

**THE WIDE WORLD OF SPORTS IS GETTING
WIDER:
A LOOK AT DRAFTING FOREIGN PLAYERS
INTO U.S. PROFESSIONAL SPORTS**

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I. INTRODUCTION

Our world is getting smaller with each passing year. Advances in science, technology, and industry have bridged geographical gaps between nations. Music, art, and education foster common understanding between vastly different societies. Working toward ideals of equality and freedom will continue to unite politically disparate communities. More and more, citizens of the world are opening their eyes to see that people who seem to live a lifetime away are really not that different after all. That which binds a community together also connects those around the world.

This global connection is becoming more apparent in the world of professional sports. Over the past few decades, American sports fans have seen a dramatic increase in the number of international players in arenas, stadiums, and ballparks throughout the United States.¹ Some fans undoubtedly disapprove of such a “foreign invasion” of “American” pastimes, while others welcome the new challenges, perspectives, and competition that the international community can bring to American games.

The changing faces of American sports heroes have not gone unnoticed by those in the sports business. Perhaps players, in particular, feel that their job security and positions in the limelight are threatened by the presence of foreign talent. If so,

1. As of the 2002–03 season, nearly fifty percent of professional baseball players and sixty-seven NBA players are from outside the United States. See Wayne Coffey, *As the Baseball World Turns: Global Draft Needed to Level Playing Field*, MILWAUKEE J. & SENTINEL, June 2, 2002, at 1C, available at 2002 WL 3148916; see *International Players in the NBA*, at http://www.nba.com/players/international_player_directory.html (last modified Mar. 15, 2003).

what can players do about it? *Should* they do anything about it? Is it right or wrong for sports management to seek talent from outside the United States? Does bringing in outside talent have a detrimental or beneficial effect on American sports? Can players and owners reach amicable solutions to the inherent tensions that these questions raise?

This comment does not attempt to answer all of these questions. Instead, it will focus on the impact of bringing foreign players into the United States via professional sports drafting systems within the professional sports of baseball and basketball. Part II provides a legal backdrop from which to view the drafting of foreign players. First, it explains the immigration laws that allow international athletes to play in the United States. It then explains the mechanisms through which players can negotiate with and challenge management on issues inherent in drafting systems: collective bargaining and antitrust law.

Part III of this comment closely examines the ways in which American baseball and basketball have grown into global, rather than American, pastimes. Part IV focuses on two recent events that have brought the issue of foreign players and the draft to the forefront of the sports world. First, America's baseball players agreed during the summer of 2002 to implement a worldwide draft system in Major League Baseball (MLB). Second, Chinese player Yao Ming was the number one draft pick in the National Basketball Association (NBA) starting in the 2002–03 basketball season. Both of these events, occurring closely together, provide a prime opportunity to analyze how foreign players are, or should be, incorporated into the business of sports in this country. Finally, Part V compares baseball and basketball, suggesting first that global drafting is necessary to maintain the health of both sports in this country; second that MLB can learn from the NBA how to bring baseball to the world.

II. THE RULES OF THE GAME

A. *Immigration Laws Affecting Foreign Athletes*

Even the youngest American sports fans may know that not all of their heroes are their neighbors. What these young fans

may not know is how athletes from around the world came to play in their cities. Before understanding the X's and O's of how foreign players maneuver through the legalities of American professional sports, it is important to understand how they have access to them.

All non-U.S. citizens desiring to enter and stay in the United States must first obtain a visa.² Athletes are no exception: Those who want to play in the United States begin their American careers by obtaining visas as nonimmigrant aliens, under either the O or P category.³ These categories were contained in legislation that became effective in 1992 and changed various standards that applying athletes must meet before entry into the United States can be granted.⁴ Prior to 1990, foreign athletes seeking entry into the United States were required to obtain an H visa, which required applicants to have "no intention of abandoning" their residences within their native countries, to be of "distinguished merit and ability," and to remain in the United States temporarily to "perform services of an exceptional nature requiring such merit and ability."⁵ Various amendments to O and P visas were proposed in 1990.⁶ The current visas became effective in 1992, replacing the former H visa as the preferred visa for athletes.⁷

1. *The Current O Visa*

Today, foreign athletes apply for a temporary work permit via the O visa.⁸ Instead of the "distinguished merit and ability"

2. Amy E. Worden, *Gaining Entry: The New O and P Categories for Nonimmigrant Alien Athletes*, 9 MARQ. SPORTS L.J. 467, 467 (1999).

3. *Id.* (citing 8 U.S.C. §§ 1101(a)(15)(O)(i), (a)(15)(P)(i) (2000)).

4. *Id.*

5. *Id.* at 468 (citing 8 U.S.C. § 1101(a)(15)(H)(2000)). Worden gives an informative and in-depth description of the category H visa, which is beyond the scope of this comment. Of particular note, however, are factors that the INS considered in determining whether the athlete met the "distinguished merit and ability" standard, including whether the athlete would perform a "star role." *Id.* at 469. If an athlete could not meet that standard, he could still obtain an H visa "if there were no qualified Americans to perform the function that he or she would perform." *Id.*

6. *Id.* at 468.

7. *Id.* at 467, 474.

8. *Id.* at 476. This category also applies to nonimmigrant alien entertainers. *Id.*

standard under the H visa, athletes must prove “extraordinary ability” to obtain an O visa.⁹ Fulfilling this standard requires the athlete to show that he has “a level of expertise indicating that the person is one of that small percentage who has risen to the very top of the field of endeavor.”¹⁰

The Immigration and Naturalization Service (INS)¹¹ has stated that membership on a professional team alone does not fulfill the extraordinary ability standard, making it more difficult for players with emerging talent to gain entry to American sports.¹² According to the federal regulation, the nonimmigrant athlete must establish his extraordinary ability through “recognized achievement in athletics and sustained national or international acclaim.”¹³ An athlete can fulfill the regulatory requirements of extraordinary ability by showing the following:

- (A) being awarded a major internationally recognized award; or
- (B) at least three of the following forms of documentation:
 - (1) documentation of the alien being awarded nationally or internationally recognized prizes or awards for

9. *Id.* at 468, 476 (citing Austin T. Fragomen, Jr., *The O and P Nonimmigrant Visa Categories: 26th Annual Immigration and Naturalization Institute*, 486 PLI/LIT 267, 269 (1993)). The author goes on to discuss the ambiguity that remains with the current extraordinary ability standard, regardless of Congress’ attempt to clarify the standards of the H visa. *Id.* at 490–92.

10. *Id.* at 476–77 (citing 8 C.F.R. § 214.2(o)(3)(ii) (2003)). The author also discusses three cases of the past decade which helped determine the meaning of the immigration statutes analyzed; *Grimson v. INS*, 934 F. Supp. 965 (N.D. Ill. 1996); *Muni v. INS*, 891 F. Supp. 440 (N.D. Ill. 1995); *Racine v. INS*, 1995 WL 153319 (N.D. Ill. 1995). Worden, *supra* note 2, at 485–90.

11. On March 1, 2003, the Immigration and Naturalization Service was moved from the Department of Justice to the Department of Homeland Security and divided into three branches. The U.S. Citizenship and Immigration Services (USCIS) is now responsible for the processing of visas and benefits. Homeland Security Act of 2002, Pub. Law 107-296. *See also* 69 Fed. Reg. 3380 (Jan. 23, 2004) (summarizing the effect of the Act on the INS). Because this paper was written before these changes took place, it will refer to the INS rather than USCIS.

12. Worden, *supra* note 2, at 477; *Muni*, 891 F. Supp. at 443.

13. Worden, *supra* note 2, at 477.

excellence in the field of endeavor,

(2) documentation of the alien's membership in associations in the field for which classification is sought, which requires outstanding achievements of their members, as judged by recognized national or international experts in their fields,

(3) published material in professional publications or major media about the alien relating to the alien's work in the field,

(4) evidence of the alien's participation in judging the work of others in the same field for which classification is sought,

(5) evidence of an alien's original scientific, scholarly, or business-related contributions of major significance in the field,

(6) evidence of the alien's authorship of scholarly articles in the field, professional journals or other media,

(7) evidence that the alien has been employed in a critical or essential capacity for organizations that have a distinguished reputation, or

(8) evidence that the alien has commanded and now commands a high salary evidenced by contracts or other evidence.¹⁴

Possessing extraordinary ability no longer requires a showing that the applicant is a star in his sport, as required with the H visa.¹⁵ But, the applicant's challenge is not met once the athlete has proven his ability: He must also prove that he will fill a position that *requires* extraordinary ability.¹⁶ This can be done one of two ways: showing that the position to be filled involves an "event or activity that has a distinguished

14. 8 C.F.R. § 214.2(o)(3)(iii)(2003). Worden also examines more fully what is meant by "extraordinary ability," as well as how that standard can be fairly applied. Worden, *supra* note 2, at 490-92.

15. Worden, *supra* note 2, at 468-69, 478-79.

16. *See id.* at 479 (emphasis added).

reputation,” or showing that the position involves a “comparable, newly organized event or activity.”¹⁷ In addition, the applicant must also obtain an advisory opinion from a peer group that has attained a level of expertise in the applicant’s sport, which must include: (1) whether the position applied for requires extraordinary ability; (2) the applicant’s achievements and ability in the sport; and (3) the duties which will be required of the applicant in performing the position.¹⁸

2. *The Current P Visa*

The current P-1 visa is appropriate for “athletes who perform individually or on a team, who have no intention of leaving his residence, and who wish to perform in one event or competition.”¹⁹ For a nonimmigrant athlete to qualify for a P-1 visa, he must demonstrate international recognition by showing that he has attained a high level of achievement.²⁰ Evidence of this high level of achievement is an athlete’s skill and recognition, which both must be “substantially above that which an athlete usually possesses” so that the athlete is “renowned, leading, or well-known in more than one country.”²¹

An athlete wanting to compete either individually or as a member of an American team must demonstrate on his visa application that he has garnered international recognition in the sport and the reputation that supports such recognition.²² Demonstrating international recognition, according to the regulation, requires two elements of proof:

- (1) A tendered contract with a major United States sports league or team, or a tendered contract in an

17. *Id.* (citing 8 C.F.R. § 214.2(o)(3)(iii)(2003)).

18. *Id.* at 479–80 (citing 8 C.F.R. § 214.2(o)(3)(2003)).

19. *Id.* at 480 (referencing Austin T. Fragomen, *The O and P Nonimmigrant Visa Categories: 26th Annual Immigration and Naturalization Institute*, 486 PLI/LIT 269, 282 (1993)).

20. 8 C.F.R. § 214.2(p)(4); Worden, *supra* note 2, at 480..

21. 8 C.F.R. § 214.2(p)(3); Worden, *supra* note 2, at 480–81.

22. Worden, *supra* note 2, at 481, (referring to 8 C.F.R. § 214.2(p)(3) and Tibby Blum, *O and P Visas for Nonimmigrants and the Impact of Organized Labor on Foreign Artists and Entertainers and American Audiences*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 533, 548 (1993)).

individual sport commensurate with international recognition in that sport, if such contracts are normally executed in the sport, and

(2) Documentation of at least two of the following:

(i) Evidence of having participated to a significant extent in a prior season with a major United States sports league;

(ii) Evidence of having participated in international competition with a national team;

(iii) Evidence of having participated to a significant extent in a

prior season for a U.S. college or university in intercollegiate competition;

(iv) A written statement from an official of the governing body of the sport which details how the alien or team is internationally recognized;

(v) A written statement from a member of the sports media or a recognized expert in the sport which details how the alien or team is internationally recognized;

(vi) Evidence that the individual or team is ranked if the sport has international rankings; or

(vii) Evidence that the alien or team has received a significant honor or award in the sport.²³

3. *Effect of the Current Legislation*

It appears that the effects of the O and P visas are different and provide safeguards for different groups. For example, acquiring a P visa is easier for the nonimmigrant athlete than acquiring an O visa.²⁴ As such, Congress has exerted more control over foreign athletes wishing to enter the United States with an O visa than those with a P visa.²⁵ The elements of the P visa are easier for applicants to prove because most athletes

23. 8 C.F.R. § 214.2(p)(4)(ii)(B) (2003).

