENIC/UEFA (2002); TFEU art. 101.

94. *Id.* ¶ 47.

95. TFEU art. 65(1)(b).

96. See THE ECONOMIC AND LEGAL ASPECTS OF TRANSFERS OF PLAYERS *supra* note 8, at 91–92.

97. See, e.g., Case C-519/04, *Meca-Medina and Majcen v. Comm’n*, 2006 E.C.R. I-6995; Case T-193/02, *Piau v. Comm’n*, E.C.R. 2005 II-209, ¶¶ 112, 116.

98. TFEU art. 101(1).

99. See ARNOUT GEERAERT, LIMITS TO THE AUTONOMY OF SPORT: EU LAW 17 (2013), [http://www.playthegame.org/fileadmin/documents/AGGIS\\_Geeraert\\_-\\_Limits\\_to\\_the\\_autonomy\\_of\\_sport.pdf](http://www.playthegame.org/fileadmin/documents/AGGIS_Geeraert_-_Limits_to_the_autonomy_of_sport.pdf).

100. See Case T-193/02, *Piau v. Comm’n*, E.C.R. 2005 II-209.

101. *Id.* ¶ 112.

follows:

The fact that FIFA is not itself an economic operator that buys players' agents' services on the market in question [is not dispositive] . . . since FIFA is the emanation of the national associations and the clubs, the actual buyers of the services of players' agents, and it therefore operates on this market through its members.<sup>102</sup>

As FIFA falls under the jurisdiction of Article 101, the key inquiry is whether eliminating third party ownership restricts trade between Member States or limits investment.<sup>103</sup> A showing that FIFA's prohibition of third party ownership incidentally restricts competition is insufficient.<sup>104</sup> Challengers must also prove that FIFA's regulation intends to restrict competition; otherwise the ban on its face likely would not violate Article 101.<sup>105</sup> This required showing of intent makes an Article 101 challenge incredibly difficult.

#### E. *Jurisdiction of the European Court of Justice*

For nearly the last half-century, European sports have been able to self-regulate and operate outside E.U. law, thanks to a "sporting exception."<sup>106</sup> A "sporting exception" is a legal term of art developed in Case C-36/74, *Walrave & Koch v. Union Cycliste Internationale*, 1974 E.C.R. 1405, where two cyclists challenged a perceived discriminatory regulation by the international cycling committee in breach of an E.U. treaty.<sup>107</sup> The court articulated a quasi-test for the "sporting exception," such that "the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty."<sup>108</sup> This 1974 ECJ ruling gave international sporting regulatory organizations, such as FIFA, relative autonomy in governing its own sport without necessarily needing to comply with E.U. law.<sup>109</sup> The *Walrave* decision essentially created a deference standard for organizations such as FIFA to make autonomous decisions without fear of judicial intervention.<sup>110</sup>

Since *Walrave*, two other sport-related ECJ cases have chipped away at the "sporting exception," Case C-415/93, *Européennes de football*

102. *Id.* ¶ 116.

103. *See* TFEU art. 101(1).

104. *See* GEERAERT, *supra* note 99, at 20.

105. *See id.*

106. *See* Behiç Fidanoglu, *Sporting Exception In the European Union's Sports Policy*, 4 ANKARA BAR REV. 65, 67 (2012).

107. *See generally* Case C-36/74, *Walrave & Koch v. Union Cycliste Internationale*, 1974 E.C.R. 1405.

108. *Id.* ¶ 4.

109. *See* Fidanoglu, *supra* note 106.

110. *See* GEERAERT, *supra* note 99, at 20–21.

