

Comment

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After the Ban: The Financial Landscape of International Soccer After Third-Party Ownership

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INTRODUCTION

In September 2014, the Fédération Internationale de Football (FIFA)—the worldwide governing body of soccer—declared its intent to ban the contentious practice of third-party ownership (TPO).¹ A TPO agreement is between a soccer club and a third party—an investment fund, corporation, sports agent, or private investor—by which the third party purchases an economic stake in future profits from the sale of one or more players at the club.² The third party believes the player has the potential to improve and be sold to another club for a high enough fee to make a profit on the initial

¹ Owen Gibson, *Sepp Blatter Says Fifa Will Ban Third-Party Ownership*, THE GUARDIAN (Sept. 26, 2014, 9:44 EDT), <http://www.theguardian.com/football/2014/sep/26/sepp-blatter-fifa-ban-third-party-ownership>.

² KPMG ASESORES, S.L., PROJECT TPO 11 (2013) [hereinafter KPMG].

investment.³ The profits made selling economic stakes in future transfers are a crucial resource for cash-strapped soccer clubs around the world.⁴

Early in 2014, FIFA announced that it would ban TPO, and that the ban would be phased in over three to four years.⁵ Accordingly, in December 2014, FIFA introduced Article 18ter of its Regulations on the Status and Transfer of Players (RSTP), prohibiting TPO.⁶ Article 18ter allowed for the natural culmination of current TPO agreements and for new agreements to be signed between January 1 and April 30, 2015, that lasted no more than one year.⁷ As of May 1, 2015, no new TPO agreements may be made.⁸ Notably, this timetable completely removed any meaningful phasing in period.

TPO is an incredibly contentious topic in the international soccer community, and FIFA's announcement has not been universally embraced.⁹ The Union of European Football Associations (UEFA)—the European governing body of soccer—has favored eliminating TPO.¹⁰ Earlier in 2014, UEFA declared its intent to ban the practice from Europe if FIFA was unwilling to do so.¹¹ Thus, South American clubs and officials believe FIFA was pressured into banning TPO by rich European leagues and clubs wishing to maintain their monopoly of the global soccer market by outlawing what many see as a legitimate and necessary financial asset for smaller clubs looking to challenge European dominance.¹²

³ Ariel Reck & Daniel Geey, *Financial Fair Play: An English Handicap?*, DANIEL GEEY: THE FINAL SCORE ON FOOTBALL LAW (Dec. 24, 2011), <http://www.danielgeey.com/financial-fair-play-an-english-handicap/>.

⁴ *See id.*

⁵ Gibson, *supra* note 1.

⁶ Circular No. 1464, Letter from Jérôme Valcke, Sec'y Gen., FIFA, to the Members of FIFA (Dec. 22, 2014) [hereinafter Circular No. 1464] (http://www.fifa.com/mm/document/affederation/administration/02/49/57/42/tpocircular1464_en_neutral.pdf).

⁷ *Id.*

⁸ *Id.*

⁹ *See Brazilian Clubs Fight Back in Third-party Ownership Debate*, SOCCEREX (Apr. 26, 2013), <https://www.soccerex.com/news/2013/04/brazilian-clubs-fight-back-third-party-ownership-debate>; Liviu Bird, *FIFA's Third-party Ownership Crusade Has Major Implications in S. America*, SPORTS ILLUSTRATED (Oct. 29, 2014), <http://www.si.com/soccer/planet-futbol/2014/10/29/third-party-ownership-fifa-brazil-south-america>.

¹⁰ Owen Gibson & David Conn, *Uefa Plans Rule Change to Clamp Down on Third-party Ownership*, THE GUARDIAN (Sept. 23, 2014, 7:01 EDT), <http://www.theguardian.com/football/2014/sep/23/uefa-third-party-ownership-champions-league>.

¹¹ *Id.*

¹² *Brazilian Clubs Fight Back in Third-party Ownership Debate*, *supra* note 9.

TPO agreements are commonplace in South America, where, without the lucrative broadcasting and sponsorship revenue enjoyed by their European counterparts, clubs often have no other options.¹³ That said, the practice is not limited to South America—smaller European clubs also depend on TPO investment for their financial and competitive livelihood.¹⁴ Many in favor of TPO agree that it can be dangerous and should be better regulated, but because of its financial utility, they argue a ban is disproportionately restrictive.¹⁵ Indeed, there is an argument that by restricting investment into clubs, FIFA's ban violates European Union (EU) competition law, deflating wages, raising barriers to entry, and entrenching the dominant players of the international soccer market.¹⁶ Instead of banning TPO altogether, some have suggested regulations to limit the scope of agreements.¹⁷ Such regulations would help prevent clubs from becoming overreliant on the practice. Not to mention, monitoring and preventing third parties from exercising undue influence over the clubs would achieve the same objectives FIFA uses to justify banning TPO while maintaining this useful financial practice.

Because of the current reliance on TPO, FIFA's ban will have disastrous financial and competitive consequences on the international soccer community, crippling clubs and entire leagues. Clubs have used TPO in an attempt to level the disparate playing field of international soccer.¹⁸ Now, without TPO, clubs across the globe face the challenge of surviving without a vital asset. International soccer is a lucrative market, where there is enough money to go around; but the sport lacks mechanisms for distributing that wealth, and those that exist are poorly enforced.¹⁹ If, instead of creating a

¹³ See *infra* Part II.B.

¹⁴ See KPMG, *supra* note 2, at 23; Fernando Duarte, *Fifa's Third-party Ownership Ban: Is It Good or Bad for Brazil?*, THE GUARDIAN (Oct. 21, 2014, 06:36 EDT), <http://www.theguardian.com/football/2014/oct/21/neymar-barcelona-fifa-third-party-ownership-brazil>.

¹⁵ Ariel Reck, *Third Party Player Ownership: Current Trends in South America and Europe*, SPORTS L. BULL., June–Oct. 2012, at 50, 54.

¹⁶ John Sinnott, *Third-party Owner Rule Not 'Legitimate'—Bosman Lawyer*, BBC SPORT (Oct. 27, 2011, 9:33 GMT), <http://www.bbc.com/sport/0/football/15386863>.

¹⁷ Luís Villas-Boas Pires, *Third Party Ownership—To Ban or Not to Ban?*, LAWINSPORT (Dec. 10, 2013), <http://www.lawinsport.com/articles/regulation-a-governance/item/third-party-ownership-to-ban-or-not-to-ban>.

¹⁸ Alex Duff & Tariq Panja, *Football Investors Get 62% in Run Around Players on Transfer Bet*, BLOOMBERG (Mar. 5, 2013, 4:00 PM PST), <http://www.bloomberg.com/news/articles/2013-03-06/football-investors-get-62-betting-on-player-transfers>.

¹⁹ See *infra* Part III.C.

regulatory framework to improve and structure the practice, FIFA's TPO ban stands without drastic, systemic changes in international soccer, then FIFA's ban could have disastrous consequences on clubs, players, and leagues around the world. This Article will introduce the practice of TPO and its role in international soccer today, before examining the repercussions and reactions to FIFA's ban. Part I outlines how TPO agreements function and FIFA's newly announced ban. Part II contextualizes TPO in the economic climate of international soccer, introducing the financial and competitive necessity of TPO, as well as arguments for why the practice should be prohibited. Finally, Part III discusses the repercussions of and reactions to banning TPO. In particular, Part III discusses the legality of banning TPO, whether a less-restrictive alternative to FIFA's ban exists, and how the financial utility of TPO can be replaced if the ban stands.

I

THE BASICS AND MECHANICS OF THIRD-PARTY OWNERSHIP AGREEMENTS

Before discussing TPO agreements, it is helpful to have a basic understanding of how players move between soccer clubs. In international soccer, players are transferred between clubs for a negotiated fee, known as a transfer fee.²⁰ Club A will negotiate a transfer fee with Club B to buy the employment contract of Player X.²¹ If Club B accepts the offer, Club A can then proceed to negotiate the personal terms of the contract with Player X (i.e., wages, bonuses, termination, and buy-out clauses).²² If Club A and Player X come to an agreement on personal terms, Club A will pay Club B the determined transfer fee in exchange for the employment contract for Player X.²³

²⁰ See generally Andi Thomas, *The European Soccer Transfer Market, Explained*, SB NATION (July 28, 2014, 11:02 AM), <http://www.sbnation.com/soccer/2014/7/28/5923187/transfer-window-soccer-europe-explained>.

²¹ *Id.*

²² *Id.*

²³ *Id.*

A. *The Separation of Economic and Federative Rights*

TPO is made possible because of the separation of a player's federative and economic rights.²⁴ Owning a player's federative rights allows the club to register that player with the club's domestic Football Association (FA) (e.g., the United States Soccer Federation, French Football Federation, or the English Football Association).²⁵ This registration is required to field the player in official competition.²⁶ Federative rights can only be held by a single club.²⁷ On the other hand, economic rights are the rights to future transfer fees from the transfer of the player to another club, and, unlike federative rights, economic rights can be divided between multiple parties.²⁸

TPO agreements divide a player's economic rights between the club and a third party. Returning to the previous example of a transfer between clubs, Club A wants to buy Player X from Club B. Club B is unwilling to sell for anything less than \$10 million—which, incredibly, is a fairly mundane transfer fee in international soccer today. Unfortunately, Club A cannot afford \$10 million. Therefore, Club A approaches a third party about co-purchasing the player's economic rights. Club A and the third party come to an agreement, by which Club A buys 25% of Player X's economic rights for \$2.5 million and the third party buys the remaining 75% of Player X's economic rights for \$7.5 million. In essence, this is a joint venture between the two: splitting the initial investment, sharing the risk, and sharing the reward. Again, while the player's economic rights can be divided, the player's federative rights cannot, and in this example they go in full to Club A.

Later on, Club A gets an offer from Club C to buy Player X, and the two clubs agree on a transfer fee of \$20 million. Club C and Player X agree on personal terms, and the transfer is finalized. Of the \$20 million, Club A will get 25%, or \$5 million, and the third party will get 75%, or \$15 million, proportionate to the 25% and 75% each party initially invested in Player X.

²⁴ Reck, *supra* note 15, at 50.

²⁵ Victoriano Melero & Romain Soiron, *The Dilemma of Third-party Ownership of Football Players*, SPORTS L. BULL., June–Oct. 2012, at 41, 41.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

TPO helps clubs acquire players they otherwise could not afford or allows a club to mitigate the risk of wasting money on players that do not perform as expected, failing to give the club a return on their investment. However, this short-term benefit is offset by losing out on future transfer profits.

B. Common Models of Third-Party Ownership

The two most common models of TPO agreements are the investment model and the financing model.²⁹ The investment model is the most commonly used³⁰ and was seen in the above example. It occurs when a club wants to buy a player but does not have the necessary funds. In this case, the club will enter into a TPO agreement with a third party, by which the investor pays all or some of the fee for the player in exchange for the proportionate share in the future transfer of the player.³¹ The financing model occurs when a club, in need of general financing to balance its books (i.e., to cover player wages, facilities fees, and other overhead costs needed to stay in business), enters into a contractual agreement with a third party by which the club receives financing in exchange for a portion of the economic rights of one or more of the club's players.³²

C. Article 18ter: FIFA's Ban on Third-Party Ownership

Previously, FIFA's RSTP Article 18bis only prohibited TPO agreements that gave a third party the ability to influence club policy.³³ Thus, a third party could own a player's economic rights so long as the TPO agreement did not allow the third party influence over club policy. As of May 1, 2015, Article 18ter extends the ban from just prohibiting TPO agreements that allow for influence, to prohibiting all TPO agreements whether or not they allow for influence. Article 18ter provides:

No club or player shall enter into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of

²⁹ KPMG, *supra* note 2, at 13.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ FIFA, REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS 16 art. 18bis [hereinafter FIFA RSTP], http://www.fifa.com/mm/document/affederation/administration/regulations_on_the_status_and_transfer_of_players_en_33410.pdf.

a player from one club to another, or is being assigned any rights in relation to a future transfer or transfer compensation.³⁴

Article 18ter is binding at the national level, with each FA required to incorporate the ban into its own domestic regulations, and gives the FIFA Disciplinary Committee the power to punish clubs and players who violate 18ter.³⁵ The FAs of both Argentina and Brazil, the two countries in which TPO is most heavily used, have been among the first to obey and incorporate FIFA's Article 18ter into their domestic regulations.³⁶

As originally announced in September 2014, the ban was supposed to include a phasing-in period of "three or four years."³⁷ In reality, Article 18ter includes an extremely limited phase-in period, allowing pre-existing deals and deals signed between January 1 and April 30, 2015, which last less than a year to run their course.³⁸ As will be detailed in Part III, with such a short phase-in period, investors immediately became more reluctant to enter TPO agreements, effectively making this phasing-in period irrelevant.