24. See Worden, *supra* note 2, at 482.

25. See *id.* at 480.

applying for entry into the United States to play professional sports have signed contracts to play with an American team.²⁶ Furthermore, an athlete in this situation will easily obtain a written statement from an expert in his sport to demonstrate his statutorily required international recognition.²⁷ Thus, it seems that Congress has considered the business of domestic professional sports and created statutes that allow American sports teams easy access to the world's best players.

It is more difficult and time-consuming for a nonimmigrant athlete to obtain an O visa, which requires an athlete to prove his own extraordinary ability and that the position he wishes to play requires such extraordinary ability.²⁸ Such restraint over foreign athletes may safeguard American athletes by allowing only the world's verifiable best athletes to play in the United States, and by maintaining the current level of athleticism and competition found in American professional sports.²⁹ Also, athletes applying for a P visa must have no intention of leaving their foreign residence,³⁰ whereas athletes applying for an O visa need not make such a showing.³¹ Accordingly, the more difficult standard for O visa applicants exists because they are permitted to seek long-term residence within the United States.

4. *Practical Application to Foreign Athletes*

The benefits and drawbacks of each visa depend on the qualifications and desires of the athletes applying for them.³² For those foreign athletes who have proven themselves exceptional, the O visa provides a practical form of entry into the United States.³³ This visa is the better choice for those athletes because it contains three subcategories that provide athletes with a temporary work permit and enables the coaches,

26. *See id.* at 481–82.

27. *Id.* at 482.

28. *Id.* at 480.

29. *Id.*

30. *Id.*

31. *Id.* at 476–80 (setting out the guidelines for O category visa application).

32. *See* Erik Varela, *The Cuban Way: MLB's Draft Rules and Its Affect on Cuban Defectors—Does It Violate Federal Discrimination Law?* (on file with author).

33. *See id.*

trainers, and families of these athletes to enter the United States.³⁴ These subcategories are undoubtedly the major benefits of obtaining an O visa because many foreign athletes wanting to play professional sports in the United States desire the opportunities for their families that the subcategories provide.³⁵ But, the additional benefits to the athlete make this type of visa more difficult to obtain.³⁶

The P visa option contains fewer stringent requirements and allows an athlete to remain in the United States for a longer period of time.³⁷ This option is not as attractive to athletes desiring a position on a professional team because it is available only to foreign athletes performing in a specific competition at an internationally recognized level.³⁸ This limitation does not allow entry to athletes who wish to play as a permanent member of a professional team. If the O visa is too difficult to obtain, an athlete can obtain a P visa by virtue of his international recognition as an athlete.³⁹ Proof of participation with a national team during an international competition, a written statement from a league, detailing the player's international reputation, and other evidence that the player received a significant honor in his particular sport are factors which illustrate international recognition.⁴⁰ By meeting these requirements—a task in which leagues are likely to assist players—an athlete may gain entry with a P visa even if he is not seeking entry for a specific competition.

Athletes choose which visa to obtain⁴¹ but are not typically on their own in making such decisions. Leagues such as MLB, which desire foreign athletes' entry into the United States, have

34. *Id.* (citing Matthew Greller, *Give Me Your Tired, Your Poor, Your Fastball Pitchers Yearning for Strike Three: How Baseball Diplomacy Can Revitalize Major League Baseball and United States - Cuba Relations*, 14 AM. U. INT'L L. REV. 1647, 1657 (1999)).

35. *Id.*

36. *Id.*

37. *Id.* (citing Greller, *supra* note 34, at 1660).

38. *See id.*

39. *Id.*

40. *Id.* (citing Greller, *supra* note 34, at 1661); *see also* Worden, *supra* note 2, at 481.

41. Varela, *supra* note 32.

the means and procedures in place to assist in obtaining the required visa.⁴² This assistance is logical because leagues scout foreign talent and invite the best athletes to play in the United States. Obtaining the necessary immigrant status is not the beginning of the foreign player's interaction with league management. It is but one step in the process of becoming an American superstar.

B. Collective Bargaining

Once a foreign player successfully enters the United States and joins a team, how does he deal with the team's management? As a member of the team, foreign players—like U.S. players—join players' unions that negotiate with the team's owners to form collective bargaining agreements. A collective bargaining agreement (CBA) is the contract between the league and the players' union that delineates the operating rules and procedures for the league and players.⁴³ The CBA generally defines salary caps, methods of salary determination, rules governing trades, and draft procedures.⁴⁴ It also ensures that the league is not acting in violation of antitrust laws.⁴⁵

1. MLB Draft and Current CBA

a. MLB's Draft Rules

Currently, foreign players are not eligible to be drafted by an MLB team in the United States.⁴⁶ Rules 3 and 4 of the

42. *Id.*

43. Larry Coon, *NBA Salary Cap / Collective Bargaining Agreement FAQ* (1999), at <http://members.cox.net/lmcoon/salarycap.htm>. The common abbreviation for collective bargaining agreements is "CBA." *Id.*

44. *Id.*

45. *Id.* See *infra* Part II.C, for a discussion on antitrust laws relevant to professional sports.

46. Varela, *supra* note 32. The status of foreign players regarding the draft was set to change by June 2003 with the adoption of a global draft system, but the worldwide draft did not occur in 2003. Associated Press, *Four-Year Deal Includes Luxury Tax, No Contraction* (Aug. 30, 2002), at <http://espn.go.com/mlb/news/2002/0830/1425253.html> [hereinafter *Four-Year Deal*]; See Patrick Ebert, *2003 Draft Preview* (May 8, 2003), at <http://www.brewerfan.net/fullArticle.jsp?articleId=142>.

Professional Major League Baseball Rule Book set out the conditions a player must meet to be eligible for the draft.⁴⁷ According to the rules, a draft-eligible player must be a resident of the United States, the District of Columbia, Puerto Rico, or other territory of the United States.⁴⁸ The only way a foreign player becomes eligible for the draft is to obtain U.S. citizenship, enroll in a U.S. high school or college, or establish a legal residency in the United States on the date of his contract or within one year prior to that date.⁴⁹

Establishing U.S. residency is a daunting and undesirable task for most foreign baseball players. Most foreign players have either completed high school in their native countries, are too old for high school, do not want to lose residence in their native countries, or simply do not have the financial means to establish a legal U.S. residence.⁵⁰ These facts do not, however, render their entry into MLB impossible or even more difficult than American-born players.⁵¹ In fact, for many international players, the road to MLB is “paved with gold,” because they can bypass the draft requirements and enter American baseball as free agents.⁵²

Because the draft rules do not apply to most foreign players, and MLB rules do not contain any provisions that specifically address the entry of foreign players into the United States, their entrance into professional baseball as free agents is much quicker than for American players.⁵³ This avenue for admittance frees most foreign baseball players from the restrictions of the draft and allows them to negotiate freely with all major and minor league teams.⁵⁴ As a result, many foreign players

47. *Id.*

48. *Id.* (citing Professional Major League Baseball Rule Book, at Rule 3).

49. Varela, *supra* note 32. Canadian players are also eligible to be drafted in MLB, as evidenced by the existence of MLB teams in Canadian cities, such as Montreal and Toronto. Associated Press, *Finding Resolutions for Key Labor Issues* (Aug. 30, 2002), at <http://espn.go.com/mlb/news/2002/0830/1425315.html> (last visited April 22, 2004).

50. Varela, *supra* note 32.

51. *Id.*

52. *Id.*

53. *Id.* This oversight in MLB rules has become known as the major league loophole. *Id.*

54. *Id.*

negotiate freely to obtain lucrative contracts long before American players, who must be in the league six years to obtain free agent status.⁵⁵

Of course, a foreign player must obtain the appropriate immigrant visa before beginning down the golden road toward lucrative MLB free agency.⁵⁶ Once a foreign player has obtained the proper visa, MLB's operating procedures make it relatively easy for him to become a free agent.⁵⁷ For example, foreign players are required to sign a contract with a major league team before obtaining either an O or P visa.⁵⁸ That contract requirement is easily met when the player turns seventeen years old, as age is the only limitation placed on foreign players' entry into MLB.⁵⁹ Once the player and the team have signed the contract, the team is required to file a petition with the regional INS Center⁶⁰ possessing jurisdiction over the area where the player will compete.⁶¹

MLB and the team contracting with the player assist the player in obtaining the proper visa. With visa in hand, foreign baseball players are free to begin careers as MLB players.⁶² And they truly are free. They are not subject to draft restrictions, can negotiate as free agents, and are free to sign with teams offering the best deals.⁶³ As such, the rules are very beneficial to some foreign players.⁶⁴

Other foreign players, however, are not able to enjoy the benefits that the rules can confer. Cuban players, in particular, are denied access to careers in MLB, and players from other countries are often exploited because of draft ineligibility.⁶⁵ The

55. *Id.*

56. *Id.*; see also Worden, *supra* note 2, at 467 (explaining that a visa is required of any foreigner wishing to enter the United States).

57. Varela, *supra* note 32. In fact, MLB's procedures actually assist foreign players in obtaining visas. *Id.* (citing Greller, *supra* note 34, at 1661).

58. *Id.*

59. *Id.*

60. There are four regional centers. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*; see Renny Hwang, *Competitive Balance in Professional Sports and the*

detrimental effect that the current MLB draft system has on these groups of players, will be discussed further in Part III.A of this comment.

b. Current Collective Bargaining Agreement

In August 2002, MLB players' union and owners agreed to a tentative labor contract remaining in effect through 2006.⁶⁶ The agreement was historic because it was the first time in over thirty years that players and owners have reached a CBA without a work stoppage.⁶⁷ Along with settling issues concerning contracts, the luxury tax, minimum salary, and drug testing, the agreement establishes a worldwide amateur draft.⁶⁸ After negotiations that had players, owners, and fans on the edges of their seats, the resulting agreement established a committee to set up rules for a worldwide amateur draft, that was originally scheduled to start by June 2003.⁶⁹ The committee's duty was to work out the details of the negotiation begun by the players.⁷⁰

The number of rounds in the proposed global draft was among the details to be settled by the committee.⁷¹ The current draft for American citizen or resident players is fifty rounds.⁷² In the first-ever agreement to institute a worldwide draft, the Players' Association initially proposed a sixteen-round draft (later increased to twenty rounds), consisting of one domestic

Impact of International Players, at http://www.stanford.edu/class/e297c/new/trade_environment/sports_diplomacy/rhwang.htm (last visited April 22, 2004).

66. Associated Press, *No Strike: Players, MLB Agree On Deal Through 2006* (Aug. 30, 2002), at <http://espn.go.com/mlb/news/2002/0830/1425017.html> [hereinafter *No Strike*].

67. *Id.* (referring to an interview with Bud Selig, Commissioner of Major League Baseball).

68. Associated Press, *Four-Year Deal Includes Luxury Tax, No Contraction* (Aug. 30, 2002), at <http://espn.go.com/mlb/news/2002/0830/1425253.html> [hereinafter *Four-Year Deal*].

69. *Id.* However, the worldwide draft has yet to come to fruition. See Ebert, *supra* note 46.

70. *Four-Year Deal*, *supra* note 68.

71. *Id.*; Laura Price-Brown, *Players, Owners OK Draft Plan / Contraction Decision Given an Extension*, NEWSDAY, July 13, 2002, at A29, available at 2002 WL 2753345.

