

Article

Between the Green Pitch and the Red Tape: The Private Legal Order of FIFA

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INTRODUCTION

The Fédération Internationale de Football Association, better-known as FIFA, is the governing body for football (or soccer, as it is known in certain countries) as well as futsal and beach soccer.¹ Founded in 1904 under Swiss law by seven European countries—Belgium, Denmark, France, the Netherlands, Spain, Sweden, and Switzerland—and based in Zurich, it currently comprises 211 member associations.² Although FIFA's most important objective is staging major tournaments,³ particularly the FIFA World Cup, it has gone further by creating common rules of behavior for thousands of parties—players, clubs, coaches, their representatives, investors, sponsors of tournaments, and even spectators of the game.⁴ These rules, given FIFA's

1. See FIFA, FIFA STATUTES: REGULATIONS GOVERNING THE APPLICATION OF THE STATUTES, STANDING ORDERS OF THE CONGRESS, art. 7(1) (football), art. 7(4) (futsal), art. 7(5) (beach soccer) (2016), https://resources.fifa.com/mm/document/affederation/generic/02/78/29/07/fifastatutes_weben_neutral.pdf [hereinafter FIFA STATUTES].

2. See *Associations*, FIFA, <http://www.fifa.com/associations> (last visited Sept. 30, 2017) (listing all current FIFA members).

3. Additionally, FIFA aims to improve and promote the game of football. See FIFA STATUTES, *supra* note 1, art. 2(a).

4. See *id.* art. 2(c) (one of FIFA's objectives is "to draw up regulations and provisions governing the game of football and related matters and to ensure their enforcement"); see also FIFA, FIFA REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS (2016), http://resources.fifa.com/mm/document/affederation/administration/02/70/95/52/regulationsonthestatusandtransferofplayersnov2016weben_neutral.pdf [hereinafter TRANSFER REGULATIONS] (laying down rules concerning the status of players, their eligibility to participate in organized football, and their transfer between clubs belonging to different member associations); FIFA, REGULATIONS ON WORKING WITH INTERMEDIARIES (2015), http://resources.fifa.com/mm/document/affederation/administration/02/36/77/63/regulationsonworkingwithintermediariesii_neutral.pdf (establishing rules for the professional representatives of players and clubs whose services can be engaged when concluding an employment contract or a transfer agreement); FIFA, REGULATIONS: CLUB LICENSING (2008), http://resources.fifa.com/mm/document/affederation/administration/67/17/66/club_licensing_regulations_en_47341.pdf [hereinafter LICENSING REGULATIONS] (defining minimum requirements for the licensing of clubs by national member associations, including restrictions on the ownership of football clubs); FIFA, FIFA DISCIPLINARY CODE (2011), <http://resources.fifa.com/mm/document/affederation/>

reach, cover almost the entire globe and nearly every essential football tournament.

FIFA is not the only private actor that has established its own legal order. Scholars have documented numerous examples where non-State actors have developed institutions that support order. This includes historical examples such as private prosecution associations during the Industrial Revolution in England,⁵ early attempts by U.S. securities traders to self-regulate under the New York Stock and Exchange Board (renamed the New York Stock Exchange in 1863),⁶ medieval merchant guilds,⁷ and pirate organizations.⁸ More contemporary examples include small local communities⁹ and business associations.¹⁰ These privately-created legal orders often function successfully in the shadow or outside the bounds of State-made laws.

One possible means of encouraging institutional cooperation is thus through private orders. These orders develop to fill regulation gaps left by other modes of governance, primarily by the State, or sometimes directly compete with other alternatives by offering institutions that better accommodate the needs of the interested actors.¹¹ Private ordering may vary from an informal or contractual relationship between two actors to a more complex law-like structure that governs the behavior of numerous parties. Accordingly, the reliance on formal State institutions varies. Whereas some orders may offer only rules of behavior and depend on State-backed institutions for adjudication of disputes and enforcement of sanctions, others may offer the full toolkit—either by creating more formal private dispute resolution and enforcement mechanisms or by using reputation mechanisms. The latter encourages cooperation by denying access to the network and its benefits for actors who have incurred a bad reputation.

FIFA's private order is distinctly law-like. Given the limited role of reputation mechanisms in supporting cooperation in football, FIFA has developed a formal institutional structure that contains elements of rule-making, dispute resolution, and enforcement. FIFA's example illustrates how a private order can function without reputation mechanisms. It also explains how

administration/50/02/75/discoinhalte.pdf [hereinafter DISCIPLINARY CODE] (for example, authorizing banning fans from entering a stadium for infringements of the rules in FIFA regulations).

5. See Mark Koyama, *Prosecution Associations in Industrial Revolution England: Private Providers of Public Goods?*, 41 J. LEGAL STUD. 95 (2012).

6. See Stuart Banner, *The Origin of the New York Stock Exchange, 1791–1860*, 27 J. LEGAL STUD. 113 (1998).

7. See Avner Greif, Paul Milgrom, & Barry R. Weingast, *Coordination, Commitment, and Enforcement: The Case of the Merchant Guild*, 102 J. POL. ECON. 745 (1994).

8. See generally PETER T. LEESON, *THE INVISIBLE HOOK: THE HIDDEN ECONOMICS OF PIRATES* (2009).

9. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

10. See, e.g., Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) [hereinafter Bernstein, *The Diamond Industry*]; Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001) [hereinafter Bernstein, *The Cotton Industry*].

11. See *infra* Part I (describing private modes of governance).

a private order can protect its unique rules from external legal challenges. Particularly, what clearly distinguishes FIFA's private legal order from many other examples is, most notably, its stark contrast with certain State-made laws. Academic literature, interest group debates, and administrative and court proceedings have focused on, *inter alia*, the compatibility of the regime with the freedom to choose employment, competition laws, and free movement rules of the European Union.¹² To be sure, tailored rules (or norms) of behavior make perfect sense in the context of many other orders, but because the parties have to rely on the backing of the State for dispute resolution or enforcement (or both), not all orders can afford to have rules that contradict State-made laws; dissatisfied actors can challenge such rules in ordinary courts of law.

This study aims to explain how and why FIFA's private legal order has succeeded in governing the behavior of the involved actors and has kept them away from regular courts. We propose that the ability of the order to offer what other governance modes cannot is the key: FIFA, as a transnational private authority, offers harmonized institutions that apply across national borders and are often better tailored to the needs of the involved parties. State-made alternatives, on the other hand, are often based on a one-size-fits-all approach and lack certainty of application. FIFA's rules increase the gains of clubs and prominent footballers. And, while the interests of some other involved parties—in particular, those of lesser known players—may be better served by the application of formal State laws, the established equilibrium discourages deviation from using the private order. Further, we identify factors that, notwithstanding alleged contradictions with formal State-made law, have contributed to the rise of this private legal order.

This Article first contributes an illustration of how private ordering can evolve and function when reputation plays a limited role. Most prior studies of private legal orders have shared a certain underlying structure: reputation-based mechanisms—either independently or in combination with more formal mechanisms—induce parties to behave in a manner beneficial to the parties and other members of a group.¹³ We, however, consider a case where an extremely large number of involved actors and the absence of entry barriers actually weaken reputation mechanisms. Although information about opportunistic behavior can be monitored and communicated easily among the actors, collective punishment is not guaranteed. Hence, bad reputation does not necessarily lead to ostracism. We show that private legal orders can function without reputation-based mechanisms. This, however, necessitates a different structure. In order to be successful, a coordinated system of privately designed rules, dispute resolution venues, and enforcement mechanisms has to emerge. This public order-like system is supported by a strong member association that performs a role similar to the position of a government in a public order.

The Article's second contribution to the literature on private ordering is

12. See *infra* Section III.A (describing public law challenges to FIFA's private legal order).

13. See *infra* Part I (describing conditions for creating cooperation by both decentralized and centralized private ordering).

the consideration of the effect of State intervention on the matters of private orders. Early literature viewed private orders as superior to State regulation and implicitly assumed that any State intervention may harm the established equilibrium. More recent studies have rightly abandoned the idea of contrasting private ordering with State regulation and instead acknowledge the role of the State in the formation of private orders.¹⁴ Rather than being viewed as competing regimes, this more nuanced approach implies that the two modes of governance interact and, perhaps, influence each other in ways that improve the quality of institutional support. These studies, however, mostly see this interaction in the form of a support that the State provides to private orders—for example, by assisting in dispute resolution or enforcement. In other words, private orders, to varying degrees, may depend upon the existing State-supported legal regimes.¹⁵ Equally important but somewhat overlooked is the monitoring mechanism offered by the interaction of private and public orders. As we propose, strategic State interventions, or threats of them, are capable of correcting the failures of private orders.

One last point that needs to be addressed here is the clarification of the meaning of “norms” or “rules” supplied by private actors. Since FIFA is a centralized private organization, this Article focuses mainly on formal, centralized private “rules” of governance, rather than on societal “norms.” We further contrast these rules with State-made legal rules.¹⁶

The rest of this Article is organized as follows. Part I briefly discusses the role of decentralized self-governance and centralized governance by private organizations in supporting cooperation. This part also proposes FIFA as an organization that has developed its own private legal order for governing football-related matters—an order that co-exists in parallel with formal State-made law. Part II puts forward the *how* question: how does FIFA organize the world of football and keep involved actors out of State courts? Part III briefly discusses challenges to FIFA’s order from formal State-made law. Part IV then proceeds to the *why* question: why is organized football subject to FIFA’s rules and institutions rather than alternative governance structures in general and formal State law in particular? We answer this question by identifying factors that increase the costs of other means of governance, thus making them no viable option. Under these circumstances, FIFA offers supportive institutions for governance that others fail to provide. Some of these factors are not football-specific. Hence, it is reasonable to expect that other groups could benefit from organizing a similar private order. In Part V, we discuss the reasons that contributed to FIFA’s success in building its own private legal

14. See Daniel Attenborough, *Empirical Insights into Corporate Contractarian Theory*, 37 LEGAL STUD. 191, 192-93, 202-03 (2017) (claiming that the formation and nature of private orders are conditional upon state interventions).

15. See *id.* at 193 (noting that “non-legal systems typically displace in part, yet rest upon, the extant legal regime”).

16. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 351 (1997) (treating both societal norms and organizational rules of centralized private organizations as privately-designed norms, as long as the distinction between their supply by decentralized and centralized means is observed).

order. Part VI points to the disadvantages of private ordering and considers a model of interactions with the State that may mitigate the negative aspects of private orders. At the end, we offer some conclusions.

I. THE THEORY OF PRIVATE MODES OF GOVERNANCE

Several governance mechanisms provide institutional support for economic activity: markets, firms, States, as well as community and private group organizations.¹⁷ Obviously, none have a monopoly. Where a State is not able or willing to provide institutions, alternative private modes of governance can fill the void.¹⁸ Often this occurred before the emergence of modern State institutions. But there are also more recent examples from developing countries where State-supplied institutions are weak or where illegal activities are prevalent and cannot be supported by formal law.¹⁹ Indeed, such private orders might be inferior to the centralized provision of reliable institutions by States, but in the absence of State action even such substandard alternatives can create economic value.²⁰

Sometimes, however, two or more modes of governance compete for organizing specific activities. In this case, rational economic actors are expected to choose the least-cost method among the available institutions.²¹ The question about the preferred source of governance then boils down to the ability of a certain governance mode to offer rules that suffer the least from market failures.²² There are two possible ways for actors to opt out of the existing governance modes in favor of private ordering. First, self-enforcing governance systems (self-governance) can organize behavior in reputation-based networks by excluding actors with bad reputations—i.e., frequent non-compliers with the accepted practice of behavior—from potentially beneficial cooperation in the future.²³ Second, private third parties can assume the role of the State and offer privately-designed rules for governing the behavior of their members on a coordinated basis (governance by private associations).²⁴

The world of football is large and diverse.²⁵ In the absence of strong connections among actors in different groups and across geographic borders,

17. See Avery Katz, *Taking Private Ordering Seriously*, 144 U. PA. L. REV. 1745, 1754 (1996).

18. See AVINASH K. DIXIT, LAWLESSNESS AND ECONOMICS: ALTERNATIVE MODES OF GOVERNANCE 3-4 (2004); John McMillan & Christopher Woodruff, *Private Order Under Dysfunctional Public Order*, 98 MICH. L. REV. 2421, 2448-53 (2000).

19. See Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2335-36 (2004).

20. See McMillan & Woodruff, *supra* note 18, at 2425.

21. DIXIT, *supra* note 18, at 4.

22. See Katz, *supra* note 17, at 1753-55 (showing that the question of identifying the optimal governance mode depends on possible costs of supplying institutions, which may include general externalities, informational asymmetries, strategic behavior, and network and learning externalities).

23. See DIXIT, *supra* note 18, at 12-13.

24. See *id.* at 13.

25. According to some estimates, as of 2015 there were over 250 million football players alone. See Chance Esposito, *A Red Card for FIFA: Corruption and Scandal in the World's Foremost Sports Association*, 16 RICH. J. GLOBAL L. & BUS. 45, 45 (2016). Apart from players, football clubs are a prominent group with interests that sometimes directly contradict the interests of players.

the role of reputation in supporting cooperation is diminished. This, therefore, rules out self-governance and calls for the need of coordinated governance by a third party—a role performed by FIFA. Although FIFA’s order shares many similarities with other organized private orders, it stands out in two respects. First, the limited role of reputation mechanisms forced FIFA to develop more formal mechanisms for dispute resolution and enforcement, making the order distinctly law-like. Second, FIFA’s rules often overstep the mandatory legal constraints defined by public orders by expressly deviating from the widely-accepted fundamental rules of behavior. This gives the order the ability to accommodate the interests of various groups. Many other industries would like, but usually fail, to achieve a comparable freedom of action in designing and enforcing rules tailored to the specific needs of the industry.²⁶

This Part uses numerous case studies to demonstrate the ways in which the two modes of private governance work independently or in interaction.²⁷ These studies, along with more recent theoretical work, reveal the necessary conditions for the functioning of either of the two modes of private ordering—(i) decentralized self-governance and (ii) centralized governance by private associations. The discussion then shows how the specific conditions of the football world have shaped FIFA’s private legal order.

A. Private Ordering by Decentralized Self-Governance

Self-governing decentralized systems are found in two different environments: (i) where the same actors interact with each other repeatedly (bilateral interactions) or (ii) where actors meet different counterparties each time, but they all belong to a homogeneous group (multilateral interactions). Under repeated interactions between the same parties, direct reciprocity can discipline the parties and discourage them from taking short-term opportunistic actions. However, in order to work effectively, certain minimum conditions should be met: (i) the parties should have sufficient regard for the future—i.e., long-term gains of cooperation must exceed the payoffs of opportunistic actions and the parties should also be certain about the continuation of the

26. Professional services—in particular, the legal industry—serve as an example where various efforts have aimed to create industry-specific rules of behavior that differ from the regular laws applicable to all. For brief discussion of such efforts, see *infra* notes 240-44 and accompanying text.

27. The early literature is described in McMillan & Woodruff, *supra* note 18, at 2435 (for spontaneous self-governing private orders) and at 2444 (for organized private orders). For more recent examples of uncoordinated self-governing mechanisms of private ordering, see, for example, Jonathan M. Barnett, *Hollywood Deals: Soft Contracts for Hard Markets*, 64 DUKE L.J. 605 (2015) (discussing the practice of contracting in Hollywood); Lisa Bernstein, *Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts*, 7 J. LEGAL ANALYSIS 561 (2015) (discussing cooperation between large U.S. Midwestern original equipment manufacturers and their suppliers); Alan D. Morrison & William J. Wilhelm Jr., *Trust, Reputation, and Law: The Evolution of Commitment in Investment Banking*, 7 J. LEGAL ANALYSIS 363 (2015) (discussing the relationships of investment banks with their clients); Dotan Oliar & Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008) (discussing the means of protecting copyright in stand-up comedy). For a recent study of governance by private associations, see Robert C. Ellickson, *When Civil Society Uses an Iron Fist: The Roles of Private Associations in Rulemaking and Adjudication*, 18 AM. L. & ECON. REV. 235, 254-61 (2016) (discussing the role of various “strong associations” in coordinating the behavior of actors).

relationship; (ii) any deviation should be detected quickly and accurately in order to impose timely and appropriate punishments; and (iii) the parties should be willing to punish, costly though it may be, the deviating actors.²⁸

Often, though, actors interact with different parties instead of meeting the same counterparty each time. The small likelihood of bilateral dealings weakens the disciplinary effect of direct reciprocity.²⁹ In such situations, self-governance is viable only if an actor's opportunistic behavior can lead to future costs for him/her through interactions with other non-affected actors belonging to the same group.³⁰ In other words, if sanctions cannot be imposed by the affected party directly, the entire collective must participate in punishing the deviating actor. This will transform a breach of contract with one party into a breach of contract with the numerous actors involved in the industry, thereby increasing the magnitude of the expected penalty.³¹

Incentives for collective punishment can be material, psychological, or a combination of both. For example, in medieval Iceland, if a person failed to comply with the court order, he/she could be declared an outlaw. Once declared an outlaw, anyone might punish the offender by taking the offender's property. This material incentive supported broad participation in collective punishment.³² Avner Greif describes another example: the community responsibility system prior to the thirteenth century, when communities were relatively small and homogeneous. According to Greif, a host community would punish all members of a foreign community if any merchant from the foreign community cheated the members of the host community and the foreign community failed to discipline this behavior. This threat provided members in each community with the incentive to police the behavior of all merchants in their own community.³³ Other scholars focus on psychological factors to explain human behavior in groups. For example, group members are likely to behave in the group's collective interest, even though such behavior is costly, if they believe that other members in the group behave similarly. Thus, the desire of individuals to contribute to public goods may become stronger or weaker depending on whether others are contributing or not.³⁴ Lastly, a combination of monetary and non-monetary benefits can explain the ability of private groups to provide public goods.³⁵

28. See DIXIT, *supra* note 18, at 60-61.

29. *Id.* at 63.

30. *Id.*

31. See Bernstein, *The Cotton Industry*, *supra* note 10, at 1764.

32. See David Friedman, *Private Creation and Enforcement of Law: A Historical Case*, 8 J. LEGAL STUD. 399, 405 (1979); Gillian K. Hadfield & Barry R. Weingast, *Law Without the State: Legal Attributes and the Coordination of Decentralized Collective Punishment*, 1 J.L. & CTS. 3, 13 (2013).

33. See AVNER GREIF, *INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE* 310 (2006).

34. See, e.g., Lior Jacob Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 U. CHI. L. REV. 359, 364-65 (2003).

35. See Koyama, *supra* note 5, at 114-15 (explaining the rise of private associations for the prosecution of criminals in England during the period between 1750 and 1850 as being fueled by the desire association members had for the esteem of others, as well as by the material incentives that such associations offered to members).

Accordingly, self-governance in the setting of multilateral interactions requires the presence of two additional conditions: (iv) information about wrongful acts has to be conveyed—typically through informal communication channels, like gossip—to all other actors in the group;³⁶ and (v) all group members, rather than the immediate contractual party that suffered from the breach, have to be interested in imposing and enforcing sanctions against the deviating actor, even though this might mean forgoing mutually beneficial actions with him/her.³⁷ Gossip about wrongful acts and imposed sanctions helps refine the meaning of the norms of behavior within the group.³⁸ Without developing a common understanding of what constitutes a wrongful act, group norms cannot support cooperation.³⁹

The size of the group affects its ability to meet the two additional conditions. The larger the group, the weaker the information dissemination mechanisms are.⁴⁰ As a result, instances of cheating counterparties are not always reflected in the reputation of an actor. Large groups also pose complications for collective punishment of wrongdoers.⁴¹ Not only do they face coordination problems, but they may also include free-riding members who refuse to incur the costs of punishing others, for example, by refusing to give away potential profit-making transactions with the wrongdoers.⁴² Thus, deviations from the established rules of behavior may go unpunished. The anticipation of these problems weakens incentives to cooperate in the first place.⁴³ In addition to size, homogeneity in the group will affect

36. See DIXIT, *supra* note 18, at 63-64.

37. See *id.*

38. See Richard H. McAdams, *Group Norms, Gossip, and Blackmail*, 144 U. PA. L. REV. 2237, 2256-57 (1996) (comparing the role of gossip in close-knit social groups to that of common law courts: gossip applies the general social norm to the particular situation, thereby clarifying its exact meaning).

39. See Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition*, 83 AM. ECON. REV. 525, 542 (1993) (explaining that credible collective punishment requires a definition of "cheating" that ensures collective response); Gillian K. Hadfield & Iva Bozovic, *Scaffolding: Using Formal Contracts to Support Informal Relations in Support of Innovation*, 2016 WIS. L. REV. 981, 1010-12 (2016) (explaining how detailed business contracts, which the parties do not intend to enforce formally, support cooperation by coordinating the interpretation of various acts and events).

40. Cf. David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 418-19 (1990) (proposing that collective reputational enforcement should work well in small groups, whereas mass markets based on reputational bonds are feasible only with technology that conveys information cheaply to a large group of actors); Strahilevitz, *supra* note 34, at 365 (pointing out that reputation mechanisms may weaken when relied upon outside small groups, but explaining that the mechanisms of successful cooperation depend primarily on the group members' ability to observe and share information about others' behavior, rather than on the group's size).

41. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 49-52, 53-56 (1965) (showing that size is one of the key factors affecting the ability of groups to promote the common interests of their members and that small groups have an advantage).

42. See McMillan & Woodruff, *supra* note 18, at 2429. Incentives for free-riding do not arise if sanctioning wrongdoers is not costly. See McAdams, *supra* note 16, at 358-65 (offering the theory that social norms arise because people seek the esteem of others; because withholding or granting esteem is costless, violations of norms can be easily sanctioned, thereby leading to their development).