II

THIRD-PARTY OWNERSHIP WITHIN THE ECONOMIC CLIMATE OF INTERNATIONAL SOCCER

A. *The Current Market Share of TPO*

TPO is most widely utilized in South America, where the practice originated, and where the export of Brazilian, Argentinian, and Uruguayan players to wealthy European clubs is crucial for clubs' livelihoods.³⁹ Rafael Botelho, the legal and corporate affairs director for a leading third-party investment fund, Traffic Sports, believes almost all of the players in Brazil are owned by third parties.⁴⁰ In Botelho's twelve years at Traffic Sports, where he has read, drafted,

³⁴ Circular No. 1464, *supra* note 6.

³⁵ *Id.*

³⁶ *El Gobierno argentino prohíbe los derechos de terceros sobre los futbolistas* [*The Argentine Government Prohibits the Rights of Third Parties Footballers*], IUSPORT (Feb. 20, 2015), <http://iusport.com/not/5265/el-gobierno-argentino-prohibe-los-derechos-de-terceros-sobre-los-futbolistas/>; Tariq Panja, *Brazil First to Ban Investor Ownership of Soccer Players*, BLOOMBERG (Jan. 13, 2015, 12:39 PM PST), <http://www.bloomberg.com/news/articles/2015-01-13/brazil-gets-first-soccer-trade-law-as-ban-makes-impact>.

³⁷ Gibson, *supra* note 1.

³⁸ Circular No. 1464, *supra* note 6.

³⁹ KPMG, *supra* note 2, at 33.

⁴⁰ Bird, *supra* note 9.

and signed more than five hundred player contracts, he does not recall a single contract without any TPO involved.⁴¹ A FIFA report showed that of the 11,552 international transfers in 2012,⁴² 618 were outgoing from Brazilian clubs, the most of any country.⁴³ Argentinian clubs came in third, with 436 players transferred, and Uruguayan ninth, with 256.⁴⁴ For the 2012–13 season alone, the revenue generated from the transfer of players under twenty-six years old—what would generally be considered the peak years of a player’s career—from Brazil and Argentina to Europe was \$179.49 million.⁴⁵ Couple the amount of money involved in the transfer of players out of South America with the fact that virtually all these players are owned by third parties, and the money involved is staggering.

In Europe, it has been estimated that third parties own shares of economic rights in somewhere between 723 and 1,107 players, worth as much as \$1.4 billion.⁴⁶ TPO is most common in Portugal and the Eastern European leagues: Albania, Bosnia, Bulgaria, Croatia, Hungary, Macedonia, Montenegro, Romania, Serbia, and Slovenia. In the Eastern European and Portuguese leagues, TPO has an estimated market share of 40–50% and 27–36%, respectively.⁴⁷ TPO’s market share is significantly lower outside of Eastern Europe and Portugal, with less than 8% in Spain and only 4% in Holland.⁴⁸ However, due to financial difficulties following the most recent financial crisis, the practice has become increasingly common in both Spain and Portugal.⁴⁹ Soccer clubs have not been immune to the recent recessions that have crippled their respective nations.⁵⁰ Thus, clubs were left searching for alternative sources of financing, and TPO presented them with a partial solution.

⁴¹ *Id.*

⁴² FIFA, GLOBAL TRANSFER MARKET 2012–HIGHLIGHTS 14 (2013) (on file with author).

⁴³ *Id.* at 21.

⁴⁴ *Id.*

⁴⁵ KPMG, *supra* note 2, at 36 (conversion calculations from euros to U.S. dollars on file with author).

⁴⁶ *Id.* at 22.

⁴⁷ *Id.*

⁴⁸ *Id.* at 23, 25.

⁴⁹ *Id.*

⁵⁰ *Id.*

B. The Disparate Climate of International Soccer

Like the rest of society today, international soccer is characterized by a growing disparity between the haves and have-nots. International soccer is dominated financially and competitively by the top four European leagues: the English Premier League, German Bundesliga, Spanish La Liga, and Italian Serie A.⁵¹ More specifically, it is dominated by a handful of top clubs within these leagues. For example, Manchester United F.C., Manchester City F.C., and Chelsea F.C. of the Premier League; Real Madrid C.F. and F.C. Barcelona of La Liga; F.C. Bayern Munich of the Bundesliga; and Juventus F.C. of Serie A.⁵² For this Article, this dominant tier of clubs will be collectively referred to as Top Clubs. Dominant on the field, Top Clubs earn exponentially more than the remaining 99% of clubs from lucrative sponsorship and broadcasting deals, and the few mechanisms in place to cause trickle-down revenue are poorly enforced.⁵³

Television revenue, the largest source of revenue for most clubs, is primarily distributed based on clubs' end-of-season league table position, with the more successful clubs often getting far more revenue than the less successful clubs. For example, in 2013, as the top-two teams in La Liga, Barcelona and Real Madrid made \$182 million each and third-place Atlético Madrid made \$61 million, while the last-place club in La Liga earned only \$18.2 million.⁵⁴

Revenue in the Premier League is more evenly distributed than in Spain, yet a substantial gap remains.⁵⁵ Following the 2013–14 season, the Premier League generated \$2.6 billion in television revenue.⁵⁶ Fifty percent was distributed evenly between all teams, roughly \$36.3

⁵¹ See *infra* Part II.B.

⁵² See *infra* Part II.B.

⁵³ See Ariel Reck, *FIFA's Solidarity Mechanism and the Impact on South American Football*, LAWINSPORT (Mar. 13, 2014), <http://www.lawinsport.com/blog/argentine-sports-law-blog/item/fifa-s-solidarity-mechanism-and-the-impact-on-south-american-football>.

⁵⁴ *Spain to Sell TV Rights*, ESPN FC (June 27, 2013), <http://www.espnfc.com/story/1486306/spain-to-sell-collective-tv-rights-for-liga-clubs>.

⁵⁵ See generally Owen Gibson, *Sky and BT Playing Cat and Mouse Ahead of Premier League Bids Process*, THE GUARDIAN (Nov. 20, 2014, 14:58 GMT), http://www.theguardian.com/football/blog/2014/nov/20/sky-bt-premier-league-bids?CMP=tw_t_gu (discussing the escalating bidding war for the UK broadcasting rights to the English Premier League).

⁵⁶ Scott Phillips, *Barclays Premier League Clubs Split \$2.6 Billion in Television Revenue*, BUS. OF SOCCER (May 16, 2014), <http://www.businessofsoccer.com/2014/05/16/barclays-premier-league-clubs-split-2-6-billion-in-television-revenue/>.

million each.⁵⁷ Of the remaining 50%, half was distributed based on clubs' final standing in the league table and the other half was distributed based on how many times the team was featured on UK television broadcasts.⁵⁸ Of the 25% of total television revenue distributed based on standings, the top four finishers earned \$153 million between them, while the bottom three only received \$12.4 million total.⁵⁹

In addition to television revenue, successful clubs get financial windfalls by competing in international and continental competitions. The top finishers in each of Europe's domestic leagues qualify to play in either the European Champions League or Europa League—continental tournaments that run concurrent with the regular-league season—in addition to their respective domestic league.⁶⁰ Following the 2014–15 season, teams will earn a minimum of \$2.6 million simply by qualifying for the European Champions League—the more prestigious of the two continental tournaments—with the champion collecting \$13.2 million for winning the final, and lesser sums earned for each win en route to the final.⁶¹

The most successful clubs have turned their sporting success into global brands with lucrative sponsorship deals. Manchester United, competing in the Premier League, has a shirt sponsorship deal worth roughly \$75 million for 2014–15 alone.⁶² In contrast, Crystal Palace, one of the smaller teams in the Premier League, will earn a decidedly more modest \$1.2 million from its shirt sponsorship over the same period.⁶³

Financial disparity exists not only within leagues, but also between them. Compare the \$2.6 billion in television revenue the Premier

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ UEFA, REGULATIONS OF THE UEFA EUROPA LEAGUE 2012–15 CYCLE 44 (2014), http://www.uefa.com/MultimediaFiles/Download/Regulations/uefaorg/Regulations/02/14/11/75/2141175_DOWNLOAD.pdf.

⁶¹ *UEFA Champions League Revenue Distribution*, UEFA (Sept. 15, 2014, 12:17 CET), <http://www.uefa.com/uefachampionsleague/news/newsid=2146867.html> (conversion calculations from euros to U.S. dollars on file with author).

⁶² Alex Miller & Nick Harris, *Man Utd's Chevrolet Deal Pushes Premier League Shirt Values to £191M*, SPORTING INTELLIGENCE (July 28, 2014), <http://www.sportingintelligence.com/2014/07/28/man-utds-chevrolet-deal-pushes-premier-league-shirt-values-to-191m-280701/> (conversion calculations from English pounds to U.S. dollars on file with author).

⁶³ *Id.* (conversion calculations from English pounds to U.S. dollars on file with author).

League collected for the 2013–14 season with the Brazilian league's most recent television-rights deal worth only \$932 million over three seasons.⁶⁴ A significant gap exists between European leagues as well, with Sporting Clube de Portugal, a perennial title contender in Portugal, earning a tenth of the television revenue of Manchester United and other top Premier League clubs.⁶⁵

The gap in television and sponsorship revenue translates into a gap in the money spent on transfers, with only a handful of the most successful clubs capable of consistently acquiring the best players. For example, during the summer of 2014, the top three teams in La Liga—Real Madrid, Barcelona, and Atlético Madrid—accounted for 81% of the \$606 million La Liga teams spent on player transfers.⁶⁶ The gap in spending power leads to predictable on-field results, and, as we will see, only a few clubs realistically have a chance of winning their domestic league—and even fewer have a chance of winning international competitions.

Since its founding in 1992, only five clubs have won the Premier League, including Blackburn Rovers' sole title in 1994–95, and two recent titles for Manchester City.⁶⁷ Manchester City is an illustration of top-tier international soccer's high barrier to entry. Indeed, its success has come only as a result of the club's new owners Sheikh Mansour's and the Abu Dhabi Group's willingness to sink \$1.6 billion into the club since 2008.⁶⁸

Like the Premier League, the German, Italian, Portuguese, and Spanish leagues are all dominated by a few traditional super clubs, long entrenched as the dominant market powers. Since 1992, seven clubs have won the German Bundesliga, though Bayern Munich and Borussia Dortmund account for eighteen of those twenty-three titles.⁶⁹ Over the same period, only five clubs have won the Italian

⁶⁴ Joao Oliveira, *Brazil Soccer Clubs Get TV Revenue Boost With Rede TV! Contract*, BLOOMBERG (Mar. 11, 2011, 10:03 AM PST), <http://www.bloomberg.com/news/2011-03-11/brazil-soccer-clubs-increase-broadcast-revenue-with-contract-with-rede-tv-.html>.

⁶⁵ Duff & Panja, *supra* note 18.