72. Price-Brown, *supra* note 71, at A29; Varela, *supra* note 32.

and one international draft of eight rounds each.⁷³ The owners countered with a proposal of one worldwide draft of forty rounds, instead of separate drafts for domestic and foreign players, later lowered to thirty-eight rounds.⁷⁴ However, the committee failed to meet prior to the June 2003 draft.⁷⁵ Whether negotiations for a worldwide draft will continue remains uncertain.⁷⁶

The players also proposed provisions to protect international players.⁷⁷ One such provision is the centralization of baseball academies in Latin America and the Caribbean to allow all MLB teams equal access to the talented players residing in those areas.⁷⁸ Outside commentators fervently agree with this suggestion, asserting that equalizing access to talent in these areas will further MLB's stated goal of achieving competitive balance⁷⁹ in the draft system.⁸⁰ The players' proposal of fewer draft rounds is consistent with protecting players' rights; the Players' Association believes that fewer draft rounds will give less renowned players more freedom to negotiate with desirable teams.⁸¹ The owners, concerned with protecting their business, balked at the two-draft system and fewer draft rounds because they believe that having two sets of high picks will drive up salaries.⁸²

Regardless of the apparent disagreement between players and owners over the implementation of a worldwide draft,

73. Varela, *supra* note 32; *Four-Year Deal*, *supra* note 68.

74. *Four-Year Deal*, *supra* note 68.

75. Ebert, *supra* note 46.

76. *See id.*

77. *Id.*

78. *Id.*

79. Competitive balance will be discussed in more detail below in the discussion of antitrust law and its application to professional sports in the United States. *See* discussion *infra* Part II.C. *See* Hwang, *supra* note 65, for an in-depth discussion of competitive balance in context with international players.

80. Stephen Cannella, et al., *Saving Baseball*, SPORTS ILLUS., Aug. 5, 2002, at 46, available at http://sportsillustrated.cnn.com/si_online/news/2002/08/09/baseball_plan (last visited April 22, 2004); *see also* Varela, *supra* note 32 (stating that MLB's goal in the draft system is to maintain "competitive balance and equality among all MLB teams").

81. Price-Brown, *supra* note 71, at A29.

82. *Id.*

representatives from both sides viewed the partial-draft agreement as a productive step.⁸³ From the union's perspective, the draft was one of the most important issues agreed upon.⁸⁴ Players have leveraged their lack of aversion to a worldwide draft, allowing more important concerns, such as fewer draft rounds, to be addressed.⁸⁵

2. NBA Draft and Current CBA

a. Brief History of the NBA Draft

The NBA draft, unlike that of the MLB, has evolved from territorial picks, to an actual coin toss, to the lottery system used today.⁸⁶ From 1947–65, a method of territorial picks governed the draft system.⁸⁷ During that time, the league was young and teams struggled to attract fans.⁸⁸ Utilizing territorial picks enabled teams to create a solid local fan base. Teams were able to forfeit their first-round draft picks before the start of the draft, instead choosing a player from their immediate area who, hopefully, had a strong local following.⁸⁹

In 1966, the league adopted the “coin flip” draft procedure.⁹⁰ The last-place finishers in each of the league's two divisions flipped a coin to determine which team would open the draft.⁹¹ The remaining teams picked in the reverse order of their win-loss records.⁹² The coin flip draft remained in place until 1985, when the NBA implemented the first lottery system.⁹³

The NBA adopted the first lottery system prior to the 1985

83. *Id.*

84. *Id.*

85. Coffey, *supra* note 1, at 1C.

86. *NBA Draft NY 02: Evolution of the Draft and Lottery* (2003), at http://www.nba.com/draft2002/history/draft_evolution.html?nav=ArticleList [hereinafter *NBA Draft History*].

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

draft.⁹⁴ Under that system, the NBA Lottery determined the order in which non-playoff teams selected players in the first round of the draft only.⁹⁵ In the second round and all following rounds, teams picked players in inverse order of their records.⁹⁶ The basic lottery system remains in place today, after undergoing procedural refinements in 1986, 1989, and 1990.⁹⁷

Just one year after the original lottery hit the NBA Draft, the Board of Governors procedurally changed the lottery, determining the order of selection for the first three teams only.⁹⁸ As in the original system, the remaining non-playoff teams select in inverse order of their regular season records.⁹⁹ The result of the change is that “the team with the worst record in the league is assured of picking no worse than fourth, the team with the second-worst record no worse than fifth and so on.”¹⁰⁰

In 1989, by agreement¹⁰¹ with the National Basketball Players’ Association, the draft was limited to two rounds.¹⁰² In the early years of the draft, teams simply selected players until they ran out of prospects.¹⁰³ The 1960 draft lasted twenty-one rounds, and by 1974, it had stabilized to ten rounds.¹⁰⁴ In 1985, the draft was shortened from ten to seven rounds.¹⁰⁵ The 1989 limitation to two rounds gives undrafted players the chance to try out for any team.¹⁰⁶

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* Note that this system of ensuring teams with poor regular season records good draft pick positions falls in line with the balance that must be struck in fostering healthy competition among teams that will be discussed below by examining the application of antitrust law to professional sports. See discussion *infra* Part II.C.

101. This agreement was a CBA between players and owners of the NBA. See *NBA Draft History*, *supra* note 86.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* Again, note the decision between players and the league to even out the

The final change to the lottery occurred in 1990, producing the current NBA system.¹⁰⁷ The Board of Governors adopted a “weighted” system for the 1990 NBA Draft Lottery, which included eleven expansion teams.¹⁰⁸ A weighted system means that the team with the worst regular season record receives eleven of sixty-six chances at the top draft pick.¹⁰⁹ The second-worst team is allowed ten chances, and the team with the best record of the non-playoff teams receives only one chance.¹¹⁰ By the early nineties, it was not unheard of for international players to be among the top picks in the lottery draft.

b. Current Collective Bargaining Agreement

The NBA’s current CBA has been in effect since January 1999 and will remain effective until the end of the 2004–05 season.¹¹¹ At that time, the league and the Players’ Association will have to negotiate a new agreement or an extension to the current one.¹¹²

Article X of the current CBA lists the terms of the NBA draft.¹¹³ Unlike the MLB draft system, the NBA draft system specifically includes foreign players. Section 6 of Article X deals specifically with foreign players in the draft:

Section 6. Application to Foreign Players.

(a) For purposes of this Section, a “foreign player” shall mean any person residing outside of the United States who participates in the game of basketball as an amateur or as a professional.

playing field and to promote competition and a favorable product by enabling undrafted players—i.e., the lower end of the talent pool – to filter throughout the league rather than concentrating on a few teams. Note also that this is the effect desired by the MLB’s Players Association in proposing fewer draft rounds. Price-Brown, *supra* note 71, at A29.

107. *NBA Draft History*, *supra* note 86.

108. *Id.*

109. *Id.*

110. *Id.*

111. Coon, *supra* note 43. An option to continue the agreement was exercised in December 2003, extending the agreement into the 2004–05 season. *Id.*

112. *Id.*

113. See *CBA Online: Article X NBA Draft* (2001), at <http://www.nbpa.com/cba/articleX.html> [hereinafter *NBA current CBA*].

(b) A foreign player is eligible to be selected in an NBA Draft held during the calendar year in which such player has his twenty-second (22nd) birthday. Any foreign player who is older than twenty-two (22), and who was not selected in the NBA Draft held during the calendar year of his twenty-second (22nd) birthday, is a Rookie Free Agent.

(c) Notwithstanding subsection (b) above, a foreign player who is at least eighteen (18) years old and who has not exercised intercollegiate basketball eligibility in the United States shall become eligible to be selected in an NBA Draft held prior to the calendar year in which he has his twenty-second (22nd) birthday if he expresses his desire to become eligible to be selected in the next NBA Draft by written notice to the NBA at least forty-five (45) days prior to such Draft.

(d) A foreign player who exercises intercollegiate basketball eligibility in the United States during the season prior to an NBA Draft shall be subject to the rules regarding completion or renunciation of collegiate eligibility, as set forth in Section 5¹¹⁴ above.¹¹⁵

The NBA's provision governing drafting foreign players will be discussed in Part III.B. For example, in detailing how the Houston Rockets drafted China's Yao Ming, this comment will analyze whether or not Yao complies with Article 6 of the NBA's CBA in Part IV.B. Additionally, this comment will demonstrate the ways in which Article 6 complies with the regulations of Federation Internationale de Basketball (FIBA)¹¹⁶ in Part III.B.

C. Antitrust Jurisprudence in Professional Sports

Like immigration law, antitrust law is important in understanding the legal framework within which professional sports players, including foreign players, pursue their careers.

114. Section 5 of Article X of the NBA's collective bargaining agreement determines the Application to Players with Remaining Intercollegiate Eligibility. *Id.* § 5.

115. *Id.* § 6.

116. FIBA is the international organization that governs basketball's global aspects. *See infra* Part III.B.2.

Antitrust law was created to promote competition in a free marketplace,¹¹⁷ and competition is rarely more important than in the business of professional sports. Because competition *is* sports, issues of ensuring and promoting competition between teams is complex and involves competing interests.¹¹⁸ To maintain the *business* of sports, team owners must ensure that they have an enticing product. Their products are not just the individual teams, but also the game that is played and the competition that exists between teams for the entire season. Therefore, owners maximize profits by competing for the best players, assembling the best teams, and drawing the most fans.¹¹⁹ To keep the competition interesting teams must be able to compete effectively. Therefore, it is in the best interest of the game—and of business—to spread player talent among all teams.¹²⁰ This creates “competitive balance.”¹²¹ Otherwise, teams that can afford the best players could hurt the overall competition of the game by keeping the majority of the best players to themselves, despite enhancing their individual ability to compete and win.¹²²

Labor issues within the professional sports world often hinge on the delicate balance between these competing interests, because owners and players also have interests in common.¹²³ Both realize that success requires that each team maintain competitive status. But while owners try to maintain an attractive product and foster healthy competition within the league, players are concerned with their individual ability to play, perform well, and make money. Individual player concerns are all too often in direct conflict with owner’s interests. For example, if labor and antitrust laws designed to promote

117. Michael Jay Kaplan, Annotation, *Application of Federal Antitrust Laws to Professional Sports*, 18 A.L.R. FED. 489 § 2(a) (1974).

118. *See id.*

119. *Id.*

120. *Id.*; *see also* James B. Perrine, *Media Leagues: Australia Suggests New Professional Sports Leagues for the Twenty-First Century*, 12 MARQ. SPORTS L. REV. 703, 721 (2002); Hwang, *supra* note 65.

121. Perrine, *supra* note 120, at 721.

122. Kaplan, *supra* note 117, § 2(a).

123. *See id.*

competition are administered in favor of the players' interests in freedom to choose when and how to play, competition between teams will decrease.¹²⁴ However, if the laws are construed in favor of owners and leagues, players' freedom to compete with each other for higher salaries or positions on more successful teams decreases.¹²⁵ Understanding the dynamics between players and owners is crucial in understanding the draft systems implemented in professional sports and international players' positions within those systems.

The Sherman Antitrust Act¹²⁶ is the federal legislation that regulates the ongoing (albeit natural) conflict between players and owners.¹²⁷ In general, the Act prohibits contracts in restraint of trade or commerce between the states or with foreign nations.¹²⁸ It also punishes individuals or organizations that monopolize, or attempt to monopolize, any part of such trade or commerce.¹²⁹ Determining whether such punishment is appropriate depends on the presence of three elements: (1) the alleged restraining activity does in fact restrain trade or commerce, (2) the activity is an unreasonable restraint, and (3) the activity is not exempt from antitrust laws.¹³⁰ Determining whether an activity is "unreasonable" appears problematic at best. Such a subjective test always lends itself to the question: unreasonable for whom? In determining the reasonableness of an alleged restraint, courts use "two 'complementary categories of antitrust analysis.'"¹³¹ First, if the activity has no competitive benefits, such as the activities of price fixing or group boycotts, it is unreasonable and per se illegal.¹³² Second, a "rule of reason"

124. *Id.*

125. *Id.*

126. 15 U.S.C. §§ 1-7 (2000).