43. As mentioned above, collective punishment can be supported by the tendency of human beings to act in the common interest if others are behaving cooperatively. See *supra* note 34. If this is the case, then the collective action problem goes away. Hence, promoting trust, rather than material

communication networks and enforcement mechanisms. For example, information generally flows better in networks that are connected by business ties⁴⁴ or ethnicity.⁴⁵ Similarly, high costs of entry into another ethnic community increase the benefit of belonging to one's own community, thereby encouraging loyalty and rule-compliance.⁴⁶

B. Centralized Governance by Private Associations

Private governance groups can correct the failures of decentralized self-governing mechanisms of cooperation. First, private groups can extend cooperation by creating formal channels of communication that foster accurate distribution of information among all interested members of the group.⁴⁷ Second, if the mere provision of accurate information about wrongful actions is not enough to impose self-organized collective punishment on wrongdoers, private associations can assist in coordinating collective punishment.⁴⁸ For instance, the failure to participate in collective punishment can itself be subject to punishment.⁴⁹ Third, organized institutions can also facilitate common

incentives, can support cooperation. Moreover, material incentives supposed to encourage behavior in the interests of the group may backfire by eroding trust and, as a result, removing the psychological motives to cooperate. See Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 338 (2001) (explaining that material incentives may have a negative effect on voluntary contributions to public goods, because material incentives can signal that voluntary cooperation is not likely, and even where the true motives of cooperation are voluntary, the presence of material incentives conceals this information from others); Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 76-77 (2003) (same).

44. See, e.g., Bernstein, *The Diamond Industry*, *supra* note 10, at 140-41; Bernstein, *The Cotton Industry*, *supra* note 10, at 1751-52.

45. See, e.g., Avner Greif, *Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders*, 49 J. ECON. HIST. 857, 879 (1989) (explaining the retention of a separate social identity of the eleventh-century Maghribi traders within the larger Jewish communities by their desire to have a closed homogeneous network for the transmission of information inside the group); Janet T. Landa, *A Theory of the Ethnically Homogeneous Middleman Group: An Institutional Alternative to Contract Law*, 10 J. LEGAL STUD. 349, 359-60 (1981) (contrasting the higher costs of searching for information regarding potential counterparties across ethnic boundaries with lower costs of informal communication within the trader's own ethnic community); James E. Rauch, *Business and Social Networks in International Trade*, 39 J. ECON. LITERATURE 1177, 1182, 1184-88 (2001) (presenting evidence that ethnic networks improve both the transmission of information regarding past opportunistic conduct and about current opportunities for profitable cooperation); James E. Rauch & Vitor Trindade, *Ethnic Chinese Networks in International Trade*, 84 REV. ECON. & STAT. 116, 122-26 (2002) (same).

46. See Landa, *supra* note 45, at 356 (explaining that "outsiders" may substitute good reputation for kinship or ethnic status, but because reputation building, unlike obtaining status rights, is costly, members of an ethnically homogeneous group have strong incentives to preserve their status by abiding by the rules of the community). Avner Greif made a similar argument later in his study of the practices of the eleventh-century Maghribi traders. See Greif, *supra* note 45, at 867-68; Greif, *supra* note 39, at 539.

47. See McMillan & Woodruff, *supra* note 18, at 2427 (explaining that private organizations not only collect and store information, but also reduce the likelihood of mistakes in the transmission of this information in large groups); Jens Prüfer, *Business Associations and Private Ordering*, 32 J.L. ECON. & ORG. 306, 321-22, 335 (2016) (formally showing how membership in private business associations improves on social networks by facilitating more cooperation between weakly connected actors; social networks, on the other hand, are better suited for situations where cooperating actors have strong informal connections).

48. See McMillan & Woodruff, *supra* note 18, at 2429-30.

49. See DIXIT, *supra* note 18, at 63-64; McMillan & Woodruff, *supra* note 18, at 2440. In general, a collective action problem can be solved by selective incentives that can be either negative or positive, in that they can either punish actors who fail to act in the interests of the group or offer benefits

classification of acts, for example, by defining the terms of the agreement between the parties or distinguishing acceptable from unacceptable behavior.⁵⁰

The historical narrative of the diamond trade illustrates how self-enforcing mechanisms of cooperation that are assisted by regional membership associations function. Given industry-specific factors, formal courts face complications in enforcing contracts between diamond traders and various middlemen.⁵¹ This failure can be corrected by reputation-based trade—where future trade is conditioned upon the reputation of a trader or middleman—as long as the same actors repeatedly deal with each other and the benefits from cooperating for both parties exceed the one-time benefit from cheating. But, the trade is multilateral, involving many different actors; moreover, extreme rewards from cheating, given the price of stones, can be well above the benefits of long-term cooperation.⁵² A combination of industry and community institutions deal with these challenges. While industry institutions—the membership association of diamond dealers and its arbitration panel—facilitate the exchange of reputational information among the actors,⁵³ long-term family reputations⁵⁴ and community institutions⁵⁵ remove the incentives to deviate from cooperation.⁵⁶ A similar structure is observed in the cotton industry.⁵⁷

C. Private Governance in the World of Football

The conditions for self-governance are not always met in the world of professional football. The relationships between football-related actors cannot continue forever. While clubs have separate legal identities distinct from their constituencies and thus have an unlimited existence, the duration of a footballer's career is restricted in time. As a result, the actors can accurately predict the end of the interaction: the closer the end date, the stronger the

to those who act in the group's interests. *See* OLSON, *supra* note 41, at 51.

50. *See* Bernstein, *The Cotton Industry*, *supra* note 10, at 1771-74; Hadfield & Weingast, *supra* note 32, at 8-9.

51. *See* Barak D. Richman, *How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York*, 31 L. & SOC. INQUIRY 383, 390-92 (2006) (explaining the inability of formal law to support the diamond trade, which heavily relies on credit sales, because of wide opportunities to cheat by hiding unpaid-for or stolen diamonds from law enforcement officials).

52. *See id.* at 393-94.

53. *See id.* at 396-97 (describing information exchange mechanisms, such as rumors within the association and the official publication of information about members for members).

54. *See id.* at 400-04 (showing that the main diamond traders belonged to families with long histories in the industry extending beyond the limited lifespan of an individual trader, and the limited entry for traders without family connections, as well as the risk of expulsion of all traders from a family with a damaged reputation, leveraged the value of reputation).

55. *See id.* at 404-07 (showing that small independent contractors, such as diamond brokers and cutters, were members of ultra-Orthodox Jewish communities that put their collective efforts toward ensuring that community members complied with their contractual obligations).

56. Market, technological, and cultural developments have eroded trust in the diamond industry recently and have led to the decline of the industry's famous private ordering system. *See* BARAK D. RICHMAN, *STATELESS COMMERCE: THE DIAMOND NETWORK AND THE PERSISTENCE OF RELATIONAL EXCHANGE* 168 (2017).

57. *See* Bernstein, *The Cotton Industry*, *supra* note 10, at 1745-54 (describing reputation-based non-legal sanctions in the cotton industry and the role of centralized industry institutions in supporting their effective functioning).

incentives to act opportunistically.

In addition, football clubs and players deal with different partners at different times, and the sheer size of the group impedes disciplining infringers by collective reciprocal action. Although contracts between clubs, or between clubs and players, are typically confidential, there is a lot of media coverage of these transactions, their conditions, the internal environment of clubs, and the personal lives of star players.⁵⁸ These information flows, although sometimes leaked strategically and with limited reliability, are instrumental for the functioning of reputation-based disciplinary mechanisms.⁵⁹ The ability of clubs and players to learn of the prior behavior of their counterparties, coupled with constrained exit options (given FIFA's monopoly power), creates potential conditions for decentralized collective punishment. Nevertheless, the extremely large number of involved actors in football generates compelling incentives for opportunistic behavior. Even if information about bad reputations were to be available, solidarity among the actors regarding the enforcement of punishments against wrongdoers is not strong.⁶⁰ Accordingly, there will always be clubs or players willing to benefit from cooperating with the wrongdoers.⁶¹ Actors can try to sustain bilateral relations in order to discipline each other through direct reciprocity, but this limits the scope of their trading opportunities.⁶²

Instead of an elaborate dispute resolution and enforcement system, FIFA theoretically could have established formal mechanisms for rating the behavior of football-related actors and sharing the results with every interested party. An actor's bad reputation would have reduced the likelihood of being approached by others, thereby encouraging compliance with the rules and contractual obligations. However, the presence of collective action and free-rider problems casts doubt on whether the "alternative FIFA" (in the capacity of an information intermediary) could have equivalently substituted for the "present-day FIFA" (in its capacity as an arbiter and enforcer).

The lack of reputation-based non-legal sanctions is compensated by stronger formal rules of behavior designed by FIFA. The role of FIFA is to supply common rules of behavior, consider disputes, and impose sanctions to

58. For example, the German-based website TransferMarkt reports almost all actual or likely transfer fees paid by clubs for signing players. See TRANSFERMARKT, www.transfermarkt.com (last visited Nov. 11, 2017).

59. See Strahilevitz, *supra* note 34, at 364-65 (noting that reputation mechanisms can remain effective even in large loose-knit groups if the involved actors receive accurate and necessary information). Many online peer-to-peer platforms, like eBay and Airbnb, have created sophisticated review mechanisms that facilitate information flows between users and enable cooperation in extremely large groups. See Liran Einav, Chiara Farronato & Jonathan D. Levin, *Peer-to-Peer Markets*, 8 ANN. REV. ECON. 615, 620-22 (2016); Tamar Frankel, *Trusting and Non-Trusting on the Internet*, 81 B.U. L. REV. 457, 471 (2001).

60. Cf. Timothy W. Guinnane, *A Failed Institutional Transplant: Raiffeisen's Credit Cooperatives in Ireland, 1894-1914*, 31 EXPLORATIONS ECON. HIST. 38, 56 (1994) (explaining the failed effort to transplant German credit cooperatives to Ireland because Irish people, unlike Germans, were reluctant to force their neighbors to repay loans when they failed to do so).

61. See *infra* note 140 and accompanying text.

62. See DIXIT, *supra* note 18, at 67.

enforce its decisions.⁶³ FIFA, thus, similar to a formal State, plays a coordinating role. Indeed, establishing and maintaining such an external governance structure is costly, but these costs are covered by the benefits of organizing behavior within large communities.⁶⁴ The question then is why do the actors involved in football subject themselves to the rules of an order designed by a private third party, namely FIFA, instead of complying with formal State laws? But before answering this question, we need first to understand how FIFA's private order functions.

II. ORGANIZATION OF THE WORLD OF FOOTBALL

This Part describes the functioning of FIFA's private legal order. Weak reputation-based non-legal sanctions in football are compensated by stronger formal rules of behavior designed by FIFA. FIFA's role is to (1) design common rules of behavior, (2) record deviations from the rules and impose sanctions on wrongdoers, and (3) create incentives for all others to participate in enforcing these sanctions. Accordingly, we proceed in three steps by first describing the core of the rules of behavior, then considering the private dispute resolution system, and lastly discussing the enforcement mechanisms designed by FIFA.

A. The Legal Order that FIFA Built: Privately-Designed Rules of Cooperation

The common rules of football are described by FIFA in the Laws of the Game.⁶⁵ The organization of the game, however, is not limited to merely standardizing the playing rules and coordinating the timetables. Thousands are involved in football, the most popular game in the majority of the world, as athletes, coaches, managers, club investors, officials, sponsors, and spectators. Moreover, football reportedly has more followers than either Christianity or Islam.⁶⁶ The presence of so many interested parties requires common and

63. The reliance on formal dispute resolution and enforcement systems in football may be the reason for handicapped reputational enforcement of agreements, rather than vice versa. If parties had only reputational mechanisms of enforcement to rely upon, they would have refused to deal with actors having a reputation as an opportunist. Formal institutions, by ensuring compliance with contractual obligations, encourage transactions even with actors with bad reputations, thereby reducing the reputational consequences of opportunistic behavior. *See generally* Scott E. Masten & Jens Prüfer, *On the Evolution of Collective Enforcement Institutions: Communities and Courts*, 43 J. LEGAL STUD. 359, 377-78 (2014) (using this logic to explain how formal legal enforcement may crowd out informal reputational enforcement). This relationship is two-sided, as the presence of strong informal networks of cooperation may discourage the improvement of functionally equivalent formal legal institutions. *See Avner Greif, Cultural Beliefs and the Organization of Society: A Historical and Theoretical Reflection on Collectivist and Individualist Societies*, 102 J. POL. ECON. 912, 937 (1994).

64. *See* DIXIT, *supra* note 18, at 74-76 (showing that the size of a community defines the efficiency of a mode of governance). Dixit explains that "small communities can achieve full self-governance using their own information systems," while cooperation in large communities fails without external governance. Intermediate communities "fare worst: they are too large for self-governance but too small for external governance." *Id.* at 76.

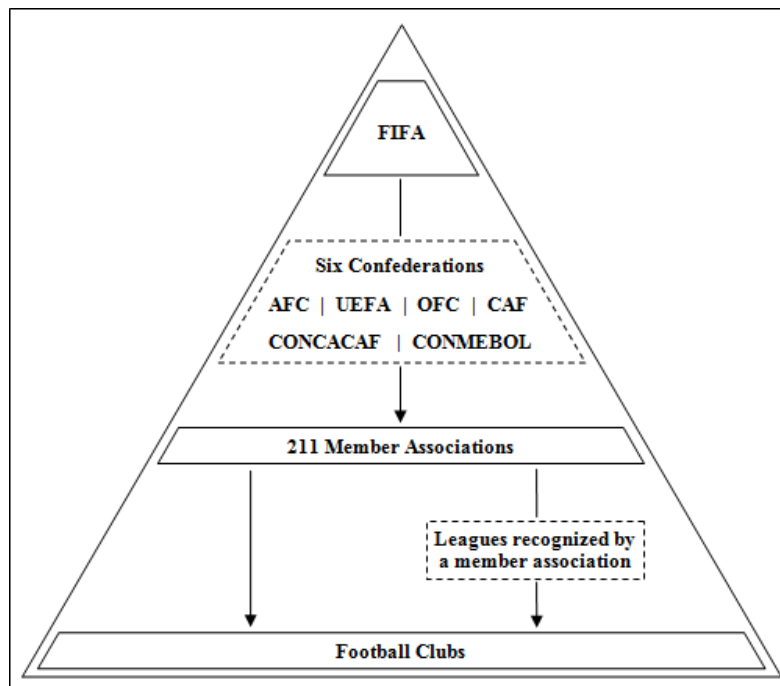
65. *See* FIFA, LAWS OF THE GAME 2017/18 (2017), http://www.fifa.com/mm/Document/FootballDevelopment/Refereeing/02/90/11/67/Lawsofthegame2017-2018-EN_Neutral.pdf.

66. JOE HUMPHREYS, FOUL PLAY: WHAT'S WRONG WITH SPORT 231 (2008).

predictable rules of behavior if the game is to be played internationally with equal opportunities for everyone. A level playing field can only exist if all participants meet similar organizational conditions. With this purpose in mind, FIFA has developed a complex organizational structure that practically spans every involved party.

At the top of the pyramidal network is FIFA with its member associations. The members are national associations, each, as a rule, representing one independent country.⁶⁷ They are grouped into six confederations representing different geographic regions.⁶⁸ National associations have their own members—licensed football clubs with at least one team participating in national competitions. This structure is illustrated in Figure I below.

Figure I. The Structure of FIFA



67. See FIFA STATUTES, *supra* note 1, art. 11(1) (providing that “only one association shall be recognized as a member association in each country”). A special case is the four British associations—the Football Association, the Scottish Football Association, the Football Association of Wales, and the Irish Football Association (Northern Ireland)—which are separate members of FIFA. An association from a region that has not yet gained independence may apply for FIFA membership with the approval of the association in the country on which it is dependent. See *id.* art. 11(6). Currently, several other football associations that do not represent independent nations are FIFA members: the associations of the Faroe Islands, Gibraltar, and Kosovo in Europe; Chinese Taipei, Guam, Hong Kong, and Macau in Asia; American Samoa, New Caledonia, and Tahiti in Oceania; and some American, British, and Dutch overseas territories in the Caribbean. See *Associations*, FIFA, <http://www.fifa.com/associations> (last visited Sept. 30, 2017).

68. See FIFA STATUTES, *supra* note 1, art. 22(1).

This structure allows FIFA to influence the game of football at every level. First, FIFA applies its rules directly to the national member associations and everyone participating in the matches and tournaments organized by FIFA. Second, FIFA's rules have indirect effect on all actors affiliated with national member associations, as these rules set the boundaries within which member associations can design national rules. As a result, FIFA stretches its influence to the very bottom of the structure, where players, coaches, referees, and other individuals—who are neither FIFA members nor members of national associations—are located.

Employment-related questions and participation in various tournaments are the centerpiece of FIFA's rules. To protect its monopoly, FIFA obliges the six confederations to ensure that international football leagues with the participation of local clubs will not be organized without the consent of the affected confederation and the approval of FIFA.⁶⁹ This monopoly is crucial in supporting the proper functioning of FIFA's private order. Employment matters cover relations between the clubs and their primary employees—i.e., professional athletes—as well as relations between clubs regarding the transfer of professional athletes. Both employment aspects are regulated by FIFA's Transfer Regulations.⁷⁰

The principle of contractual stability forms the basis of employment relationships between clubs and professional athletes.⁷¹ Accordingly, a contract between a professional and a club, apart from the contract term's expiry, may only be terminated (i) by the mutual agreement of the parties, (ii) by either party based on just cause, or (iii) by the player who has, in the course of the season, appeared in less than ten percent of the official matches of his/her club (sporting just cause).⁷²

69. *See id.* art. 22.3(e).

70. *See* TRANSFER REGULATIONS, *supra* note 4.

71. Note that not all countries qualify professional athletes as employees under domestic laws. An overwhelming majority of countries—most EU member States and the US included—treat professional athletes as employees, albeit sometimes subject to a special legal regime of employment. *See* Adam Epstein, *The ADEA and Sports Law*, 16 J. LEGAL ASPECTS SPORT 177, 178 (2006) (discussing the status of athletes in the United States); Michele Colucci, *Sport and Contractual Stability: The Italian Case*, 2011 EUR. SPORTS L. & POL'Y BULL. 199, 202 (explaining that professional athletes in Italy, although qualified as employees, are exempt from traditional protections prohibiting employee monitoring by cameras, limiting the repeated use of fixed-term labor contracts, and ensuring employee reinstatement in cases of unilateral dismissal without just cause). For the sake of simplicity, we disregard special treatments offered in some jurisdictions (for example, as a special category of professional athletes or even as enterprises) and assume that all professional footballers are employees.

72. TRANSFER REGULATIONS, *supra* note 4, art. 13 (termination by mutual agreement), art. 14 (termination by just cause), art. 15 (termination on the ground of sporting just cause). The main instance of just cause from the player's perspective is non-payment or late payment of a salary by the club. From the club's perspective, just cause can be present if a player breaches his/her contractual obligations, including failure to report for work. *See* FIFA, COMMENTARY ON THE REGULATIONS FOR THE STATUS AND TRANSFER OF PLAYERS, art. 14, cmts. 3, 4 (2007), http://www.fifa.com/mm/document/affederation/administration/51/56/07/transfer_commentary_06_en_1843.pdf [hereinafter FIFA COMMENTARY]. Sporting just cause applies only to established professional athletes and can be invoked during a fifteen-day period following the club's last official match in the season. *See* TRANSFER REGULATIONS, *supra* note 4, art. 15. An established player is a player who has completed his/her training period and whose level of football skills is "at least equal to or even superior to those of his

Any unilateral termination outside the listed grounds leads to adverse consequences for the terminating party. The scope of these consequences depends on whether the contract is terminated during a so-called “protected period” or after it.⁷³ The protected period is a period of three years after the entry into force of a contract signed prior to the twenty-eighth birthday of the player or a period of two years if the player is older than twenty-eight at the signing date.⁷⁴ If a player terminates the contract during the protected period without just cause, he/she is, as a rule, banned from playing in official matches for four months.⁷⁵ A similar breach during the protected period by a football club results in a restriction from signing new players for two consecutive registration periods, which typically are open before the start of a season and during its middle break.⁷⁶ Thus, the sanction lasts approximately one year. Both players and clubs are not subject to non-monetary sanctions if a contract is terminated after the protected period. However, the terminating party shall always pay monetary compensation, regardless of whether the breach occurs during or after the protected period.⁷⁷ If not set in the contract, the compensation due to a player is normally his/her full salary for the remainder of the contract.⁷⁸ The following case illustrates how the compensation due to a club is calculated if a contract is wrongfully terminated by a player.

In February 2008, Essam El-Hadary, an Egyptian goalkeeper who appeared more than one hundred times in his country’s national team, terminated his employment contract with Egyptian club Al-Ahly Sporting Club and moved to Swiss club Olympique des Alpes SA, known as FC Sion.⁷⁹ The decision to terminate the employment contract unilaterally without just cause and enter into a new contract with FC Sion came after negotiations failed between the two clubs regarding the transfer of Mr. El-Hadary.⁸⁰ Because there was no contractual buyout clause in Mr. El-Hadary’s contract with his former

teammates who play regularly.” FIFA COMMENTARY, art. 15, cmt. 2.

73. TRANSFER REGULATIONS, *supra* note 4, art. 17(3)-(4).

74. *Id.* at 5 (Definition 7) A protected period starts again when the duration of an existing contract is extended. *Id.* art. 17(3).

75. *Id.* art. 17(3). The restriction can be six months if there are aggravating circumstances, such as repeated breaches. See Jean-Philippe Dubey, *The Sanctions Imposed on the Players for Breach or Unilateral Termination of Contract*, 1 CAS BULL. 34, 35-36 (2010) (explaining the established practice that, aside from exceptional circumstances where the playing ban is not applied or its length is reduced, the decision-making body must always apply the sanction).

76. TRANSFER REGULATIONS, *supra* note 4, art. 17(4). The length of a football season is defined by each national association and normally lasts one year on a fall/spring or spring/fall calendar basis. *Id.* art. 6(1)-(2).

77. *Id.* art. 17(1).

78. See *Talaea El Gaish Club v. Dodzi Dogbé*, CAS 2014/A/3675, Award, ¶ 62 (Feb. 27, 2015). The compensation is thus based on the residual value of the player’s employment contract, but if the player takes steps to mitigate his/her losses by starting new employment, the corresponding part of the player’s new salary must be deducted from the amount of the compensation. In contrast, if a player unilaterally terminates his/her employment contract without just cause, CAS considers it more appropriate to apply the “positive interest” approach, which often leads to a compensation amount exceeding the residual value of the player’s contract. See *infra* notes 79-87 and accompanying text.