(UEFA) v. Jean-Marc Bosman, 1995 E.C.R. I-5040, and Case C-519/04, *Meca-Medina and Majcen v. Commission*, 2006 E.C.R. I-6995. *Bosman*, in particular, was a landmark case as it significantly changed the economics of international football.<sup>111</sup> Jean-Marc Bosman was a Belgium football player who wanted to sign for a new team after his club contract with RC Liège expired.<sup>112</sup> RC Liège did not allow Bosman to switch clubs until his new team compensated it with a transfer fee.<sup>113</sup> Bosman subsequently filed suit claiming it was illegal for RC Liège to prevent him from playing for a new team if he was not under contract.<sup>114</sup> The court agreed and declared that RC Liège violated Article 48 of the European Economic Community Treaty (the prior incarnation of the TFEU), which secures freedom of movement for all workers in the EU.<sup>115</sup> Now, following *Bosman*, all European soccer players have the *Bosman* right to a free transfer at the expiration of their contract.<sup>116</sup>

The *Meca-Medina* case involved two swimmers who challenged the International Swimming Federation's anti-doping regulations.<sup>117</sup> The swimmers appealed the ECJ lower court's finding that anti-doping regulations fell under the sporting exception and were not considered economic activity.<sup>118</sup> The appellants successfully argued that the anti-doping standard restricted competition under Article 82 of the TFEU and had broader economic effects on the European market.<sup>119</sup> The 2006 decision was eye opening for many as it reinforced that sporting organizations were not free to restrict competition if there were broader economic impacts resulting from the rule.<sup>120</sup>

After the *Meca-Medina* decision, UEFA released the following statement expressing its disapproval of the court's decision:

Encouraged by the judgment in *Meca-Medina*, it is to be expected that complainants will now amplify arguments to the effect that sports rules and practices have "disproportionate" effects or are "not limited to what is necessary for the proper conduct of competitive

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111. See Samuli Miettinen & Richard Parrish, *Nationality Discrimination in Community Law: An Assessment of UEFA Regulations Governing Player Eligibility for European Club Competitions (The Home-Grown Player Rule)*, 5 ENT. & SPORTS L. J. 2, ¶¶ 1–3 (2007).

112. Case C-415/93, *Européennes de football (UEFA) v. Jean-Marc Bosman*, 1995 E.C.R. I-5040, ¶¶ 28–31.

113. See *id.* ¶ 33.

114. *Id.* ¶ 34.

115. *Id.* ¶ 137.

116. See Miettinen & Parrish, *supra* note 111, at ¶ 1.

117. Case C-519/04, *Meca-Medina and Majcen v. Comm'n*, 2006 E.C.R. I-7006, ¶¶ 7–10.

118. See *id.* At ¶¶ 19–20

119. *Id.*

120. See Gianni Infantino, *Meca-Medina: A Step Backwards for the European Sports Model and the Specificity of Sport?*, UEFA.ORG (Oct. 2, 2006), [http://www.uefa.org/MultimediaFiles/Download/uefa/KeyTopics/480391\\_DOWNLOAD.pdf](http://www.uefa.org/MultimediaFiles/Download/uefa/KeyTopics/480391_DOWNLOAD.pdf).

sport” and, in this way, “prove” a violation of competition law. It seems the European Court of Justice (unlike the CFI) has now declared its interest and willingness to examine all manner of such arguments in the future. The European Commission may also have a harder job in rejecting vexatious claims under competition law.<sup>121</sup>

These cases demonstrate that the ECJ is a proper forum for challenging FIFA's new mandate and obtaining the desired revocation of the ban. Not only is a lawsuit in the ECJ a proper legal vehicle for such a challenge, but precedent indicates the ECJ is open to striking down rulings from international sporting organizations.<sup>122</sup> There are other legal forums where a challenge may be brought, such as the Swiss legal system—as FIFA and UEFA are both headquartered in Switzerland.<sup>123</sup> However, it is possible that Sepp Blatter's influence could make that forum an undesirable place in which to challenge to the ban of third party ownership.

## II. ANALYSIS

The worldwide ban of the practice of third party ownership is an extreme reaction by FIFA intended to quell discontent by critics; instead, a more moderate solution of regulating third party ownership should be implemented. FIFA's ban should be challenged in the European Court of Justice because the ban restricts freedom to provide services, free movement of capital, and freedom of competition under, respectively, Articles 56, 63 and 101 of the Treaty on the Functioning of the European Union.<sup>124</sup> The best forum in which to challenge the ban is the European Court of Justice. The remaining questions are who has standing to bring such a challenge and which of the different parties with standing *should* challenge FIFA.