⁶⁶ Ian Mount, *Soccer Team Spending: A Case of Haves and Have-Nots*, FORTUNE (Sept. 16, 2014, 5:00 AM EST), <http://fortune.com/2014/09/16/soccer-team-spending-players-talent/>.

⁶⁷ *History of the Premier League*, BARCLAYS PREMIER LEAGUE, <http://www.premierleague.com/en-gb/history/premier-league/> (last updated July 1, 2015).

⁶⁸ David Conn, *Abu Dhabi Accused of 'Using Manchester City to Launder Image'*, THE GUARDIAN (July 30, 2013, 12:04 EDT), <http://www.theguardian.com/football/2013/jul/30/manchester-city-human-rights-accusations>.

⁶⁹ Karel Stokkermans & Andreas Werner, *(West) Germany—List of Champions*, RSSSF, <http://www.rsssf.com/tablesd/duitchamp.html> (last updated Oct. 29, 2015).

Serie A, and two of those champions only have one title each.⁷⁰ Similarly, Real Madrid and Barcelona account for eighteen of the last twenty-three Spanish La Liga titles.⁷¹ At the continental level, since its inception as the European Cup in 1955, the European Champions League has been won by a club outside the top four leagues only fourteen times and only twice in the last twenty seasons.⁷²

C. TPO's Role Within Soccer's Disparate Economic Climate

In sum, international soccer is characterized by a tremendous financial and competitive disparity between what this Article will refer to as Top Clubs and Selling Clubs. Top Clubs are the handful of traditionally successful clubs that currently dominate the domestic and continental competitions, and whose revenue severely outstrips those of Selling Clubs. Selling Clubs are all those outside the Top Clubs who, without the same revenue from sponsorship, broadcasting, or continental tournaments, are forced to sell their best players, the sale of which often accounts for these clubs' primary source of revenue.⁷³

More specifically, there are two, very different philosophies behind Selling Clubs. First, there are clubs that find themselves on the brink of collapse due to financial mismanagement—often the result of the pressure to achieve immediate success—and are forced to sell their best or most promising players simply to ensure financial survival. And second, there are clubs that acquire, develop, and sell players as part of a deliberate business model aimed at long-term financial stability—a business model known as FIPG, or financial investment on potential growth.⁷⁴

⁷⁰ Tamas Karpati & Igor Kramarsic, *Italy—List of Champions*, RSSSF, <http://www.rsssf.com/tables/italchamp.html> (last updated Oct. 29, 2015).

⁷¹ José Vicente Tejedor Carnicero, *Spain—List of Champions*, RSSSF, <http://www.rsssf.com/tables/spanchamp.html> (last updated Oct. 29, 2015).

⁷² *European Cup Roll of Honour*, UEFA, <http://www.uefa.com/uefachampionsleague/history/champions/index.html> (last visited Oct. 25, 2014).

⁷³ For an incredibly detailed and nuanced discussion of the differences in Selling Club philosophies, see *Capitalising on Player Potential—The Myth of Moneyball in Football*, LEFT WING SOCCER (Dec. 30, 2013), <http://leftwingsoccer.com/fipg/>. Of course, because it is the Top Clubs who have the finances to consistently afford these talented players and the Selling Clubs who must get rid of the talented players, talent in international soccer quickly concentrates with the Top Clubs at the tip of the pyramid.

⁷⁴ *Id.*

This subtle distinction in Selling Clubs highlights the different circumstances Selling Clubs find themselves in and the different objectives that TPO has become necessary to achieve. First, TPO financing provides a lifeline to many Selling Clubs struggling to maintain existence. Second, TPO is a financial tool used by Selling Clubs as part of a long-term financial strategy in an attempt to level the playing field and challenge the monopoly afforded Top Clubs due to systemic financial advantages.

1. Selling Clubs: Fighting for Survival

At the very bottom of the world of international soccer are Selling Clubs struggling to stay in business at all, many of whom rely on TPO for the most basic financial survival.⁷⁵ In the words of Daniel Cravo, a lawyer for Brazilian clubs who find themselves in this situation, “[w]e use this kind of asset, the available asset that we have, on a large scale in Brazil We don’t have plenty of money to share concerning television rights or sponsorship”⁷⁶

To make matters worse, banks are reluctant to loan money to Selling Clubs, particularly in the wake of the 2008 credit crisis.⁷⁷ According to Ray Ranson, the president of R2 Assets Management Ltd., an investment fund with roughly \$75 million invested in TPO agreements, “[t]he clubs need it,” insisting that third-party owners provide a financial lifeline to cash-strapped clubs.⁷⁸ Indeed, many Selling Clubs are completely reliant on TPO, so much so that it is possible entire leagues could collapse without it.⁷⁹

2. Selling Clubs: Striving for Relevancy

Second are the Selling Clubs who are on the cusp of achieving Top-Club status. They are financially stable, yet lack the resources to break into the Top Clubs. These Selling Clubs will use TPO financing to buy and retain talented players and modernize their facilities.

Take, for example, the recent success of Atlético Madrid. Competing in Spain’s La Liga, Atlético has a well-known history

⁷⁵ Simon Evans, *Third Party Owner Ban Would be Bad for Brazil-Club Lawyer*, REUTERS (Oct. 22, 2014, 1:14 AM BST), <http://uk.reuters.com/article/2014/10/22/uk-soccer-fifa-tpo-idUKKCN0IB00R20141022>.

⁷⁶ *Id.*

⁷⁷ Duff & Panja, *supra* note 18.

⁷⁸ *Id.*

⁷⁹ Bird, *supra* note 9.

using TPO, accounting for roughly 30% of the club's financing.⁸⁰ As mentioned, Spain's La Liga has perhaps the greatest wealth disparity in all of Europe, with Barcelona and Real Madrid essentially trading the league title back and forth for the past twenty seasons.⁸¹ With TPO investment, Atlético could acquire and hold on to star players otherwise outside their financial means, which eventually culminated in their breaking La Liga's duopoly to be crowned champions in 2014.⁸²

Awareness of TPO exploded in England after the transfers of Carlos Tevez and Javier Mascherano from Sport Club Corinthians Paulista of Brazil to the English club West Ham F.C. in 2006.⁸³ West Ham is a historic English club, with a youth academy that has produced some of the best English players.⁸⁴ However, in the current economic climate even storied clubs like West Ham have been brought to their knees, and have needed to find alternative financing methods in an attempt to keep up with the Top Clubs; TPO is just that.

Brazilian clubs use TPO to hold on to their best players in the face of interest from top European clubs. The Brazilian player Neymar da Silva Santos Jr., known to soccer fans as Neymar or Neymar Jr., is currently a star forward for Barcelona, having been bought by the club from the Brazilian club Santos for roughly \$90 million in 2013.⁸⁵ In 2009, when then seventeen-year-old Neymar had barely broken into the first team at Santos, the club feared they would lose their talented youngster to a European club able to pay higher wages and provide a grander stage.⁸⁶ To hold on to their budding star, Santos put together a vastly improved contract offer, made possible only by

⁸⁰ Duff & Panja, *supra* note 18.

⁸¹ Carnicero, *supra* note 71.

⁸² Duff & Panja, *supra* note 18; Sid Lowe, *Atlético Madrid Win More than the League with 'Impossible' La Liga Title*, THE GUARDIAN (May 19, 2014, 9:44 EDT), <http://www.theguardian.com/football/blog/2014/may/19/atletico-madrid-la-liga-title-impossible>.

⁸³ David Ornstein, *West Ham Charged Over Mascherano and Tevez Deals*, THE GUARDIAN (Mar. 2, 2007, 19:45 EST), <http://www.theguardian.com/football/2007/mar/03/newsstory.sport8>.

⁸⁴ *Hammers Academy—Big Business for the Club*, W. HAM UNITED N. AM. ACAD., http://www.westhamacademyinternational.com/Academy_Graduates.html (last visited Nov. 8, 2015).

⁸⁵ Duarte, *supra* note 14 (conversion calculation from English pounds to U.S. dollars on file with author).

⁸⁶ *Id.*

selling 40% of Neymar's economic rights to the investment fund DIS Esporte Group.⁸⁷

Without TPO investment, Selling Clubs would be unable to acquire new players or hold on to their own talented players in the face of big-money offers from Top Clubs. Thus, without TPO investment, Selling Clubs would lose what little ability they currently have to compete with Top Clubs.

3. *The Financial and Competitive Necessity of TPO for Selling Clubs*

According to Luís Godinho Lopes, former president of Sporting Clube de Portugal, Selling Clubs see TPO as the only way to level the playing field in the increasingly disparate world of international soccer.⁸⁸ The CEO of Doyen Sports—an investment fund with TPO agreements with clubs around Europe—Nelio Lucas poses the relevant question: “Do we want a world where only Barcelona, Real Madrid, Bayern or other ‘giants’ win trophies due to the distorted marketplace or do we want smaller clubs like Atletico Madrid, Seville, Porto, Benfica, PSV or other similar [clubs] to challenge them and provide competition?”⁸⁹

The defenders of TPO are not limited to the clubs and investors who directly benefit from the practice. The Spanish La Liga argues that TPO is necessary for the financial and competitive survival of Spanish clubs.⁹⁰ In fact, as will be detailed further on,⁹¹ La Liga, together with the Portuguese Primeira Liga, has mounted a formal legal complaint against FIFA. The two leagues claim that 18ter violates EU competition law by limiting investment in Selling Clubs, therefore impairing their ability to compete with Top Clubs, limiting wages, and entrenching the dominant market players.⁹²

⁸⁷ *Id.*

⁸⁸ Duff & Panja, *supra* note 18.

⁸⁹ Tariq Panja, *FIFA Investor Ban Hurts Small Teams, Soccer's Doyen Says*, BLOOMBERG (Sept. 29, 2014, 5:48 AM PDT), <http://www.bloomberg.com/news/2014-09-29/fifa-investor-ban-hurts-small-teams-soccer-s-doyen-says.html>.

⁹⁰ *The Spanish and Portuguese Leagues Denounce FIFA's TPO Ban to the European Commission*, LIGA DE FÚTBOL PROFESIONAL (Feb. 9, 2015) [hereinafter LFP], http://www.lfp.es/en/news/the-spanish-and-portuguese-leagues-denounce-fifas-tpo-ban-to-the-european-commission?action=redirect_site&continue=&no_show_redirect_site=on.

⁹¹ See *infra* Part III.B.

⁹² Blog Symposium, *FIFA Must Regulate TPO, Not Ban It. The Point of View of La Liga*, ASSER INT'L SPORTS L. BLOG (Apr. 14, 2015) [hereinafter *The Point of View of La Liga*], http://www.asser.nl/SportsLaw/Blog/post/fifa-must-regulate-tpo-not-ban-it-by-the-spanish-football-league-la-liga#_ftnref1.

D. A Sixty-Two Percent Return on Investment

The buying and selling of players' economic rights has proved to be lucrative for third parties. Traffic Sports, one of the most prominent investment funds, made a 62% return on its initial investment of \$50 million in twenty-one players between 2008 and 2012.⁹³ In one instance, Traffic spent \$6.8 million for a share of the economic rights of nineteen-year-old Brazilian Keirrison de Souza Carneiro; eight months later, the player was transferred to F.C. Barcelona for \$19.3 million, and Traffic's share of the player's economic rights earned them a 114% return on the initial investment.⁹⁴ Ray Ranson confirms that his company routinely makes returns of about 50% in two years.⁹⁵ With such a high rate of return, firms are investing incredible amounts into TPO agreements. Vibrac Corp., a closely held lender in the British Virgin Islands, invested as much as \$245 million in 2014, while Doyen Sports has invested a somewhat more modest \$130 million in TPO agreements over the past two years.⁹⁶

E. Why Ban TPO?

As mentioned at the outset, TPO is a highly contentious topic, and, while there are many advocates of the practice and countless clubs who rely on the financing, there are powerful opponents who advance legitimate justifications for banning TPO.⁹⁷ Opponents, mostly European-based, argue that not only is TPO actually harmful financially—siphoning money out of clubs—but, by giving third parties influence in the transfer policies of clubs, TPO both undermines contractual stability between player and club and facilitates match-fixing.⁹⁸

⁹³ Duff & Panja, *supra* note 18.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Alex Duff, *Soccer Transfers Fueled by Secretive Loans Beat UEFA Bid*, BLOOMBERG (Sept. 30, 2014, 2:01 AM PDT), <http://www.bloomberg.com/news/2014-09-29/soccer-transfers-fueled-by-secretive-loans-beat-uefa-clampdown.html>.