79. See *FC Sion v. FIFA & Al-Ahly Sporting Club*, CAS 2009/A/1880, *Essam El-Hadary v. FIFA & Al-Ahly Sporting Club*, CAS 2009/A/1881, Award, ¶¶ 6-18 (June 1, 2010) [hereinafter *FC Sion Award*].

80. *Id.*

club, the compensation for the unilateral termination had to be calculated based on Article 17(1) of the Transfer Regulations.⁸¹ In doing so, the arbitrators relied on the so-called principle of “positive interest” or “expectation interest,” which aims to put the injured party in the position it would have been if no contractual breach had occurred.⁸² Accordingly, the compensation awarded to the Egyptian club reflected an amount it had to spend on the market to find an equivalent replacement for the moving player—both in sporting value and the period of remaining contractual time.⁸³ The final award thus included the amount that FC Sion was ready to pay for the player’s transfer (\$600,000), plus the player’s salary under the new contract for the remaining period of the terminated contract (\$488,500).⁸⁴ The player’s salary Al-Ahly Sporting Club saved as a result of the termination (\$292,000) was deducted from the sum.⁸⁵ The amount that Mr. El-Hadary and FC Sion had to pay (\$796,500) exceeded FC Sion’s valuation of the player; that, along with the disciplinary sanctions imposed on both, serve to deter other actors from breaching or inducing to breach existing contracts.⁸⁶ Thus, defining compensation under Article 17(1) of the Transfer Regulations requires taking into account not only the interests of the involved player and club, but also of the whole football community—in particular, the need to promote contractual stability.⁸⁷

For the purposes of contractual stability, the move of a player between two clubs usually follows one of the standard practices. A player whose contract has expired is free to move to any other club of his/her choice.⁸⁸ Players with active contracts are bound to their current clubs and can move based on two grounds. First, the move can be based on the transfer of the

81. *Id.* ¶ 198.

82. *Id.* ¶ 204.

83. *Id.* ¶ 241.

84. *Id.*

85. *Id.* ¶¶ 225-26. Importantly, the third-party decision-maker, when calculating the amount of compensation, has a wide margin of appreciation and can consider different factors that may affect the size of the compensation in each specific case. For instance, if Al-Ahly Sporting Club would have paid a transfer fee for obtaining the services of Mr. El-Hadary, the awarded compensation might have also included the non-amortized part of these expenses. *See id.* ¶¶ 214-15. On the other hand, if there is no specific evidence on the estimated value of the player in the market, the decision-maker may use other calculation methods. *See Sevilla FC SAD v. Udinese Calcio S.p.A.*, CAS 2010/A/2145, *Morgan de Sanctis v. Udinese Calcio S.p.A.*, CAS 2010/A/2146, *Udinese Calcio S.p.A. v. Morgan de Sanctis & Sevilla FC SAD*, CAS 2010/A/2147, Award, ¶¶ 76-78, 86 (Feb. 28, 2011) (where the arbitrators did not include the lost transfer fee and the replacement value of the player in the calculation of the compensation).

86. The player was banned from playing in any official football match for four months, and the club, more severely, was prohibited from registering new players for two registration periods. *See FC Sion Award*, *supra* note 79, ¶¶ 184, 249.

87. *See FC Shakhtar Donetsk v. Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA*, CAS 2008/A/1519, *Matuzalem Francelino da Silva & Real Zaragoza SAD v. FC Shakhtar Donetsk & FIFA*, CAS 2008/A/1520, Award, ¶¶ 153-55 (May 19, 2009) [hereinafter *Matuzalem Award*].

88. Historically, clubs could ask for compensation in exchange for letting a player move even if the player’s contract had expired. The European Court of Justice put an end to this practice in 1995 in consolidated proceedings known as the *Bosman* ruling. *See Case C-415/93, Union Royale Belge des Sociétés de Football Ass’n (ASBL) v. Jean-Marc Bosman*, 1995 E.C.R. I-4921 [hereinafter *Bosman Ruling*].

registration of a player from one club to another.⁸⁹ Second, clubs can enter into a so-called “loan contract,” pursuant to which one club loans a player to another club for a fixed period of time after which the player is bound to return.⁹⁰ Whereas the first ground leads to the termination of the player’s contract with the current club, in the second case the contract is suspended during the entire period that the player is on loan, and the new club, based on the new contract with the player, is obliged to pay the player’s salary.⁹¹

Normally, a club intending to conclude a contract with a professional player who has a valid employment contract must inform the player’s current club before starting negotiations with a player.⁹² After reaching a general agreement on the terms and conditions of employment with a player, the club starts negotiations with the player’s current club.⁹³ If the two clubs agree on the transfer compensation due to the player’s current club, the contract between the player and the club is terminated by mutual agreement and the player can enter into a contract with the new club. A player’s contract may include a so-called “release” clause, which requires the current club to let the player go if another club meets the trigger amount specified in the clause.⁹⁴ In the absence of an agreement between clubs or a contractual release clause, unilateral termination of a contract by a player without just cause is clearly a breach of contract.⁹⁵ Nevertheless, following this breach, a player may start employment with a new club. Certainly, this scenario entails the payment of compensation to the old club for the loss of the player’s services, and it may also trigger non-monetary

89. See TRANSFER REGULATIONS, *supra* note 4, art. 18(3).

90. *Id.* art. 10. Loans often aim to give a promising athlete regular playing time where there are very few opportunities to play on the main team of his/her club of origin. If national football associations do not allow reserve teams to participate in lower tier tournaments, clubs are effectively forced to loan their young players. Chelsea FC of England and Juventus FC and AS Roma of Italy are notorious examples, each loaning out more than twenty players every year, according to TransferMarkt. See generally TRANSFERMARKT, *supra* note 58. A player is expected to be more experienced after returning from a loan. If for the borrowing club this is an opportunity to boost its squad at low cost, the lending club, in addition to offering its young talented players the opportunity to play football regularly, can save on the rising cost of wages. See Gavin Hamilton, *Pogba Leads Record Transfer Spending*, WORLD SOCCER, Oct. 2016, at 24-25.

91. See FIFA COMMENTARY, *supra* note 72, art. 10, cmt. 4(2).

92. TRANSFER REGULATIONS, *supra* note 4, art. 18(3).

93. To protect the new club from the risk of missing a player’s consent to enter into an employment contract after the transfer has been agreed between the two clubs, it is a standard contracting practice to precondition the performance of the transfer agreement on the consent of the player to sign with the new club. See *Real Betis Balompié SAD v. PSV Eindhoven*, CAS 2010/A/2144, Award, ¶ 54 (Dec. 10, 2010).

94. For example, in August 2012, Liverpool FC, an English club, activated the release clause in Joe Allen’s contract with Swansea City AFC, a Welsh football club that plays in the English Premier League. Liverpool FC took advantage of a technicality in the contract that required Swansea City AFC. to allow Mr. Allen to join one of five specified clubs—Liverpool F.C. among them—that offered at least £15 million. Andy Hunter, *Liverpool Close to Signing Joe Allen from Swansea City for £15 Million*, GUARDIAN (Aug. 8, 2012), <https://www.theguardian.com/football/2012/aug/08/liverpool-joe-allen-swanssea-city>. In early June 2016, Borussia Dortmund signed Marc Bartra from FC Barcelona after the player’s release clause fell from an initial €40 million to €8 million because of the limited playing time he received in Barcelona’s matches the previous season. See Andrew Murray et al., *81 Things We Want from the New Season*, FOURFOUR TWO, Sept. 2016, at 62.

95. See Frans M. de Weger, *Webster, Matuzalem, De Sanctis . . . and the Future*, INT’L SPORTS L.J., July-Oct. 2011, at 42, 47.

sanctions.⁹⁶

The amount of compensation for unilateral termination of a contract without just cause may be specified by the parties in advance through a “buyout clause.” This agreement has primacy, such that compensation will be defined based on Article 17(1) of the Transfer Regulations only if there is no *ex ante* agreement.⁹⁷ However, a “buyout clause” should be distinguished from a release clause.⁹⁸ Whereas a buyout clause defines the consequences of a unilateral termination of a contract by either of the parties, a release clause is conditional upon an offer from a third club and aims to secure transfer compensation.⁹⁹ Therefore, a buyout clause allows a player to pay the specified amount to his/her club and terminate the contract prior to its expiry without specifying any reason.¹⁰⁰ In legal terms, buyout clauses are liquidated damages clauses and may thus be invalid under the domestic laws of some countries.¹⁰¹ Formally, the compensation must be paid by the terminating player, but the new club, regardless of its involvement or inducement to terminate, is jointly and severally liable for its payment.¹⁰² Thus, the payment may actually be made by the new club.¹⁰³ In practice, the buyout clause often serves as a starting point in negotiations between clubs, rather than a legal ground for the transfer of players.

B. FIFA's Private Dispute Resolution System

The success of the private legal order built by FIFA relies on the effectiveness of its dispute resolution and enforcement mechanisms. Private adjudication provides information and expertise advantages over adjudication in formal State courts.¹⁰⁴ The results of adjudication are buttressed by an effective enforcement system: if the rules cannot be enforced against their

96. See *supra* notes 77-86 and accompanying text.

97. See, e.g., RCD Mallorca SAD & A. v. FIFA & UMM Salal SC, CAS 2009/A/1909, Award, ¶ 47 (Jan. 2010).

98. See FIFA COMMENTARY, *supra* note 72, art. 17, cmt. 1(3).

99. See de Weger, *supra* note 95, at 44, 56.

100. See FIFA COMMENTARY, *supra* note 72, art. 17, cmt. 1(3).

101. See FC Pyunik Yerevan v. Carl Lombe, AFC Rapid Bucuresti & FIFA, CAS 2007/A/1358, Award, ¶ 23 (May 26, 2008) [hereinafter FC Pyunik Award] (qualifying buyout clauses as liquidated damages clauses). In some countries, buyout clauses in employment contracts with athletes are allowed by special statutory provisions. See FIFA COMMENTARY, *supra* note 72, art. 17, cmt. 1(3) (mentioning special regulation in Spain). Under Spanish law, each player has a right to terminate an employment contract at will anytime; accordingly, exercising such right is not a breach of a contract. This raises a question about the proper legal qualification of the termination compensation—i.e., whether it is liquidated damages or some form of indemnification for the loss of the services of a player. See Law Regulating the Special Employment Relationship of Professional Athletes arts. 13(i), 16 (B.O.E. 1985, 153) (Spain).

102. TRANSFER REGULATIONS, *supra* note 4, art. 17(2); FIFA COMMENTARY, *supra* note 72, art. 17, cmt. 1(4).

103. See, e.g., Sevilla FC v. RC Lens, CAS 2010/A/2098, Award, ¶ 10 (Nov. 29, 2010) (where Malian football player Seydou Keita unilaterally terminated his employment contract with Sevilla Fútbol Club SAD, a Spanish football club, and the club received the amount specified in the buyout clause from another Spanish club, Fútbol Club Barcelona, through the offices of the Spanish National Professional Football League).

104. See *infra* pp. 129-30.

infringers, or the rules can be challenged in public courts, the whole system of rules will be shattered.

Disputes within FIFA are resolved by the internal judicial bodies of FIFA. These are the Disciplinary Committee, which is responsible for imposing sanctions according to the FIFA Disciplinary Code; the Ethics Committee, which may pronounce sanctions provided by the FIFA Ethics Code; and the Appeal Committee, which hears appeals from both.¹⁰⁵ These judicial bodies resolve disputes based on the FIFA regulations or, in the absence of relevant rules, first, in accordance with FIFA's customs and, second, pursuant to the rules they would lay down if they were acting as legislators.¹⁰⁶ Disputes arising from international transfers of players are considered by another internal body, the Dispute Resolution Chamber of the FIFA Players' Status Committee.¹⁰⁷

In addition to the internal mechanisms of dispute resolution, FIFA recognizes the mandatory jurisdiction of the Court of Arbitration for Sport (CAS) to decide on disputes between FIFA, its members, confederations, leagues, clubs, players, intermediaries, and other involved parties.¹⁰⁸ The CAS, founded in 1984 and headquartered in Lausanne, Switzerland, is an international arbitration court for resolving sports-related disputes and is independent from FIFA.¹⁰⁹ FIFA's members and six confederations have not only agreed to be bound by the decisions of the CAS, but they are also obligated by the FIFA membership rules to create mechanisms that will ensure compliance with these decisions by their member clubs and affiliated athletes and coaches.¹¹⁰

FIFA recognized the CAS as a final appeal jurisdiction in 2002, and this has dramatically increased the caseload of the court.¹¹¹ The court's 367 arbitrators, of which only ninety-two are eligible to consider football-related disputes, received a record 503 filings in 2015, compared with less than one hundred complaints filed annually during the 1990s.¹¹² In practice, most cases are considered by a panel of three arbitrators, though there are also cases

105. See FIFA STATUTES, *supra* note 1, arts. 62 (Disciplinary Committee), 63 (Ethics Committee) & 64 (Appeal Committee).

106. See DISCIPLINARY CODE, *supra* note 4, art. 144.

107. See FIFA STATUTES, *supra* note 1, art. 54(2); TRANSFER REGULATIONS, *supra* note 4, art. 24(1).

108. See FIFA STATUTES, *supra* note 1, art. 66.

109. See Richard H. McLaren, *Twenty-Five Years of the Court of Arbitration for Sport: A Look in the Rear-View Mirror*, 20 MARQ. SPORTS L. REV. 305, 306, 309 (2010); Louise Reilly, *An Introduction to the Court of Arbitration for Sport (CAS) and the Role of National Courts in International Sports Disputes*, 2012 J. DISP. RESOL. 63, 63-64.

110. See FIFA STATUTES, *supra* note 1, art. 68(1).

111. See McLaren, *supra* note 109, at 315. This recognition, given the growing interest of public bodies to intervene in sports, was driven by the strategy to keep formal courts and public law away from football. See Antoine Duval, *The Court of Arbitration for Sport and EU Law: Chronicle of an Encounter*, 22 MAASTRICHT J. EUR. & COMP. L. 224, 225-26 (2015).

112. *List of Arbitrators (General List)*, CT. ARB. FOR SPORT, <http://www.tas-cas.org/en/arbitration/list-of-arbitrators-general-list.html> (last visited Nov. 8, 2017); *List of Arbitrators (Football List)*, CT. ARB. FOR SPORT, <http://www.tas-cas.org/en/arbitration/list-of-arbitrators-football-list.html> (last visited Nov. 8, 2017); *Jurisprudence*, CT. ARB. FOR SPORT, <http://jurisprudence.tas-cas.org/Help/Home.aspx> (last visited Nov. 8, 2017).

decided by one arbitrator.¹¹³ Currently, football-related disputes account for about thirty to forty percent of all cases considered by the CAS.¹¹⁴ Most are appeals from the decisions of the internal judicial bodies of FIFA.¹¹⁵ The cases involve contractual disputes between clubs, clubs and players, or intermediaries and clubs; indeed, there are also disciplinary cases.¹¹⁶ The CAS resolves all these disputes by applying primarily the various regulations of FIFA and, additionally, Swiss law.¹¹⁷

Internal judicial bodies and the recognition of the CAS as an independent appeal instance form the system that aims to resolve disputes without external influence.¹¹⁸ This system is further backed by a waiver of any right to take recourse to ordinary courts of law.¹¹⁹ FIFA takes significant efforts to prevent external intervention into its legal order. An actor who successfully takes a dispute to formal State courts not only imposes costs on its counterparty by escaping from its obligations, but also creates a negative externality for all other actors, for any such intervention reduces the clarity of the established rules of behavior. First, the new interpretation of the challenged rule changes the case law of the internal dispute resolution bodies and might require an involved re-thinking of compliance measures. If internal dispute resolution bodies do not update their case law, losing parties in similar future cases are likely to challenge decisions in State courts. Second, any successful challenge provides other actors that lose their arguments in the internal dispute resolution venues, both in similar and different cases, with stronger incentives to seek justice elsewhere.

C. The Ties that Bind: The System of Sanctions and Incentives Promoting Compliance with the Decisions of the Private Dispute Resolution Bodies

FIFA not only has its own dispute resolution system but also has developed effective enforcement mechanisms relying on sanctions and, to a lesser extent, reputation and social ties. Without such mechanisms, the value added by the private legal order would be shattered, for any actor dissatisfied

113. Original Research (on file with authors). We coded all football-related CAS awards that were decided between 1998 and 2015 and published in the database of CAS awards. *See Database*, CT. ARB. FOR SPORT, www.tas-cas.org/en/jurisprudence/archive.html (last visited Nov. 12, 2017). The total number of coded awards is 326, of which 252 were decided by three arbitrators and forty cases were decided by one arbitrator. Thirty-four awards lacked information on the number of arbitrators.

114. *See McLaren*, *supra* note 109, at 315.

115. *See FIFA STATUTES*, *supra* note 1, art. 64(2) (stipulating that recourse may only be made to the CAS after all other internal channels have been exhausted).

116. *See Ulrich Haas, Applicable Law in Football-Related Disputes: The Relationship between the CAS Code, the FIFA Statutes and the Agreement of the Parties on the Application of National Law*, 2 CAS BULL. 7 (2015).

117. *See FIFA STATUTES*, *supra* note 1, art. 66(2). The role of Swiss law is only to assist in interpreting the rules of FIFA. *See Haas*, *supra* note 116, at 15-16.

118. *See Kate Youd, The Winter's Tale of Corruption: The 2022 FIFA World Cup in Qatar, the Impending Shift to Winter, and Potential Legal Actions against FIFA*, 35 NW. J. INT'L L. & BUS. 167, 181 (2014).

119. *See infra* Section III.B (describing the obligation to refrain from taking disputes outside the system mandated by FIFA and the mechanisms for enforcing this obligation).

with the decision entered against it could easily challenge it elsewhere by asking for the application of relevant State-made laws.¹²⁰ Therefore, one of the main concerns of FIFA is ensuring compliance with its rules and decisions.¹²¹ And FIFA has put in a great deal of effort to achieve this objective.

The sanction system includes fines, temporary bans, or ostracism.¹²² They may be applied directly to member associations which, under the threat of sanctions, are obliged to comply with the regulations and decisions of FIFA, as well as with the decisions of the CAS.¹²³ Clubs, players, and other involved actors may be subject to direct sanctions as well, but in many instances FIFA reaches them indirectly through the relevant member association. It is the member associations' obligation to ensure that their own members—that is, football clubs—and affiliated players comply with all applicable rules and decisions.¹²⁴

Organized football is not available to everyone. In order to play in organized football—national leagues organized by a member association or international competitions under the aegis of a confederation of which the association is a member—football players must be registered with a member association of FIFA.¹²⁵ The registration implies that a player agrees to be bound by the rules of FIFA, the respective confederation, and the national association. This agreement is key in extending FIFA's reach to players. Since players are not, formally, members of FIFA or of its member associations, the registration system is needed to give players incentives to comply with the rules. The alternative to registration is ostracism—an absolute prohibition to take part in organized football.¹²⁶

The most effective compliance-encouraging instrument for clubs is the regular obligation, typically on an annual basis, to go through a licensing procedure as a condition to participating in international and top-division national competitions.¹²⁷ Under the Licensing Regulations, an applicant must recognize the binding effect of FIFA's private legal order and promise to keep disputes within the “football family” by refraining from filing petitions and complaints with ordinary courts.¹²⁸

120. See *infra* Section III.A (describing challenges to FIFA's legal order from State law).

121. FIFA's other main concern is the protection of its private legal order from outside challenges. See *infra* Section III.B (exploring the interests and incentives of different actors to challenge the private legal order of FIFA).

122. There are also other sanctions specific to the type of the infringer. Clubs, for instance, may be subject to a deduction of points or relegation to a lower competition level. See DISCIPLINARY CODE, *supra* note 4, art. 64(1)(c).

123. See FIFA STATUTES, *supra* note 1, art. 13(1)(a).

124. See *id.* arts. 13(1)(d), 68(1).

125. See *id.* art. 5(1).

126. See *id.*

127. See LICENSING REGULATIONS, *supra* note 4, art. 2.2.9. National associations must decide to which clubs the licensing requirement applies; as a minimum, the requirement is applicable to top-division clubs that qualify for international competitions on sporting merit, but it is best practice to implement the club licensing system for all top-division clubs of the national association. *Id.* In strict legal terms, a license is granted to a legal entity responsible for a football team participating in national and international competitions. See *id.* art. 4.3.1.1.

128. See *id.* art. 9.2.1.

Accordingly, FIFA uses three means for extending its reach to non-members. First, FIFA can apply its regulations directly to everyone participating in matches and competitions organized by FIFA, like the FIFA World Cup.¹²⁹ Second, member associations are charged with applying FIFA regulations directly to all affected parties within their borders.¹³⁰ And, third, member associations are under obligation to transpose FIFA regulations into national regulations.¹³¹ In the last case, the FIFA regulations establish the minimum line, and member associations are free to establish stricter rules.

The effect of sanctions is leveraged by the monopoly power of FIFA. Consider the right of FIFA to suspend a member association for a specific period or to expel it fully from FIFA for failure to comply with its obligations.¹³² This punishment is credible only if other members of the community are willing to participate in its enforcement by refusing to deal with the infringer.¹³³ FIFA achieves this by making participation in collective punishment part of the equilibrium. In particular, member associations may not entertain sporting contacts with a suspended or expelled member.¹³⁴ Given FIFA's monopoly, this in fact means that national teams and licensed clubs from the suspended or expelled country cannot participate in any organized game with national teams or clubs from other associations. Similarly, if a ban on any football-related activity is imposed on an individual—for example, a player—all clubs will be held liable for registering the “outlawed” player.¹³⁵ In the absence of non-FIFA affiliated tournaments that can generate significant financial rewards, compliance with the established rules and participation in the enforcement of FIFA's rulings is an inevitable decision. The lack of alternatives explains why every involved party commits to be bound by the rules of the game in the first place and abides by this commitment subsequently.