### A. *Who Has Standing?*

Accepting the premise that the ECJ is the most appropriate forum to file a lawsuit against FIFA, the next logical question is: who should bring the suit? There are four possibilities: (1) an affected football club, (2) an affected player, (3) an affected Member State, or (4) an affected third party investor or investment group. An affected third party investor will likely be in the best position to challenge the ban, but each prospective plaintiff has its advantages and challenges.

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121. *Id.*

122. *See, e.g.*, Case C-519/04, *Meca-Medina and Majcen v. Comm'n*, 2006 E.C.R. I-6995.

123. *Who We Are*, FIFA.COM, <http://www.fifa.com/about-fifa/who-we-are/index.html> (last visited Jan. 24, 2015); *About UEFA*, *supra* note 72.

124. *See generally* TFEU arts. 56, 63, 101.

## 1. A Football Club

A football club is probably the least likely of the four potential parties to bring a suit. The clubs that are most negatively affected by the ban are from South America and they may not have the resources to pursue a legal challenge.<sup>125</sup> A club whose economic model has been largely reliant on third party investors, such as the Portuguese club FC Porto,<sup>126</sup> might be motivated to file a claim because its economic interest in preserving its status as a hub between South American talent and the European superclubs.<sup>127</sup> Despite not being a prototypical “big” league, Portuguese clubs have maintained their success through a steady stream of third party ownership of South American players.<sup>128</sup> What might discourage Portuguese clubs like FC Porto to pursue legal recourse, however, is internal pressure from the Portuguese Football Association and possible penalties and scrutiny from UEFA.<sup>129</sup> Clubs may be unwilling to challenge their own union and risk losing the ability to play in the UEFA Champions League, a necessary source of revenue for many of these countries.<sup>130</sup>

## 2. A Player

A player is the second-most likely individual to challenge the ban. Past cases like *Bosman* and *Meca-Medina* illustrate successful challenges by players against regulations from sporting organizations. The plaintiff likely would not be a high-profile player, but an unknown simi-

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125. See Barracco, *supra* note 28 (noting the difficulty that Brazilian football clubs have in staying solvent without third party investors).

126. Recall that FC Porto was the club that purchased James Rodríguez from Argentine club Banfield. See *supra* note 29.

127. See Simon Evans, *Third Party Owner Ban Would be Bad for Brazil-Club Lawyer*, REUTERS (Oct. 22, 2014), <http://uk.reuters.com/article/2014/10/22/uk-soccer-fifa-tpo-idUKKCNOIB00R20141022>. Brazilian lawyer Daniel Cravo believes that Brazilian clubs are being subjugated for the benefit of bigger European clubs. See *id.* Cravo argues that Brazilian clubs are the most interested parties and could sustain a David against Goliath type legal challenge. See *id.* But see Alexandre Alliatti & Daniel Mundim, *Veto a Investidores: Salários Menores e Assédio do Exterior São Tendência*, GLOBO.COM (Sep. 30, 2014), <http://globoesporte.globo.com/futebol/noticia/2014/09/veto-investidores-salarios-menores-e-assedio-do-externo-sao-tendencia.html> (arguing that Brazil’s football leagues will suffer in the short term, but will be healthier in the long run).

128. See Richard Berry, *R.I.P. TPO: A Guide to FIFA’s Ban On Third Party Ownership*, LAWNSPORT (Jan. 23, 2015), <http://www.lawinsport.com/articles/item/r-i-p-tpo-a-guide-to-fifa-s-ban-on-third-party-ownership>.

129. See, e.g., Neeraj Thomas, *The Future of Third Party Ownership and Influence in Football Following the FC Seraing Case*, LAWYERISSUE (Mar. 15, 2016), <http://www.lawyerissue.com/the-future-of-third-party-ownership-and-influence-in-football-following-the-fc-seraing-case/> (chronicling the case of Belgian club FC Seraing that challenged TPO ban and has been handed a transfer ban for 2 years).