127. Kaplan, *supra* note 117, § 2(a). The Sherman Antitrust Act is an extremely lengthy piece of legislation. This comment will therefore only discuss its provisions in general terms.

128. *Id.*

129. *Id.*

130. *Id.*

131. Perrine, *supra* note 120, at 811; Edward Mathias, *Big League Perestroika? The Implications of Fraser v. Major League Soccer*, 148 U. PA. L. REV. 203, 206 (1999) (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978)).

132. Mathias, *supra* note 131, at 206 (citing *Arizona v. Maricopa County Med.*

test is applied, holding an activity illegal if its anticompetitive effects outweigh its pro-competitive benefits.¹³³

In the early twentieth century, federal courts held that professional sports were *not* engaged in interstate commerce and were thus not bound by federal antitrust laws.¹³⁴ The Supreme Court upheld the lower courts' view in 1922 because "sporting events were local in nature and the teams' interstate travel did not involve them in interstate commerce."¹³⁵ Although the ruling applied to all professional sports, baseball was the only popular professional sport in the United States at that time.¹³⁶ Throughout the years, however, baseball was joined by a number of other sports in the national spotlight. In 1954, the Supreme Court ruled that the 1922 decision applied solely to baseball, creating an anomalous antitrust exemption for baseball that still exists.¹³⁷ Other sports do not enjoy such protection from the Sherman Act.¹³⁸

It is against this backdrop that player drafts must be evaluated. It is easy to imagine the antitrust issues that could arise under a player draft system. For example, thoughts of monopoly and restriction of free trade quickly come to mind when one considers the ways in which a draft system might

Soc'y, 457 U.S. 332, 344 (1982)).

133. *Id.*; Shant H. Chalian, *Fourth and Goal: Player Restraints in Professional Sports, a Look Back and a Look Ahead*, 67 ST. JOHN'S L. REV. 593, 597-98 (1993) (stating that the Supreme Court adopted the "rule of reason" test in recognition that all agreements can be said to restrict trade in some manner, and in rejection of a literal interpretation of the Sherman Antitrust Act). Chalian asserts that a literal application of the Sherman Act would destroy the free market system, rather than promote it. *Id.* at 598 n.19 (relying upon *Bd. of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918) and Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L.J. 19, 29 n.40 (1986)).

134. *See* Kaplan, *supra* note 117, at § 2(a).

135. *Id.* (referring to *Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208-09 (1922)).

136. *See* Kaplan, *supra* note 117, § 2(a).

137. *See id.*

138. *See id.* MLB's owners and management probably believe that they enjoy protection from the Act. Players, however, believe the opposite. Antitrust legislation is the only vehicle with which players can challenge labor restrictions imposed by management, and the exemption that owners enjoy is the same exemption around which players must maneuver in order to challenge practices they deem unfair.

prohibit players' freedom of contract and freedom of movement within their professions. It may be just as obvious, however, that draft systems are necessary to maintain the ever-important competitive balance in professional sports.¹³⁹

An example of sports policy that has come under antitrust scrutiny is the "reserve clause." The reserve clause has been used by several professional sports organizations in the past and is still retained in varying forms by some teams.¹⁴⁰ A reserve clause is a provision in a player's contract that, in the context of other agreements, effectively removes free choice of teams from a player, creating a "restraining effect on the interstate market of players."¹⁴¹ Thus, if the player wants to play in a particular league, he has no option but to reach an agreement with the team granted the right to negotiate with him.¹⁴²

The reserve clause constitutes a restraint upon the right of the athlete to sell his services in a free market, thereby preventing access to the supply of player resources.¹⁴³ It is also self-enforcing because a player knows that a violation of his contract's reserve clause will result in his boycott by other teams in the league.¹⁴⁴ Some courts have considered the reserve clause to be "violative of the federal antitrust laws, or so probably violative of those laws as to warrant court intervention with its enforcement, since the clause had the effect of controlling, and was designed to control, the supply of athletes, thereby lessening competition for the services of players."¹⁴⁵

But not all courts agree. For example, some courts have indicated that the illegality of the clause has not been

139. See Hwang, *supra* note 65.

140. Kaplan, *supra* note 117, § 7(b).

141. *Id.* Whether the player was initially cultivated from a minor league team, or drafted from collegiate or other amateur ranks, the reserve clause mandates that once a particular team has received the right to negotiate with a particular player, no other team in the league is allowed to cultivate that player's interest in playing for them. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* See, e.g., Robertson v. Nat'l Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975) ; Boston Prof'l Hockey Ass'n v. Cheevers, 348 F. Supp. 261 (D. Mass. 1972), *remanded on other grounds*, 472 F.2d 127 (1st Cir.); Nassau Sports v. Hampson, 355 F. Supp. 733 (D. Minn. 1972).

established.¹⁴⁶

Aside from the legality of contractual provisions, the entire draft system has come under attack as violating the Sherman Antitrust Act.¹⁴⁷ Although no court has directly considered whether a team's refusal to negotiate with a previously drafted player is an illegal group boycott, one court has indicated that it is an antitrust violation.¹⁴⁸ However, courts have considered particular aspects of the player draft, and it seems that the legality of the draft depends on their reasonableness.¹⁴⁹

One important factor distinguishes the reserve clause from the draft: The reserve clause is *not* the result of collective bargaining between players and owners.¹⁵⁰ Labor exemptions found within the Sherman Antitrust Act¹⁵¹ might shield certain owner-player activities from antitrust scrutiny if they are the result of bargaining between players' associations and league owners.¹⁵² The reserve clause may potentially violate federal

146. Kaplan, *supra* note 117, § 7(b). Examples of cases *denying* that the reserve claims definitively violate antitrust law are *Molinas v. National Basketball Ass'n*, 190 F. Supp. 241, 242–43 (S.D.N.Y. 1961) (dismissing the complaint of a former NBA player who admittedly bet on his own games and claimed that the reserve clause furthered a conspiracy by the NBA member teams to restrain trade); *Nassau Sports v. Peters*, 352 F. Supp. 870, 882 (E.D.N.Y. 1972) (holding that hockey player failed to prove that his option commitment violated antitrust laws); and *Washington Capitols Basketball Club, Inc. v. Barry*, 419 F.2d 472 (9th Cir. 1969) (holding that the District Court did not abuse its discretion in finding that a basketball player's contract containing a reserve clause was valid which prevented him from playing for another team).

147. Kaplan, *supra* note 117, § 13; *see, e.g., Drysdale v. Fla. Team Tennis, Inc.*, 410 F. Supp. 843, 847–48 (W.D. Pa. 1976) (holding that tennis player had standing to allege Sherman Antitrust violations when the Tennis Association draft required player to sign with a financially unstable team); *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1058 (C.D. Cal. 1971) (finding a substantial probability that NBA bylaws concerning player eligibility for the draft violated the Sherman Act).

148. *See Denver Rockets*, 325 F. Supp. at 1058 (holding that the Four-Year Rule aspect of the draft was an illegal group boycott).

149. Kaplan, *supra* note 117, § 11(a); *see Denver Rockets*, 325 F. Supp. at 1058.

150. Kaplan, *supra* note 117, § 3; *see Cheevers*, 348 F. Supp. at 267–68 (D. Mass. 1972) (stating that the record was devoid of evidence that the reserve clause was ever a matter of collective bargaining negotiations between the league and representatives of the players).

151. *See* 15 U.S.C. § 17 (2000). The Clayton Act is another piece of antitrust legislation with a comparable labor exemption clause. 29 U.S.C. § 52 (2000).

152. Kaplan, *supra* note 117, § 3; *see also E. Coal Corp. v. Disabled Miners Ass'n*, 449 F.2d 616, 620 (6th Cir. 1971) (finding no antitrust violation where dispute concerned

antitrust law because it is a part of the standard player contract. As such, it is not the result of bargaining between players and owners.¹⁵³ In contrast, the player draft and its terms and procedures are points of negotiation during the formation of CBAs.¹⁵⁴ As such, they may fall under the labor exemption clause of federal antitrust legislation and courts may protect them by holding them exempt from antitrust law scrutiny.

However, restrictive employment conditions in professional sports leagues fall under the scrutiny of the Sherman Antitrust Act¹⁵⁵ because separate clubs that compete to employ players agree to them.¹⁵⁶ Courts analyze alleged restraints under the rule of reason test, rather than finding them per se illegal.¹⁵⁷ Under the rule of reason test, courts typically invalidate employment restraints because their detrimental effects on the ability of players to market their services to the individual clubs in the league outweigh their pro-competitive justifications.¹⁵⁸ In particular, courts are not persuaded by leagues' arguments that restrictions on players' salaries and mobility (often found within the CBA's terms) promote competitive balance between the individual clubs.¹⁵⁹

1. *Major League Baseball's Antitrust Exemption*

The development of antitrust jurisprudence as applied to professional baseball is nothing short of puzzling. The Supreme Court first considered the application of antitrust law to baseball¹⁶⁰ in 1922.¹⁶¹ In *Federal Baseball Club of Baltimore, Inc.*

benefits established by collective bargaining agreement).

153. Kaplan, *supra* note 117, § 3.

154. See Coon *supra* note 43.

155. Note that Section 1 of the Sherman Antitrust Act is the legal basis upon which players generally challenge restrictive employment provisions, such as the player draft. Perrine, *supra* note 120, at 810.

156. *Id.* at 810–11.

157. *Id.* (citing Mackey v. Nat'l Football League, 543 F.2d 606, 622 (8th Cir. 1976) (holding that the NFL's "Rozelle Rule" violated Section 1 of the Sherman Act)).

158. Perrine, *supra* note 120, at 811.

159. *Id.*; see also Smith v. Pro Football, Inc. 593 F.2d 1173, 1186 (D.C. Cir. 1978) (rejecting the NFL's competitive balance justifications for its player draft).

160. The first court to deal with antitrust issues with professional baseball was a trial court in New York in 1914. *Am. League Baseball Club v. Chase*, 149 N.Y.S. 6 (N.Y.

v. National League of Professional Baseball Clubs, the Club of Baltimore alleged that the defendant conspired to monopolize the baseball business by purchasing clubs in the plaintiff's league while inducing others to leave.¹⁶² The result was that the Club of Baltimore was the only remaining member of its league—the Federal League—that competed with the National and American Leagues.¹⁶³ The Court ruled in favor of the League because baseball was not a part of interstate commerce, thus, not subject to federal antitrust law.¹⁶⁴ Justice Holmes justified this holding by stating “[t]he business is giving exhibitions of baseball, which are purely state affairs.”¹⁶⁵ He explained that the travel of teams between cities and states was “mere incident” to the business of baseball and “not the essential thing.”¹⁶⁶

Courts and commentators attacked the Supreme Court's ruling in *Federal Baseball*.¹⁶⁷ More than thirty years after the decision, the Court was presented with another antitrust challenge to baseball in *Toolson v. N.Y. Yankees*.¹⁶⁸ *Toolson* was a consolidation of cases challenging MLB's reserve system.¹⁶⁹ In a per curiam opinion, the Court affirmed the lower courts' rulings dismissing the complaints, noting that Congress had

Sup. Ct. 1914). The court found that “organized” baseball did not constitute interstate commerce and was not under the control of Congress. *Id.* at 16–17.