Reputation or unwritten norms of behavior play a certain role as well, although this role is far more limited compared to other instances of promoting cooperation through private means of governance.¹³⁶ First, clubs deal with each other regularly in national and international transfer markets when they sign players over to one another. Strained relationships based on prior dealings,

129. See DISCIPLINARY CODE, *supra* note 4, art. 2.

130. See, e.g., *id.* art. 70(1).

131. See, e.g., LICENSING REGULATIONS, *supra* note 4, art. 1.

132. See FIFA STATUTES, *supra* note 1, arts. 14, 15; DISCIPLINARY CODE, *supra* note 4, art. 64(1)(d).

133. See DIXIT, *supra* note 18, at 63-64; Avinash Dixit, *Governance Institutions and Economic Activity*, 99 AM. ECON. REV. 5, 9, 12-13 (2009) (noting that collective action problems of punishment can be solved by stipulating equilibrium strategies where taking punishment actions is part of compliance with the rules of the game); see also Greif et al., *supra* note 7, at 757-58 (documenting various strategies used by medieval merchant guilds for sustaining credibility of their sanctions, including by imposing fines or commercial sanctions on their non-complying member merchants).

134. See FIFA STATUTES, *supra* note 1, art. 16(3).

135. See TRANSFER REGULATIONS, *supra* note 4, art. 11.

136. For example, compare the following discussion with Barnett, *supra* note 27, at 646, explaining the role of reputational capital in contracts with established Hollywood stars, and Bernstein, *supra* note 27, at 592-96, 604-07, showing how relational ties substitute or complement procurement contracts of large original equipment manufacturers.

however, can be the reason for rejecting any friendly contacts in the future. A hostile move by one party can spark retaliation by another.¹³⁷ In addition, it is common for strong rivalries between clubs to create additional pressure for players not to move to the “enemy” camp.¹³⁸ This might suffice to support bilateral cooperation without external intervention, but it cannot satisfy the conditions for successful multilateral cooperation.¹³⁹ Indeed, given the extremely large number of involved actors, as well as the geographical lines of demarcation among member associations and confederations, reputation alone is not enough to foster support for collective punishment of wrongdoers. For example, a player rejected in one country (or region) can find employment in another.¹⁴⁰

Second, reputation mechanisms are further strengthened by the involvement of specialized intermediaries between the clubs and players. Previously known as agents, these intermediaries perform two tasks: they (1) negotiate better terms for their clients and (2) close information gaps between players and clubs.¹⁴¹ While the first task is clear, the second needs further explanation. Each intermediary typically has a pool of players and is well aware of these players’ abilities. Accordingly, an intermediary can offer the services of its clients to clubs that have specific needs.¹⁴² For example, one club may look for a midfield player with an ability to support teammates in an intense high-pressure game, whereas another may need a midfielder who can exploit open spaces and readily find teammates to pass the ball to. Top clubs

137. Information about the existence of a gentlemen’s agreement among a group of about two hundred European clubs not to employ players who had terminated their contracts unilaterally, which was denied by the European Club Association, surfaced in 2013. See *Article 17: Rummenigge Furious, FIFPro Reacts*, FIFPRO (Dec. 13, 2013), <https://www.fifpro.org/news/article-17-rummenigge-furious-fifpro-reacts/en>.

138. One of the most controversial transfers in the history of football was the decision of Luis Figo, the once Portugal captain, to swap FC Barcelona for their long-standing rivals CF Real Madrid in the summer of 2000. FC Barcelona’s supporters felt so betrayed and angry that a pig’s head and coins were thrown at him when he returned with Madrid to the Nou Camp for the Spanish *La Liga* game between the two clubs. See Sarah Edworthy, *8 Footballers Who Have Sparked Fans’ Fury by Leaving in Acrimony*, DAILY TELEGRAPH, Feb. 19, 2005, at 6; *Loyalty’s for Mugs? The Men Who Crossed the Great Divide*, DAILY MIRROR, May 27, 2004, at 79.

139. See *supra* note 40 and accompanying text.

140. Clubs from leagues in North American, East Asian, and Middle East countries, which are not yet competing with top European leagues in terms of either sporting or financial power, can use these situations as an opportunity to snap up talented players who are otherwise reluctant to play in these leagues.

141. Some intermediaries have a much larger role. They may have a key influence on the player’s football career, particularly by motivating and directing him at a young age. For instance, Mino Raiola, one of the most influential intermediaries in modern football, offers personal services to each of his clients, varying from dealing with daily routines to managing their funds: the former may include a call from a player asking for shopping advice; at the other extreme, Mr. Raiola reportedly manages a whopping €900 million investment portfolio in the interests of his clients. See Simon Kuper, *The Dealmaker*, FIN. TIMES, Oct. 29, 2016, at 16; Skype Interview with Former Legal Counsel, Undisclosed FIFA Member Association (Sept. 6, 2016) (source requesting confidentiality).

142. Professor Bernstein has advanced a similar argument in other contexts. See Bernstein, *The Diamond Industry*, *supra* note 10, at 133 (arguing that brokers reduce transaction costs in the diamond trade because they can obtain relevant information at lower cost than individual buyers and sellers—the chief reason being that the information obtained by brokers is less transaction-specific and can be offered to many interested parties); Lisa Bernstein, *The Silicon Valley Lawyer as Transaction Cost Engineers?*, 74 OR. L. REV. 239, 246-47 (1995) (depicting a similar role for lawyers in Silicon Valley).

often bring this task “in-house” by employing special data analysts and scouts who study player performance statistics and attend youth tournaments worldwide to select talented players for their employers.¹⁴³ Although this tendency has arguably reduced the role of intermediaries,¹⁴⁴ it cannot compensate for the intermediaries’ knowledge about the personalities of players.

Many of these intermediaries are repeat players and thus have strong incentives to protect the reputational capital that they have developed in a close-knit industry of top clubs and football academies. As a result, they mostly act according to the established norms of behavior. But the world of intermediaries is big, and outside the small group of global or local top agents, self-governance is pushed to the margins.

Apart from sanctions and reputation, clubs and other actors put peer-pressure on each other to comply with the decisions of FIFA’s dispute resolution bodies. There are two reasons for this. First, clubs that have been punished and complied with imposed sanctions have an interest in others complying as well, because non-compliance by others will impair the level playing field by putting complying actors in a disadvantaged position. Second, and more importantly, FIFA has developed sanctions that punish the entire collective if one of the actors fails to comply with a ruling entered against it. Accordingly, everyone in the collective is strongly interested in ensuring compliance by the wrongdoer.¹⁴⁵ The case of *FC Sion* is illustrative.

As described earlier, the case concerning Mr. El-Hadary imposed a one-year ban on Swiss club FC Sion to sign new players.¹⁴⁶ Notwithstanding this ban, FC Sion signed six new players and, after securing the order of a local court stating that the new players were eligible to play, fielded them against Celtic FC, a Scottish club, in a qualifying match of the Europa League in August 2011. Although the Swiss club was the winner of the match, the Union of European Football Associations (UEFA) disqualified the club from the competition for breaching the transfer ban imposed on it; FC Sion’s place in the tournament was handed to the Scots. FC Sion brought the dispute to Swiss courts and obtained an interim measure—later ignored by UEFA—ordering the reinstatement of the club in the Europa League.¹⁴⁷ In December 2011, FIFA

143. See, e.g., Jack Gaughan, *Manchester United Appoint 50 New Scouts in Double-Quick Time as Premier League Giants Scour the Globe for the Next Generation of Young Talent*, DAILY MAIL (Oct. 13, 2016), <http://www.dailymail.co.uk/sport/football/article-3835049/Manchester-United-appoint-50-new-scouts-double-quick-time-Premier-League-giants-scour-globe-generation-young-talent.html> (describing the rise of football scouts and the importance of identifying talent in ensuring sustainable sporting success); Adam Isaacs, *Analytics Level Playing Field in Identifying Football Talent*, FIN. TIMES (Dec. 1, 2014), <https://www.ft.com/content/d153fb1a-637b-11e4-8a63-00144feabdc0>.

144. See Simon Kuper, *Clout of Football Managers Relegated by Data and the Total Squad Wage Bill*, FIN. TIMES, Aug. 13, 2016, at 3 (“Whereas managers used to make new signings based on intuition, tips from friendly agents and chance past experiences of a player, now transfers are increasingly informed by data.”).

145. See generally GREIF, *supra* note 33, at 310-11 (explaining the incentives structure of the medieval community responsibility system).

146. See *supra* note 86.

147. FC Sion and several of its players also complained to the European Commission and the Swiss competition authority about the behavior of UEFA. They argued that UEFA’s refusal to reinstate

stepped up the dispute, threatening to suspend the Swiss Football Association—and therefore its member clubs—should the authorities fail to impose sanctions on FC Sion for using ineligible players.¹⁴⁸ This put additional peer-pressure on the management of FC Sion.¹⁴⁹

To conclude, this is an example of an effective complex enforcement system that is not backed by the coercive power of any State. FIFA acts as a coercive power itself; in addition, incentive mechanisms complement the sanctions.¹⁵⁰

III. THE PARALLEL WORLD OF PUBLIC LAW AND THE MECHANISMS OF LOCKING IN FIFA'S PRIVATE LEGAL ORDER

This Part describes the challenges to FIFA's private legal order that come from public law. The analysis then moves to the mechanisms that FIFA uses to promote the exclusive reliance of actors on its private order.

A. Challenges to the Private Legal Order from Public Law

1. Employment Laws and FIFA's Transfer Regulations

FIFA's Transfer Regulations create strong tensions between FIFA's regulatory autonomy and the sovereign jurisdictions of its member associations (and supra-national organizations, such as the EU). Apart from the Transfer Regulations and the corresponding rules adopted by the continental confederations and national football associations, clubs and their players also have to adhere to national and supra-national labor laws. This system of overlapping, and sometimes contradicting, rules has its origins in the historical practice of national and international legislatures refraining from regulating the area of sports, thereby leaving the ordering of the matter to the sporting associations themselves.¹⁵¹ Figure II below illustrates the relationships between the different levels of public and private ordering.

the club in the Europa League was an abuse of a dominant position.

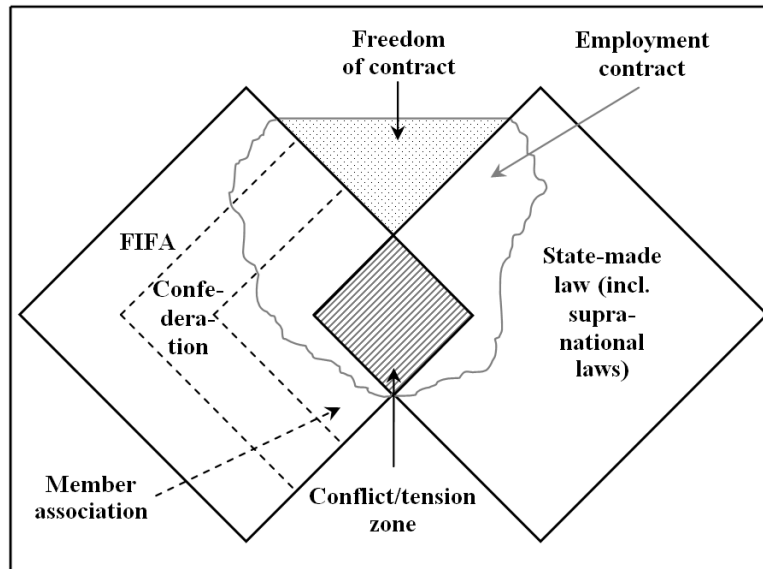
148. This narrative is based on official documents and news articles compiled by History Commons. See *Football Business and Politics: FC Sion Affair*, HIST. COMMONS, http://www.historycommons.org/timeline.jsp?timeline=ftbl_bus_pol_tmnl&ftbl_bus_pol_tmnl_specific_issues=ftbl_bus_pol_tmnl_fc_sion_affair (last visited Sept. 30, 2017).

149. See Graham Dunbar, *FIFA Threat to Suspend Switzerland over Sion Case Jeopardizes Basel Place in Champions League*, ASSOCIATED PRESS (Dec. 17, 2011) (describing the efforts of the vice president of a rival Swiss club, FC Basel, in securing the support of other European clubs to end the resistance by the management of FC Sion).

150. See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 247 (1979) (showing that unless ostracism or a reputation-related private remedy is available because the dispute is between members of a close-knit community, a public remedy will often be necessary to induce parties to submit the dispute to arbitration and comply with the arbitrator's award).

151. See Steven F.H. Jellinghaus, *Een introductie tot sport en recht*, ARBEID INTEGRAAL, no. 3, 2003, at 70-71; see also MARCO MOSSELMAN, *INLEIDING SPORT EN RECHT* 16, 54 (2012); HEIKO VAN STAVEREN, *SPORT EN RECHT* 34-46 (2007).

Figure II. The Relationship of Labor Rules in Football



Tensions between different levels of employment rules are especially visible in matters such as employee discrimination, the freedom to choose employment, and the freedom of movement. Each is described briefly below.

Employee Discrimination. Rules restricting the number of foreign players that a football club is allowed to register, as well as their eligibility to play, are commonplace among national associations. Numerous national football associations—such as that of China, Russia, and the United States—have quotas in place today,¹⁵² whereas some national associations within the EU maintain a quota that distinguishes between EU and non-EU nationals.¹⁵³ This limit has led to several lawsuits filed with the European Court of Justice (ECJ) and the CAS.¹⁵⁴ Football governing bodies upheld foreign player quotas, but

152. In China, each club can have only five foreign players, of which only three can play at any one time. See Ben Bland, *China Limits Foreign Footballers to Develop Domestic Players*, FIN. TIMES, Jan. 17, 2017, at 9. The clubs of the Russian Premier League are not allowed to field more than six players that are not eligible to play for the Russian national team. See RUSSIAN FOOTBALL UNION, REGULATIONS OF THE RUSSIAN FOOTBALL CHAMPIONSHIP AMONG THE TEAMS OF THE CLUBS OF THE PREMIER LEAGUE, 2016–2017, art. 5.10, <http://rfpl.org/rfpl/documents/> (in Russian). The rules of Major League Soccer, the men’s professional soccer league in the United States and Canada, allocate 176 international roster spots among the twenty-two clubs. Each club was given eight international roster spots in 2008. Since there is no limit on the number of international players on each club’s roster and the spots can be traded, currently some clubs have more than eight international players. The total number of international players in the league, however, cannot exceed the maximum limit. See MAJOR LEAGUE SOCCER, 2017 MLS ROSTER RULES AND REGULATIONS (Feb. 2017), <https://www.mlssoccer.com/league/official-rules/mls-roster-rules-and-regulations>.

153. See *Rules for Non-EU players*, GOLDEN GOALS, <http://www.goldengoals.com/content/rules-for-non-eu-players> (last visited Sept. 30, 2017).

154. See, e.g., Case C-152/08, *Real Sociedad de Fútbol SAD and Nihat Kahveci v. Consejo Superior de Deportes and Real Federación Española de Fútbol*, 2008 E.C.R. I-06291; *Racing Club Asociación Civil v. FIFA*, CAS 2014/A/3536, Award (May 5, 2015); see also Zeynep Ilay Gümrük, *The European Court of Justice’s Ruling in the Kahveci Case Lights the Way for Other Turkish National*

the ECJ rebuked these decisions on the matter of treating players from all EU member States as “domestic” and non-EU players as “foreign.”¹⁵⁵ Nevertheless, the problem remains unsolved in countries like Italy and Spain.¹⁵⁶ Instead, there is a movement in the opposite direction: national football associations that do not currently have quotas in place opt for their introduction in the future (for example, as planned by the English Football Association and declared by its chairman Greg Dyke).¹⁵⁷ Restrictive quotas are imposed for employees in no private field other than football, for such quotas would be blatant discrimination.¹⁵⁸

Freedom to Choose Employment. Football players are strictly bound to their employment contracts and have limited means to terminate employment during a contract’s term.¹⁵⁹ The inability of players to terminate their contracts without cause, before expiry and without paying compensation, is in stark contrast to traditional employment law, according to which employees are free to end employment without cause by prior notice. The special treatment of football players comes close to forced or compulsory labor.¹⁶⁰ As explained above, early termination of an employment contract by a player without just cause always leads to the payment of compensation to the player’s club and may also result in a temporary ban from playing.¹⁶¹

Freedom of Movement. The freedom of movement for workers, which is implicitly involved in the discussion above, is a problem particular to EU law.¹⁶² The groundbreaking case here is the *Bosman* ruling of the ECJ.¹⁶³ Prior to this decision, football players were tied to their clubs indefinitely and could move between clubs only after the payment of compensation. When the employment contract of Jean-Marc Bosman, a Belgian player, expired with his club Royal Club Liégeois SA, he intended to move to USL Dunkerque, a French football club. The latter, however, was not willing to pay the transfer

Sportsmen in the European Union, 2 ANKARA B. REV. 102, 111-12 (2009).

155. See Case C-152/08, *Real Sociedad de Fútbol SAD*, 2008 E.C.R. I-0629, ¶ 32 (holding that limits on the number of lawfully employed non-EU national players authorized to play in competitions organized at the national level amount to discrimination on grounds of nationality); Case C-265/03, *Igor Simutenkov v. Ministerio de Educación y Cultura, Real Federación Española de Fútbol*, 2005 E.C.R. I-2596, ¶ 41 (same).

156. See *Rules for Non-EU players*, *supra* note 154 (explaining that national associations in both countries continue applying quotas that distinguish between EU and non-EU nationals).

157. See Ben Smith, *FA’s Greg Dyke Announces Plans to Restrict Non-EU Players*, BBC (Mar. 23, 2015), <http://www.bbc.com/sport/football/32024808>.

158. See H.W.P. van den Hout, *6+5=11: Nationaliteitsclausules na het Bosman-arrest*, ARBEIDSRICHT, no. 3, 2009, at 13, 13-14.

159. See *supra* notes 71-72 and accompanying text.

160. More than three decades ago, the European Commission of Human Rights, the predecessor of the European Court of Human Rights, refused to qualify pre-*Bosman* transfer rules as leading to forced labor. See *X. v. Netherlands*, App. No. 9322/81, 32 Eur. Comm’n H.R. Dec. & Rep. 180, 183 (1983) (explaining that the applicant voluntarily chose to become a professional football player, knowing that he would be affected by the transfer rules).

161. See *supra* notes 72, 73, 77 and accompanying text.

162. The freedom of movement for workers is one of the four economic freedoms within the EU. See Consolidated Version of the Treaty on the Functioning of the European Union art. 45, May 9, 2008, 2012 O.J. (C 326) 47, 65-66 [hereinafter TFEU].

163. *Bosman Ruling*, *supra* note 88.

fee, and, as a result, the Belgian football authorities did not transfer the player's certificate, rendering Mr. Bosman ineligible to play in France. Mr. Bosman took the matter to court, and the ECJ declared the rule incompatible with the freedom of movement for workers and competition law.¹⁶⁴ This decision shook up the entire football world at the time, leading to the reshaping of transfer rules into the order we know today.¹⁶⁵

The concept of contractual stability has been introduced into player transfer rules to replace the pre-*Bosman* system of transfer fees.¹⁶⁶ Accordingly, transfer fees due after the expiry of a contract have been substituted with compensation due for the unilateral termination of a valid contract without just cause. The new system, which is a product of negotiations between the European Commission, FIFA, UEFA, and FIFPro (the latter a global organization representing the interests of professional football players) aims to promote contractual stability between players and clubs while respecting each player's right to free movement.¹⁶⁷ Nevertheless, the prevailing interpretation of Article 17 of the Transfer Regulations by FIFA's internal dispute resolution bodies and the CAS strongly favors contractual stability over free movement.¹⁶⁸ It is fair to acknowledge that even involvement of the EU has not forced football's special legal order to comply with the requirements of formal State laws.

2. Competition Laws and the Monopoly of FIFA

Anti-competitive activities are a main feature of the European Union's work, particularly that of the European Commission, due to potential implications for free trade and the common market.¹⁶⁹ The powers of the Commission are based on Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).¹⁷⁰ The way FIFA can run afoul of these regulations is extensively discussed in literature, so we merely present a brief overview.¹⁷¹

FIFA has a near-monopoly in organizing official football tournaments.¹⁷² Relying on its regulatory rights, FIFA can restrict access to the market, thereby

164. *See id.*

165. *See* Steven F.H. Jellinghaus, *Het opleidings- en solidariteitssysteem van de FIFA: de stand van zaken*, ARBEIDSRECHTERLIJKE ANNOTATIES, no. 2, 2005, at 4, 27-31.

166. *See* Matuzalem Award, *supra* note 87, ¶ 79.

167. *See* Paul A. Czarnota, *FIFA Transfer Rules and Unilateral Termination Without "Just Cause"*, 2 BERKELEY J. ENT. & SPORTS L. 1, 3-5, 7 (2013).

168. *See id.* at 37-38.

169. *See* DAMIAN CHALMERS, GARETH DAVIES & GIORGIO MONTI, EUROPEAN UNION LAW 943 (2014).

170. *See* TFEU, *supra* note 162, arts. 101-02. Article 101 deals with distortion of the market by agreements between competitors, such as price-fixing, and Article 102 covers abuse of a dominant position in a specific market.

171. *See, e.g.*, RICHARD PARRISH, SPORTS LAW AND POLICY IN THE EUROPEAN UNION 109-59 (2003); Ben Van Rompuy, *The Role of EU Competition Law in Tackling Abuse of Regulatory Power by Sports Associations*, 22 MAASTRICHT J. EUR. & COMP. L. 179, 198-206 (2015).

172. *See supra* note 69 and accompanying text.

entrenching its market power.¹⁷³ FIFA can refuse to authorize an event organized by a potential competitor or, alternatively, can prohibit the participation of its members—and, thus, football clubs and players—in competitor-organized events. As a result, FIFA can effectively establish barriers for competition.¹⁷⁴ Though not challenged directly, competition authorities and courts in Europe have already considered several cases that could be easily extended to FIFA.¹⁷⁵ Other competition law challenges to FIFA might involve its rules on third-party ownership¹⁷⁶ and player transfers.¹⁷⁷ These and similar potential actions taken against FIFA under both articles of the TFEU could void and imperil many of FIFA's actions.¹⁷⁸ An additional problem is the European Commission's insistence on pursuing its competition policy through national courts, which is discussed next.