⁹⁷ Gibson, *supra* note 1; Carol Couse, *The International Transfer System and the Principle of Specificity of Sport*, SPORTS L. BULL., June–Oct. 2012, at 75, 80.

⁹⁸ Couse, *supra* note 97, at 80; Gibson, *supra* note 1.

1. *The Long-Term Financial Harm of TPO*

A chief concern with TPO is that it encourages short-termism and overreliance on outside funding.⁹⁹ Bruno de Carvalho, the current president of Sporting Clube de Portugal, a club with well-known ties to TPO, describes TPO as a monster created by clubs from which they can no longer escape.¹⁰⁰ According to de Carvalho, TPO agreements trap clubs in a “vicious cycle of debt and dependence,” bleeding clubs of their money, with clubs almost always losing money over the course of a TPO agreement.¹⁰¹ Says de Carvalho, “[p]eople are very happy to sell a player for £50m, but for the club it is £1m or £2m. And they paid more than that in the salary of one year. Almost all the time you lose money. This is mathematics.”¹⁰² Thus begins a perpetual cycle. Selling Clubs rely on TPO investment to finance player acquisitions, but without the rights to the proceeds from later selling the player, the Selling Club cannot profit from sales. Without profiting from sales, and having to pay wages over the course of the TPO agreement, the Selling Clubs could ultimately lose money from these arrangements. In this way, the Selling Club is worse off financially after the agreement than they were going into it. Hence, TPO agreements can make Selling Clubs increasingly dependent on TPO financing going forward.

2. *Third-Party Influence*

In addition to the financial harm, there are concerns that TPO creates conflicts of interests for club owners and officials, and between agents and the players they represent. Opponents of the practice claim that TPO agreements give third-party investors undue influence over club policies, subordinating the interests of club and

⁹⁹ Daniel Geey, *Third Party Investment from a UK Perspective*, ASSER INT’L SPORTS L. BLOG (Apr. 17, 2015), <http://www.asser.nl/SportsLaw/Blog/post/blog-symposium-third-party-investment-from-a-uk-perspective-by-daniel-geey>; see also Raffaele Poli, *Third-party Entitlement to Shares of Transfer Fees: Problems and Solutions*, ASSER INT’L SPORTS L. BLOG (Apr. 15, 2015), <http://www.asser.nl/SportsLaw/Blog/post/blog-symposium-third-party-entitlement-to-shares-of-transfer-fees-problems-and-solutions-by-dr-raffaele-poli-head-of-cies-football-observatory>.

¹⁰⁰ Owen Gibson & David Conn, *Fifa Inactivity Allows Menace of Third-party Ownership to Go Unchecked*, THE GUARDIAN (Sept. 23, 2014, 7:49 EDT), <http://www.theguardian.com/football/2014/sep/23/fifa-third-party-ownership>.

¹⁰¹ *Id.*

¹⁰² *Manchester United: Sporting Reveal Marcos Rojo Sale ‘Pressure,’* BBC: SPORT (Oct. 3, 2014), <http://www.bbc.com/sport/0/football/29474696> (Converted into U.S. dollars, these values are \$75.25 million, \$1.5 million, and \$3 million, respectively.).

player to a third party's financial interest, an outcome that can facilitate match-fixing in international soccer.¹⁰³

There are two ways third parties can use TPO agreements to subjugate the clubs' interests to their own. First, contractual provisions inserted into the agreements can force clubs to sell the player if a bid comes in at a high enough price.¹⁰⁴ Examples below:

Buy-Sell Clauses: In the event of an offer for the player from another club, some time at or above an agreed-upon amount, if the third party wants to accept the offer, the club must either accept it or buy the third party's share for the same amount the third party would have received had the offer been accepted.¹⁰⁵

Reimbursement on non-transfer of player: If the player is not transferred by a certain date, the club will reimburse the third party's investment, plus interest.¹⁰⁶

Investment shifts on non-transfer of player: If the player is not transferred by the end of the employment contract between club and player, the investor's share in the player shifts to another player.¹⁰⁷

These and similar provisions give third parties direct, contractual influence over club policy. Ray Ranson of R2 Assets confirms that he never enters TPO agreements without including contractual provisions giving his company direct influence over club transfer policy.¹⁰⁸

The second means of undue third-party influence comes from investors leveraging clubs' financial necessity and resulting dependency on TPO investment into indirect influence over club policy or over the game-day performance of players and coaches. Third parties could assert this through gentlemen's agreements—

¹⁰³ Daniel Geey, *Third Party Player Ownership: A UK Perspective*, SPORTS L. BULL., June–Oct. 2012, at 55, 58–59.

¹⁰⁴ See KPMG, *supra* note 2, at 38.

¹⁰⁵ Ariel Reck, *Do "Buy-Sell" Clauses in Third Party Ownership Agreements Constitute Undue Influence Under FIFA's Art 18bis?*, LAWINSPO (Sept. 1, 2014), <http://www.lawinsport.com/blog/argentine-sports-law-blog/item/do-buy-sell-clauses-in-third-party-ownership-agreements-constitute-undue-influence-under-FIFA-s-art-18bis#references>.

¹⁰⁶ KPMG, *supra* note 2, at 38.

¹⁰⁷ *Id.*

¹⁰⁸ Duff & Panja, *supra* note 18.

meetings that take place off the record, where the parties come to under-the-table arrangements. These means of indirect influence are much harder to track and prevent. Thus, compared to the direct, contractual means of influence, it is the indirect influence leveraged by third parties that is the real concern.¹⁰⁹

As touched on above, whether direct or indirect, third-party influence presents two dangers to international soccer. First, it can undermine contractual stability and the development of young players.¹¹⁰ Second, it can facilitate match-fixing.¹¹¹

a. Undermining Contractual Stability and Development of Club and Player

The third party only profits if the player they invest in is transferred for a fee high enough to recoup the initial investment. Therefore, the third party's only interest is to transfer the player to the highest bidder. However, this can go against the wishes and interests of the club or the player.¹¹² If a third party can dictate the transfer policy of a club, the contract between player and club is virtually meaningless. For the club, it becomes impossible to plan the long-term development of a team if they cannot control their transfer policy or rely on their contracts. For the player, with their future in the hands of a profit-seeking third party and treated simply as a financial asset, there can be no certainty or stability in the player's own professional development or personal future.

A recent and extreme example of undue third-party interest comes from a TPO agreement between Sporting Clube de Portugal and Doyen Sports.¹¹³ Sporting's president, de Carvalho, claimed the club had no interest in selling their player Marcos Rojo to Manchester United.¹¹⁴ However, Doyen, owning 75% of Rojo's economic rights, used the TPO agreement with Sporting to "manipulate" the club's

¹⁰⁹ Fernando Veiga Gomes, *Third Party Player Ownership, Again!*, SPORTS L. BULL., June–Oct. 2012, at 63, 64.

¹¹⁰ Geey, *supra* note 103, at 59.

¹¹¹ Richard Andrews, *Third Party Ownership—Risk or Reward?*, SPORTS L. BULL., June–Oct. 2012, at 33, 35.

¹¹² See David Conn, *Marcos Rojo Deal Prompts Third-party Revolt from Sporting Lisbon President*, THE GUARDIAN (Sept. 10, 2014, 14:34 EDT), <http://www.theguardian.com/football/2014/sep/10/sporting-lisbon-third-party-ownership-attack-marcos-rojo-manchester-united>.

¹¹³ *Id.*

¹¹⁴ *Id.*

decisions and force the sale of Rojo.¹¹⁵ According to de Carvalho, Doyen executives would impersonate Sporting officials when meeting with other clubs to arrange for the player's transfer behind Sporting's back.¹¹⁶ De Carvalho maintains Sporting had no interest in selling Rojo, but, in the end, the pressure became too much.¹¹⁷

Similarly, TPO can undermine the development of young players. Young players with high potential can demand some of the greatest transfer fees from Top Clubs, making them inviting targets for third-party investors. Every player dreams of playing for a Top Club. However, moving too early can hurt the development of a young player. Often it would be better for their career to remain at a smaller club for an extra year or two, developing professionally and personally, without the expectations that come with playing for a Top Club.

None of this is of concern to a third-party investor. The third party's interest is limited to the payoff from getting a talented youth to a Top Club as quickly as possible, while their potential is still high and their expected career is long, regardless of whether the move is good for the player's long-term career.

b. Conflicts of Interest and Match-Fixing

The concern is that conflicts of interest arise when a third party owns economic rights in a player who competes against a club in which the same third party has an ownership stake or other interest.¹¹⁸ Even by instructing a single player to get sent off, to allow an attacker to get by, or miss a seemingly easy chance to score himself, a third party could drastically alter the course of a game.¹¹⁹ A third party can own the economic rights of players on teams across a league, potentially undermining the competitive integrity of the whole league.¹²⁰ UEFA and the European Parliament have both made it

¹¹⁵ *Id.*

¹¹⁶ *Sporting Lisbon President Tells of Pressure from Marcos Rojo Owners*, THE GUARDIAN (Oct. 3, 2014, 7:49 EDT), http://www.theguardian.com/football/2014/oct/03/sporting-lisbon-bruno-de-carvalho-pressure-third-party-ownership-rojo?CMP=tw_t_gu.

¹¹⁷ *Id.*

¹¹⁸ Geey, *supra* note 103, at 59.

¹¹⁹ *Id.*

¹²⁰ *Id.*

clear that eliminating match-fixing and securing the integrity of sporting competitions is one of their highest priorities.¹²¹

In sum, TPO has become an invaluable asset for Selling Clubs in the disparate economic climate of international soccer. Long-entrenched European Top Clubs dominate competitively, which in turn leads them to reap exponentially more lucrative financial returns, amounting to a viscous cycle maintaining these clubs' dominance. The competitive and financial gaps between Top Clubs and Selling Clubs is continuing to grow, and as it does, TPO has become increasingly necessary for Selling Clubs trying to maintain competitiveness, or to stay in business at all. There are potential dangers that come with TPO—long-term financial harm, contractual instability, and conflicts of interests—and opponents of the practice are right to highlight these dangers. That said, eliminating TPO altogether could have drastic ramifications on the already disparate economics of international soccer.

III

THE REPERCUSSIONS OF AND REACTIONS TO FIFA'S BAN

Whether or not opponents of TPO are right in their attack on the practice, the dire financial straits Selling Clubs find themselves in today cannot be overemphasized. For some Selling Clubs, TPO investment is the only thing allowing them to remain competitive, the only thing maintaining some semblance of competition in domestic and international soccer. For many more, TPO investment is necessary simply to stay in business. TPO is a widespread practice because of the financial necessity facing Selling Clubs, and banning TPO does nothing to alleviate clubs' financial necessity. Instead, Selling Clubs who have relied on TPO financing for so long, are abruptly forced to find new means of financing. This system shock could have disastrous consequences. Indeed, Marcos Motta, a Brazilian soccer lawyer and a member of FIFA's working group on TPO, believes banning TPO "would simply collapse Brazilian football."¹²² While the effects of losing TPO will perhaps hit hardest

¹²¹ *Match-Fixing Resolution*, UEFA (Apr. 11, 2013, 16:08 CET), <http://www.uefa.org/stakeholders/european-union/news/newsid=1940354.html#match+fixing+resolution>.