161. Kaplan, *supra* note 117, § 4; Chalian, *supra* note 136, at 600.

162. Fed. Baseball Club of Baltimore, Inc., v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 207 (1922).

163. *Id.*

164. *Id.* at 208; Chalian, *supra* note 133, at 600.

165. *Fed. Baseball Club of Baltimore, Inc.*, 259 U.S. at 208.

166. *Id.* at 208–09. Justice Holmes further categorized baseball as outside the realm of commerce because “personal effort, not related to production, is not a subject of commerce.” *Id.* at 209.

167. Chalian, *supra* note 133, at 600 & n.37.

168. *Id.* *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953) (per curiam). Chalian, *supra* note 133, at 600.

169. The reserve system is similar to the reserve clause discussed *supra* notes 140–154 and accompanying text. The reserve clause operates to prohibit other teams from negotiating with a player who has already been drafted. Chalian, *supra* note 133, at 600–01. The reserve system challenged in the *Toolson* case allows a player who is unhappy to either request a trade or retire. *Id.* Whether or not the player is happy with his position, the reserve system allows teams to trade the player without his consent. *Id.* at 601.

acquiesced to the ruling in *Federal Baseball* by failing to legislate to the contrary.¹⁷⁰ A vigorous dissent argued that organized baseball had become involved in interstate activity to a degree sufficient to trigger application of the Sherman Act.¹⁷¹ Having been upheld, lower courts continued to apply *Federal Baseball* and *Toolson* with reservation.¹⁷²

The most recent Supreme Court decision regarding baseball's antitrust exemption was *Flood v. Kuhn*,¹⁷³ decided in 1972¹⁷⁴—another challenge to baseball's reserve system.¹⁷⁵ Under the reserve system, Curt Flood, an all-star centerfielder for the St. Louis Cardinals, was traded to the Philadelphia Phillies without his consent or notice.¹⁷⁶ He refused to report to the Phillies and sued.¹⁷⁷

Contrary to the reasoning in *Toolson*, the Court in *Flood v. Kuhn* relied upon more than “mere congressional silence and passivity.”¹⁷⁸ The Court found it significant that over fifty bills regarding baseball's antitrust exemption had been introduced since *Toolson*, and none had passed both houses of Congress.¹⁷⁹ The Court recognized that reaffirming baseball's antitrust exemption seemed to contradict the Court's handling of other sports,¹⁸⁰ but it was unwilling to set aside fifty years of precedent, and the exemption stood.¹⁸¹ The dissent criticized the

170. *Id.* (referring to *Toolson*, 346 U.S. at 357 which states that “Congress has had the ruling under consideration but has not seen fit to bring such business under these laws . . . [leaving it] for thirty years to develop, on the understanding that it was not subject to existing antitrust litigation.”).

171. *Id.* (referring to *Toolson*, 346 U.S. at 357–58 (Burton, J., dissenting)).

172. Chalian, *supra* note 133, at 601.

173. 407 U.S. 258 (1972).

174. In 1999, the Supreme Court unanimously refused the request of the Minnesota Attorney General to reopen the issue of baseball's status under federal and state antitrust laws. *Supreme Court Refuses Challenge to MLB Antitrust Exemption*, Nov. 16, 1999, at <http://www.sportslawnews.com/archive/articles1999/MLBantitrustMN.htm> (last visited April 22, 2004).

175. Chalian, *supra* note 133, at 601; *Flood*, 407 U.S. at 259.

176. *Id.* at 601–02 (referring to *Flood*, 407 U.S. at 264–65).

177. *Id.* at 602 (referring to *Flood*, 407 U.S. at 265).

178. *Id.* at 602 (referring to *Flood*, 407 U.S. at 283).

179. *Id.* at 602 (referring to *Flood*, 407 U.S. at 281).

180. *Id.* at 602 (referring to *Flood*, 407 U.S. at 282–83).

181. *Id.* at 602 (referring to *Flood*, 407 U.S. at 282).

majority for its unnecessarily rigid application of *stare decisis* and argued that the apparent interstate nature of baseball should subject it to federal antitrust law.¹⁸²

Since the *Flood* decision, legislative bills to overturn *Flood* and the exemption have been introduced in Congress, but few have gained support.¹⁸³ But Curt Flood has not been forgotten. In 1998, Congress passed, and President Clinton signed into law, the Curt Flood Act of 1998.¹⁸⁴ Seventy-six years after baseball's antitrust exemption was created, the Curt Flood Act, amending the Clayton Act, overturned part of that exemption.¹⁸⁵ The Act came into being after MLB players and owners agreed in their 1997 CBA to jointly request and lobby for the passage of legislation clarifying baseball players' protection under federal antitrust law.¹⁸⁶

A significant aspect of the Act is that it applies *only* to MLB players, as its stated purpose is to grant them the same coverage under antitrust law as other professional athletes.¹⁸⁷ The result of this limitation in scope is that any antitrust issues concerning non-MLB players, such as minor league baseball and the amateur draft, are specifically excluded from protection under the Curt Flood Act.¹⁸⁸ Moreover, section 3(d)(4) of the Act states specifically that nothing in the Act "shall be construed to affect the application to organized professional baseball of the

182. *Flood*, 407 U.S. at 286–88, 292–93 (Douglas, J. and Marshall, J., dissenting, respectively); Chalian, *supra* note 133, at 602.

183. Chalian, *supra* note 133, at 602–03. Some stated that the need for legislation was small, due to the success of players during collective bargaining negotiations. *Id.* at 603 (citing PAUL D. STAUDOHR, *THE SPORTS INDUSTRY AND COLLECTIVE BARGAINING* 21 (2d ed. 1989)).

184. Curt Flood Act of 1998, Pub. L. No. 105–297, 112 Stat. 2824 (1998) (codified as amended 15 U.S.C. §§ 1–27a); John T. Wolohan, *The Curt Flood Act of 1998 and Major League Baseball's Federal Antitrust Exemption*, 9 MARQ. SPORTS L.J. 347, 348 (1999).

185. Wolohan, *supra* note 184, at 348, 367.

186. *Id.* at 367. Article XXVIII of the 1997 agreement dealt specifically with antitrust law issues and provided for the joint lobbying effort. *Id.* at 348 n.10.

187. See Curt Flood Act of 1998, § 2; *Id.* at 367.

188. See Curt Flood Act of 1998, § 3(c). Wolohan, *supra* note 184, at 367–68. It follows that the limitation also means foreign players are not covered by the Curt Flood Act *until* they are MLB players – their negotiations as free agents before signing with a team are not protected because such activities are issues concerning non-MLB players.

nonstatutory labor exemption for antitrust laws.”¹⁸⁹ In other words, agreements reached by collective bargaining between MLB players and owners are not protected by antitrust law.¹⁹⁰

While it is a milestone in baseball’s struggle with antitrust jurisprudence, the Curt Flood Act did not solve the seventy six-year puzzle of MLB’s antitrust exemption. The Act only partially eliminated the antitrust exemption from MLB. Players, owners, and legislators are still fighting what Justice Blackmun oversimplified as an “anomaly” over thirty years ago.¹⁹¹ In November 2001, Senator Paul Wellstone and Representative John Conyers Jr. introduced into the Senate¹⁹² and House of Representatives,¹⁹³ respectively, legislation that would amend the Clayton Act in order to render antitrust law applicable to the elimination or relocation of MLB teams.¹⁹⁴ Because the reports before the House Judiciary Committee lacked specifics on financial matters, Conyers asked MLB Commissioner, Bud Selig, to testify before the Committee.¹⁹⁵ As of yet, there has been no movement in the direction of the proposed legislation, and some suggested that the plea for total repeal of the exemption yet again fell on deaf ears due to its low priority with Congress.¹⁹⁶

2. *Effects of Antitrust Law on the NBA*

Although antitrust jurisprudence has carved out an exemption for baseball, basketball does not fall into baseball’s

189. Curt Flood Act of 1998, § 3(d)(4).

190. Wolohan, *supra* note 184, at 376. Note that, currently, collective bargaining negotiations regarding the draft system do not impact entering foreign players as they are not yet eligible for the draft.

191. *See Flood*, 407 U.S. at 282–83.

192. Fairness in Antitrust in National Sports (FANS) Act of 2001, S. 1704, 107th Cong. (2001).

193. Fairness in Antitrust in National Sports (FANS) Act of 2001, H.R. 3288, 107th Cong. (2001).

194. John Files, *Baseball: Exemption Legislation Introduced*, N.Y. TIMES, Nov. 15, 2001, at S4.

195. Matthew Roberts, *Baseball Faces Antitrust Scrutiny, but Little Chance of Change*, at <http://www.sportslawnews.com/current/MLBAntitrusthearings.htm> (last visited April 22, 2004).

196. *Id.*

same narrow niche.¹⁹⁷ In fact, antitrust laws apply to basketball in the same way as other businesses engaged in interstate commerce.¹⁹⁸

Because agreements and activities within the business of basketball are open to antitrust scrutiny, past players have been successful in litigating against leagues that inhibited their freedom to play. For example, in 1971, Spencer Haywood won his case when the Supreme Court ruled in favor of his right to play in the NBA, violating the league's four-year-eligibility rule.¹⁹⁹ Prior to the ruling, the NBA had a rule that prohibited graduating high school players from becoming eligible for professional team play until four years after graduation.²⁰⁰ There was no age restriction on entering NBA players, and players were not required to attend college for four years after high school graduation to become eligible for the NBA.²⁰¹ They simply could not "make [themselves] available" for the NBA draft until four years after high school graduation.²⁰²

Haywood competed with the gold-medal 1968 U.S. Olympic Basketball Team, and returned to sign a contract with the Denver Rockets (who were in the American Basketball Association) in 1970.²⁰³ He was then drafted by the NBA's Seattle team.²⁰⁴ Amazingly, he had done all of this before his college graduation, and the NBA threatened to disallow the

197. *Flood*, 407 U.S. at 282 (stating that "baseball is, in a very distinct sense, an exception and an anomaly," and that "other professional sports operating interstate – football, boxing, basketball . . . are not so exempt.").

198. *Robertson v. Nat'l Basketball Ass'n*, 389 F. Supp. 867, 881, 892–94 (1970) (holding that the Sherman Antitrust Act applies to sports other than baseball in the same way in which it applies to other commercial enterprises and that the merger of the NBA with the American Basketball Association raised issues under sections 1 and 2 of the Act).

199. *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204 (1971) (prohibiting the league from sanctioning the team for which Haywood played).

200. Douglas Brown, *Sportslaw History: The Spencer Haywood Case*, at <http://www.sportslawnews.com/archive/history/SpencerHaywoodcase.htm> (last visited April 22, 2004).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

contract and sanction the Seattle team.²⁰⁵ In response, Haywood sued the NBA, alleging that the league's conduct constituted a group boycott in violation of the Sherman Antitrust Act.²⁰⁶ The case eventually reached the Supreme Court, and Haywood's arguments prevailed.²⁰⁷

The application of antitrust law to basketball is also subject to pitfalls of the Sherman Antitrust Act. For example, in 1984, a player sued the NBA challenging the college draft provisions and maximum salary limitations stated in a settlement agreement between the players and the league.²⁰⁸ Unlike *Haywood*, the court denied the player's motion for preliminary injunction against the league because the college draft and salary limitations were mandatory bargaining subjects under federal labor laws and resulted from legitimate arms-length negotiations.²⁰⁹ As such, they were protected by the labor exemption shield of the Sherman Antitrust Act.²¹⁰

III. A GLOBAL PLAYING FIELD

A. *Emergence of Baseball as an International Sport*

1. *International Awareness in MLB*

Most Americans would agree that baseball is America's pastime. Baseball is regarded as the "sport which mirrors our nation's soul,' representing all that is good and right about America."²¹¹ Yet it is easy to recognize that the Juan Gonzalezes and Sammy Sosas of today have joined the Babe Ruths of yesterday. Even so, it may not be readily apparent that baseball has emerged as an international—not just an American—

205. *Id.*

206. *Id.*

207. *Haywood*, 401 U.S. at 1207.