3. Access to Justice and the Prohibition on Filing Complaints in Public Courts

FIFA's compliance with the fundamental freedoms and anti-competition law is not subject to challenges solely from the EU bodies, either acting on their own or on a request; national courts also have a duty to uphold EU laws and principles. It is therefore not surprising that FIFA has been "fiercely territorial" when it comes to athletes bringing cases in national courts¹⁷⁹ and actually prohibits such action in its statutes.¹⁸⁰ Member associations, in turn, have to prevent their members from going to the courts.¹⁸¹ Clauses prohibiting access to courts are void in many legal systems.¹⁸² However, football players seeking to have such clauses struck down would face substantial risk; bringing a case to court is accompanied by heavy internal sanctions for the member allowing it and negative consequences for the athlete's personal career.¹⁸³

173. See Van Rompuy, *supra* note 171, at 199.

174. See *id.*

175. Two cases—one at the EU level and one at the national level—considered the power of sport associations to block the organization of sporting events by competing bodies. In *FIA/Formula One*, the European Commission considered whether the *Fédération Internationale de l'Automobile* (or FIA), the governing body for motor sport, used its power to block the organization of competing races. In *Gargano Corse/ACI*, the Italian national competition authority questioned whether the regulations of the domestic motor sport association intended to restrict competition by prohibiting the arrangement of motor sport events by private organizers. Three other national cases—one from Ireland and two from Sweden—focused on the right of sport associations to effectively restrict competition by discouraging athletes from competing in events run by other organizations. See Van Rompuy, *supra* note 171, at 200-06 (describing all five cases).

176. See W. Tyler Hall, Comment, *After the Ban: The Financial Landscape of International Soccer after Third-Party Ownership*, 94 OR. L. REV. 179, 202-15 (2015).

177. See Richard Parrish, *Article 17 of the FIFA Regulations on the Status and Transfer of Players: Compatibility with EU Law*, 22 MAASTRICHT J. EUR. & COMP. L. 256, 267-75 (2015).

178. See Van Rompuy, *supra* note 171, at 207.

179. See Burgess Williams, *The Fate of Third Party Ownership of Professional Footballers' Rights: Is a Complete Prohibition Necessary?*, 10 TEX. REV. ENT. & SPORTS L. 79, 95-96 (2009).

180. See FIFA STATUTES, *supra* note 1, art. 59(2)

181. See *id.* art. 59(1)-(3).

182. See, e.g., Ian Blackshaw, *ADR and Sport: Settling Disputes through the Court of Arbitration for Sport, the FIFA Dispute Resolution Chamber, and the WIPO Arbitration and Mediation Center*, 24 MARQ. SPORTS L. REV. 1, 38 (2013).

183. See *infra* notes 204-05 and accompanying text.

Nevertheless, there are a few potential problems for FIFA and other sports organizations that seek to shield their disputes from external judicial scrutiny. First of all, there is always the possibility that a player will ignore all of the obstacles and will bring a dispute to a State court anyway.¹⁸⁴ Secondly, standard clauses on accepting the exclusive jurisdiction of the CAS are controversial, given the question of whether their acceptance is voluntary.¹⁸⁵ Indeed, in an ongoing dispute in Germany, the appeal court of Munich (*Oberlandesgericht München*) struck down the exclusive arbitration clause of a sport association as invalid.¹⁸⁶ Thirdly, the parties to disputes are often able to rely on FIFA's internal mechanisms to ensure that CAS awards are enforced; but, like any arbitral award, they might need the help of State courts.¹⁸⁷ Some courts, like those in Switzerland and France, apply a very light review, but some are more critical: for example, in the *Wilhelmshaven* case, a German court held that it could not enforce a CAS award without going against public policy, namely EU laws concerning free movement.¹⁸⁸ Therefore, by ignoring public laws, FIFA and the CAS might expose themselves to outside interference.¹⁸⁹

B. Keeping Governments and Public Courts at Bay: Mechanisms for Advancing the Exclusive Use of the Private Legal Order

Section III.A shows that FIFA's rules and regulations, particularly player transfer rules and the exclusivity of official tournaments organized under the helm of FIFA, may be in conflict with the laws of States and supra-national jurisdictions.¹⁹⁰ This implies that FIFA members, clubs, footballers, and other involved actors have strong grounds to challenge the established rules and decisions of FIFA or the CAS in public courts so as to avoid obligations or limitations imposed by these rules and decisions. Such cases have, indeed, happened in the past.¹⁹¹

Incentives to challenge FIFA's private legal order are particularly strong where the established rules of behavior contradict the interests of a specific

184. For the discussion of some examples, see *infra* Section III.B.

185. See Reilly, *supra* note 109, at 67.

186. See OLG München, Jan. 15, 2015, Az. U 1110/14 Kart. The case involves Claudia Pechstein, a speedskater, but could set a precedent. The decision of the Munich regional court has been reversed recently by Germany's Federal Court of Justice, but the athlete is considering filing a complaint with the German Constitutional Court; a related case is pending before the European Court of Human Rights. See Rebecca R. Ruiz, *Sports Arbitration Court Ruling against German Speedskater Claudia Pechstein is Upheld*, N.Y. TIMES (Jun. 7, 2016), http://www.nytimes.com/2016/06/08/sports/sports-arbitration-court-ruling-against-german-speedskater-claudia-pechstein-is-upheld.html?_r=0; see also Duval, *supra* note 111, at 249-50; Despina Mavromati, *The Legality of the Arbitration Agreement in Favour of CAS under German Civil and Competition Law: The Pechstein Ruling of the German Federal Tribunal (BGH) of 7 June 2016*, 1 CAS BULL. 27, 28-30 (2016).

187. See McLaren, *supra* note 109, at 324.

188. See OLG Bremen, Dec. 30, 2014, 2 U 67/14; see also Duval, *supra* note 111, at 248-49.

189. See Duval, *supra* note 111, at 254; Reilly, *supra* note 109, at 80.

190. See *supra* Section III.A.

191. Two cases are described in this Article. See *supra* notes 147-49 and accompanying text (describing the *FC Sion* case); see also *infra* notes 221-22 and accompanying text (describing the *Matuzalem* case).

group of actors. The two main groups of actors are clubs and footballers. Although neither of the two is directly represented in FIFA or in regional confederations, both have established external networks to influence football governance.¹⁹² In particular, both clubs and players have representative organizations that promote their interests in football matters. The European Club Association (ECA), headquartered in Nyon, Switzerland, counts among its members over two hundred clubs from fifty-four European member associations of FIFA.¹⁹³ FIFPro, based in Hoofddorp, the Netherlands, is the worldwide representative organization for more than 65,000 professional footballers, both male and female.¹⁹⁴ It has sixty-eight national players associations as its members currently.¹⁹⁵ Had clubs or players acted separately, they would have lacked incentives to deviate from the established private legal order, even if it contradicted their interests.

First, the desire of each actor to leave may be constrained by the equilibrium—if all other actors are satisfied with the status quo, the motives of separate actors to deviate are weakened.¹⁹⁶ They have to predict the behavior of other actors and act accordingly. If the dissatisfied actor is not likely to be joined by others, the costs of his or her actions are high.¹⁹⁷ For example, before breaching the player transfer rules, a player has to examine the probability of being hired by another club after the breach. If the breach leads to an effective ostracism, a player may stick to the rules even if he or she disagrees with them. The likelihood of finding a new club is certainly higher when many other clubs or players, or perhaps everyone, boycott the transfer rules.

Second, challenging the existing rules in State courts involves classic collective action and free-rider problems.¹⁹⁸ Even though multiple actors might all benefit from changing the rules, bringing a challenge in State courts is associated with a cost that makes it unlikely that any individual actor will move

192. See Matthew Holt, *The Ownership and Control of Elite Club Competition in European Football*, 8 SOCCER & SOC'Y 50, 54, 61 (2007) (distinguishing between internal and external governance in football and describing the means of external governance available to stakeholders).

193. See *ECA Members 2017/18*, EUR. CLUB ASS'N, <http://www.ecaeurope.com/eca-members/eca-members> (last visited Oct. 6, 2017). The interests of wealthy and powerful clubs, however, are overrepresented in ECA. See Michele Colucci & Arnout Geeraert, *Social Dialogue in European Professional Football*, INT'L SPORTS L.J., nos. 3-4, 2011, at 56, 64. Football clubs are also indirectly represented by the Association of European Professional Football Leagues (EPFL). *Id.* at 63.

194. See *About FIFPro*, FIFPRO, <https://www.fifpro.org/en/about-fifpro/about-fifpro> (last visited Sept. 30, 2017).

195. See *id.* It is difficult to conclude which interest group is stronger, but anecdotal evidence suggests that some clubs strongly discourage their players from being affiliated with FIFPro, thereby weakening the representation of the players' interests. We obtained this information during an interview with an ex-legal counsel at a FIFA member association. See Skype Interview with Former Legal Counsel, *supra* note 141. This practice, however, might be limited to particular countries and induced by personal hostility between top officials of clubs and national players' unions.

196. See Mark Granovetter, *Threshold Models of Collective Behavior*, 83 AM. J. SOC. 1420, 1424-25 (1978) (showing that for explaining outcomes of collective actions, in addition to individual preferences of all actors, we need to know how these individual preferences interact).

197. See *id.* at 1422.

198. A collective action problem arises when there is a conflict between a behavior that maximizes the welfare of an individual and a behavior that maximizes the welfare of the group to which the individual belongs. See RUSSELL HARDIN, *COLLECTIVE ACTION* 8-9, 16-22 (1982); OLSON, *supra* note 41, at 5-16.

alone.¹⁹⁹ The costs of such action will be borne by the activist, whereas the benefits will be shared among all other affected actors.²⁰⁰ Hence, such activism is a public good that is better accomplished if the actors act collectively and share the costs.²⁰¹ But if there are costs to acting collectively, then there will always be free-riding actors who increase the costs shared by others and thereby discourage any action.²⁰² As a result, the actors may be trapped in a sub-optimal equilibrium.

Third, cases challenging the rules of established private orders require accumulation of substantial financial resources and time. Sport associations clearly realize that most of the individual athletes lack both.²⁰³ Moreover, “rebellious” athletes may be banned from competitions during the entire period of judicial proceedings. Given the length of legal battles and the limited span of sport careers, such challenges, in fact, are likely to end the athlete’s career.²⁰⁴ Add to this possible negative public opinion surrounding the cases, and there is a strong case against challenging the established order.²⁰⁵

Acting as an interest group, the likes of ECA and FIFPro deal with the described problems and, as a result, strengthen the voice of the actors they represent.²⁰⁶ The question is what are the interests of the two main involved groups—players and clubs? FIFPro is dissatisfied with the current transfer system and is interested in making changes.²⁰⁷ One of its main motivations is that the existing rules fail to correct financial imbalances between big and small clubs.²⁰⁸ Although FIFPro has not specified the preferred alternative, it is clear that formal law is not the solution: FIFPro is, rather, interested in overhauling

199. See KEITH DOWDING, POWER 33-38 (1996); OLSON, *supra* note 41, at 5-16.

200. See OLSON, *supra* note 41, at 15.

201. See *id.*

202. See *id.* at 40-41.

203. Commenting on the case initiated by speedskater Claudia Pechstein against exclusive arbitration clauses, the CAS Secretary General noted: “I don’t think every athlete in the world can afford this kind of marathon,” referring to Ms. Pechstein’s seven-year legal battle. Accordingly, he did not expect many similar suits. See Ruiz, *supra* note 186.

204. For example, Jean-Marc Bosman had to sacrifice his career and endure a long legal battle to challenge the then-effective transfer rules of football players. See Stefaan Van den Bogaert, Editorial, *Bosman: One for All . . .*, 22 MAASTRICHT J. EUR. & COMP. L. 174, 178 (2015). Less known is the story of Carlos Gonzalez Puche, an ex-footballer who had to hang up his boots early due to a “club cartel that blacklisted players fighting for their rights.” He dared to speak out about the oppressed rights of players in Colombia in the 1980s, an era when the country’s big clubs were under the control of drug barons, and later, with the help of FIFPro and high-profile Colombian players, set up a union to represent players in disputes with clubs. These efforts, arguably, contributed to reducing the influence of the criminal underworld over Colombian football and led to fairer and more professional relationships between players and clubs. See Carl Worswick, *Colombia’s Finest*, WORLD SOCCER, Dec. 2016, at 70, 72.

205. After the *Bosman* ruling, Mr. Bosman was portrayed as the villain who had inflicted irreparable harm on football. Van den Bogaert, *supra* note 204, at 175.

206. Indeed, these interest groups, brokered by the European Commission and UEFA, are involved in a social dialogue with the aim of improving the practices of employee protections in football. See Colucci & Geeraert, *supra* note 193, at 57-58.

207. See Gavin Hamilton & Keir Radnedge, *20 Stories to Follow in 2016: Will FIFPro Win Its Legal Challenge to the Transfer System?*, WORLD SOCCER, Jan. 2016, at 25.

208. See *id.* (quoting Philippe Piat, President of FIFPro, as stating, “Some star[] [players] are incredibly wealthy but in small clubs and small countries there is almost slavery . . . FIFPro would like to make the system much more equitable (sic)”).

the current system.²⁰⁹ ECA, on the other hand, seems to be in strong favor of preserving the status quo.²¹⁰ Notwithstanding the divergence in the interests of the two main interest groups, legal challenges to the private legal order are rare. The parties instead prefer to preserve the order and modernize it to accommodate their interests.²¹¹

To avoid outside challenges, FIFA Statutes prohibit recourse to external dispute resolution venues, including ordinary State-sponsored courts.²¹² This prohibition extends to obtaining provisional measures—such as restraining orders, asset freezing orders, or provisions of security for costs.²¹³ FIFA sanctions non-complying members directly and requires them to establish effective mechanisms to discourage actors outside FIFA's direct reach from taking actions in national courts.²¹⁴ For example, FIFA can suspend a member association should it fail to discipline local actors, meaning that neither the national team nor local clubs can participate in official tournaments. This collective responsibility scheme provides all involved actors with incentives to promote compliance with the rules and intensifies pressure on individual wrongdoers.²¹⁵

This practice indicates that clubs and players challenge FIFA's rules in State courts when they face dire consequences that can threaten their existence (for clubs) or careers (for players). To avoid this, the rules promote sanctions that do not create such a classic end-game problem.²¹⁶ As described above, the sanctions provide for temporary bans on playing football (for players) or registering new players (for clubs).²¹⁷ Clubs may also be relegated to lower divisions or banned from participating in international tournaments for a specific period of time.²¹⁸ But permanent bans are rare: they are typically imposed to promote compliance with already instituted sanctions. However, large sums of material fines related to the breach of employment contracts can

209. *See id.* (explaining that FIFPro is not intent on scrapping the transfer system altogether; it just wants to bring “balance between the rights of players and the clubs”).

210. *See id.*

211. Rare instances of challenging FIFA's rules by various stakeholder interest groups are strategically motivated. *See, e.g.*, Colucci & Geeraert, *supra* note 193, at 63-64 (describing the use of public courts by G-14, an informal network of leading football clubs in Europe, to strengthen its position in negotiations to obtain from football governing bodies compensation for clubs if players are injured while representing their national teams).

212. *See* FIFA STATUTES, *supra* note 1, art. 59(2).

213. *Id.*

214. *See id.* art. 61; DISCIPLINARY CODE, *supra* note 4, art. 64(1)(d).

215. *See supra* notes 145-49 and accompanying text.

216. In a similar vein, Professor Bernstein notes that the Board of Arbitrators of the New York Diamond Dealers Club uses suspension more frequently than expulsion to secure compliance with its decisions. “The expelled member may feel like he has nothing to lose (sic) by challenging (sic) the club.” Bernstein, *The Diamond Industry*, *supra* note 10, at 129; *see also* Jack Hirshleifer, *Anarchy and Its Breakdown*, 103 J. POL. ECON. 26, 30-33 (1995) (showing that a spontaneous order can be sustained when (1) the decisiveness of conflict is sufficiently low and (2) income inadequacy is not large enough to push some participants beyond the line of survival).

217. *See supra* notes 75-76 and accompanying text (describing the typical sanctions for breaching transfer rules that may be imposed on players and clubs, respectively).

218. *See supra* note 122 and accompanying text (describing other possible sanctions that may be imposed on clubs).

be equivalent to a temporary ban, particularly for players who cannot afford paying huge compensation amounts for breaching transfer rules.²¹⁹ To avoid a scenario where a player unable to pay a large fine launches a war against FIFA in State courts, the rules impose joint and several liability both on the player and his/her new club.²²⁰ This means that if a player fails to pay, the club is obligated to make the payment. Accordingly, the player has less incentive to take the dispute to State courts. Not surprisingly, one of the rare challenges to a CAS award in State courts took place when the compensation sum was beyond both the player's and the jointly liable club's financial means; moreover, the club was in insolvency proceedings, and the player had to bear the entire burden alone.²²¹ Not able to pay, the player took the case to Swiss federal courts, arguing that the ban on him for failing to comply with the CAS award violated the fundamental principles of public policy.²²²

This discussion shows that FIFA's private legal order is effective in capturing all involved actors, so long as it does not impose excessive sanctions that would create an end-game situation. Thus, even though separate actors or even some interest groups may be interested in replacing FIFA's private order with an alternative, they do not have incentives to exit the system. This, however, does not mean that the existing system is efficient. Nevertheless, the absence of coordinated actions against the system by involved actors in State courts is a strong suggestion that the private legal order provides something that is not offered by its State-backed alternatives. In the following Part, we show the advantages of the private order as opposed to formal law.

IV. ADVANTAGES OF THE PRIVATE LEGAL ORDER

After describing FIFA's private legal order—explaining how it operates in practice and what the incentives of the involved actors are—we turn to the discussion of the reasons for the development of the private legal order. Although tempting, we do not put forward an efficiency hypothesis that explains FIFA's role in governing football-related behavior by increasing the collective gains of the involved actors. To establish this, we would need to show that FIFA's rules are not merely redistributing gains among different involved actors, but are creating an added value. Given the many path dependencies, this is difficult to achieve.²²³ Accordingly, we propose that the private legal order owes its existence to the shortcomings of the alternatives. Unlike other available governance modes, the private order has been able to offer advantages that others have failed to provide.²²⁴ Some of these

219. See, e.g., Matuzalem Award, *supra* note 78, ¶ 179 (ordering Mr. Matuzalem, who breached his employment contract with FC Shakhtar Donetsk, to pay a fine approximating €12 million).

220. See TRANSFER REGULATIONS, *supra* note 4, art. 17(2).

221. See Parrish, *supra* note 177, at 264-65 (describing the saga of the *Matuzalem* case).

222. See *id.*

223. See *supra* notes 196-202 and accompanying text.

224. See, e.g., Bernstein, *The Cotton Industry*, *supra* note 10, at 1739 (arguing that the benefits of a private legal order stem from structures that improve on aspects of the public legal system); Prüfer, *supra* note 47, at 309 (noting that where non-contractibility or too-high transaction costs make State governance an unattainable option, private institutions can mitigate cooperation problems).

advantages—such as harmonized rules, effective mechanisms of deterring their breach, and lower costs of enforcement—are commonly discussed in the literature on private legal orders. Other advantages—such as incentives for developing players—are specific to football.

*A. Substituting a Patchwork of National Laws with Common Rules
Applicable Across Countries*

The need to overcome fragmented regulatory regimes created by States' diverse legislation provides a major reason for the emergence of transnational private orders. Indeed, actors often opt out of formal law and form private orders when their activities transcend national borders and are subject to competing regulatory regimes.²²⁵ Football is not a special case. It would be complicated to establish a level playing field if clubs were to compete under different rules. Under the current regime, although national football authorities are responsible for organizing local competitions, they act within the minimum requirements of FIFA and regional confederations. The converse would be myriad national associations with their own rules. With the latter, clubs and players in some countries might be subject to less onerous regulations than their peers in other countries, or similar behavior might incur different consequences in various jurisdictions. These differences would drive talented players and investments to clubs in a handful of countries, effectively excluding others from competition.

Uniform rules cover not only employment matters, but also the dates for organizing international fixtures and the periods during which clubs are allowed to register new players. Uncoordinated dates for competitions could lead to clashes between different games, forcing a player to choose between his/her national team and a club. Similarly, uniformity, or at least similarity, across different countries regarding player registration periods—also known as “transfer windows”—allows player mobility without causing major disruptions to national tournaments.²²⁶ Otherwise, major transfers from a club in the most crucial period of the season would disrupt the team and upset its tournament plans. Consequently, although the member associations may define specific time frames for registration periods, “[t]he current tendency is towards uniformity of periods among the different associations, not only within the same confederation, but also among associations belonging to different confederations.”²²⁷ The first transfer window, which usually is open during the entire summer, is the main registration period and is used by the clubs to “set[] up their squads for the forthcoming season.”²²⁸ The second shorter period opens in the winter, which approximately corresponds to the middle of the season, and is intended to provide clubs with an opportunity to adjust their

225. See Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, 38 J.L. & SOC'Y 20, 25 (2011); Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319, 327-28 (2002).

226. FIFA COMMENTARY, *supra* note 72, art. 6, cmt. 2.

227. *Id.* art. 6, cmt. 1.

228. *Id.* art. 6, cmt. 3.

squads or replace injured players.²²⁹

B. Strengthening Predictability by Ensuring Stable Contractual Relations

A stark contrast between FIFA's private order and public laws is the private order's strong adherence to the principle of contractual stability in employment matters.²³⁰ This makes a big difference in dealing with potential hardships in replacing players that depart unexpectedly in the middle of a season. Football has very specific needs that depend heavily on human capital. Players are the main asset of a club, both from a sporting and an economic perspective.²³¹ Clubs invest considerable resources in intelligent squad-building.²³² They organize extensive pre-season and mid-season training camps and develop strategies depending on the players at their disposal. An entire game pattern can be built on the skills of specific players. Unexpected departures can therefore leave gaps that are not easy to fill promptly.