130. See *id.*

lar to Jean-Marc Bosman.<sup>131</sup> A potential candidate would be a Brazilian player denied the opportunity to play for a smaller European club because, without third party investors, the club did not have the resources to absorb the risk of signing an unknown player from across the Atlantic.<sup>132</sup> Assuming the player was talented enough, he would eventually attract the attention of a bigger European club and make the move later in his career. However, because football careers are short,<sup>133</sup> the potential plaintiff would have a strong argument that he lost years of potential wages because of the third party ownership prohibition. Compared to a football club, a player is more likely to succeed in challenging the ban by arguing that the ban violates Article 56 of the TFEU and directly restricts his freedom to perform services in the EU.<sup>134</sup>

### 3. A FIFA Member State

A FIFA Member State is another potential party litigant who is not a football actor, but is an interested party and has enough clout to effectively challenge FIFA's third party ownership ban in court as a representative of a domestic league.<sup>135</sup> Countries like Spain, which are hosts to major football clubs, derive great economic benefits from their domestic leagues and should be eager to challenge any FIFA regulation that might curtail revenues.<sup>136</sup>

Indeed, both Spain and Portugal are considering a legal challenge to FIFA's ban on third party ownership.<sup>137</sup> The domestic football leagues within those countries depend significantly on third party ownership to absorb the risk of new players.<sup>138</sup> The two countries released a joint statement in February 2015 announcing that they planned to file a com-

131. Tariq Panja, *Ronaldo and Beckham's Millions Start With an Unknown Belgian*, BLOOMBERG (Dec. 10, 2015), <http://www.bloomberg.com/news/articles/2015-12-10/ronaldo-and-beckham-s-millions-start-with-this-unknown-belgian>.

132. See *supra* Section I, Part A.

133. See *Age, PROF'L FOOTBALLER'S ASS'N*, <http://www.thepfa.com/equalities/age> (last visited Feb. 15, 2016) (stating average career length is 8 years).

134. See TFEU art. 56.

135. For example, Spain, instead of La Liga, would challenge FIFA.

136. See KPMG SPORTS, *SOCIOECONOMIC IMPACT OF PROFESSIONAL FOOTBALL IN SPAIN* 12 (2015), <https://home.kpmg.com/content/dam/kpmg/pdf/2015/07/socioeconomic-impact-professional-football.pdf>.

137. See *Spain and Portugal Challenge FIFA's Ban on Third-Party Ownership*, GUARDIAN (Feb. 10, 2015), <http://www.theguardian.com/football/2015/feb/10/portugal-spain-fifa-ban-third-party-ownership>.

138. *Spain, Portugal to Challenge FIFA Ban on Third-Party Ownership*, ESPN (Feb. 9, 2015), <http://www.espnfc.com/league-name/story/2290346/headline> ("This ban damages the clubs, principally those with less economic resources, preventing them from sharing with third parties the economic rights of the professional players in their squads and to manage their financial obligations in the most prudent form.").

plaint with the European Commission's competition arm.<sup>139</sup> "The prohibition of third-party ownership constitutes an economic agreement that restricts the economic liberty of clubs, players and third parties without any justification or proportionality . . . ."<sup>140</sup> To date, however, neither Spain nor Portugal has followed through on their promise.

#### 4. A Third Party Investor

A third party investor has the most motivation and resources to launch a legal challenge against FIFA. However, at the same time, a third party investor like Kia Joorabchian may have difficulty evoking sympathy with the court in the same way as a struggling player, such as the case mentioned above. That is not to mention that the biggest names in third party investment, Joorabchian, Jorge Mendes, and Doyen Sports, all have undesirable reputations for a myriad of reasons.<sup>141</sup> Consequently, a more successful plaintiff would probably be a smaller operator with demonstrably legitimate success investing in players' economic rights and without the alleged self-dealing done by the aforementioned investors. Among those interested and affected by the ban, investors have likely sustained the greatest financial injury and could best utilize Articles 56, 63, 101 to challenge the ban.<sup>142</sup>

Doyen Sports demonstrated how third party investors could challenge the ban when it filed a complaint in a French court challenging the global restriction of third party ownership in football.<sup>143</sup> Doyen Sports argued that it would be forced to shut down once the ban is implemented, as approximately 79 percent of its revenue is derived from its position as a third party owner.<sup>144</sup> The French court ordered representatives from FIFA, UEFA, and the French soccer federation to appear before the court on May 28, 2015.<sup>145</sup> After the hearing, the French court de-

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139. *See id.*

140. *Id.*

141. *See, e.g., Gambia: Revealed – Bakau Utd Agree Investment Deal With Football Agency, supra* note 36 (discussing a deal between Doyen and Bakau United); David Conn, *supra* note 75 (discussing Jorge Mendes' apparent breach of FIFA regulations); Daniel Geey, *The Integrity of Football: Club and Player Ownership in the English Premier League*, DANIEL GEEY.COM (Apr. 15, 2008), <http://www.danielgeey.com/the-integrity-of-football-club-and-player-ownership-in-the-english-premier-league/> (discussing Kia Joorabchian's TPO involvement).