208. *Wood v. Nat'l Basketball Assoc.*, 602 F. Supp. 525 (S.D.N.Y. 1984), *aff'd* 809 F.2d 954 (1987).

209. *Id.*; Kaplan, *supra* note 117, § 7(a).

210. *Wood*, 602 F. Supp. at 528; Kaplan, *supra* note 117, § 7.

211. Gary T. Otake, *A Century of Japanese American Baseball*, at <http://www.nikkeiheritage.org/research/bbhist.html> (last visited April 22, 2004).

sport.²¹²

In fact, foreign-born superstars, like Gonzales and Sosa, are not statistical anomalies. As of Opening Day for the 2002–03 season, 26.1 percent of players listed on MLB rosters were from foreign countries.²¹³ The percentage of foreign players in the minor leagues is nearly double that of the majors: nearly fifty percent.²¹⁴ Considering both major- and minor-league players, 44.75 percent of all players under contract to major league teams are foreign-born.²¹⁵

Perhaps more surprising to baseball fans—and more indicative of baseball’s growing international scope—is the sport’s popularity and success in Asian countries. For example, in the 2001 draft the Chicago Cubs won the bidding war for Korean pitcher Jae Kuk Ryu.²¹⁶ The year before, Ichiro Suzuki became the first Japanese “everyday position player” in MLB.²¹⁷ Even more significant for Japan is the entrance of Hideki Matsui into MLB.²¹⁸ For the first time, an Asian-born player has entered American baseball as a heavy hitter.²¹⁹ Matsui, nicknamed “Godzilla” by the American press, played for the Yomiuri Giants. Having hit 332 home runs in ten seasons, he

212. There are professional baseball leagues in Canada, Japan, and Mexico, as well as other countries throughout the world. Varela, *supra* note 32.

213. Coffey, *supra* note 1.

214. *Id.*

215. *Id.* Thirty-one countries are represented by players in MLB, including Nigeria, which signed its first player to the Milwaukee Brewers in June 2002. *Id.*

216. *Id.* Ryu signed with the Cubs, who were able to outbid more successful teams like the Atlanta Braves and the New York Yankees, for \$1.6 million. *Id.* Ryu was able to negotiate his contract as a free agent because the draft rules did not apply to him as a foreign player. *Id.* The Cubs undoubtedly considered the deal to be the result of genius scouting and good luck, but others considered the deal to be indicative of the growing problem of skyrocketing salaries and “unfair” bidding practices resulting from the lack of a global draft. *Id.*

217. *Around the Horn*, 160 TIME ASIA MAGAZINE 19 ¶ 1 (Nov. 10, 2002) [hereinafter *Around the Horn*], available at <http://www.time.com/time/asia/covers/1101021118/ichiro.html>. Ichiro has played in the All-Star game and has been named Most Valuable Player. *Id.*

218. Shintaro Kano, *Godzilla v. the Majors*, 160 TIME ASIA MAGAZINE 19 ¶ 2 (Nov. 11, 2002), available at <http://www.time.com/time/asia/covers/1101021118/matsui.html>.

219. *Id.*

was the unrivaled best of the Japanese game.²²⁰

Though it may appear that a Japanese baseball player is an oxymoron that embodies a strange clash of east meets west, baseball has, in fact, been a part of Japanese culture for over a century.²²¹ Japan adopted baseball in 1870 in an effort to redefine Japanese national identity in a burgeoning modern era.²²² During that time, baseball was considered a bridge between the values of the eastern world—harmony, perseverance, and self-restraint—and those of the new western world.²²³ By the time that Japanese citizens began immigrating to the United States in the late nineteenth century, they were bringing with them a knowledge and appreciation of baseball that other immigrant groups did not possess.²²⁴

Shortly after settling into the United States, Japanese-Americans began forming their own baseball teams.²²⁵ The first team was formed in Honolulu in 1899, and Japanese-American baseball reached the mainland in 1903 with establishment of the Fuji team in San Francisco.²²⁶ By 1910, U.S. cities with large Japanese-American populations, such as Seattle, Los Angeles, and Honolulu, had formed teams and leagues.²²⁷

Japanese-American baseball developed not only from Japan's love of the game, but from a desire to create a bond between Japanese-Americans and the dominant white society.²²⁸ Unfortunately, that desire was often met with hostility.²²⁹ With the dawning of World War II and the forcible transfer of Japanese-Americans from their homes into internment camps, the acceptance of Japanese baseball by the United States

220. *Id.* The loss of Matsui is a serious and controversial blow to Japanese fans. *Id.*

221. Otake, *supra* note 211.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* During 1920–41, Japanese baseball teams and leagues flourished with the rising number of American-born Japanese-Americans. *Id.* The hope continued that the game would serve to develop a sense of social identity and community for the growing Japanese population in America. *Id.*

229. *Id.*

seemed unlikely.²³⁰ Yet the spirit of baseball remained strong in the Japanese-American community, prompting a slow resurgence of the game after the war until the 1970s.²³¹

It is unfortunate that many Americans probably have no idea about Japan's long baseball history. Today's young fans are not aware that Japanese children have loved baseball and idolized baseball's heroes for as long as American children. The strength of the Japanese game did not fade, however, with the decline of Japanese-American baseball. Japanese baseball has become—and continues to become—more than just a blip on MLB's radar with the wild popularity of Japanese teams such as Orix (Ichiro's Japanese team) and the Giants (Matsui's Japanese team).²³² With high profile teams in the United States clamoring after Japan's star players, such as Ichiro and Matsui, it seems clear that East will continue to meet—and join—West on America's baseball diamonds.²³³

2. *Other International Issues*

While more foreign baseball players from around the globe are finding America to be their “field of dreams,” MLB is not available to all. Cuban baseball players are among the most talented in the world,²³⁴ but their entry into American baseball is not paved with gold like that of their international counterparts.²³⁵ As with Japanese baseball during World War II,

230. *Id.* However, Otake goes on in his article to discuss the ways in which Japanese-American baseball history is a unique reflection of the acceptance of Japanese-Americans into American society as a whole. *Id.*

231. *Id.* Baseball was not the same after the war, however, in that the social climate and interaction between Japanese-Americans and white Americans was not the same. *Id.* Additionally, as the original generation of Japanese immigrants passed, the social need for baseball within the Japanese-American community dwindled. *Id.*

232. *See Around the Horn*, *supra* note 217.

233. *See id.* *Around the Horn* is an interview between TIME author Robert Whiting and Ichiro Suzuki. *Id.* Ichiro gives a great deal of insight into the past, present, and future interaction between Japanese and American baseball, as well as the effects of foreign players leaving their homes to play in MLB. *See id.*

234. At least ten percent of all Cubans play baseball in some type of organized league. Scott Cwiertny, Comment, *The Need For a Worldwide Draft: Major League Baseball and Its Relationship with the Cuban Embargo and United States Foreign Policy*, 20 LOY. L.A. ENT. L. REV. 391, 391 (2000).

235. Varela, *supra* note 32.

American baseball reflects the social and political tensions existing between Cuba and the United States. The stressed relationship between Cuba's communist regime and the United States is long-standing, and the resulting trade embargo²³⁶ imposed upon Cuba by the United States brought that stress onto the baseball diamond.²³⁷ Prior to the trade embargo, MLB rosters encompassed approximately 110 Cuban players.²³⁸ Since the imposition of the embargo, MLB has conformed to the embargo requirements and prohibits teams from scouting Cuban players.²³⁹

Recently, MLB teams have disobeyed the mandated restraints against Cuba and Cuban players.²⁴⁰ In 1999, the Los Angeles Dodgers were caught scouting Cuban players, in direct violation of MLB rules and in possible violation of the trade embargo.²⁴¹ The Dodgers attempted to circumvent the federal foreign policy against trading with Cuba (and MLB draft rules) by helping two minor league players defect to the Dominican Republic, allowing the players to enter MLB, and to sign with the Dodgers, as free agents.²⁴² Had the players come directly to the United States on their own, they would have been subject to MLB's draft rules and been available to teams with higher draft picks than the Dodgers.²⁴³

In order to make it to the big leagues, Cuban players must

236. 22 U.S.C. § 2370 (1994). The embargo still exists today after undergoing many modifications since 1962, and currently provides that persons subject to the jurisdiction of the United States are prohibited from engaging in effectively every type of transaction with Cuba unless they have received a special license to do so. Cwierny, *supra* note 234, at 395 (citing Lynn R. Coleman & Thomas R. Graham, *The Stars and Stripes Wherever: The Impact of Unilateral U.S. Economic Sanctions on the International Petroleum Industry*, 35 ALTA. L. REV. 334, 338 (1996)). Cwierny offers an in-depth discussion of the Cuban Embargo in its initial stages and continuing developments which are beyond the scope of this comment. *Id.* at 395–401.

237. Varela, *supra* note 32.

238. Cwierny, *supra* note 234, at 391.

239. *Id.* at n.7 (referring to Steve Fainaru, *LA Loses Minor Leaguers: Dodgers Punished for Holding Secret Tryouts*, BOSTON GLOBE, June 28, 1999, at D1).

240. Varela, *supra* note 32.

241. Cwierny, *supra* note 234, at 392. As a result of their actions, the Dodgers lost their contractual rights to the players and were ordered to pay a fine of \$200,000. *Id.*

242. *Id.*; Fainaru, *supra* note 239.

243. *Id.*

first make it to America. Because the Cuban government restricts its citizens' freedom of travel, Cuban players are forced to defect to pursue their MLB careers.²⁴⁴ Cuban defection to the United States has raised serious concerns with MLB and has forced MLB to alter its draft policies to deal with those concerns.²⁴⁵ The first Cuban baseball player to defect to the United States was Rene Arocha.²⁴⁶ In 1991, after ten years of playing with the Cuban National Team, Arocha quietly wandered away from his teammates while they were boarding an airplane in Miami, headed home to Cuba.²⁴⁷ He immediately sought political asylum from the INS, who granted it in keeping with the policy of granting asylum to those who flee Fidel Castro's regime.²⁴⁸

Once Arocha was granted the right to stay in the United States, MLB had to decide what to do about his unique situation and arrival.²⁴⁹ Arocha's residency status did not fit the draft rules: He was a foreign player who would not ordinarily be eligible for the draft, yet he arrived in the United States without the normal procedures that other foreign players used to enter baseball as free agents. This was a case of a player coming, unannounced, to MLB, rather than an MLB team recruiting the player. Interestingly, MLB held a special lottery style draft²⁵⁰ to decide which team would be able to sign him.²⁵¹

Arocha was the only Cuban player to receive the special lottery draft. Three years later, three other Cuban players defected from Cuba to Mexico and illegally entered the United

244. Varela, *supra* note 32.

245. *Id.*; see also Cwiertyny, *supra* note 234, at 411-14.

246. Varela, *supra* note 32.

247. *Id.*

248. *Id.*

249. *Id.*

250. Compare to the lottery style draft detailed in Part II.B of this comment in discussing the evolution of the NBA's draft system.

251. Varela, *supra* note 32; Cwiertyny, *supra* note 234, at 412. The name of each team was simply placed in a hat, and the team that "won" the right to contract with Arocha was drawn at random from the names in the hat. Varela, *supra* note 32; Cwiertyny, *supra* note 234, at 412-13. The St. Louis Cardinals won the draw and eventually signed Arocha as a free agent. Varela, *supra* note 32; Steve Wulf, *Rene Arocha*, SPORTS ILLUS., Apr. 19, 1993, at 60.