Players not only contribute their sporting abilities but also serve as valuable assets on a club's balance sheet.²³³ Clubs typically pay significant amounts to sign their star players. Clubs generate revenue by using a player's value for merchandising activities and expect to recover their investments either by achieving successful sporting results or by releasing their players prior to the expiration of their contracts in exchange for hefty transfer fees.²³⁴ The economic reality in football is that the services a player provides are attributed an economic value and are "traded and sought after on the market."²³⁵ This reality has pressured FIFA into protecting a club's right to the services of its players.²³⁶

For these reasons, FIFA aims to reinforce contractual stability. The main purpose of Article 17 of the Transfer Regulations in light of its interpretation by the CAS is to deter unilateral contract terminations, whether by players or clubs.²³⁷ Contractual stability increases certainty. Accordingly, a club that (a) develops a player, (b) secures the services of a player by paying a large transfer fee, or (c) builds its game around a group of players, can plan for a longer term without the fear that its arrangements will be shattered by unexpected player exits. And if a player walks away prematurely, the club can expect compensation—an important source of income, specifically for clubs that do not have access to extensive broadcasting, commercial, and game attendance revenues.²³⁸ This allows many small clubs to retain competitiveness by

229. *Id.* art. 6, cmt. 4.

230. *See supra* notes 165-68 and accompanying text.

231. *See* FC Pyunik Award, *supra* note 101, ¶ 41.

232. *See* Murad Ahmed, *Football Transfer Fees Soar to \$4.8bn Record*, FIN. TIMES, Jan. 27, 2017, at 18 (reporting that football clubs broke all previous records, spending \$4.8 billion on signing new players in 2016, and English clubs dominated the market, spending \$1.37 billion on transfer fees).

233. *See* FC Pyunik Award, *supra* note 101, ¶ 41.

234. *See id.*

235. *See* Matuzalem Award, *supra* note 87, ¶ 103.

236. *See* TRANSFER REGULATIONS, *supra* note 4, art. 17.

237. *See supra* note 86 and accompanying text.

238. *See* Czarnota, *supra* note 167, at 8-9.

securing replacements for leaving players.²³⁹

Certainly, football is not the one and only industry that suffers from unexpected departures of employees. Any other field that heavily relies on human capital faces a similar dilemma. In information technology and professional consulting sectors, the common privately-designed solution is the non-compete covenant, under which a departing employee undertakes not to compete with the employer, whether by moving to an established rival or by starting a new business, typically during a limited time period and within a specific geographic area.²⁴⁰ The problem with contractual non-compete clauses is their uncertain legal status regarding enforceability.²⁴¹

A more coordinated response has arisen among U.S. law schools. Under the best practice guidelines of the Association of American Law Schools (AALS), which has a membership of 180 U.S. law schools, law schools are advised to extend job and visiting professor offers to faculty from other schools no later than March 1 and March 15, respectively.²⁴² Academic staff departures after students have selected courses for the next academic year and faculty workload has been planned may cause major disruptions. The AALS guidelines give affected law schools sufficient time to find replacements.²⁴³ Although the AALS guidelines only provide best-practice suggestions without the power of coercive enforcement, they enjoy broad compliance by the member law schools.²⁴⁴ FIFA has strengthened the predictability of employment further by designing an enforceable compensation obligation on any breaching party.

Compensation itself, however, may not be enough to deter violations of the established rules of behavior. Many private orders make opportunistic behavior extremely costly by spreading information about the reputation of their members.²⁴⁵ When both the ability to find business partners and non-economic benefits, like community status, are conditioned upon good reputation, deviations from the established rules do not only lead to costs associated with the compensation of actual damages but also create additional opportunity costs.²⁴⁶

239. *See id.* at 9.

240. *See* Robert W. Gomulkiewicz, *Leaky Covenants-Not-to-Compete as the Legal Infrastructure for Innovation*, 49 U.C. DAVIS L. REV. 251, 260 (2015).

241. *See id.* at 261-65; *see also infra* note 314.

242. *See* Ass'n of Am. Law Sch., *Statement of Good Practices for the Recruitment of and Resignation by Full-Time Faculty Members*, 2016 AALS HANDBOOK 117, 118 (2016).

243. *See id.* at 117 (“Unless the school is given sufficient time to make the necessary arrangements to find another teacher to offer the instruction given by the departing teacher, the reasonable expectations of students will be frustrated and the school’s educational program otherwise disrupted.”).

244. *See* Thom Lambert, *March 15: Kick-Off for the Law School Hiring Cartel*, TRUTH ON THE MARKET (Mar. 15, 2011), <https://truthonthemarket.com/2011/03/15/march-15-kick-off-for-the-law-school-hiring-cartel> (suggesting that law schools speed up recruitment to make sure they make offers before the March deadlines).

245. *See* Richman, *supra* note 19, at 2335 (showing that many works on private orders uncovered similarly organized reputation mechanisms that induced certain mutually and socially beneficial behavior).

246. *See id.* at 2344-45.

As discussed earlier, reputation plays an insignificant role in football.²⁴⁷ To compensate for this, FIFA rules not only establish the principle of contractual stability but also create incentives for the enforcement of this principle. First, non-monetary sanctions are applied jointly with the more traditional punishment of damage compensation. Temporary bans imposed on players to practice football and on clubs to sign new players aim to promote compliance with the rules.²⁴⁸ Their equivalents are not available in formal law and, accordingly, cannot be applied by public courts. Second, the rules promote compliance with the principle by allocating liability for its breach. The rule of strict liability—according to which a club that signs a player who has unilaterally terminated his/her contract is jointly and severally liable for the payment of compensation, regardless of the club’s involvement in inducing the breach—has a discouraging effect on clubs considering to offer employment to deviating players.²⁴⁹ By limiting employment opportunities, this further strengthens contractual stability.

The rule of strict liability for “player poaching” places the responsibility for breaching a contract with the “lowest cost avoider,” so that this party has an incentive to limit the possible occurrence of a contractual breach. A party with such an incentive will take the steps necessary to reduce the likelihood of a breach, thereby avoiding both the costs of the danger manifesting and saving another party, someone to whom avoidance would come at a higher price, from taking less efficient measures. Particularly, if a player from one club (Club A) illegally signs with or transfers to another club (Club B), the presumption is that this latter club, Club B, enticed the player to sign with them.²⁵⁰ The club will thus be held liable for the payment of compensation. Proof of whether or not Club B actually “poached” the player is unnecessary.²⁵¹ This provides Club B with an incentive not to illegally sign players from other teams: Club B is perhaps the lowest cost avoider in the case of poaching, because regulatory bodies or Club A would have to take far more extensive measures to prevent the player from moving illegally. Club A might, in the extreme, have to monitor each player’s every move constantly. On the other hand, Club B just has to refrain from doing something. Furthermore, investigation into actual collusion can be expensive and hard. A rule of strict liability saves this cost, too.²⁵²

247. See *supra* notes 136-40 and accompanying text.

248. See *supra* notes 73-76 and accompanying text (describing sporting sanctions for the breach of transfer rules).

249. See Parrish, *supra* note 177, at 270-71.

250. See TRANSFER REGULATIONS, *supra* note 4, art. 17(4).

251. See *id.* art. 17(2). This rule is “of an objective nature and does not require that the new club be considered as instigator of the player’s breach.” *Ascoli Calcio 1898 S.p.A. v. Papa Waigo N’diaye & Al Wahda Sports and Cultural Club*, CAS 2014/A/3852, Award, ¶ 110 (Jan. 11, 2016). However, if Club B can prove it had nothing to do with the transfer, it will avoid liability. See, e.g., *Al Gharafa S.C. & Mark Bresciano v. Al Nasr S.C. & Fédération Internationale de Football Association (FIFA)*, CAS 2013/A/3411, Award, ¶ 6 (May 9, 2014). This is to ensure that the strict liability rule does not become too costly: clubs might be very hesitant to sign with any players if they are always suspect.

252. In a similar manner, and with similar incentives, FIFA employs a rule of strict liability for match-fixing: if any club official has allegedly fixed a match, the club will be held responsible if it cannot demonstrate innocence. FIFA also holds clubs strictly liable for the behavior of their fans. See

C. Giving Clubs Incentives to Invest in Training Young Players

Football education, unlike general education, is rarely publicly funded and thus requires private investment. Football academies are often operated by or have links to clubs. Although players under the age of eighteen are allowed to sign professional contracts, only a small proportion of talented youngsters are able to land such contracts.²⁵³ Hence, many are amateurs without contracts that tie them to a specific club and are free to move, at least within the country of their residence.²⁵⁴ The right of young players to move from football academies and less-known clubs to leading football clubs distorts the incentives of the former to invest in the training of young players.

FIFA's Transfer Regulations include rules that financially motivate football academies and clubs, particularly in less-developed countries, to invest in training young players. The period between the age of twelve and twenty-one is normally considered a player's training period.²⁵⁵ After a player signs his/her first professional contract and each time a player is transferred from one club to another, until the end of the season of his/her twenty-third birthday, clubs that contributed to the player's training are entitled to training compensation.²⁵⁶ Upon signing the first contract as a professional, the player's new club must pay training compensation to every club with which the player has previously been registered during the training period.²⁵⁷ If the player changes clubs again before the end of the season of his/her twenty-third birthday, that prior club has a right to receive training compensation for the period that the player was effectively trained by that club.²⁵⁸ Accordingly, every club where an athlete played between the age of twelve and twenty-one is eligible for training compensation.

The rules for calculating training compensation aim to discourage clubs in developed countries from hiring talented young players in less-developed

Public Joint-Stock Company "Football Club Metalist" v. Union des Associations Européennes de Football (UEFA) & PAOK FC, CAS 2013/A/3297, Award, ¶ 8.14 (Nov. 29, 2013) (for match-fixing); DISCIPLINARY CODE, *supra* note 4, art. 67(1) (for fans' misbehavior). The latter might seem a tall order, but clubs are perhaps often the parties with the closest connection to their fans and the ones with the most information and understanding of their own fans, making them the lowest cost risk avoider, even if they cannot avoid everything.

253. See TRANSFER REGULATIONS, *supra* note 4, art. 18(2). Contracts with players under the age of eighteen may not be longer than three years—a limitation that aims to promote career development and progress of young players by preventing clubs from excessively tying in players at an age when their bargaining power is weak.

254. Only players over the age of 18 are eligible for international transfers. TRANSFER REGULATIONS, *supra* note 4, art. 19(1). There are three exceptions to this rule: (1) where the player's parents, for reasons not linked to football, move to the country where the new club is located; (2) the player lives no further than fifty kilometers from a national border and the new club in the neighboring association is located within the same distance of that border; or (3) the transfer takes place within the European Union or the European Economic Area and the player's age is between sixteen and eighteen. TRANSFER REGULATIONS, *supra* note 4, art. 19(2). The last special geographic exception is, indeed, the result of the requirement to ensure the freedom of movement among EU Member States. See *supra* notes 162-65 and accompanying text (briefing the *Bosman* case and its outcomes).

255. TRANSFER REGULATIONS, *supra* note 4, annex 4, art. 1(1).

256. *Id.* art. 20. Training compensation is not due for a period after the completion of training.

257. *Id.* annex 4, art. 3(1).

258. *Id.*

countries only because the training costs in less-developed countries are lower.²⁵⁹ Therefore, the training compensation that a new rich club must pay to a player's foreign training club is calculated based on the training costs in the country of the new club.²⁶⁰ The training compensation is thus a reward, which gives football academies and clubs incentives to train players; it is not merely a refund for the costs of training.²⁶¹

In addition to training compensation, former clubs of a transferring player have a right to receive a solidarity contribution.²⁶² The purpose of this payment is similar: to support the training of young players by clubs.²⁶³ Yet, there are important differences. Unlike training compensation, which a club can get only once, a solidarity contribution is paid upon every transfer to all former clubs that have contributed to a player's training, regardless of the player's age. Total solidarity contribution equals five percent of the compensation (transfer fee or transfer amount) paid by the player's new club to the former club.²⁶⁴ Thus, it is due only if a player moves from one club to another before the expiry of the existing contract.²⁶⁵ Each club receives a specific proportion of the total solidarity contribution according to the length of a period it contributed to the training of a transferring player.²⁶⁶

In sum, the described rules reward smaller clubs financially and give them reasons to remain under the clout of the private order.

D. Correcting Market Failures by Tailored Contracting Practices

FIFA regulations and CAS Awards respect the freedom of contract and enforce the provisions agreed upon by the parties.²⁶⁷ When the preferred contracting practices in a given industry cannot be enforced in State courts, membership in private associations that offer enforcement support becomes increasingly attractive.²⁶⁸ Legal counsel for clubs and players have designed

259. See Jean-Philippe Dubey, *The Jurisprudence of the CAS in Football Matters (Except Art. 17 RSTP)*, 1 CAS BULL. 3, 8 (2011).

260. See TRANSFER REGULATIONS, *supra* note 4, annex 4, art. 5(1).

261. See CD Nacional SAD v. CA Cerro, CAS 2015/A/3981, Award, ¶ 81 (Nov. 26, 2015).

262. See TRANSFER REGULATIONS, *supra* note 4, art. 21.

263. See Dubey, *supra* note 259, at 9.

264. See TRANSFER REGULATIONS, *supra* note 4, annex 5, art. 1.

265. See *id.* Since a player is free to transfer to any club after the expiry of an existing contract, such transfers, in the absence of compensation paid by the player's new club to his/her former club, do not trigger solidarity contributions.

266. Proportions of the solidarity contribution owed to the player's former training clubs are defined in Annex 5 of the Transfer Regulations. Clubs involved in the early years of training a player are entitled to 0.25% of the total solidarity contribution for each year of training, whereas each subsequent year of training confers a right to receive 0.10% of the total contribution. See TRANSFER REGULATIONS, *supra* note 4, annex 5, art. 1.

267. See, e.g., Shakhtar Donetsk v. Ilson Pereira Dias Junior, CAS 2010/O/2132, Award, ¶¶ 49-52 (Sept. 28, 2011) (enforcing an employment contract between the Ukrainian club and Brazilian player Ilsinho stipulating that unless the club transferred the player's registration during the first year of employment, the parties would extend the four-year contract by another year under the threat of a heavy fine).

268. See Banner, *supra* note 6, at 125-26 (arguing that the ability of the New York Stock and Exchange Board to enforce "time bargains," or what we would today call futures transactions, was a major incentive for securities traders to join the board, as these transactions could not be enforced in

various contractual mechanisms that correct market failures associated with cooperation. Because not all of these mechanisms can be enforced in State courts, the private legal order adds value to the transactions governed by its rules.

As an illustration, consider information asymmetries between clubs in player transfers (unsuccessful transfers when players fail to adapt to the new environment or are not a good fit to the new club's squad are not uncommon) and the contractual techniques for dealing with them. These failures are corrected by contractual sell-on or conditional transfer fee clauses, thus facilitating cooperation. Under a sell-on clause, if the new club transfers the player to a third club for compensation exceeding the compensation paid to the player's former club, the former club is entitled to receive a portion of the transfer fee expressed as a percentage of the capital gain made by the second club.²⁶⁹ In fact, the transfer fee is divided into two components: a fixed amount due at the time of the transfer of a player to a new club, and a variable notional amount, payable to the former club in the event of a subsequent successful transfer of the player from the second club to a third club.²⁷⁰ This increases the total transfer fee the original club receives for releasing the player. A similar mechanism is offered by contingent transfer fee clauses. Likewise, the transfer amount has two parts: a fixed amount and a contingent amount, the latter of which depends on the future performance of the transferred player or of the new club regardless of the player's performance.²⁷¹

Loan agreements between clubs, which are supposed to meet short-term needs when a certain player is injured, can also be used to mitigate information asymmetries. According to a loan agreement, a player employed by one club plays for the other club during a specific period.²⁷² Often such contracts contain a buy option, allowing the borrowing club to sign the player permanently if the club is satisfied with the player's contribution to its squad.²⁷³

New York courts until 1858).

269. See, e.g., *Sevilla FC v. RC Lens*, CAS 2010/A/2098, Award (Nov. 29, 2010) (concerning an agreement in which Racing Club de Lens agreed to release its player Seydou Keita to Sevilla Fútbol Club SAD for the transfer fee of €4 million, and, if a subsequent transfer of the player was made, RC Lens would receive ten percent of the capital gain between €4 million and €8 million and fifteen percent beyond €8 million).

270. See *id.* ¶ 20.

271. See, e.g., Real Madrid & Arsenal—Mesut Özil, FOOTBALL LEAKS (Jan. 25, 2016), <https://footballleaks2015.wordpress.com/2016/01/25/real-madrid-arsenal-mesut-ozil/> (leaking an agreement entitling the old club to, in addition to the fixed transfer amount of €44 million, a contingent transfer compensation in the maximum amount of €6 million, depending on the qualification of the new club to play in the UEFA Champions League, a prestigious club tournament in Europe).

272. See *supra* note 90 and accompanying text.

273. For example, FC Bayern Munich exercised an option to sign Kingsley Coman, a talented French youngster, following the player's successful stint in the club during the first year of his two-year loan move from Juventus FC. See Rhodri Cannon, *Bayern Munich Set To Activate Option To Buy Kingsley Coman, Reveals Karl-Heinz Rummenigge*, MAILONLINE (Aug. 4, 2016), <http://www.dailymail.co.uk/sport/football/article-3723474/Bayern-Munich-set-activate-option-buy-Kingsley-Coman-reveals-Karl-Heinz-Rummenigge.html>. A.S. Roma has been pursuing the policy of signing players on temporary loan agreements and activating buy options if the players meet the club's expectations. See, e.g., Oliver Todd, *Mo Salah and Edin Dzeko Bag Permanent Roma Deals After Italians Activate Clauses*, MAILONLINE (Oct. 3, 2015), <http://www.dailymail.co.uk/sport/football/article-3257035/Roma-seal-permanent-deals-Premier-League-duo-Mo-Salah-Edin-Dzeko.html>.

Information asymmetries between clubs and players when cooperation begins are also dealt with via the practice of leaving strategic gaps in employment contracts. Whereas some parties—whether players or clubs—insist on including release or buyout clauses in contracts, others prefer to enter into contracts without precisely defining such amounts.²⁷⁴ In the latter case, the club has wide discretion in negotiations with other clubs over the transfer of a player, though this comes at the expense of clarity. In the absence of fixed-release fees or compensation amounts, the parties have to rely on ex-post negotiations and, if they fail, on litigation.²⁷⁵ However, such contracts with intentional gaps reduce the likelihood of player transfers from a club without the club's consent and, more importantly, advance knowledge.²⁷⁶ Accordingly, the decision to fix a release fee or a compensation amount ex ante, or to leave the matter open and rely on ex post negotiations (or litigation), is a trade-off between incurring costs at the two different stages.²⁷⁷ This trade-off obviously affects the choice of the contracting parties. Where a player has a large growth potential and the parties are uncertain about the limits of such growth, or the player is crucial for the club, leaving gaps in a contract may better serve the club's interests. The presence of a release fee or a compensation amount in the contract, or its absence, and the size, then reflect the strength of the bargaining

274. *E.g.*, compare Professional Player Employment Contract Between Real Madrid Club de Fútbol and Luka Modric, FOOTBALL LEAKS (Aug. 27, 2012), <https://footballleaks2015.wordpress.com/2016/03/07/real-madrid-luka-modric> (in which the contract fixed the amount of compensation at €500 million for unilateral termination at the will of the player), with The Standard Premier League Playing Contract between Manchester United Football Club Limited and Memphis Depay, FOOTBALL LEAKS (Jun. 10, 2015), <https://footballleaks2015.wordpress.com/2016/03/29/psv-eindhoven-manchester-united-memphis-depay> (in which the contract required calculating the amount of compensation when a player was terminated without just cause, based on the player's true transfer market value at the date of termination).

275. *See, e.g.*, Shakhtar Donetsk v. Ilson Pereira Dias Junior, CAS 2010/O/2132, Award (Sept. 28, 2011); Sevilla FC SAD v. Udinese Calcio S.p.A., CAS 2010/A/2145, Morgan de Sanctis v. Udinese Calcio S.p.A., CAS 2010/A/2146, Udinese Calcio S.p.A. v. Morgan de Sanctis & Sevilla FC SAD, CAS 2010/A/2147, Award (Feb. 28, 2011); FC Sion Award, *supra* note 79.

276. In April 2013, about one month before the UEFA Champions League final between German clubs Borussia Dortmund and FC Bayern München, the news about the transfer of Borussia Dortmund's star player, Mario Götze, to their bitter rival in Munich at the end of the season shocked the players, managers, and fans of the club. FC Bayern München, after negotiating general terms of employment with Götze, triggered the €37 million (\$48 million) release clause included in the player's four-year contract with Borussia Dortmund signed the previous summer. This move, which came as a surprise in Dortmund, worsened the relations of the two clubs ahead of the final. *See* Marcus Christenson, *Mario Götze's Move from Borussia Dortmund to Bayern Munich Adds Spice: Champions League Final at Wembley Could Result in a Mixed Response from Fans for the Exceptional Midfielder*, GUARDIAN, (May 18, 2013), <https://www.theguardian.com/football/blog/2013/may/18/mario-gotze-borussia-dortmund-bayern-munich>; Joshua Robinson, *Dortmund Dismayed by Transfer; Supporters in Shock as Rival Bayern Munich Poaches Star Player Mario Götze*, WALL ST. J. (Apr. 23, 2013), <https://www.wsj.com/articles/SB10001424127887324874204578440980670452440>. The club has avoided including release or buyout clauses in contracts with players since then. *See Ad Hoc Announcement: Transfer Rumours about Mats Julian Hummels*, BORUSSIA DORTMUND GMBH & CO. KGAA (Apr. 28, 2016), <http://aktie.bvb.de/eng/IR-News/Ad-Hoc-News/Transfer-rumours-about-Mats-Julian-Hummels> (stating that Borussia Dortmund has not agreed on an "exit clause" with any of its current players).