142. The more successful challenges to FIFA regulations have argued that the international sporting organization breached several articles of the TFEU. *See, e.g.,* Case C-415/93, *Européennes de football (UEFA) v. Jean-Marc Bosman*, 1995 E.C.R. I-5040.

143. Alex Duff, *Hedge Fund Challenges European Soccer-Transfer Market Ban*, BLOOMBERG (Mar. 18, 2015), <http://www.bloomberg.com/news/articles/2015-03-18/hedge-fund-challenges-european-soccer-transfer-market-exclusion>.

144. *Id.*

145. *Id.*

clined to intervene in FIFA's decision to ban third party ownership.<sup>146</sup>

Doyen Sports also lost another pending third party ownership challenge in Belgium, where a Brussels court ruled in favor of FIFA.<sup>147</sup> It is possible that Doyen's challenge could be consolidated with future domestic challenges to FIFA's ban, and end up before the ECJ in the near future.<sup>148</sup> These two losses were a blow for proponents of third party ownership, but more challenges could be imminent—whether by an investment group, a club, or a football league. However, any challenges would have to contend with the recent corruption charges brought against the head members of FIFA, which have taken attention away from its controversial actions on third party ownership.<sup>149</sup>

### B. *Treaty on the Functioning of the European Union*

The TFEU offers many avenues for potential litigants to challenge FIFA's ban in court. This Note highlights Articles 56, 63, and 101 specifically as the sources of rights most affected by the ban. Players, both European and non-European Union citizens, prevented by the ban from providing services in the EU will probably focus on Article 56.<sup>150</sup> Aggrieved third party investors should invoke Article 63, as the ban restricts their ability to invest capital.<sup>151</sup> Specific football clubs or member states, meanwhile, should argue that FIFA's ban is inherently anti-competitive and violates Article 101.<sup>152</sup> However, plaintiffs are not limited to only challenging the ban under these Articles; successful challenges to FIFA regulations in the past have involved claims under other TFEU articles.<sup>153</sup> The case of *Bosman*, for example, involved challenges under the TFEU for Articles 45, 101, and 102.<sup>154</sup>

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146. *FIFA Welcomes Legal Win for Ban on Third-Party Ownership*, AP (July 27, 2015), <http://news.yahoo.com/fifa-welcomes-legal-win-ban-third-party-ownership-115559838.html>.

147. *See id.*

148. This pattern has been seen in prior challenges to sporting organization cases, such as *Bosman* and *Piau*.

149. In May 2015, U.S. Attorney General Loretta Lynch shocked the world by bringing corruption charges against the leading members of FIFA. Those arrested include Jack Warner, the President of the North American and Caribbean chapter of FIFA. Sepp Blatter and Michel Platini have also been removed from their posts at FIFA and are expecting criminal charges. *See* Owen Gibson, *FIFA and IAAF Endure Grim 2015 But Corruption Crises Far from Over*, *GUARDIAN* (Dec. 31, 2015), <http://www.theguardian.com/football/2015/dec/31/fifa-iaaf-corruption-crisis-2015>.

150. *See* TFEU art. 56.

151. *See id.* art. 63.

152. *See id.* art. 101.

153. *See* Gardiner & Welch, *supra* note 78, at 830.

154. The 1995 case was decided under the EC Treaty before the reorganization of the articles under the TFEU. The analogous articles under the EC Treaty are 48, 85, and 86. *See generally* Case C-415/93, *Européennes de football (UEFA) v. Jean-Marc Bosman*, 1995 E.C.R. I-5040.