States.²⁵² They argued that they should be signed as free agents, like Arocha, but the Commissioner of Baseball disagreed and prohibited any MLB team from negotiating with them because they were in the United States illegally.²⁵³ The players were instead held to be subject to the draft as set out in Rules 3 and 4 of the Professional Major League Baseball Rule Book.²⁵⁴ This is the current rule for all Cuban players who defect directly to the United States.²⁵⁵

There is, however, a loophole in the general amateur draft rule for foreign players, and especially Cuban defectors.²⁵⁶ If a Cuban player defects directly to a nation *other* than the United States—such as the Dominican Republic, the Bahamas, or Costa Rica—and establishes a legal residence there before entering the United States to play baseball, he is not subject to the draft rules and can to enter MLB as a free agent.²⁵⁷ Thus able to bypass the draft rules, a Cuban defector can sign with the team of his choice and enjoy all the benefits that free agency provides.²⁵⁸

The application of the draft to Cuban players, and the loophole available to avoid it, has raised several concerns about the equity of MLB procedures for foreign players. First, is MLB discriminating against Cuban players on the basis of national origin by subjecting them to the draft while allowing all other foreign players to enter MLB as free agents? According to Rolando Viera, the answer is yes. Viera came to the United States from Cuba in April 2001 to play baseball.²⁵⁹ His path to MLB, however, did not follow those of the Cuban players before him. He did not escape Cuba and defect to the United States or

252. Cwiertny, *supra* note 234, at 413.

253. *Id.*

254. *Id.*; see also Varela, *supra* note 32.

255. Cwiertny, *supra* note 234, at 413; see also Varela, *supra* note 32.

256. Cwiertny, *supra* note 234, at 413 (referring to Major League Rule 3(a)(1)(B) (1999)).

257. *Id.* at 413–14. By defecting to such countries before entering the United States, Cuban defectors fall under Rule 3(a)(1)(b) and are able to sign as free agents, like any other foreign players. *Id.*

258. *Id.* at 414.

259. Varela, *supra* note 32.

to another country: he won the lottery.²⁶⁰ Viera won a unique lottery program that enables the winner to move to the United States legally with the proper paperwork.²⁶¹

Unlike Cuban players before him, Viera did not intend to leave Cuba.²⁶² His ex-wife entered him in the lottery unbeknownst to him and, when his entry was drawn, his Cuban team essentially banned him and treated him as an outcast.²⁶³ His only choice was to move to the United States and to play baseball in the major leagues.²⁶⁴

Because he had a visa, Viera was considered a legal resident in the United States and was entered in MLB's amateur draft.²⁶⁵ Viera requested to be removed from the draft and considered a free agent. He argued that he was not a resident of the United States and that he should be treated like other foreign players who obtain a visa while maintaining residence in their native country.²⁶⁶ MLB denied his request, stating that the definition of "residency" in the United States applied to him, making him eligible for the draft.²⁶⁷ Viera then sued MLB, claiming that its rules discriminate based upon national origin and that MLB's definition of residency does not supersede that of the INS.²⁶⁸ Viera also requested a temporary restraining order against MLB to prevent him from being entered into the draft for the upcoming season.²⁶⁹

Although a federal judge denied Viera's request for a restraining order, he allowed Viera to sue MLB for

260. *Id.* (citing Tom Farrey, *Paying the Price in Pursuit of Fame, Fortune*, ESPN.com (July 11, 2001,) at <http://espn.go.com/gen/s/2001/0709/1224184.html> (last visited April 22, 2004)).

261. Farrey, *supra* note 260.

262. *Id.*

263. *Id.*

264. Varela, *supra* note 32.

265. *Id.*

266. *Id.*

267. *Id.* The MLB definition of "resident" is a person living in the United States, who receives mail in the United States and has no intention of returning to his home country. *Id.* (citing Farrey, *supra* note 260).

268. Varela, *supra* note 32.

269. *Id.*

discrimination.²⁷⁰ As a result, Viera was forced to enter the draft.²⁷¹ The Boston Red Sox drafted Viera and eventually entered into a contract with him, even though Viera is still pursuing his discrimination claim against MLB.²⁷² Suggesting that Viera's unprecedented claim against MLB may have some merit, the judge who denied his request for a restraining order noted that his complaint raised substantial issues regarding MLB's disparate treatment of Cuban players.²⁷³

Cuban players are not the only players outside the United States who suffer from MLB draft ineligibility. Latin America provides the largest market for international players,²⁷⁴ and MLB has long focused its international recruiting efforts in Latin American countries.²⁷⁵ MLB recruits from these countries by scouting talent from the professional leagues that play during the winter, and by establishing academies from which MLB teams may recruit new talent.²⁷⁶ Because the recruited players are not subject to the draft, they are not protected by certain rules accompanying the draft system. For example, they are often recruited at a very young age, below the mandated age of seventeen, and are rarely given a fair contract, if given one at all.²⁷⁷ Furthermore, instead of finding the golden road that other foreign players find in free agency, many new Latin American recruits are paid very little.²⁷⁸

Some commentators strongly believe that these issues prove the need for a worldwide draft in MLB.²⁷⁹ They argue that a

270. *Id.*; Amy Armond, *Cuban Ball Player Denied Request for Free Agency: Court Rules That Viera Must Enter the Draft* (June 6, 2001), at <http://www.sportslawnews.com/archive/Articles2001/CubanPlayerDeniedFreeAgency.htm> (last visited April 22, 2004).

271. Varela, *supra* note 32.

272. *Id.*; see also Armond, *supra* note 270.

273. Varela, *supra* note 32 (citing Tom Farrey, *Red Sox Take Draft-Eligible Cuban*, at <http://espn.go.com/mlb/s/2001/0604/1209454.html> (June 6, 2001)).

274. Hwang, *supra* note 65.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. See generally Cwiertny, *supra* note 234 *passim* (discussing the Dodger's violation of MLB rules and the trade embargo against Cuba, arguing the need for a

worldwide draft would eliminate the ability of any foreign player to enter MLB as a free agent.²⁸⁰ Doing so would even the playing field of all foreign players, and place them on the same ground as American players by entering every player into MLB via the amateur draft.²⁸¹ Further, eliminating the possibility of free agency would erase the incentive to utilize the loophole in the draft, and stop violations of MLB rules and U.S. foreign policy to recruit Cuban and Latin American players.²⁸²

B. *The NBA and Global Basketball*

1. *Introduction of International Players*

The current roster of NBA teams shows that the NBA has become a global league.²⁸³ The 2004 season's rosters include sixty-eight international players from thirty-three countries and territories, and the 2003 draft saw a record nine international players drafted in the first round alone.²⁸⁴ Not only are international players visible in the NBA, they are a powerful presence. The 2002 season's international players included the Rookie of the Year,²⁸⁵ 2002 All-Stars,²⁸⁶ and the number one draft pick—Yao Ming—whose contract with the Houston Rockets will be in Part IV.B.

The influx of international players into the NBA has grown considerably over the past two decades. In 1983, eight foreign players took the court on opening night.²⁸⁷ Two players are credited with helping to pave the way for international players

worldwide draft to eliminate such incidents).

280. *Id.* at 426.

281. *Id.*

282. *Id.* at 424–26; Hwang, *supra* note 65.

283. *International Players in the NBA*, *supra* note 1; Capi Lynn, *Basketball Camp Serves as Prelude to 3-on-3 Street Tournament*, STATESMAN J. (Salem, Oregon), July 25, 2003, at A1, available at 2003 WL 55982979.

284. *International Players in the NBA*, *supra* note 1; Lynn, *supra* note 283.

285. *Id.* Pau Gasol of the Memphis Grizzlies is from Spain. *Id.*

286. *Id.* Dikembe Mutombo of The Congo (New Jersey Nets), Steve Nash of Canada (Dallas Mavericks), and Dirk Nowitzki of Germany (Dallas Mavericks) were three of the 2002 All-Stars. *Id.*

287. *Diversifying: NBA Becoming an International League*, HOUS. CHRON., June 2, 2002, at 1, available at 2002 WL 3267968 [hereinafter *Diversifying*].

in the NBA: Vlade Divac of Serbia and Montenegro and Drazen Petrovic of Croatia.²⁸⁸ Divac came to the United States and the NBA in 1989 and still plays today as the center for the Sacramento Kings.²⁸⁹ Fans called Petrovic the “Croatian Sensation” and, although he was tragically killed in an automobile accident in 1993, many believe that he helped pioneer the migration of international talent into the NBA more than any other foreign-born player.²⁹⁰

Agents, team executives, and players who have been involved with signing, drafting, and competing against foreign players have identified several factors that contributed to the increased foreign presence in the NBA.²⁹¹ The first is the emergence of stronger competition abroad.²⁹² The Euro League and the FIBA²⁹³ Super League merged in the 2002–03 season.²⁹⁴ Because of the merger, the Euro League now consists of the top thirty-two European teams, which means that NBA-caliber players now compete against more superior players than before the merger.²⁹⁵ For example, Pau Gasol, 2002 Rookie of the Year, came from Barcelona, where he was “playing against players physically superior to what any American college could offer as competition” when he was just nineteen years old.²⁹⁶ The second contributing factor is that foreign players generally have more practice time than American collegiate players.²⁹⁷ While the NCAA regulates the number of hours a college basketball coach can work with his players, a European or Chinese professional team can devote more time honing its top talent.²⁹⁸

288. *Id.*

289. *Id.*

290. *Id.* (discussing comments made by Dallas Mavericks assistant coach, Donnie Nelson).

291. *Id.*

292. *Diversifying, supra* note 287.

293. FIBA is the global governing body of professional basketball. FIBA GEN. STAT. art. 1 (2002). Part III.B.2 will briefly discuss FIBA and its impact on the NBA and the international athletes within the NBA.

294. *Diversifying, supra* note 287, at 3.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

The past two decades have also seen astounding advances in satellite television and technology.²⁹⁹ NBA games are readily available to many children worldwide who are interested in basketball.³⁰⁰ Many of today's top European players grew up idolizing Divac and Petrovic the same way that American players idolize Magic Johnson and Larry Bird.³⁰¹ Some executives and agents credit the 1992 Dream Team as the catalyst which "represented a zeitgeist moment that transported the cherubic faces of NBA basketball stars like Michael Jordan and Charles Barkley onto a global stage."³⁰² Not only were they acting "like the greatest collection of players ever assembled" on a global scale, they also "had time to become pop-culture icons."³⁰³

Finally, the perception of international talent has changed such that foreign players are immediately accepted as NBA-caliber athletes.³⁰⁴ "For many years, the perception of the foreign player was that of a spot-up scorer who disdained physical contact and [who] could not play defense."³⁰⁵ Today, many of the foreign players have become hardened by better competition and access to the top basketball game in the world.³⁰⁶

2. *FIBA—Global Basketball Governing Body*

FIBA is headquartered in Geneva, Switzerland, and is an "independent association composed of national basketball federations and associations worldwide."³⁰⁷ It has also established itself as "the sole competent authority for men's and women's basketball throughout the world and is recognised as such by the International Olympic Committee."³⁰⁸ Article 5, Chapter One of the FIBA General Statutes articulates the goals

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. FIBA GEN. STAT. art. 1,2 (2002).

308. *Id.* at art. 1.

of the organization and the means through which FIBA operates to achieve those goals:

FIBA's aim shall be to develop and control the sport of basketball in all countries worldwide. To this end, FIBA shall promote, supervise and direct the sport of basketball throughout the world.