¹²² Bird, *supra* note 9; *see also* ROLL CALL: MEETING OF THE "WORKING GROUP ON THIRD-PARTY OWNERSHIP OF PLAYERS' ECONOMIC RIGHTS," FIFA (Sept. 2, 2014), available at http://www.fifa.com/mm/document/affederation/footballgovernance/02/46/40/53/02.09.2014rollcalltpo_neutral.pdf; *Working Group on Third-party Ownership*

in Brazil and other South American countries, its effects will also be felt by Selling Clubs in Portugal, Eastern Europe, and Spain.

And, unfortunately, the phase-in period for Article 18ter does little to mitigate the harm. With typical TPO agreements lasting five years, even with the three- to four-year phase-in period FIFA originally announced,¹²³ TPO investment was expected to dry up as soon as the ban was originally announced in September 2014.¹²⁴ Indeed, at least one Brazilian investment fund has put new investment on hold.¹²⁵ Motta predicts this reaction is indicative of how other investors will respond to the ban, meaning TPO investment could quickly dry up.¹²⁶ The abrupt loss of a vital source of funding for Selling Clubs will have drastic effects on international soccer, and there are two potential repercussions to investigate here. The first is that clubs and third parties will find ways of circumventing the ban, making the practice more dangerous than it currently is. The second, more interesting, possibility is a legal challenge against FIFA under EU law—something already initiated by La Liga and the Primeira Liga. Of course, a third outcome exists: that TPO investment will dry up and Selling Clubs will no longer be able to compete or stay in business at all.

A. Circumventing the Ban

Ariel Reck, an Argentine sports lawyer, questions the effectiveness of FIFA's ban and believes third parties will either find creative ways to emulate the effects of TPO agreements or that banning them will only make the practice more secretive and dangerous.¹²⁷ For example, without TPO, we could see an increase in the use of "bridge transfers" of players, with third parties essentially using—or creating their own—proxy clubs to transfer players to before loaning them or

Holds First Meeting, FIFA (Sept. 2, 2014), <http://www.fifa.com/aboutfifa/organisation/footballgovernance/news/newsid=2435566/index.html>.

¹²³ Gibson, *supra* note 1.

¹²⁴ Bird, *supra* note 9.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Ariel N. Reck, *The Impact of the TPO Ban on South American Football*, ASSER INT'L SPORTS L. BLOG (Apr. 16, 2015), <http://www.asser.nl/SportsLaw/Blog/post/the-impact-of-the-tpo-ban-on-south-american-football-by-ariel-n-reck>.

selling them to a final destination.¹²⁸ Clubs have already been sanctioned for using bridge transfers,¹²⁹ but the practice remains prevalent in leagues across the world.¹³⁰

A second way to circumvent Article 18ter would be for the club—after a secret agreement with a third party—to assign the transfer profits to the player in question, and from there, for the transfer profits to be transferred to the third party.¹³¹ From the language of Article 18ter, it does not seem that players are considered third parties, and, thus, assignments to the players may not be scrutinized as heavily.¹³²

A further complicating factor is that, in most countries, even if the contract would be invalid under the country's respective FA, the contract could still be valid under civil law.¹³³ FIFA has the authority to punish players and clubs, but not third parties.¹³⁴ Therefore, it is possible to imagine a situation where a Selling Club—out of necessity—enters a TPO agreement despite Article 18ter, resulting in a very difficult situation for the club. Indeed, because FIFA can only sanction the players and clubs involved, not third parties, and because the contract would be valid under civil law, third parties could use threats of disclosing the agreement to FIFA as a means of exerting even greater pressure against the club. In the end, FIFA's ban does nothing to ease the dire circumstances that make Selling Clubs turn to TPO to begin with. By banning the practice—as opposed to regulating TPO—FIFA has arguably only made Selling Clubs more vulnerable to third parties than they already are.

B. The Legal Challenge Against FIFA's Ban

The second possibility is a legal challenge against FIFA and Article 18ter. Jean-Louis Dupont—the lawyer behind the monumental *Bosman* ruling, which secured free agency for international soccer

¹²⁸ *Id.* For more information on how bridge transfers work, see Ariel Reck, *What is a "Bridge Transfer" in Football?*, LAWINSPOORT (Apr. 30, 2014), <http://www.lawinsport.com/sports/football/item/what-is-a-bridge-transfer-in-football>.

¹²⁹ See *Racing Club Ass'n Civil v. FIFA*, CAS 2014/A/3536, Arbitral Award ¶¶ 10.1, 10.3 (Court of Arbitration for Sport, May 5, 2015), http://www.tas-cas.org/fileadmin/user_upload/Award_Final_3536__internet_.pdf.

¹³⁰ Reck, *supra* note 127.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

players¹³⁵—believes a legal challenge under EU competition law has a very good chance of succeeding.¹³⁶ Dupont does not believe the restriction in this case—Article 18ter—is justified.¹³⁷ He stresses robust protections for freedom of competition and prohibitions against unreasonable restraints on competition that exist under EU law. In fact, at the time of writing, the Spanish and Portuguese leagues have already lodged a formal complaint with the European Commission, arguing that banning TPO is an unjustified and disproportionate restriction on competition.¹³⁸

In particular, the antitrust claim is that by banning TPO, the lack of investment in Selling Clubs will prevent those clubs from acquiring new players or holding onto current players.¹³⁹ The European Court of Justice (ECJ), where the case would likely be heard,¹⁴⁰ has defined players as the materials necessary to create a competitive product in the soccer markets.¹⁴¹ Thus, by limiting clubs’ ability to acquire players, FIFA is limiting the ability of these clubs to compete in the soccer markets, unfairly entrenching Top Clubs as the dominant market forces.¹⁴²

Dupont, together with Javier Berastegi, is behind the complaint by the Spanish and Portuguese leagues.¹⁴³ Spanish sports and entertainment lawyer Felix Plaza seconds the complaint against Article 18ter, arguing that the ban is “restrictive and goes against the free movement of capital,” and, therefore, “FIFA has gone past what is reasonable and it’s going to create problems.”¹⁴⁴

Reinforcing the argument that Article 18ter is unreasonable, there are signs indicating FIFA’s decision was politically motivated, as

¹³⁵ Case C-415/93, *Union Royale Belge des Societes de Football Ass’n v. Bosman*, 1995 E.C.R. I-4921; Tom Fordyce, *10 Years Since Bosman*, BBC: SPORT (Dec. 14, 2005, 22:35 GMT), <http://news.bbc.co.uk/sport2/hi/football/4528732.stm>.

¹³⁶ Sinnott, *supra* note 16.

¹³⁷ *Id.*

¹³⁸ LFP, *supra* note 90.

¹³⁹ *Id.*; *The Point of View of La Liga*, *supra* note 92.

¹⁴⁰ *See infra* Part III.B.2.

¹⁴¹ Case C-264/98, *Balog v. Royal Charleroi Sporting Club ASBL*, 2001, *removed from the register on Dec. 4, 2001*, paras. 86–87. The *Balog* case was settled out of court and therefore removed from the register.

¹⁴² *The Point of View of La Liga*, *supra* note 92.

¹⁴³ LFP, *supra* note 90.

¹⁴⁴ Alex Duff, *Spanish Soccer Will Challenge FIFA Ban on Alternative Financing*, BLOOMBERG (Jan. 16, 2015), <http://www.bloomberg.com/news/2015-01-16/spanish-soccer-will-challenge-fifa-ban-on-alternative-financing.html>.

opposed to a decision based on empirical studies and balanced consideration regarding the potential effects of banning TPO. *La Liga* highlights the following signs of political motivation: that two independent studies have come out in favor of TPO; there were no reports or other investigations by FIFA to support a ban; FIFA's Working Party on TPO only met on the subject once; FIFA did not consult other FAs or governments in reaching their decision; and finally, FIFA's General Assembly itself concluded TPO was a complex issue requiring further investigation.¹⁴⁵ Considering all this, it is somewhat concerning that FIFA's Executive Committee was so quick to ban the practice.

1. Governing Law: Articles 101 and 102 TFEU

Articles 101 and 102 of the Treaty of the Functioning of the European Union (Articles 101 and 102 TFEU) would govern a claim that FIFA's ban is anticompetitive.¹⁴⁶ Together, Articles 101 and 102 TFEU prohibit any agreement between undertakings, decisions by associations of undertakings, and concerted practices by one or more undertakings that may affect trade and are intended to or will in fact prevent, restrict, or distort competition.¹⁴⁷ Therefore, in order for Articles 101 and 102 TFEU to govern, there must be an undertaking or association of undertakings, an agreement or decision, a market, and an anti-competitive effect on that market.¹⁴⁸

An undertaking is any entity engaged in an economic activity, which includes employment procurement.¹⁴⁹ The ECJ has held that FIFA, other continental federations such as UEFA, and domestic FAs are each simultaneously undertakings in their own right and an association of undertakings; thus, they are subject to Articles 101 and 102 TFEU.¹⁵⁰ In *Balog*, the ECJ reasoned that a set of transfer regulations by FIFA was a decision under Articles 101 and 102 TFEU because it was issued by FIFA's Executive Committee and had binding legal effect on FIFA members.¹⁵¹

¹⁴⁵ *The Point of View of La Liga*, *supra* note 92.

¹⁴⁶ Consolidated Version of the Treaty on the Functioning of the European Union arts. 101–102, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Case C-41/90, *Hofner v. Macrotron GmbH*, 1991 E.C.R. I-1979, ¶ 21.

¹⁵⁰ Case C-264/98, *Balog v. Royal Charleroi Sporting Club ASBL*, 2001, *removed from the register on Dec. 4, 2001*, para. 57.

¹⁵¹ *Id.* at para. 66.

Like the transfer regulations in *Balog*, FIFA's ban is from the Executive Committee and, as a part of FIFA's RSTP, is binding on FIFA members.¹⁵² Therefore, FIFA's ban would be a decision by an undertaking for the purposes of Articles 101 and 102 TFEU. Alternatively, because the ECJ simultaneously considers FIFA an undertaking and an association of undertakings, FIFA's ban could also be subject to Articles 101 and 102 TFEU as a decision by an association of undertakings.¹⁵³

In *Balog*, the ECJ defined three relevant markets in soccer.¹⁵⁴ First is the contest market, where the product is the soccer game contested on the field between two clubs; a joint production by the two clubs, where the consumer is the supporter who pays for game-day entertainment.¹⁵⁵ In general, the most valuable products would be exciting games contested between two competitive clubs. Next is the secondary market, the market for secondary goods such as sponsorships, broadcast deals, tickets, merchandise, and any other goods the club can commercialize to exploit the value of the product the club produces in the contest market.¹⁵⁶ A more valuable product in the contest market increases the value of a club's goods in the secondary market.¹⁵⁷ The third market is the transfer market, where clubs compete over the supply of players—what the ECJ considers the raw materials required for clubs to produce a quality product in the contest market.¹⁵⁸ In the transfer market, clubs compete to acquire the players necessary to have a team capable of competing with other clubs to produce a compelling contest market product and achieve on-field success. To compete in the transfer market, a club needs both the money to pay high transfer fees and offer large wages and to be competitive in the contest market in order to offer potential players the chance to compete for championships.

By restricting investment in clubs, FIFA's ban on TPO would directly restrict clubs' ability to compete in the transfer market, which would affect their competition in the contest and secondary markets as well. In sum, FIFA's ban would restrict competition in the

¹⁵² Circular No. 1464, *supra* note 6.

¹⁵³ *Balog*, C-264/98 at para. 60.

¹⁵⁴ *Id.* at para. 76.