Regardless of the specific challenger and TFEU Article(s) cited, a successful challenge will focus on the sporting exception at issue in the *Bosman* and *Meca-Medina* cases.<sup>155</sup> The characterization of the third party ownership ban as preserving the integrity of the sport will have to be balanced with the broader economic impacts caused by the withdrawal of third party investment in the EU market.<sup>156</sup> As discussed above, the ECJ has been receptive to limiting the “sporting exception” in recent years.<sup>157</sup> However, FIFA has a much better case now that the regulation at issue will directly preserve the integrity of the sport.<sup>158</sup> For this reason, challengers to the ban will need to overcome FIFA’s “sporting exception” in order to have any chance at overturning the ban.

### C. *Broader Implications of a Successful Challenge*

When FIFA President Sepp Blatter announced on September 26, 2014 that FIFA planned to ban the practice of third party ownership, the decision was met with unexpected praise.<sup>159</sup> FIFA is a highly maligned organization that has numerous corruption and human rights complaints against it.<sup>160</sup> Thus, it was surprising that a large announcement from the organization was met with positive feedback rather than backlash. On the other hand, this response was consistent with the public demonization of third party ownership that began with the Tévez and Mascherano saga and that led to the English ban on the practice in 2008.<sup>161</sup> However, what has been overlooked in the third party ownership debate is that the criticism focuses on the results, rather than the actual structure of third party ownership.<sup>162</sup> In practice, third party owners have been dif-

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155. See *id.* at I-5063; see also Gianni Infantino, *Meca-Medina: A Step Backwards for the European Sports Model and the Specificity of Sport?*, UEFA.ORG (Oct. 2, 2006), [http://www.uefa.org/MultimediaFiles/Download/uefa/KeyTopics/480391\\_DOWNLOAD.pdf](http://www.uefa.org/MultimediaFiles/Download/uefa/KeyTopics/480391_DOWNLOAD.pdf).

156. See An Vermeesch, *All's Fair in Sport and Competition? The Application of EC Competition Rules to Sport*, 3 J. CONTEMP. EUR. RES. 238, 238–39 (2007).

157. See Case C-519/04, *Meca-Medina and Majcen v. Comm'n*, 2006 E.C.R. I-6995, ¶¶ 19–20.

158. Cf. *id.* (stating that there is no general exclusion of purely sporting rules from the EC Treaty).

159. See, e.g., Brian Homewood, *FIFA To Ban Third-Party Ownership of Players*, REUTERS (Sept. 26, 2014), <http://www.reuters.com/article/us-soccer-fifa-players-idUSKCN0HL1DT20140926>.

160. See Roger Pielke Jr., *Can FIFA's Corruption Be Stopped?*, FOREIGNPOLICY.COM (Nov. 16, 2014), <http://foreignpolicy.com/2014/11/16/can-fifas-corruption-be-stopped/>.

161. See Conn, *supra* note 37.

162. See, e.g., John Sinnott, *Does Third-Party Ownership Benefit or Hinder Football?*, BBC (Oct. 27, 2011), <http://www.bbc.com/sport/0/football/15298353> (highlighting how third party owners operate in the shadows of the game); see also Bisson, *supra* note 73 (quoting Michel Platini comparing third party ownership to human trafficking and declaring it a scourge on the game). But see Peter Staunton, *Why Fifa are Wrong over Third-Party Ownership Ban*, GOAL.COM (Oct. 14, 2014), <http://www.goal.com/en-gb/news/2892/transfer->

difficult to identify; furthermore, they are free to take other roles in a player's career, such as his agent.<sup>163</sup> Jorge Mendes is a prime example of someone who occupies the dual role of third party owner and agent.<sup>164</sup> This conflict of interest is rightly criticized because it lends itself to undue influence on a player's and/or club's transfer decisions.<sup>165</sup>

Thus, when FIFA announced the ban, the feedback was positive because observers believed FIFA recognized and was responding to a shady, underhanded practice.<sup>166</sup> But there is a legitimate criticism that FIFA took the most extreme step to solve the problem before exploring a less extreme alternative: effective regulation.<sup>167</sup> If, as this Note explores, the ban is successfully challenged in the ECJ and subsequently struck down, FIFA would be forced to turn to regulation to effectively rid the sport of the undesirable aspects of third party ownership.