277. *See generally* Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 840-44 (2006) (explaining that parties engage in an efficiency-based choice between rules and standards at the contracting stage, and where ex ante transaction costs are lower than ex post enforcement costs, parties prefer to negotiate and draft clear rules instead of relying on abstract standards that depend heavily on the enforcement by a third-party adjudicator).

power of the parties.

Another example of tailored contracting practices to correct market failures is the use of liquidated damages clauses or penalties. Undoubtedly, the compensation requirement for a breach of an employment contract is at the core of promoting stable contractual relations between clubs and players.²⁷⁸ But when it comes to the enforcement of these clauses, legislation across States can vary significantly. Penalty clauses are invalid in some jurisdictions, whereas courts may reduce the contractually-agreed amount of a penalty in others.²⁷⁹ The agreed amount of liquidated damages, similarly, cannot be discretionary and must be a reasonable estimation of the expected damages.²⁸⁰ Meanwhile, one panel has reportedly found that, under FIFA's Transfer Regulations, contractual liquidated damages clauses have clear priority over other rules and cannot be reduced by a third-party decision-maker.²⁸¹

FIFA has designed effective mechanisms for enforcing the described contracting practices.²⁸² Recourse to ordinary State courts will undermine these practices because most cannot be enforced under national legislation. When the private group's enforcement mechanisms are superior to State court enforcement, State intervention reduces the group's ability to regulate its members.²⁸³ For example, when a State court decides not to enforce a contract valid under FIFA rules, both the rules and the private enforcement mechanisms become weaker. Differing State court approaches to the tailored contracting practices of football-related actors would result in increased uncertainty, thereby reinforcing speculative incentives to litigate in courts instead of the internal dispute resolution bodies. When the rule is not consistently applied, the resulting uncertainty encourages litigation as an attempt to win the case or to force the respondent to settle in the face of potential litigation costs. Not surprisingly, FIFA has concentrated its efforts on the allocation of institutional responsibility for resolving football-related disputes.²⁸⁴ Its rules discourage bringing matters governed by the private order into the realm of State courts: should there be contractual disputes involving clubs, players, or other actors, they are subject to exclusive adjudication by FIFA's (or its member associations') internal dispute resolution bodies and by the specialized CAS.

278. See *supra* notes 237-39 and accompanying text.

279. See Ugo Mattei, *Comparative Law and Economics of Penalty Clauses in Contracts*, 43 AM. J. COMP. L. 427, 433, 435-38 (1995) (describing the common law ban on penalty clauses and the approaches of legislators and courts in modern civil law countries).

280. See *id.* at 435-36.

281. See Yuri Zaitsev & Mikhail Prokopets, Partners at Legal Sport Law Co. & Members of the Sports Int'l Lawyers Ass'n, Presentation on the Most Important Cases of the Legal Sport Industry in 2014, Moscow (2015) (referring to Vladimir Mukhanov v. FC Aktobe, CAS 2014/A/3640, Award (Jan. 28, 2014) (unpublished)).

282. See *supra* Section II.C.

283. See Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 156, 185 (1996).

284. See *supra* Section III.B (describing the mechanisms employed by FIFA to promote the exclusive use of the private legal order).

E. Arbitration

The arbitration system may also make FIFA more attractive to its members and other football-related actors. Disputes are solved by highly specialized third-party decision-makers—national arbitration institutes formed by domestic football associations or the CAS. Narrow specialization of arbitrators increases the quality of dispute resolution without the expense of increased time and costs of considering cases. This leads to two major outcomes. First, better knowledge of football-related matters available to arbitrators expands the ability of the involved actors to contract over terms that would be difficult to explain and verify to generalist courts.²⁸⁵ CAS, for example, has less stringent rules on evidence,²⁸⁶ which adds to the verifiable knowledge of parties. As arbitrators are bound first by FIFA and CAS rules, they also have greater discretion to take into account matters that are peculiar to sport, and can be more knowledgeable concerning the needs of the parties to a dispute, such as the impact that a breach of contract may have on either side in a specific case.²⁸⁷ Second, specialized arbitration by one decision-making body instead of by many national courts increases certainty by making the applicable rules more predictable.²⁸⁸

In addition, specialization reduces the costs of dispute resolution: arbitrators normally deliver decisions in a shorter amount of time than what many State courts would require for similar cases. Arbitral procedures are also simpler and less formal.²⁸⁹ FIFA's internal dispute resolution bodies and the CAS are said to deliver their judgments faster than an ordinary judicial proceeding could, which, given the time-pressure on resolution in the field of sport, is seen as an advantage.²⁹⁰ For example, resolution is often needed as soon as possible for athletes and clubs to know whether they can compete in the next tournament.²⁹¹ To further improve this, the CAS sometimes expedites proceedings and declares the operational part of an award well before publishing the full decision so that all parties may resume their normal activities as soon as possible.²⁹² Lastly, when it comes to disputes between

285. See generally *infra* note 324.

286. See, e.g., Antonio Rigozzi & Brianna Quinn, *Evidentiary Issues Before CAS*, in INTERNATIONAL SPORTS LAW AND JURISPRUDENCE OF THE CAS: 4TH CONFERENCE CAS & SAV/FSA, LAUSANNE 2012 (Michele Bernasconi ed., 2014) (manuscript at 24, 39), <http://ssrn.com/abstract=2438570> (discussing arbitrators' wide discretion in deciding on the admissibility of evidence and the parties' autonomy to lay down rules of evidence); see also Georg von Segesser, *Admitting Illegally Obtained Evidence into CAS Proceedings—Swiss Federal Supreme Court Shows Match-Fixing the Red Card*, KLUWER ARB. BLOG (Oct. 17, 2014), <http://arbitrationblog.kluwerarbitration.com/2014/10/17/admitting-illegally-obtained-evidence-in-cas-proceedings-swiss-federal-supreme-court-shows-match-fixing-the-red-card/> (comparing evidence rules in sport arbitration with regular criminal or civil trials and concluding that “compared to criminal or civil proceedings, in sport arbitration, where the public interest of fighting bribery and match-fixing is acute, arbitrators might be more inclined to favor fair play in sports over foul play in obtaining evidence”).

287. See Reilly, *supra* note 109, at 65-66.

288. See generally Richman, *supra* note 19, at 2341.

289. See Charny, *supra* note 40, at 410.

290. See Reilly, *supra* note 109, at 71.

291. See Blackshaw, *supra* note 182, at 14.

292. See *id.*

parties with different nationalities, FIFA's internal dispute resolution bodies and the CAS act as impartial third-party decision-makers that are less likely to be biased towards any of the disputing parties.²⁹³

Normally, arbitration comes with a downside. Adjudication in State courts is a public good that supplies the market with interpretations of laws.²⁹⁴ Under widespread arbitration, which is commonly conducted confidentially, case law is underprovided.²⁹⁵ The situation is different in close-knit groups with their own "in-house" dispute resolution systems, because such groups can share the costs of precedents among all group members, thereby creating incentives for arbitrators to produce written and publicly-available opinions.²⁹⁶ Indeed, the CAS publishes some, but not all, of its awards, summarizing some others in the *CAS Bulletin* (the official publication of the court) and neglecting the rest.²⁹⁷ The latter practice seems to be in the interest of expediency rather than privacy of the parties. Nevertheless, sports lawyers, as members of a close-knit group, are likely to be aware of the outcomes and reasoning of the awards by the means of social connections and gossip.²⁹⁸ Hence, even unpublished awards do not decrease the public-good effect of adjudication.

* * *

In summary, FIFA's private order offers its incumbents advantages that alternatives cannot deliver. Some of these advantages, such as increased certainty, are in the interest of all actors involved, whereas others, like the commitment to enforce contractual practices or training compensation awards, are preferred by sophisticated actors (i.e., clubs and prominent footballers) and small clubs, respectively. This, though not allowing us to state plainly that the private order is maximizing the welfare of all involved actors, also does not justify arguments for abandoning the current system in favor of State laws. To the contrary, the arguments demonstrate the private order's value.

V. FACTORS THAT MADE THE RISE OF THE PRIVATE LEGAL ORDER FEASIBLE

Many other industries where, similar to football, employee-specific capital is important, tend to be governed by rigid formal law that cannot be tailored to the needs of the industry. Although some have succeeded in obtaining the privilege of a closed group where non-members are excluded from participating in the industry—consider, for instance, laws requiring

293. See generally DIXIT, *supra* note 18, at 29 (explaining that international arbitration can be used in international transactions to reduce the risks of favored treatment of parties by their domestic courts).

294. See Landes & Posner, *supra* note 150, at 236.

295. See *id.* at 248 (explaining that arbitrators, who are paid by private parties to resolve their disputes, have no incentives to produce precedents that would provide guidance to future parties by incurring additional unpaid costs).

296. See *id.* at 248-49.

297. The CAS maintains a database of published awards. See *Database*, *supra* note 113. As of December 2016, the CAS had made approximately 330 football-related decisions publicly available. The *CAS Bulletin* is published twice a year and is also available online. See *CAS Bulletin*, CT. ARB. FOR SPORT, <http://www.tas-cas.org/en/bulletin/cas-bulletin.html> (last visited Nov. 12, 2017).

298. See Bernstein, *The Diamond Industry*, *supra* note 10, at 151 n.64 (making a similar argument for the members of the Diamond Dealers Club when it comes to "new and unusual cases").

practicing lawyers to join a local bar association—they have fallen short of establishing their own rules of conduct to replace formal State-made law.²⁹⁹ This is where these industries and their membership associations differ from FIFA. The question then is why has FIFA been successful in creating its own private legal system, whereas others, such as bar associations (or associations of law firms), have failed or have not even tried to establish an equivalent system?

In brief, this can be explained by a combination of three factors. First, FIFA started as a small network to organize international competitions, develop a commonly-shared fixture calendar, and harmonize the rules of the game across borders. This network was not costly to manage. FIFA was later able to build on this foundation by adding more powers. Second, all of this was made possible by the reluctance of States to intervene in regulating sports in general and football in particular. Hence, supported by or benefitting from the special treatment of sports by States, FIFA filled the regulatory gap and strengthened its status as a private regulator. Third, in order to attract audiences, football needed its own rules and regulations more than many other sectors. As a result, the new order has departed from traditional laws governing other fields in many ways. The remainder of this section discusses each factor in greater detail.

Professor Amitai Aviram's theory for the formation of private legal orders explains that successful private legal systems do not form "out of the blue." Rather, they build on an existing foundation, "typically by regulating norms that are not very costly to enforce" and then continue to grow and take over norms that are harder to enforce as they mature and become capable of enforcing them.³⁰⁰ The more private legal systems develop, the more members of the network benefit and the more others are incentivized to join.³⁰¹ Thus, the network will be able to take on the enforcement of yet costlier norms.³⁰²

FIFA's development fits into this framework. The organization stems from gentlemen's agreements that filled the void of international sports regulation then in place, and that benefited from a first-mover advantage.³⁰³ Since there had been little regulation in place, setting up a new organization provided membership benefits that had not been available before. The role of the new body was to oversee international games and competitions with the participation of a handful of its members' national teams. The original founders of FIFA were a small core group of people driven by the shared motivation to

299. See *supra* notes 242-44 and accompanying text (describing the AALS practice suggestion for law schools hiring laterals from other schools).

300. See Amitai Aviram, *A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems*, 22 *YALE L. & POL'Y REV.* 1, 14, 20-23 (2004) [hereinafter Aviram, *A Paradox*]; Amitai Aviram, *Path Dependence in the Development of Private Ordering*, 2014 *MICH. ST. L. REV.* 29, 48-49, 50-53.

301. See Aviram, *A Paradox*, *supra* note 300, at 21-22.

302. See *id.*

303. Henk Eric Meier & Borja García, *Protecting Private Transnational Authority Against Public Intervention: FIFA's Power over National Governments*, 93 *PUB. ADMIN.* 890, 893-94 (2015).

establish the new organization.³⁰⁴ This, coupled with the obvious need to organize international fixtures, provided incentives for complying with FIFA's rulings.

After World War I, FIFA strengthened its role by staging World Cups—the extremely popular and lucrative world championships for men's national teams of different countries.³⁰⁵ Since only members were eligible to participate, FIFA membership increased in its appeal for both the incumbent and prospective members. The success of these tournaments meant that FIFA could make use of an already existing network, thus overcoming initial collective action problems, to broaden its rule-making powers. As it grew, more and more countries saw network benefits in joining. FIFA was thus able to regulate more exclusively and add control mechanisms—i.e., the ability to control interactions within the field—to its toolbox. Soon enough FIFA was able to offer membership benefits—such as the right to participate in tournaments, the rights of countries to host the tournaments, and even the notion that having one's team “recognized” meant having one's sovereignty recognized.³⁰⁶ These benefits, combined with the negative consequences of staying outside of the unrivalled network, led to FIFA's transformation from a body responsible for a mere organization of international tournaments into a full-blown membership association regulating almost all aspects of organized football.

FIFA then made sure to keep its regulatory monopoly position. To fend off State intervention, FIFA invoked the doctrine of “autonomy of sport.”³⁰⁷ To discourage those within the network from turning to formal courts outside the private legal order, FIFA revoked the network benefits of those who violated the private legal rules.³⁰⁸ Now that FIFA is thus embedded, its network benefits are inescapable and it is, thanks to its established structure, presumably still less costly than the alternative solutions.

This was made possible by the reluctance of States to intervene in the governance of football. Just forty years ago, FIFA was largely focused on organizing the game across the globe; it was a small gentlemen's club with a staff of eight, was far from politics, and produced little cash.³⁰⁹ Since then, it

304. See Alan Tomlinson, *FIFA and the Men Who Made It*, 1 *SOCCER & SOC'Y* 55, 55-59 (2000). The small number of member associations and the close ties between them fostered decision-making and enforcement. Even nowadays FIFA remains at high levels a network of people who know one another fairly well and are willing to do favors for one another. See Guillermo Jorge, *Fixing FIFA: The Experience of the Independent Governance Committee*, 21 *SW. J. INT'L L.* 165, 167 (2014).

305. The inaugural FIFA World Cup was held in Uruguay in 1930 with the participation of thirteen national teams. Earlier attempts to organize an international competition among national teams were not successful. See Tomlinson, *supra* note 304, at 57-58. Not only has the World Cup become one of the world's largest media spectacles, but participation in the World Cup can also boost national pride and, for some, be seen as a demonstration of a nation's power and success. Not surprisingly, it is considered the “greatest asset” of FIFA. *Id.* at 55; see also Frances Robinson & Gabriele Steinhäuser, *Flemings Battle Walloons in Belgium, but They'll Always Have the World Cup*, *WALL ST. J.* (Jun. 26, 2014), <https://www.wsj.com/articles/flemings-battle-walloons-in-belgium-but-they-ll-always-have-the-world-cup-1403749857>.

306. See Meier & García, *supra* note 303, at 894.

307. See *id.* at 894-95.

308. See *supra* Section III.B.

309. See HEIDI BLAKE & JONATHAN CALVERT, *THE UGLY GAME: THE QATARI PLOT TO BUY THE WORLD CUP* 17 (2016); ANDREW JENNINGS, *FOUL! THE SECRET WORLD OF FIFA: BRIBES, VOTE*

has evolved into a powerful organization generating billions of dollars in annual revenues through sales of media and marketing rights.³¹⁰ State-related bodies have similarly evolved to pay more attention to football. Formal regulation exempted pure sporting interests that had nothing to do with economic activity.³¹¹ Accordingly, sports were not affected by State intervention and developed independently. But gradually, along with the increasing commercial dimension, State intervention has grown.³¹² The period of independence allowed FIFA to create its private legal order, which co-existed along with formal law, notwithstanding many conflicts. Later, FIFA's private legal order became so strong that the increasing willingness of State-related bodies to intervene had only limited effect on it.³¹³

The absence of State interest to intervene in the organization of sports, while explaining the ability of FIFA to develop its own legal order, does not answer the question of why football needed alternative governance rules. The history of the development of player transfer rules sheds light on this. In brief, football's interest in securing contractual stability is not unique, but the stakes were much higher in football than in most other fields.³¹⁴ Combined with an already existing network and a green light to self-organize with minimum public intervention, this led to the development of the order as we know it now.

RIGGING AND TICKET SCANDALS 9, 19-21 (2008).

310. See JENNINGS, *supra* note 309, at 49, 52; see also Matthew Futterman, Aruna Viswanatha & Christopher M. Matthews, *FIFA Corruption Allegations Reach Into Soccer's Highest Levels*, WALL ST. J. (May 27, 2015), <https://www.wsj.com/articles/corruption-allegations-reach-into-highest-levels-of-soccers-fifa-1432774912>.

311. See Richard Parrish, *Football's Place in the Single European Market*, 3 SOCCER & SOC'Y 1, 14 (2002); Van Rompuy, *supra* note 171, at 180.

312. See Parrish, *supra* note 311, at 14; Van Rompuy, *supra* note 171, at 180.

313. See, e.g., Parrish, *supra* note 311, at 5-8 (describing post-Bosman negotiations between football governing bodies and the European Commission, which resulted in a compromise reform of player transfer rules—a settlement that “was widely interpreted as a favourable settlement” for FIFA and UEFA).

314. Contrast the following narrative with the evolution of employee mobility in investment banking: As any intensive human knowledge-based sector, investment banks are interested in maintaining stable employment: if employee turnover is weak, banks can invest in the development of industry-specific skills and, in addition, do not need to fear information leaks and client losses associated with the departure of key employees. Historically, the traditional investment bank's partnership structure weakened incentives for employee mobility, but this has changed during the last decades. See Morrison & Wilhelm, *supra* note 27, at 397-99 (explaining that opaque individual performances of investment bankers discouraged competitors from soliciting laterals, which resulted in bankers spending their entire careers in one bank, though the development of measures of individual performance and the following rise of “star” culture have changed this). Accordingly, investment banks lacked incentives for lobbying special employment laws. They have more reasons to do this nowadays and have relied on non-compete provisions to limit employee mobility. The effectiveness of these clauses, though, given hostility of courts in many jurisdictions, is dubious. A lawsuit filed by Perella Weinberg Partners L.P. (PWP), a boutique M&A firm, against four of its former bankers, alleged that the bankers intended to “steal the practice group that PWP had spent millions of dollars and over seven years of effort to develop,” as stated in the complaint. See Sujeet Indap & James Fontanella-Khan, *Wall Street's Battle of the Bankers*, FIN. TIMES (Jan. 24, 2016), <https://www.ft.com/content/3cfb2542-bde3-11e5-846f-79b0e3d20eaf>. This rare public move put the long-established practice of including non-solicitation and non-competition clauses into bankers' employment contracts under judicial scrutiny, thus threatening to undermine the industry's traditional way of functioning. As explained by one attorney, even if the legality of these clauses is controversial, they are an effective tool to discourage employee mobility because “[t]he simple threat of litigation around these acts as an instrument to inflict pain on counter-parties with fewer resources.” *Id.*

Modern player transfer rules originated in England more than a hundred years ago. The northern clubs—Blackburn Rovers FC, Aston Villa FC, and Notts County FC—dominated English football in the late nineteenth century.³¹⁵ Although professional football was not officially recognized, the big clubs had for some time been in a position to pay their players or offer other benefits.³¹⁶ The Football Association, the governing body of football in England, eventually embraced the reality and recognized professional players but, in exchange, introduced transfer rules, according to which professionals had to register with their clubs every year and could move to another club only at the end of each season; old clubs could not prevent such moves.³¹⁷ In other words, clubs could commit players for a maximum of one year and had to renew their contracts annually. Accordingly, rich clubs from large cities could attract the best talent from clubs in smaller towns by offering higher salaries.³¹⁸ For example, when Nottingham Forest FC, then a small regional club, tried to obtain an injunction preventing one of its players from moving to Blackburn Rovers, both the first instance and the appeal courts refused to offer support.³¹⁹

After the English Football League, a league competition with professional football clubs from England and Wales, was expanded to include smaller clubs, the football authorities decided to remove the imbalance between big and small clubs in order to promote competition and increase the excitement and unpredictability of the tournament.³²⁰ A tournament dominated constantly by a handful of teams would hardly attract nation-wide interest. In the absence of support from the judiciary, the football authorities had to take action themselves: from the start of the 1893-94 season, the new transfer rules required that each player register with a club and, once registered, not play for another club unless permitted by the old club.³²¹ This was the precursor of the pre-*Bosman* system of transfer rules.

This story shows how important competition in football is. Only at first glance are football teams competing with each other. When it comes to attracting audiences, football has significant competition. Its rivals are not only other sporting events, but also the entertainment industry in general.³²² As a result, ensuring strong competition among the teams is crucial for maintaining and increasing the beautiful game's audience. In other industries, the

315. Cf. *Football Geography: A Country of Two Halves*, ECONOMIST (Aug. 13, 2016), <https://www.economist.com/news/britain/21704844-englands-beautiful-game-has-gone-south-country-two-halves> (“Half the 12 teams competing in the [English Football League’s 1888–89] inaugural season came from the north and half from the midlands; none was from south of Birmingham. Long after, the sport remained ‘a game of industrial England.’”).

316. See David McArdle, *Ignoring the Inevitable: Reflections on the Intervention of the English Courts in Football’s Contract Disputes*, 2 EUR. SPORTS MGMT. Q. 264, 265 (2002).

317. See *id.* at 265-66.

318. See *id.* at 267.

319. See *id.* at 266 (describing the facts of *Radford v. Campbell* (1890) 6 TLR 488 (Eng.)).

320. See *id.* at 267.

321. See *id.*

322. For a review of literature arguing for and against viewing sports as operating in a larger entertainment market, see Nathaniel Grow, *Regulating Professional Sports Leagues*, 72 WASH. & LEE L. REV. 573, 575 n.2 (2015).

competition, as a rule, is internal. For example, lawyers and law firms traditionally compete with other lawyers and law firms, rather than with bankers or auditors or, perhaps even more remotely, journalists. Even though contractual stability would benefit law firms, the stakes are thus lower. Clients can afford to have a stable list of top law firms or the Big Four auditing firms, but such consistency would most likely endanger the position of football as one of the most popular forms of entertainment. This can explain why football authorities are so interested in creating conditions that keep the game competitive. Since such conditions are not offered by public legal systems, football authorities step in by developing their own rules of the game.