¹⁵⁵ *Id.* at para. 78.

¹⁵⁶ *Id.* at paras. 77–78.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at paras. 86–87.

following way: a restriction on investment in clubs would make them less competitive in the transfer market, making it harder for Selling Clubs to compete to bring on talented new players and to hold on to their own players. Making it harder for clubs to bring in players equates to a restriction on the investment in the raw materials necessary to create a competitive product in the contest market; that is, a viable squad of players. Preventing clubs from assembling a viable competitive squad leads to: the entrenchment of the current dominant players, a reduction on the number of transfers, a reduction on the numbers of players employed, a deflationary effect on players' salaries, and less competition in the secondary market for derivative goods.

By restricting Selling Clubs' ability to compete in the transfer market, FIFA's ban will restrict competition in both the contest market and secondary market. Unable to acquire talented players, the games produced by a club will be of lower value, making their secondary products less valuable as well. The three relevant markets are interconnected, and FIFA's ban restricts competition in each.

Of course, Articles 101 and 102 TFEU only prohibit unreasonable restrictions on competition.¹⁵⁹ Therefore, a crucial part of each side's argument will be the reasonableness of Article 18ter, that is, whether the restrictions are justified by legitimate objectives; whether the restrictions are necessary to achieve those justifying, legitimate objectives; and finally, whether the restrictions in question are proportionate to achieve those legitimate objectives.¹⁶⁰

2. *Parties and Court*

Under Article 105 TFEU, the European Commission (EC) is the primary monitor and enforcer of EU competition law.¹⁶¹ Accordingly, the Portuguese and Spanish FAs have filed their complaint with the EC.¹⁶² The EC's decision can be appealed to the ECJ, a body with the jurisdiction to respond to a private party's request for judicial review of the actions of an EU institution.¹⁶³ Alternatively, the initial claim could have been made in a national court, where the party could motion for a preliminary hearing by the ECJ under Article 267

¹⁵⁹ TFEU, *supra* note 146, at arts. 101–02.

¹⁶⁰ *Infra* Part III.B.3.

¹⁶¹ TFEU, *supra* note 146, at art. 105.

¹⁶² LFP, *supra* note 90.

¹⁶³ TFEU, *supra* note 146, at art. 263.

TFEU.¹⁶⁴ Article 267 TFEU gives the ECJ jurisdiction to give binding opinions on unsettled questions of EU treaty law.¹⁶⁵ It is up to the complainant to convince the court that the question at hand requires a preliminary hearing, and with no prior cases on point, there is a very good chance the ECJ would grant a preliminary hearing if this case goes to a national court.¹⁶⁶ Thus, even if the EC were to dismiss the claim, the Spanish and Portuguese leagues could move the case to a national court and ask for a preliminary hearing by the ECJ.

3. FIFA's Counter: Is This Restriction on Competition Justified Under Meca-Medina?

As mentioned, Articles 101 and 102 TFEU do not prohibit any restriction on competition, only unreasonable restrictions.¹⁶⁷ The idea that banning TPO would restrict competition is not in question; limiting investment into clubs naturally restricts their ability to compete, especially in this case, where TPO is one of the few available sources of financing for Selling Clubs. The question is whether such restriction on competition is unreasonable or, instead, is justified by legitimate objectives. In *Wouters*, the ECJ held that even rules that restrict competition can be justified by legitimate EU objectives.¹⁶⁸ The ECJ has applied this principle to sports rules that restrict competition, perhaps most famously in *Meca-Medina*.¹⁶⁹ Following *Meca-Medina*, the test to determine whether a restriction on competition is justified is known as the *Meca-Medina* test.¹⁷⁰

The *Meca-Medina* test requires a case-by-case assessment of the overall context and justifications behind the restriction in question.¹⁷¹ The *Meca-Medina* test has three prongs, and the restriction in question must satisfy each prong to satisfy the test.¹⁷² First, the restriction must be justified by pursuing legitimate objectives as

¹⁶⁴ *Id.* at art. 267.

¹⁶⁵ *Id.*

¹⁶⁶ See *The EU and Sport: Background and Context—Accompanying Document to the White Paper on Sport* 70–76 (Comm'n of European Cmty's. Staff Working Document, SEC/2007/0935 final, Nov. 7, 2007) [hereinafter *Staff Working Document*], <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52007SC0935&from=EN>.

¹⁶⁷ *Supra* Part III.B.1.

¹⁶⁸ Case C-309/99, *Wouters*, 2002 E.C.R. I-01577, para. 97.

¹⁶⁹ Case C-519/04, *Meca-Medina v. Comm'n*, 2006 E.C.R. I-06991.

¹⁷⁰ *Staff Working Document*, *supra* note 166, at § 3.4(b).

¹⁷¹ *Meca-Medina*, 2006 E.C.R. I-06991 at para. 42.

¹⁷² *Id.*; *Staff Working Document*, *supra* note 166, at annex 1, § 2.1.5.

defined by the EU.¹⁷³ Second, there cannot be nonrestrictive alternatives.¹⁷⁴ And third, the restriction cannot be overly restrictive; that is, it must be proportionate and cannot be more restrictive than necessary to secure its justifying, legitimate objectives.¹⁷⁵

a. Meca-Medina's First Prong: Legitimate Objectives

In order to satisfy the *Meca-Medina* test, FIFA will have to show its restriction pursues legitimate sporting objectives. The EU has outlined a number of legitimate sporting objectives.¹⁷⁶ Part II presented arguments FIFA would use to justify banning TPO: that TPO creates undue third-party influence over clubs to facilitate conflicts of interests and match-fixing, undermines contractual stability and the development of young players; and encourages unsustainable business practices with long-term financial harm.¹⁷⁷ However, Ariel Reck, the aforementioned Argentine sports lawyer, and La Liga each argue FIFA's justifications are flawed.¹⁷⁸

When it comes to preventing match-fixing and protecting the integrity of the game, La Liga questions FIFA's commitment to this cause when FIFA does nothing to regulate the loaning of players from one club to another, has deregulated the representation of players, and has accepted that a few incredibly powerful agents represent the star players playing for opposing clubs.¹⁷⁹ Each of these situations creates conflicts of interest similar to those FIFA warns that TPO creates, but there has been no similar action on any of these fronts.

First, the loan system allows clubs to maintain ownership of a player while sending the player to play for another club, either a club in the same league or a different league.¹⁸⁰ The fear La Liga hints at is that the loaning club could maintain influence over the loaned

¹⁷³ *Meca-Medina*, 2006 E.C.R. I-06991 at para. 42; *Staff Working Document*, *supra* note 166, at annex 1, § 2.1.5.

¹⁷⁴ *Meca-Medina*, 2006 E.C.R. I-06991 at para. 42; *Staff Working Document*, *supra* note 166, at annex 1, § 2.1.5.

¹⁷⁵ *Meca-Medina*, 2006 E.C.R. I-06991 at para. 42; *Staff Working Document*, *supra* note 166, at annex 1, § 2.1.5.

¹⁷⁶ *Staff Working Document*, *supra* note 166, at annex 1, § 2.1.5; Couse, *supra* note 97, at 77, 80.

¹⁷⁷ Gibson, *supra* note 1; E-mail from Ariel Reck, Founder and Partner, Reck Sports Law, to author (Oct. 24, 2014, 5:37 AM PST) (on file with author); *see supra* Parts II.E.1–2.

¹⁷⁸ E-mail from Ariel Reck to author, *supra* note 177.

¹⁷⁹ *The Point of View of La Liga*, *supra* note 92.

¹⁸⁰ *See* Thomas, *supra* note 20.

player, creating the same conflicts of interest and match-fixing concerns FIFA argues come with TPO. The conflicts are obvious if the loaner and loanee clubs play each other with said player on the field, but also if the two were in direct competition with each other; any game the player participated in would provide opportunity for the player to sabotage the loaner club.

Second, the fact that only a few powerful agents—men such as Portuguese super agent Jorge Mendes—control the most important players creates a situation ripe for match-fixing.¹⁸¹ These players are at clubs competing against each other in the best domestic and international competitions, with millions of dollars on the line. Indeed, there have long been concerns and complaints regarding the role of agents and their influence.¹⁸² However, rather than improve the regulation of player agents, FIFA has recently deregulated the practice; what control it could have had over who represents players, and what potential there was for monitoring and protecting against conflicts of interest, is gone.¹⁸³ La Liga raises the question: if FIFA is so concerned with match-fixing and the integrity of competition, why does it not also look into improving the regulation of loan deals, and why has it deregulated the archaic regulatory framework for player agents?¹⁸⁴

Furthermore, it does not necessarily follow that because some TPO investors seek to abuse these agreements and exert undue influence over the club,¹⁸⁵ that all investors in TPO agreements seek to do so. The huge financial gains investors routinely see from these agreements show how much investors gain even without undue influence.¹⁸⁶ As will be touched on, one possible solution to preventing agreements in which investors seek to assert undue influence is to properly regulate and monitor TPO—a solution that

¹⁸¹ David Conn, *Jorge Mendes: The Most Powerful Man in Football?*, THE GUARDIAN (Sept. 22, 2014, 8:01 EDT), <http://www.theguardian.com/football/2014/sep/22/-sp-jorge-mendes-agent-third-party-ownership-players>.

¹⁸² See generally Paul Kelso, *Soccer Agents: The Ugly Face of the Beautiful Game*, THE GUARDIAN (Aug. 15, 2003, 21:25 EDT), <http://www.theguardian.com/uk/2003/aug/16/football.paulkelso1>.

¹⁸³ Nick De Marco, *The End of the Licensed Football Agent?*, LAWINSPORE (Nov. 20, 2014), <http://www.lawinsport.com/blog/item/the-end-of-the-licensed-football-agent>.

¹⁸⁴ *The Point of View of La Liga*, *supra* note 92.

¹⁸⁵ *Supra* Part II.E.2.

¹⁸⁶ *Supra* Part II.D.

would preserve those innocent financial agreements between investor and club while ensuring against third-party influence.¹⁸⁷

In terms of FIFA's objective to protect contractual stability, TPO does not necessarily destabilize the contracts between player and club. As Reck points out, TPO can improve the contractual stability of Selling Clubs; TPO agreements help Selling Clubs hold on to players they would otherwise be forced to sell.¹⁸⁸

First, because the investor's economic rights in the player extinguish once the player is transferred, it is not possible for the investor to continuously move the player without negotiating new TPO agreements with each club.¹⁸⁹ Investors, therefore, aim to transfer their player once, for the largest price, and to the biggest club.¹⁹⁰ While it could be argued that just this single sale undermines contractual stability, players' agents, and often players themselves, frequently angle for the same move facilitated by TPO arrangements. So it is uncertain whether contractual stability is any worse under TPO agreements.

Second, not only is contractual stability not inherently worse with TPO than without it, Reck goes on to argue that TPO agreements actually increase contractual stability for Selling Clubs, helping them to hold on to important players they otherwise could not.¹⁹¹ According to Reck, the greatest enemy of contractual stability for Selling Clubs is their financial insecurity, the very foe TPO is meant to combat.¹⁹² TPO agreements allow Selling Clubs to pay players wages more comparable to those offered by Top Clubs. These improved wages, combined with a general stabilizing of the Selling Club's finances, help to disincentivize transfers away from Selling Clubs. From the players' point of view, the draw of higher wages at other clubs is weaker, and from the clubs' point of view, the financial necessity to sell is less.

A highly visible example comes from Santos' use of TPO to hold on to star player Neymar. As mentioned,¹⁹³ in 2009, Santos, like many Brazilian clubs, was struggling financially and was faced with big money offers from Top Clubs in Europe proposing to buy

¹⁸⁷ *Infra* Part III.B.3.c.

¹⁸⁸ E-mail from Ariel Reck to author, *supra* note 177.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *See supra* Part II.C.2.