FIFA's primary argument against third party ownership is that the practice threatens the integrity of the game.<sup>168</sup> While FIFA posits that this could happen in different ways, the primary concern is the third party investor's potential unscrupulous use of its financial clout to influence players or match outcomes.<sup>169</sup> For example, if a third party investor partially owns the rights of many players in a club, that investor could easily wield undue influence over the club's activity by threatening to advise certain players to miss an important match through illness if the club did not bend to the investor's will.<sup>170</sup> However, this particular fear is unfounded, as regular football agents could potentially wield the same sort of influence over a club.<sup>171</sup>

A more significant concern is the possibility of a third party investor

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zone/2014/09/26/5135392/why-fifa-are-wrong-over-third-party-ownership-ban (arguing that FIFA has not attempted to actively regulate the practice); Jerrad Peters, *Topics that Shape Future of Third-Party Ownership*, SPORTSNET (Sept. 28, 2014), <http://www.sportsnet.ca/soccer/topics-that-shape-future-of-third-party-ownership/> (making similar argument).

163. See, e.g., Conn, *supra* note 75.

164. See *id.*

165. See *id.*

166. See Menary, *supra* note 52.

167. See Williams, *supra* note 31, at 99.

168. See Owen Gibson & David Conn, *FIFA Inactivity Allows Menace of Third-Party Ownership To Go Unchecked*, GUARDIAN (Sept. 23, 2014), <http://www.theguardian.com/football/2014/sep/23/fifa-third-party-ownership>; FIFA, *Executive Committee Says Stop to Third-Party Ownership of Players' Economic Rights*, FIFA.COM (Sept. 26, 2014), <http://www.fifa.com/about-fifa/news/y=2014/m=9/news=executive-committee-says-stop-to-third-party-ownership-of-players-econ-2444471.html>.

169. See THE ECONOMIC AND LEGAL ASPECTS OF TRANSFERS OF PLAYERS, *supra* note 8, at 91–93

170. See Thomas, *supra* note 129.

171. See *id.*

also being a partial owner of an opposing club.<sup>172</sup> If, for instance, a third party investor is the minority owner of club A and owns the economic rights of three players in club B, the investor could potentially influence the result of a match between the two clubs.<sup>173</sup> Even if club A is in Scotland and club B is in Romania, there is a chance the two clubs could meet in international competitions such as the Europa League or UEFA Champions League.

To prevent such scenarios from occurring, FIFA should implement regulations in tandem with the various national football associations visible to the other associations. The most obvious requirement would be a national register of third party owners, similar to the register of players' federative rights.<sup>174</sup> The registration of a player's federative rights could be approved after a thorough inspection of the contract between the club and the third party owner.<sup>175</sup> Each national football association may even choose to limit the percentage a third party investor may own of a player's economic rights (such as 25 percent).<sup>176</sup> In addition, there should be a limit on how many players in one club a third party investor may invest in.<sup>177</sup> More stringent requirements, such as limiting a third party investor to owning players' rights on only one team per league could further alleviate integrity concerns.<sup>178</sup> Most importantly, prohibiting agents, executives, or other stakeholders of a club to be third party investors would go a long way towards preventing undue influence.<sup>179</sup>

These potential regulations are relatively straightforward and would be simple to implement. There is a possibility that very stringent regulations (such as the 25 percent limit ownership stake) could be found to unduly restrict trade under the TFEU.<sup>180</sup> However, despite the cases discussed above, the ECJ affords a fair amount of deference to sporting organizations<sup>181</sup> and the regulations would likely pass the test—especially after the revocation of the more extreme alternative.<sup>182</sup>

#### D. *FIFA's Autonomy Going Forward*

FIFA prides itself on its supremacy in the football world, in that they

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172. *See id.*

173. *See id.*

174. *See id.*

175. *See id.*

176. *See id.*

177. *See id.*

178. *See id.*

179. *See id.*

180. *See* TFEU art. 101.

181. *See* discussion *supra* Part II.B.