VI. RISKS ASSOCIATED WITH FIFA'S ORDER AND IMPLICATIONS FOR PRIVATE ORDERING

When private ordering is chosen over formal State law, there is a strong case that the private order better suits the needs of the involved actors.³²³ This favored position flows largely from the proximity of private rule-makers, which can be either the parties themselves or their member associations, to the involved actors. This leads to two advantages. One is an informational advantage in designing specialized rules of behavior and resolving the arising disputes in a swift, qualified, and perhaps even less costly manner.³²⁴ Another is the order's responsiveness to the special needs of the involved actors due to the actors' greater involvement in the formation of the rules.³²⁵

Private ordering, however, comes with two potential risks. First, privately designed institutions are not necessarily the most efficient from the perspective of maximizing social welfare. Consider, for example, the negative externalities that they may create for third parties—i.e., the possible situations where private ordering would create costs for non-member third parties, thereby resulting in a net loss for society.³²⁶ Since third parties are not represented in the order, it is likely that their interests will be ignored or, even worse, abused by the private

323. Surely, path dependency, collective action problems, and other factors might deter a shift from a bad equilibrium to a better one. We discuss factors contributing to the maintenance of an established equilibrium above. *See supra* notes 196-202 and accompanying text.

324. *See* DIXIT, *supra* note 18, at 32-48 (showing the advantages of private contract enforcement, whether by the parties and industry peers based on relational contracting or by arbitration, as opposed to a State law that must use limited public information); Bernstein, *The Cotton Industry*, *supra* note 10, at 1741 (arguing that insider information available to arbitrators “transforms considerations that in the public legal system would have been only observable to the parties . . . into considerations that are also verifiable,” thereby expanding the “contractible” aspects of an exchange and making contracts more complete); Charny, *supra* note 40, at 409 (same).

325. *See* Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1700-01 (1996) (contrasting the ability of private ordering to accommodate the interests of the governed to the less responsive nature of centralized rule-making).

326. *See* Ellickson, *supra* note 27, at 253 (listing the collective action problem and the pursuit of ends other than economic efficiency, along with negative externalities, as explanations for the existence of non-efficient private orders); Maria Larrain & Jens Prüfer, *Trade Associations, Lobbying, and Endogenous Institutions*, 7 J. LEGAL ANALYSIS 467, 486-91 (showing formally that when property rights are weakly protected by the State, private trade associations increase welfare by lobbying for stronger property rights; contrarily, when property rights are strong, trade associations engage in rent-seeking that leads to negative spillovers); Posner, *supra* note 325, at 1722-23 (discussing the negative externality argument).

order and its constituencies. Private orders, such as the Ku Klux Klan, may succeed in securing internal cooperation and promoting the interests of their members, but their ends are unacceptable for society.³²⁷

FIFA's order may affect the public at large in either positive or negative ways. One of the positive effects is football's contribution to promoting tolerance and diversity. For instance, the success of the multicultural French national team in the 1998 World Cup is suggested to have had a positive effect on the perception of French citizens of their multicultural society.³²⁸ There are, however, numerous examples of negative externalities involving FIFA. Consider the costs associated with football-related hooliganism³²⁹ or the reported use of forced labor on venues that will stage the 2018 and 2022 FIFA World Cups in Russia and Qatar, respectively.³³⁰ The popularity of football, effective in promoting healthy lifestyles though it may be, may also have a negative effect on the education of younger generations by distracting them from studying at school.³³¹

Moreover, even when we disregard negative externalities and focus on the interests of the private order's constituencies only, private orders do not invariably imply maximum individual gains for all involved actors, because the development and maintenance of such orders may simply promote redistribution of gains from weakly represented actors to more powerful groups. Accordingly, the second problem of private ordering is the emergence of unbalanced orders due to efforts by certain power groups.³³² The power grab can also be initiated by the bureaucrats responsible for managing the private order—for example, through actions that, instead of promoting the interests of the order's constituencies, broaden the role of the bureaucracy or prolong its stay at the helm of the order.

Available evidence, indeed, suggests that some rules within FIFA have redistributive effect. For instance, the average employment contract length increased by about six months (or twenty percent) after the *Bosman* ruling, thus strengthening player security.³³³ The reality may be more complicated, as some

327. See Francis Fukuyama, *Social Capital and Civil Society* 4 (Int'l Monetary Fund, Working Paper WP/00/74, 2000), <https://www.imf.org/external/pubs/ft/wp/2000/wp0074.pdf>.

328. See J. J. Gouguet, *Economic Impact of Sporting Events: What Has to Be Measured?*, in *TRANSATLANTIC SPORT: THE COMPARATIVE ECONOMICS OF NORTH AMERICAN AND EUROPEAN SPORTS* 152, 156-57 (Carlos Pestana Barros et al. eds., 2002).

329. See *id.* at 157-58.

330. See *Extra Time and Punishment: The Cost Overruns on Russia's World Cup Stadiums are Staggering*, *ECONOMIST* (July 22, 2017), <https://www.economist.com/news/europe/21725330-they-have-become-symbol-corruption-under-putins-rule-cost-overruns-russias-world-cup>; *Qatar's Migrant Workers: Still Slaving Away*, *ECONOMIST* (June 6, 2015), <https://www.economist.com/news/middle-east-and-africa/21653625-year-after-vow-improve-lot-foreign-labourers-little-has>.

331. For the extensive discussion of the negative effects of sports on society, see HUMPHREYS, *supra* note 66. The use of doping and frequent injuries, which often lead to gradual health damage, may cast doubt even on the health benefits associated with sports.

332. See Posner, *supra* note 325, at 1718-19. Indeed, State capture by influential power groups is not uncommon either. See Joel S. Hellman, Geraint Jones, & Daniel Kaufmann, *Seize the State, Seize the Day: State Capture and Influence in Transition*, 31 *J. COMP. ECON.* 751, 758 (2003) (ranking twenty-two post-Communist countries by the level of State capture by influential private businesses).

333. See Bernd Frick, *The Football Players' Labor Market: Empirical Evidence from the Major European Leagues*, 54 *SCOTTISH J. POL. ECON.* 422, 437 (2007).

rules may not only affect the position of players versus clubs; the outcomes may also vary for different classes of players (depending on age, performance, nationality) and clubs (depending on wealth). When some of these nuances are taken into account, abolishing transfer rules is expected to increase player salaries, but players' gains are not sufficient to cover the losses suffered by clubs, thus reducing the joint surplus.³³⁴

A more revealing example of subordinating a private order to personal interests is the recent controversy around FIFA. According to the alleged charges of conspiracy and bribery, dozens of FIFA officials were involved in illegal actions when deciding on tournament locations and selling media rights to these events.³³⁵ This scandal has unveiled the "normal" business practices at high levels of FIFA's organization and how regional associations promoted their own self-interest at the expense of the game.³³⁶

The presence of these failures raises the question of the role of the State in the functioning of private orders. Private orders typically impinge on the State's jurisdiction—whether by functioning in fields where States are unwilling or unable to offer institutions, or by competing with already existing State institutions in offering institutional support for a specific activity. The authority of private orders to govern a given field is thus limited by the sovereign power of the State, and the State can reclaim this authority.³³⁷ Accordingly, alternative modes of governance usually function within the often implicit constraints imposed by public orders and try to avoid external legal interventions. When there are extreme deviations from the fundamental rules and norms supported by a relevant public order, it may provoke the very thing private orders try to avoid—external interventions into their domain. Therefore, when a private order ignores the problem of negative externalities or becomes heavily unbalanced by abusing the position of weak constituencies, it is, in fact, inviting the State to intervene, thereby undermining its own authority.³³⁸ On the other hand, as long as a private order can create a balance between the interests

334. See Marko Terviö, *Transfer Fee Regulations and Player Development*, 4 J. EUR. ECON. ASS'N 957, 969-72 (2006).

335. See, e.g., Esposito, *supra* note 25, at 55-59.

336. Bribery and corruption are not specific to private orders and exist throughout many public institutions as well. The problem, however, may be exacerbated in private orders that lack direct representation of the involved actors. This is, certainly, the case with FIFA—neither football clubs, nor players have voice in electing FIFA's governing bodies. As a result, the order's bureaucracy is more prone to becoming detached from the constituencies whose interests it is supposed to look after.

337. See Panagiotis Delimatsis, *The Future of Transnational Self-Regulation—Enforcement and Compliance in Professional Services*, 40 HASTINGS INT'L & COMP. L. REV. 1, 18-19 (2017); Ellickson, *supra* note 27, at 236 (noting that States give up part of their power in regulating behavior where they tolerate private orders); Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1696 (2008) (noting that the State can delegate the power to regulate to, and can take it away from, self-governing bodies).

338. The history of legal regulation is abundant with examples of State intervention in response to the failures of private ordering. See, e.g., Note, *Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 1006-20, 1037-40 (1963) (discussing situations where the law imposes limitations on the actions of private associations that have negative effect on its individual members or the public in general). For the classic discussion of externalities and ways of tackling undesirable activities by regulating or imposing bounties and taxes (known as "Pigouvian taxes") on them, see ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* 159-63, 168-71 (1920).

of different power groups and is willing to take action in response to its failures, the order can ensure its successful independent functioning. Any State intervention would be redundant and would weaken the private order by disrupting the functioning of the order's established rules, as well its dispute resolution and enforcement mechanisms.

Anticipating this scenario, private orders are expected to refrain from abusing their autonomy or failing to take action in anticipation of broad public expectations. Nevertheless, when this happens, the State can use its power of reclaiming governance to assist and improve the private order. Interventions by public orders can be crucial in ensuring that the private order is not leading to excessive negative externalities, or ensuring that one of the groups inside the order is not tilting the balance too much in its own favor.³³⁹ By reining in too powerful actors, public orders can contribute to the success of a private order. Otherwise, a private order might become the hostage of one interest group, which would transfer value at the expense of all others, thereby losing broad support and legitimacy. At the same time, these interventions should be careful not to crush the private order.³⁴⁰

Figure III. The Evolution of Private Orders³⁴¹

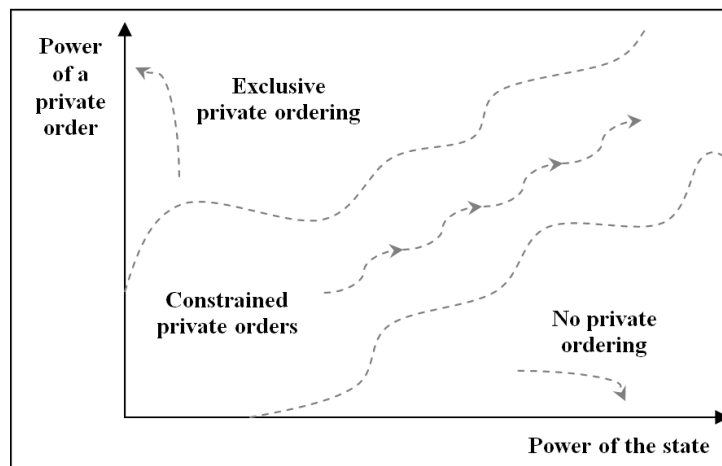


Figure III above illustrates the three types of interactions between the State and a private order. At one extreme, in the absence of the State, private orders are the sole suppliers of institutions. Typical instances include private orders that predated modern States, private orders in current-day developing countries where weak State institutions are insufficient to support economic

339. See Ellickson, *supra* note 27, at 249-50.

340. See *supra* note 283 and accompanying text.

341. Figure III is based on the idea from the literature on State-building proposed by Acemoglu and Robinson. See DARON ACEMOGLU & JAMES A. ROBINSON, STATE BUILDING: A POLITICAL ECONOMY PERSPECTIVE (forthcoming 2018); Daron Acemoglu & James A. Robinson, *Paths to Inclusive Political Institutions* 2-3, 5-15 (Jan. 19, 2016), <https://economics.mit.edu/files/11338>.

activities, and illegal underworld activities that, obviously, cannot be supported by formal law and thus require private supply of institutions.³⁴² Along with the increasing power of the State, most of the private orders in this group have become history.

At the other extreme is the exclusive supply of institutions by the State. While their monopolization of regulations may be warranted in many areas, like criminal justice and the protection of minorities, governments do recognize that private ordering often has informational and receptivity advantages. Therefore, private orders can often be better positioned to develop and maintain institutions that are tailored to the interests of the involved actors. Exclusive state regulation in all fields will inevitably lead to inefficiencies.

Constrained private orders in the middle area function under the threat of government interventions. These interventions can be direct—for instance, by overruling a decision of the private order or limiting its authority—or indirect—by supporting the inclusion of various interest groups in decision-making processes within the private order. The State, while recognizing the benefits of private ordering and leaving it alone, preserves the power to intervene when things go wrong. This State shadow reduces excessive negative externalities and interest capture of the private order. Importantly, stronger power of a public order does not, and certainly should not, mean more intensive and frequent external interventions into private orderings. Rather, the co-evolution of powerful private and public orders implies strategic external interventions that correct the failures of private ordering but do not meddle in the internal affairs of the private order too much. The latter would risk disrupting the functioning of the order. In other words, the public-private interactions direct the evolution of private orders. As long as public orders recognize the advantages of private ordering and intervene carefully, these interactions can strengthen private orders, rather than weaken them.

Given the informational advantages and receptivity of private orders,³⁴³ constrained private orders are more likely to increase the collective gains of the involved actors relative to other available governance mechanisms, including a public ordering regime.³⁴⁴ In other words, constrained private orders can offer organizational support that other competing alternatives struggle to provide due to high transaction costs.³⁴⁵ Otherwise, the private order would lose the race in

342. See *supra* note 19 and accompanying text.

343. See *supra* notes 323-25 and accompanying text (explaining the advantages of private ordering as compared to State regulation).

344. The concept of “relative efficiency” should be distinguished from the argument that group norms tend to maximize the welfare of the group in which they arise. The latter has been advanced by Robert Ellickson. See ELLICKSON, *supra* note 9, at 167.

345. See Richman, *supra* note 19, at 2338-50 (explaining that the choice of a governance mode depends on its relative superiority in offering effective and cheap enforcement, market entry, and high-powered incentives); Barak D. Richman, *Norms and Law: Putting the Horse Before the Cart*, 62 DUKE L.J. 739, 762-64 (2012) (the same). Various examples of private orders often outperform public orders and firms in enforcement and market incentives, respectively, but limit market access. Hence, a private order arises where the effects of entry barriers associated with reputation mechanisms are insignificant or the order can offer methods for strengthening access without compromising the credibility of the order. See Richman, *supra* note 19, at 2346-47. One such method described by Richman is ex ante screening of new entrants. *Id.* at 2347. Our case study shows that not all private legal orders are

the competition with formal State law and other alternatives as dissatisfied actors have strong incentives to challenge the validity of private orders citing the order's incompatibility with mandatory State laws and public order concerns.³⁴⁶

Returning to the example of FIFA, the constant likelihood of challenging the order by bringing a claim in ordinary courts of law has helped reverse one-directional shifts of power within FIFA. Moreover, there is evidence that various interests groups use the threat of challenging FIFA's private order strategically in order to strengthen their negotiating power in the process of rule-making within the organization.³⁴⁷ Since a complaint by a single actor in most cases suffices to challenge FIFA's order in State courts, the collective action problem has only limited effect on distorting the interactions between the private and public orders. This is further strengthened by the presence of collective representation organizations of the main interest groups.³⁴⁸ The recent charges against the top officials of FIFA signal that governments are now willing to intervene not only in the name of protecting weaker interest groups, but also for dealing with misbehavior in handling FIFA's internal governance matters and finances. Governance failures can certainly have negative spillovers on the design of the private order. Good governance is thus a condition for the autonomy of FIFA's private order.

The recent social dialogue in European football, brokered by the EU Commission, is an example of how public orders can fulfill their role as guardians of private orders. The problem arose from reported widespread practices of abusing player rights in some Eastern European countries, including cases of imposing penalties on players equal to their salary or not paying salaries to injured players.³⁴⁹ The EU Commission, instead of intervening directly and regulating sports, encouraged various stakeholder groups, such as ECA and FIFPro, to engage in a dialogue with a view to improving the practices of player protection.³⁵⁰ In this way, the EU Commission tries to achieve balance in the involvement of various interest groups in football governance and at the same time is preserving the autonomy and self-regulation of football. For the private order, participation in this dialogue and support in implementing the results of this dialogue are the best ways to guarantee its role as a supplier of rules.³⁵¹ In contrast, the private order's refusal to accommodate such efforts might undermine the order by giving incentives to interest groups to advocate for external State involvement,

reputation based. Such orders can effectively function even if they involve a large number of heterogeneous actors.

346. As already mentioned, it is possible that costly institutions persist even though efficiency requires changes. According to Douglas North, the two main reasons to blame are the powerful vested interests of some actors or multiple equilibria and historical accidents. See DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 92-104 (1990).

347. See *supra* note 211.

348. See *supra* Section III.B (discussing the roles of ECA and FIFPro).

349. See Colucci & Geeraert, *supra* note 193, at 64.

350. *Id.* at 60-67. The process resulted in a document listing the minimum requirements in standard players' contracts at the European Union level.

351. See *id.* at 67.

thereby putting an end to the regulatory monopoly of the private order.

This model of interactions can be used to improve the functioning of the private order further. For example, one instance of possible inefficiency within FIFA is the well-known practice of including excessively high buyout clauses, at the insistence of clubs, in contracts with athletes.³⁵² This practice is effective in discouraging early contract termination, but it comes at the cost of deterring efficient breaches of contracts.³⁵³ Thus, government interventions can push FIFA's internal dispute resolution bodies and the CAS towards a practice of enforcing contractually agreed buyout clauses only if they reflect the real replacement value of the concerned player. Note that in jurisdictions where liquidated damages clauses are enforceable by State courts, the pre-agreed amount of damage cannot be arbitrary; rather, it has to be the expected approximation of a possible damage.³⁵⁴ Such practice, at least initially, may stimulate speculative litigation among the parties, but along with the developing "case law" on the appropriate amounts of buyout clauses, the incentives of the parties for filing speculative complaints with decision-making bodies will be corrected.

CONCLUSION

States and supra-national organizations are far from being the sole suppliers of behavior-governing institutions. Scholars have documented numerous examples where non-State actors have developed institutions that support order. These privately-created legal orders often function successfully in the shadow of or without State-made laws. FIFA is yet another example of a private actor that has established its own rules and regulations and has designed sophisticated dispute resolution and enforcement systems for these rules. This private legal order has succeeded in governing the behavior of the involved actors by keeping them away from regular courts. The reason, as we show, is the ability of the order to offer what other governance modes, including State-backed public orders, could not.

One implication of our study is that "FIFAGate," the recent money laundering and fraud conspiracy case under investigation by both the U.S. Department of Justice and Swiss authorities, should not become a pretext for criticizing everything related to FIFA. FIFA's administrative structure, certainly, needs reforms that will limit future mismanagement and corruption

352. Cf. Matuzalem Award, *supra* note 87, ¶ 36 (Mr. Matuzalem and Real Zaragoza SAD alleging in their submissions that "[i]t is a known fact that these [buyout] amounts are always set at a level far higher than the effective value of the player concerned." (internal quotations omitted)); see also Professional Player Employment Contract Between Real Madrid Club de Fútbol and Luka Modri, *supra* note 274 (reporting the amount of the compensation for unilateral termination of the contract agreed by Real Madrid Club de Fútbol and its Croatian player Luka Modric).

353. For an argument on efficient breaches of contracts, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 149-51 (8th ed. 2011); Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 *COLUM. L. REV.* 554, 561-62 (1977).

354. See Mattei, *supra* note 280, at 435-36.

risks.³⁵⁵ But the scandal and the resulting reforms do not necessarily mandate changes in the entire private legal order. So far, the calls for reform have focused on the administrative side of FIFA: reducing corruption risks by empowering professional staff, rather than top FIFA officials, to make commercial decisions; strengthening gender diversity among top officials; limiting maximum terms of their service, including for FIFA's president; and increasing transparency.³⁵⁶ The rules that regulate relations among different actors involved in football-related activities are not in the limelight. Nevertheless, further calls to increase State intervention in regulating football-related activities, which may be leveraged by corruption allegations, cannot be ruled out. This Article suggests that a careful approach is required and, unless a better alternative that meets the specific needs of the various groups of involved actors is found, there should be limits to external intervention in football-related matters.

Efforts should instead focus on identifying and dealing with some inefficiencies in FIFA's private order. It is here that State involvement may help private orders to improve. Law and economics literature in this field has done an excellent job in pointing to the limits of State-centric models of governance and showing that there can be better alternatives. But these studies have often ignored the interactions between different modes of governance, particularly the backstage role of State-sponsored institutions in the functioning of private orders. The common assumption that any external intervention weakens private orders needs to be corrected. When the State recognizes the benefits of private ordering and tolerates its autonomy, the State still has an important role to play. This role is to challenge and correct the failures of established private orders without threatening their viability, like healthy civil societies curb the excesses of governments.

355. See, e.g., Jorge, *supra* note 304, at 165-66 (arguing that FIFA combines enormous economic and social influence with very little constraints imposed by its "rather amateur governance structure").

356. See, e.g., Ralph Atkins, *Infantino Elected as New FIFA President*, FIN. TIMES (Feb. 26, 2016), <https://www.ft.com/content/f984ab40-dc95-11e5-827d-4dfbe0213e07>; Keir Radnedge, *FIFA Faces Uncertain Future as Carrard Unveils Reforms*, WORLD SOCCER, Jan. 2016, at 18-19; Keir Radnedge, *Infantino, the Man*, WORLD SOCCER, Apr. 2016, at 14; Joshua Robinson, *FIFA Elects Gianni Infantino To Succeed Sepp Blatter as President*, WALL ST. J. (Feb. 26, 2016), <https://www.wsj.com/articles/fifa-elects-gianni-infantino-to-succeed-sepp-blatter-as-president-1456506510>.