Neymar.¹⁹⁴ By entering an agreement with the fund DIS Esporte Group, Santos was able to offer Neymar an improved contract, keeping hold of a key on-field contributor until they transferred him to Barcelona in 2013 for an enormous fee.¹⁹⁵ The Neymar situation illustrates how TPO can, in fact, increase the contractual stability between player and club, help clubs develop long-term plans, and help clubs maintain more control over when to transfer their players.

Reck believes that without TPO investment, it will be impossible for cash-strapped Selling Clubs to refuse the advances of Top Clubs looking to buy their promising young talent.¹⁹⁶ Thus, financial security will undermine any long-term development strategies the club might want to pursue in order to develop the squad necessary to compete with Top Clubs. In short, it is likely that the loss of TPO will result in more talented players leaving Selling Clubs for less money, further destabilizing Selling Clubs and entrenching the dominant clubs in international soccer.

Next, Reck rebuts the idea TPO is financially harmful by comparing the practice to bank loans and other forms of outside funding.¹⁹⁷ Reck's argument is echoed by La Liga, which notes that banning TPO is inappropriate when similar means of third-party investment are used—and successfully regulated—in other industries.¹⁹⁸ Reck himself cites the practice of third-party litigation funding, a practice valid all over Europe, which operates just like TPO agreements.¹⁹⁹ There are some ethical questions surrounding third-party litigation, but, as with the TPO debate, without further research isolated instances of abuse should not lead to the condemnation of an entire practice.

Additionally, Reck notes that many players in which third parties buy shares are not transferred.²⁰⁰ In these cases, only the club benefits from the initial investment from the TPO agreement: the player stays with the club, the TPO agreement runs its course and extinguishes,

¹⁹⁴ Duarte, *supra* note 14.

¹⁹⁵ David Bond, *Neymar Case Embarrassed Barcelona, Says Club President*, BBC: SPORT (Mar. 10, 2014, 18:37 GMT), <http://www.bbc.com/sport/0/football/26520978>.

¹⁹⁶ Reck, *supra* note 127.

¹⁹⁷ E-mail from Ariel Reck to author, *supra* note 177.

¹⁹⁸ *The Point of View of La Liga*, *supra* note 92.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

and the club is free to keep the player or transfer him on, enjoying the full profit from the sale.²⁰¹

Finally, Reck and La Liga disagree with de Carvalho over the inevitability of financial harms and the vicious cycle of debt and dependency.²⁰² Reck and La Liga do not ignore that TPO agreements can, and have, led to financial harm, but they both make it clear that, first, not all TPO agreements are financially harmful, and, second, with a proper regulatory framework in place, these dangers could be further mitigated.²⁰³ For Reck and La Liga, TPO agreements often lead to more stability and increased investment in clubs—investment that benefits the clubs themselves, the players employed and developed by the clubs, and the competitive balance of international soccer.²⁰⁴

Without thorough investigation into the financial realities of TPO, it is impossible to effectively balance the costs and benefits of the practice—a level of investigation that has unfortunately been neglected by FIFA.²⁰⁵ At the very least, Reck and La Liga demonstrate that FIFA's stated legitimate objectives may not justify banning TPO.

b. Meca-Medina's Second Prong: Are Restrictions Inherent?

Assuming FIFA can prove its ban is justified by legitimate objectives, the second prong of *Meca-Medina* requires FIFA to show that restrictions are inherent, or necessary, in the pursuit of the justifying, legitimate objectives.²⁰⁶ In other words, there cannot be nonrestrictive means of achieving the same objectives.²⁰⁷

Both sides of the TPO agree that some restriction on the practice is necessary, but disagree on the degree of restriction necessary.²⁰⁸ For example, Reck and La Liga advocate for increased regulation of TPO—regulation that would limit the scope of TPO agreements, prevent overdependence on the practice, and monitor and prevent

²⁰¹ *Id.*

²⁰² Reck, *supra* note 127; *The Point of View of La Liga*, *supra* note 92.

²⁰³ Reck, *supra* note 127; *The Point of View of La Liga*, *supra* note 92.

²⁰⁴ Reck, *supra* note 127; *The Point of View of La Liga*, *supra* note 92.

²⁰⁵ See *supra* Part II.B.

²⁰⁶ Case C-519/04, *Meca-Medina v. Comm'n*, 2006 E.C.R. I-06991 para. 42; *Staff Working Document*, *supra* note 166, at annex 1, § 2.1.5.

²⁰⁷ *Meca-Medina*, 2006 E.C.R. I-06991 para. 42; *Staff Working Document*, *supra* note 166, at annex 1, § 2.1.5.

²⁰⁸ See generally E-mail from Ariel Reck to author, *supra* note 177; Gomes, *supra* note 109, at 63–65; Pires, *supra* note 17; Reck, *supra* note 15, at 50–54.

issues of third-party influence. And a key part of La Liga's legal complaint against FIFA will be to prove restrictions present a viable, less-restrictive alternative.²⁰⁹ Therefore, the second prong—the necessity of some degree of restriction on TPO—is not the central issue. Instead, the challenge will hinge on the third prong: whether FIFA's ban is disproportionately restrictive, that is, whether there is a viable, less-restrictive alternative.

c. Meca-Medina's Third Prong: Is FIFA's Ban Proportionate?

The crucial third prong of *Meca-Medina* requires that the restriction on competition be proportionate.²¹⁰ A restriction is disproportionate if less-restrictive means can achieve the legitimate objectives used to justify the restriction under the first prong of *Meca-Medina*.²¹¹ Thus, a key part of the legal challenge against FIFA by the Spanish and Portuguese leagues is to put forward viable, less-restrictive alternatives that will achieve the same legitimate objectives FIFA uses to justify Article 18ter.

As mentioned, there is the possibility that banning TPO will only make it more dangerous, more secretive, and create more uncertainty for Selling Clubs.²¹² La Liga argues that, as opposed to the dangers of banning TPO, regulating the practice would create legal certainty for clubs, protect clubs from aggressive third parties while preserving the undeniable financial utility of the practice, protect the integrity of competition, and maintain the financial utility of TPO.²¹³

In particular, La Liga puts forward the following regulations: capping the percentage of a player's rights an investor can own; limiting the number of players on any one club an investor can own; prohibiting TPO agreements for minors; prohibiting certain contractual clauses that make it easier for investors to influence clubs; and prohibiting investment by certain interested parties.²¹⁴ The goal of this regulatory framework is to limit the scope of TPO agreements, to prevent dangerous overdependence on TPO—an overdependence

²⁰⁹ Reck, *supra* note 127; *The Point of View of La Liga*, *supra* note 92.

²¹⁰ *Meca-Medina*, 2006 E.C.R. I-06991 para. 42; *Staff Working Document*, *supra* note 166, at annex 1, § 2.1.5.

²¹¹ *Meca-Medina*, 2006 E.C.R. I-06991 para. 42; *Staff Working Document*, *supra* note 166, at annex 1, § 2.1.5.

²¹² *Supra* Part III.A.

²¹³ *The Point of View of La Liga*, *supra* note 92.

²¹⁴ *Id.*

that could lead to the long-term financial harm de Carvalho warns against²¹⁵—and to monitor and prevent undue third-party influence.²¹⁶ Luís Villas-Boas Pires, a Portuguese sports law expert, has developed a more robust list of regulations to restrict the scope of TPO agreements and monitor these agreements to avoid undue third-party influence. His list includes all of La Liga's suggested regulations, as well as: establishing a TPO Licensor at the international and domestic levels, where clubs must disclose who owns the economic rights of their players; requiring TPO agreements be conditioned on the player's consent; and limiting the number of clubs competing in the same league in which a single investor can own players.²¹⁷

In theory, these regulations would maintain the financial utility of TPO while also securing the same, legitimate objectives behind FIFA's ban—preventing both overreliance on the practice and third-party influence. Of course, without having been properly tested and evaluated, it is impossible to say conclusively whether or not regulations would succeed. That said, the potential success of regulations at least deserves greater consideration than that given to them by FIFA's Working Group and Executive Committee, which seemingly dismissed them off-handedly.²¹⁸

Unfortunately, there is a potentially fatal self-defeating paradox in regulating TPO. As Ranson of R2 Assets maintains, some third parties only enter a TPO agreement if it lets them influence club policy.²¹⁹ If regulations succeed in preventing third-party influence, many third parties may no longer feel comfortable investing, and TPO investment could dry up entirely. In other words, regulations would be self-defeating.

Regulations must achieve twin objectives. First, regulations must limit investment to a healthy level in order to strike a balance between reckless overreliance on TPO and elimination of the practice altogether. Second, regulations must prevent third-party influence. Banning TPO would succeed in both preventing dangerous overreliance on the practice and third-party influence; thus, if regulations fail to achieve either of these goals, they are not a viable alternative to FIFA's ban. The problem is, by successfully preventing

²¹⁵ See *supra* Part II.E.1.

²¹⁶ *The Point of View of La Liga*, *supra* note 92.

²¹⁷ Pires, *supra* note 17.

²¹⁸ See *supra* Part III.B.

²¹⁹ See *supra* Part II.E.2.

third-party influence, regulations will likely dry up TPO investment completely. Thus, the theoretical benefit of regulating TPO rather than banning it may be impossible to achieve.

It is, however, possible there are third parties willing to invest without influence over club policy and that these third parties would continue to enter TPO agreements if regulations came into play, resolving the above paradox. Indeed, we have already seen the tremendous profits TPO creates for third-party investors, and the potential for this profit remains so long as Selling Clubs remain in such dire need of financing.²²⁰ Therefore, it is not impossible to believe that there are third-party investors who would continue to invest once these regulations were put in place to prevent undue third-party influence.

That said, Richard Scudamore, CEO of the English Premier League, has his doubts: “It is impossible for me to believe that the person who has the financial interest in that player doesn’t have an influence over the future of that player.”²²¹ This will be a crucial part of the legal challenge against FIFA’s ban: can regulations mitigate the potential dangers of third-party influence without eliminating TPO investment altogether? If regulations cannot achieve these twin objectives, they fail to represent a viable alternative to FIFA’s ban.

C. Replacing the Financial Utility of TPO

The final question is that if FIFA’s ban does stand up to the legal challenge, is it possible to mitigate the harm Selling Clubs will suffer without such a crucial asset? TPO investment has long been a key tool for Selling Clubs to level the disparate playing field of international soccer, without which the gap between haves and have-nots will only continue to grow at an increased rate. In fact, with the recent announcement of the lucrative new Premier League domestic broadcasting deal as a sign of the money continuing to come into soccer, the income disparity between Top Clubs and Selling Clubs is already set to increase.²²² The new deal is roughly a 70% increase on

²²⁰ See *supra* Part II.D.

²²¹ Duff & Panja, *supra* note 18.

²²² Owen Gibson, *Sky and BT Retain Premier League TV Rights for Record £5.14bn*, THE GUARDIAN (Feb. 10, 2015, 12:42 EST), <http://www.theguardian.com/football/2015/feb/10/premier-league-tv-rights-sky-bt>.

the current deal, which had been, by far, the highest of all time.²²³ For perspective, the new deal means the lowest finisher in the Premier League will make more from its domestic broadcasting deal than the top finisher in the German Bundesliga, itself considered a top four league.²²⁴ With the financial disparity showing no signs of shrinking, it becomes even more important to find ways to mitigate the harm of losing TPO financing and to improve the distribution of wealth across leagues and clubs. The remainder of Part III.C suggests policies and mechanisms to help replace the financial utility of TPO and create a more equitable, financially stable—and therefore more competitive—international soccer community.