182. *See id.*

“control every type of Association Football by taking appropriate steps to prevent infringements of the Statutes, regulations or decisions of FIFA or of the Laws of the Game.”<sup>183</sup> This is most apparent in its direction of the world’s biggest sporting event, the World Cup.<sup>184</sup> FIFA’s decision to award the 2022 World Cup to the small country of Qatar has, to put it mildly, been criticized.<sup>185</sup> Despite allegations of bribery and of Qatar using slave labor to construct football stadiums for the World Cup, FIFA has steadfastly stuck by its decision.<sup>186</sup>

Against this background, FIFA, and other sports organizations, must recognize that it is no longer the golden age of “sporting exceptions,” as articulated in *Walrave*.<sup>187</sup> *Meca-Medina* showcased the ECJ’s willingness to evaluate FIFA’s decisions using E.U. law.<sup>188</sup> The autonomy sporting organizations formerly enjoyed has transformed into more of a “sporting presumption.”<sup>189</sup> Sports organizations are free to regulate their sport, but now must be wary of breaching E.U. law.<sup>190</sup> While that sentiment may seem self-evident, it is a rather recent development.

#### CONCLUSION

Third party ownership has been a necessary and essential resource for many football clubs worldwide since the 1990s.<sup>191</sup> The practice has leveled the playing field for small clubs to compete financially with larger, more established clubs.<sup>192</sup> But third party ownership also acts as a doorway for outside influences to insinuate themselves in clubs and to wield an undue amount of power over club decisions.<sup>193</sup> This negative aspect of third party ownership has dominated the discussion for the last few years and has prompted FIFA to ban the practice altogether.<sup>194</sup> The

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183. FIFA STATUTES 6, FIFA (Apr. 2015), [http://www.fifa.com/mm/Document/AFFederation/Generic/02/58/14/48/2015FIFAStatutesEN\\_Neutral.pdf](http://www.fifa.com/mm/Document/AFFederation/Generic/02/58/14/48/2015FIFAStatutesEN_Neutral.pdf).

184. *See id.*

185. *See, e.g.,* Teri Thompson & Nathaniel Vinton, *As FIFA Clears Qatar, Russia of Wrongdoing in World Cup Bidding, Michael Garcia Vows Appeal and Rips Soccer’s Governing Body for ‘Erroneous Representations of the Facts’*, N.Y. DAILY NEWS (Nov. 13, 2014), <http://www.nydailynews.com/sports/soccer/fifa-clears-qatar-russia-wrongdoing-world-cup-bidding-article-1.2009117>.

186. *See id.*

187. *See* Case C-36/74, *Walrave & Koch v. Union Cycliste Internationale*, 1974 E.C.R. 1405, 1417.

188. *See* Case C-519/04, *Meca-Medina and Majcen v. Comm’n*, 2006 E.C.R. I-6995.

189. *See* Infantino, *supra* note 120, at 2.

190. *See id.*

191. *See* Borden, *supra* note 68.

192. *See id.*

193. *See* Gibson & Conn, *supra* note 168.

194. *See* Gibson, *supra* note 16.

ban by FIFA violates the articles of the TFEU discussed above by restricting freedom of competition, freedom of services, and the free movement of capital within the European Union.<sup>195</sup>

FIFA erred by choosing the most extreme option to curb the negative implications of third party ownership without first pursuing a more moderate solution.<sup>196</sup> Its only attempt at regulating third party ownership was an ineffective, vague, and unenforceable “material influence” standard.<sup>197</sup> This Note proposes alternative, stricter, and more specific regulations over third party owners in the form of registration requirements, close monitoring, and transparency on a country-by-country level.<sup>198</sup> Compared to the “materially influence” test, these strategies can realistically and effectively curtail the downsides of third party ownership while facilitating the positive effects of the practice.<sup>199</sup> These alternative regulations not only allow smaller clubs to continue meaningfully competing in the spirit of the game, they do so without contravening E.U. law.<sup>200</sup> FIFA’s supremacy in all matters football can only go so far and its blanket ban on third party ownership crossed the line.

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195. *See supra* Section II.

196. *See id.*

197. *See Geey, supra* note 51.

198. *See supra* Section II, Part C.

199. *See supra* Section II.

200. *See id.*