1. Improved Solidarity Mechanism and Training Compensation

Training Compensation and the Solidarity Mechanism—established by FIFA RSTP Articles 20 and 21 and Annexes 4 and 5—are the two primary structural means of creating trickle-down from the top of the soccer pyramid to the bottom: from Top Clubs to Selling Clubs.²²⁵ The Solidarity Mechanism dictates that when a player is transferred before the end of his contract, 5% of the fee paid for the player is to be distributed amongst the clubs responsible for the player's training between the ages of twelve and twenty-three.²²⁶ Training Compensation is due to clubs responsible for training a player, up until his twenty-third birthday, the first time the player signs a professional contract or when he is transferred between clubs in different FAs, for example, from a Spanish club, registered with the Spanish FA, to an Italian club, registered with the Italian FA.²²⁷

Unfortunately, a recent study from the European Club Association (ECA) highlights how infrequently payments from the Solidarity Mechanism are actually collected.²²⁸ The total solidarity payments collected for transfers between 2011 and 2013 was \$57.9 million—only 1.15%, rather than the 5% required by FIFA RSTP 21.²²⁹ That

²²³ Gabriele Marcotti, *TV Deal Widens Soccer's Wealth Gap*, WALL ST. J. (Feb. 15, 2015, 4:43 PM ET), <http://www.wsj.com/articles/broadcast-rights-deals-widen-soccers-wealth-gap-1424036601>.

²²⁴ *The Premier League TV Deal—Master and Servant*, THE SWISS RAMBLE (Feb. 23, 2015), <http://swissramble.blogspot.com/2015/02/the-premier-league-tv-deal-master-and.html>.

²²⁵ FIFA RSTP, *supra* note 33, at 19, 34–39.

²²⁶ *Id.* at 38.

²²⁷ *Id.* at 34.

²²⁸ EUROPEAN CLUB ASS'N, *STUDY ON THE TRANSFER SYSTEM IN EUROPE* 86 (2014).

²²⁹ *Id.*

means roughly \$200 million in compensation was not paid.²³⁰ In addition, a FIFA report showed that only 1%, or \$18 million, was paid in training compensation.²³¹ The ECA report highlights significant issues in the monitoring and collecting of payments.²³² And Reck points out that Top Clubs have little incentive to pay these fees, when the current rules—and poor enforcement thereof—allow them to hold out on payments, either by avoiding them altogether or settling with the training club for significantly less than is due.²³³ According to the ECA study, 80% of the compensation due from the Solidarity Mechanism is from Top Clubs, meaning better enforcement would lead to significant trickle-down revenue.²³⁴

Reck believes the introduction of the FIFA Transfer Matching System,²³⁵ a system to track all transfers between domestic FAs, would improve enforcement of the Solidarity Mechanism.²³⁶ More robust monitoring and real consequences for failing to comply with Training Compensation and the Solidarity Mechanism would increase the trickle-down revenue to Selling Clubs who successfully develop young players and transfer them on to bigger clubs. All told, better implementation of the Training Compensation and Solidarity Mechanism would be a simple way to create significant trickle-down revenue and further incentivize investment in academies and other sustainable, long-term businesses practices.

2. Reduced Role of Agents

Another finding by the ECA report is that 14.6%, or \$254 million, of the transfer fees paid between 2011 and 2013 went to agent commissions.²³⁷ And the amount is only rising.²³⁸ In the Premier League alone, clubs paid out \$179 million in agent fees for transfers in 2014, almost \$30 million more than in 2013.²³⁹ This is a

²³⁰ *Id.*

²³¹ FIFA, *supra* note 42, at 41.

²³² EUROPEAN CLUB ASS'N, *supra* note 228.

²³³ Reck, *supra* note 53.

²³⁴ EUROPEAN CLUB ASS'N, *supra* note 228.

²³⁵ *International Transfer Matching System—ITMS*, FIFA, <http://www.fifatms.com/en/Products/ITMS/> (last visited Nov. 1, 2015).

²³⁶ Reck, *supra* note 53.

²³⁷ EUROPEAN CLUB ASS'N, *supra* note 228.

²³⁸ *Premier League Clubs Spend Record £115m on Agents Fees*, BBC: SPORT (Nov. 28, 2014, 19:26 GMT), <http://www.bbc.com/sport/0/football/30254835>.

²³⁹ *Id.*

tremendous amount of money leaking out of soccer clubs and represents significant revenue that Selling Clubs do not receive.

The role of the agent in international soccer ought to be reevaluated, and, at the least, the amount of compensation possible should be capped. Unfortunately, FIFA has done just the opposite by recently deregulating the practice—the full consequences of which are still uncertain.²⁴⁰

3. *Luxury Tax*

An idea initially voiced by Dupont, instating a luxury tax, would be another way to cause trickle-down, as well as potentially limit the spending of Top Clubs, helping Selling Clubs to catch up.²⁴¹ FIFA could set a soft cap of what clubs could spend on transfer fees over the course of a season, or multiple seasons, and any amount spent over that threshold would be taxed at an incredibly high rate. The taxes could be allocated to domestic FAs, which could in turn distribute the taxes to clubs that are struggling financially but that can demonstrate they are making real efforts to modernize, increase performance, and, in general, achieve long-term financial stability. Like improving the Solidarity Mechanism and Training Compensation, a luxury tax would create both trickle-down revenue and additional incentives for Selling Clubs to adopt better business practices. Of course, a luxury tax would likely be subject to complaints from Top Clubs against any limitations on their power to spend, complaints similar to those already raised against UEFA's Financial Fair Play rules.²⁴²

4. *Distribution of Tournament Profits*

In the wake of the 2014 FIFA World Cup held in Brazil, FIFA has announced it would create a \$100 million “Legacy Fund” for the country in thanks for a well-run World Cup and its contributions to

²⁴⁰ De Marco, *supra* note 183.

²⁴¹ Jean-Louis Dupont, Opinion, *Football's Anticompetitive Streak*, WALL ST. J. (Mar. 25, 2013, 3:38 PM ET), <http://online.wsj.com/news/articles/SB10001424127887324077704578357992271428024?mg=reno64wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424127887324077704578357992271428024.html>.

²⁴² See generally Ed Thompson, *Legal Challenge to UEFA FFP Rules by 'Bosman' Lawyer*, FINANCIAL FAIR PLAY (May 9, 2013), <http://www.financialfairplay.co.uk/latest-news/legal-challenge-to-uefa-ffp-rules-by-bosman-lawyer>; Press Release, Manchester City F.C. Supporters Club, Press Release: New Action Taken By PSG Fans Against UEFA's Financial Fair Play (Nov. 13 2014) (<http://www.lawinsport.com/sports-law-news/item/press-release-new-action-taken-by-psg-fans-against-uefa-s-financial-fair-play>).

soccer in the past.²⁴³ For all World Cups, the financial burden rests on the host country to create the required infrastructure—stadiums and transportation, even housing and utilities, depending on the state of the country—meaning that these events generate lucrative profits for FIFA.²⁴⁴ The 2014 World Cup generated over \$4 billion in sales for FIFA, and the 2018 edition is expected to generate over \$5 billion.²⁴⁵ Currently, the profit from these tournaments does little but pay FIFA executives or accumulate in FIFA’s enormous reserves.²⁴⁶ FIFA justifies keeping such large reserves so it can react to unexpected events.²⁴⁷ However, Brazil’s “Legacy Fund” invites the idea that profits from World Cups, which would otherwise go to FIFA’s reserves could at least in part go to helping lessen the financial disparity. This money could be distributed similarly to the funds created through the proposed luxury tax; the tax could be distributed to domestic FAs, who would then reward Selling Clubs who show intent and effort to modernize.

These mechanisms would further incentivize efforts to modernize, improve market performance, achieve long-term financial stability, and improve trickle-down revenue to help mitigate the initial harm Selling Clubs will suffer without TPO investment. Ideally the loss of TPO will spur innovation in Selling Clubs, to incentivize them to develop and adopt modern business practices, and better orient themselves towards long-term, sustainable success.²⁴⁸ However, maintaining this laissez-faire attitude that currently permeates international soccer, leaving Selling Clubs on their own to save themselves is reckless, arguably even negligent, and could have

²⁴³ Tariq Panja, *FIFA’s \$100 Million to Boost Brazil as World Cup Gift*, BLOOMBERG (Nov. 10, 2014, 8:00 PM PST), <http://www.bloomberg.com/news/2014-11-10/fifa-s-100-million-to-boost-brazil-soccer-as-world-cup.html>.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ FIFA, FINANCIAL REPORT 2013 14 (2014), http://www.fifa.com/mm/document/affederation/administration/02/30/12/07/fifafr2013en_neutral.pdf; Doreen Carvajal, *For FIFA Executives, Luxury and Favors*, N.Y. TIMES (July 17, 2011), <http://www.nytimes.com/2011/07/18/sports/soccer/18iht-fifa18.html?pagewanted=all>.

²⁴⁷ FIFA, *supra* note 246, at 20.

²⁴⁸ See Duarte, *supra* note 14 (“Clubs will obviously take a financial hit in the short term[,] but Fifa’s ban on third-party ownership should [] be seen as an opportunity. Clubs will have to focus more seriously on youth development and . . . [t]he ruling will force Brazilian clubs to actually become more professional and moderni[z]e Whoever has their feet on the ground will have financial and sporting success.” (quoting Brazilian football business expert Amir Somoggi)).

disastrous consequences beyond just Selling Clubs, with the entire soccer ecosystem at risk.

CONCLUSION

Working under the assumption that FIFA defeats the legal challenge against Article 18ter, losing TPO could dramatically change the financial and competitive landscape of international soccer. Selling Clubs who have long used TPO to compete with Top Clubs, or relied on the financing to stave off bankruptcy altogether, will, all of a sudden, be forced to find new sources of funding. The current economic landscape is harshly skewed in favor of the Top Clubs, and the loss of TPO will only worsen this. Ideally, in response to the sudden loss of TPO investment, Selling Clubs will innovate to develop, adopt modern business practices, and better orient themselves towards long-term, sustainable success. However, this is a long-term solution to Selling Clubs' difficulties, and the harm of losing TPO will be much more immediate. To mitigate this harm and ensure competitiveness in the immediate future, wholesale, systemic changes to the international soccer community will be required.

Regulations to help control the scope of TPO agreements, to limit clubs' dependence on TPO investment, and to monitor investor influence could present a viable alternative to banning TPO outright. The fact this possibility was seemingly so hastily dismissed, however, leads to the concern that FIFA's quick decision to ban rather than regulate TPO was political in nature, not the result of a thoroughly researched and balanced evaluation. In support of this sad conclusion, two independent studies came back in favor of TPO. First, the Working Group only met once before deciding to ban TPO. And second, FIFA's General Assembly itself thought more investigation was necessary.

There is concern that regulations are potentially self-defeating: if they successfully prevent third-party influence, they could effectively dry up TPO investment altogether and end up offering no better solution than FIFA's ban. Still, with the incredible profit to be made by third parties—a profit possible even without harming the club involved—there is a strong possibility that this catch-22 would not come to pass and that regulations would succeed in ensuring against overreliance and undue third-party influence while maintaining TPO as the necessary financial tool it has become.

Opponents of TPO will point to high-profile, isolated cases of abuse of the TPO system as evidence TPO should be banned. The

Tevez and Mascherano deals that first brought UK attention to TPO or the recent Rojo affair are sure to garner attention. However, what will get less attention are TPO agreements that naturally and harmlessly run their course, with the clubs getting the funds they so desperately require and the investor earning a legitimate payout on his gamble. Exceptions should not be mistaken as the rule. And, at the very least, the real, long-term financial and competitive pros and cons of TPO and the viability of regulations need to be given due examination. Otherwise, FIFA's ban brings the future of the international soccer community into question. If Article 18ter stands without systemic changes, Top Clubs' positions at the peak of the pyramid will be entrenched while Selling Clubs at the bottom will disappear. The legal challenge against FIFA is strong. Without drastic changes towards a more equitable and stable community, the future of international soccer could hinge on the outcome.