In particular, FIBA shall:

- a) Establish the Official Basketball Rules, the specifications for equipment and facilities, and all internal and general regulations that must be applied on all occasions, particularly at international or Olympic competitions for which FIBA establishes the system of competition.
- b) Organise, govern and control all international competitions, particularly at national and club team level.
- c) Control the practice of men's and women's basketball in all its forms and in all age groups.
- d) Govern and control the appointment of international referees.
- e) Regulate and approve the transfer of players and referees from one national federation to another.
- f) Promote amicable and courteous relations between national federations, Zone Commissions and their officials and players.
- g) Take every measure appropriate in order to prevent violations of the General Statutes, Internal Regulations of FIBA and Official Basketball Rules.
- h) Provide for the principles valid for deciding and settling all disputes and guaranteeing the right of defence and an impartial judgement, as per the statutory provisions or regulations.³⁰⁹

Any independent national basketball federation is eligible

309. *Id.* at art. 5.

for membership in FIBA, which is attained by submitting an application for approval to FIBA's Central Board.³¹⁰ In applying to FIBA, the applicant declares that it will both "conform at all times to the General Statutes, Internal Regulations and decisions of FIBA and the appropriate Zone Commission" and "observe the Official Basketball Rules of FIBA."³¹¹ Applicants are also required to submit a copy of their own statutes and regulations, and details of their organization and basketball facilities.³¹² The United States is listed as an affiliated national federation in the Annex to the General Statutes, and is a member of FIBA.³¹³

FIBA will recognize only one national basketball federation per country.³¹⁴ In the United States, that federation is the NBA. FIBA requires that its member federations govern both men's and women's basketball in their respective countries and that the members apply the Official Basketball Rules set out by FIBA.³¹⁵ As an affiliated member of FIBA, the NBA has the right to participate in FIBA activities and competitions, to vote at various Congresses of FIBA, and to appoint a delegate to represent its interests within FIBA.³¹⁶ Any other basketball affiliations within a FIBA member country cannot pursue international activity without the approval of both the recognized federation and FIBA itself.³¹⁷

FIBA's Internal Regulations provide guidelines for a player's international transfer.³¹⁸ The scope of the regulations on international transfers states, in pertinent part:

4.1 Scope of the regulations

1. Any basketball player shall have the right to play basketball in any country in the world, within the limits

310. *Id.* at art. 6.

311. *Id.*

312. *Id.*

313. *Id.* at art. 6 & annex.

314. *Id.* at art 6.

315. *Id.*

316. *See id.* arts. at 6, 11.

317. *Id.* at art. 6.

318. FIBA INTERNAL REGULATIONS, WORLD EDITION art. 4 (2002).

established by the General Statutes and Internal Regulations of FIBA as well as the eligibility regulations of the respective national federation.

2. These regulations governing international transfer apply in their entirety to all national federations. However, in exceptional circumstances, FIBA may reach a special agreement with a national federation.

3. For national transfers, national federations are invited to draw on these international regulations and to establish their own regulations governing the transfer of players in the spirit of the FIBA Regulations.³¹⁹

The regulations provide that a player must be at least eighteen years of age³²⁰ before transferring, and, obtain a letter of clearance from the national basketball federation where he was last licensed before he can be licensed to play for a team in another country.³²¹ On or after the player's eighteenth birthday, the club of origin—the federation where the player is licensed when he turns eighteen—has the right to sign the player's first contract.³²² Such a contract must be in writing and be for one to four years long.³²³ Upon fulfillment of his contract, a player may transfer with no obligation to pay the club of origin.³²⁴ Should the player refuse to sign the contract with his original club and transfer to a foreign club, the two clubs must then agree upon compensation paid to the club of origin.³²⁵

319. *Id.* at art. 4.1.

320. *Id.* Note the similarity between this requirement and that of Article X, Section 6 of the NBA's current CBA. *NBA current CBA*, *supra* note 113.

321. FIBA INTERNAL REGULATIONS, WORLD EDITION art. 4.3.1 (2002).

322. *Id.* at art. 4.3.2.

323. *Id.*

324. *Id.* at art. 4.3.2.

325. *Id.* The requirement of compensation is discussed further concerning the deal made with Yao Ming's Chinese team. *See infra* Part IV.B.

IV. INSTANT REPLAY—RECENT BIG PLAYS

A. *MLB Players and Owners Avoid Strike*

Part II.B of this comment outlined the current CBA between MLB players and owners. Sports commentators have since analyzed the deal and identified its winners and losers. It is seemingly unanimous that the biggest losers in the deal are the most profitable teams, like the New York Yankees.³²⁶

The luxury tax and revenue sharing portions of the deal will increase the amounts that high profile teams like the Yankees will have to pay.³²⁷ As a result, commentators agree that well-run, mid-market teams win in the agreement.³²⁸ These teams will receive more from the revenue sharing aspect of the deal, will be able to keep more of their young, talented players through higher salaries, and will be able to afford good new players to upgrade their teams.³²⁹ The obvious winners are baseball's consumers—the fans. As one player commented: "It came down to us playing baseball or having our reputations and life [sic] ripped by the fans. Baseball would have never been the same if we had walked out."³³⁰

For the first time in almost a decade, players have been willing to implement a worldwide draft.³³¹ Negotiations are far from over, as the details of how a worldwide draft will operate—or if it will operate at all—are not yet decided.³³² In the meantime, there is much speculation about who will win and lose if and when a worldwide draft begins. Surprisingly,

326. See *No Strike*, *supra* note 66; see also Josh Dubow, *And the Winners Are . . .* (Aug. 30, 2002), at <http://espn.go.com/mlb/news/2002/0830/1425301.html>.

327. See *No Strike*, *supra* note 66; Dubow, *supra* note 326; see also Jayson Stark, *Q&A: How the Labor Deal Works* (Aug. 31, 2002) (explaining the details and impact of the luxury tax and revenue sharing aspects of the deal), at http://espn.go.com/mlb/columns/stark_jayson/1425248.html.

328. *No Strike*, *supra* note 66; Dubow, *supra* note 326.

329. Dubow, *supra* note 326; see also *No Strike*, *supra* note 66.

330. *No Strike*, *supra* note 66 (quoting Steve Kline, the St. Louis Cardinals' player representative).

331. Coffey, *supra* note 1.

332. See *supra* Part II.B.

American players are among the winners.³³³ A worldwide draft will allow American players to enter MLB on the same footing as foreign players because foreign players will no longer be able to prematurely exploit free agency. Players undoubtedly recognized the importance of evening the playing field, as their proposals included provisions that will provide less heralded players with a greater chance at success.³³⁴

Less surprisingly, small- to middle-market teams also benefit from a worldwide draft.³³⁵ Just as the economic aspects of the deal allow these teams the opportunity to better themselves, a worldwide draft will allow them greater opportunity to sign a power player from outside the United States.³³⁶ As it stands, teams in smaller markets do not have the same access to global talent as larger market teams because they cannot afford to outbid teams with a larger profit base.³³⁷

There could be both negative and positive impacts on foreign players. Although the language of the draft is inclusive—allowing foreign players to be eligible for something they are currently not eligible for—the inclusion eliminates the availability of the golden road to free agency.³³⁸ Therefore, the most desirable foreign players will not have the advantage of signing with the teams who make them the best offer.³³⁹ For Cuban players, the removal of free agency may make defection

333. Even though drafting of any type places restriction of players' freedom of movement, MLB players were surprisingly not averse to agreeing to its implementation. See Coffey, *supra* note 1.

334. See Cannella et al., *supra* note 80; see also *supra* Part II.B.

335. See Coffey, *supra* note 1.

336. See *id.*

337. See *id.* Although the logic is such that teams from smaller markets will have greater access to high profile foreign players, one general manager of a small market team is not entirely thrilled about the ramifications of a worldwide draft, explaining that he can currently sign "50 Dominican or Venezuelan kids for \$20,000, and have a pretty good chance that some of them will develop into good players," rather than spending \$1 million on one player. *Id.*

338. See *supra* Part II.B.

339. While the elimination of free agency is clearly detrimental to foreign players' current options, being able to be drafted into MLB at all is a privilege for anyone, providing access to opportunities available only to those at the top of the sports world. See Armond, *supra* note 270 (quoting federal Judge James Whittemore, who denied Rolando Viera's request for free agency).

to the United States or a third country a less attractive option, albeit their only option for them to play baseball in the United States.³⁴⁰ Even so, the implementation of a worldwide draft will eradicate any unfair treatment of Latin American players and will enable them to enter MLB with the same protections as Americans, and other foreign-born players.³⁴¹

Throughout all of the negotiating, one fact seems to have been lost: MLB's ability to reach an agreement makes baseball the biggest winner. Reaching this agreement was no small accomplishment: It was the first time since 1970 that MLB players and owners found common ground without resorting to a strike.³⁴² The previous eight attempts to reach agreement resulted in five strikes and three lockouts.³⁴³ In fact, MLB has been characterized by tensions and struggles between players and owners since its beginning in 1869.³⁴⁴ More labor disputes have arisen in MLB than in any other professional sport in the United States, and tensions have increased by implementing collective bargaining.³⁴⁵ MLB's labor history makes the current agreement between players and owners even more significant. Perhaps it is a signal that players and owners will be even more willing to break tradition and work together for what is best for baseball.

B. Houston Rockets Draft China's Yao Ming as the Number One Pick

The summer of 2002 was as significant for professional basketball as it was for baseball. During that time, the Houston Rockets negotiated with China over the first international

340. See *supra* Part III.A.

341. See Hwang, *supra* note 65.

342. *No Strike*, *supra* note 66.

343. *Id.*

344. Jeffrey S. Moorad, *Major League Baseball's Labor Turmoil: The Failure of the Counter-Revolution*, 4 VILL. SPORTS & ENT. L.J. 53, 53-54 (1997). Moorad offers an in-depth and insightful look into the history and development of the labor struggles in MLB.

345. *Id.* See also Coffey, *supra* note 1 (referring to negotiations between MLB players and owners as dealings between the "Hatfields and McCoys of the sports world").

player to go number one in the NBA draft, Yao Ming.³⁴⁶

Yao is from Shanghai,³⁴⁷ where he was just as much a phenomenon as he is in Houston, Texas.³⁴⁸ Towering above his countrymen at seven feet and five inches, Yao was destined to be a basketball player.³⁴⁹ He was born into a basketball family³⁵⁰ and attended one of Michael Jordan's summer camps as a teenager.³⁵¹ At that time, it was clear to others that he had exceptional talent, and clear to him that the NBA was the best game around.³⁵² Yao began his professional career at the age of sixteen.³⁵³ At that early age, he was playing against the best player in China, Wang Zhizhi.³⁵⁴ In the five years since his entry into Chinese professional basketball, Yao "went step by step to becoming the most dominant player in China."³⁵⁵

The NBA had already noticed Yao by the end of his third professional season with the Shanghai Sharks.³⁵⁶ It would take more time before NBA scouts began seriously courting Yao.³⁵⁷ At the end of his fifth season with the Sharks, the Houston Rockets had drawn the number one draft pick, and choosing Yao was a

346. Curtis Bunn, *Rockets Build at Center: Yao First Pick of Draft*, ATLANTA J. - CONST., June 27, 2002, at E1.

347. Chris Young, *Yao: The Next Big Thing*, TORONTO STAR, Nov. 2, 2002, at E1 available at 2002 WL 101966106.

348. See Mark Heisler, *How Now Yao? Everyone Wants a Progress Report on 7-5 Rocket Rookie, Who is Coming Along Slowly*, L.A. TIMES, Nov. 17, 2002, at D1, available at 2002 WL 103218280.

349. *Id.*

350. Both of Yao's parents were basketball players. *Id.* His father was six feet and ten inches, and his mother, a six-foot, four-inch center on the Chinese national team. *Id.*

351. *Id.*

352. *See id.*

353. *Id.*

354. Heisler, *supra* note 348. Wang Zhizhi came to the United States to play for the Dallas Mavericks in 2001, making him the first Chinese national to play in the NBA. Crystyl Mo, *Brick City: Mainland China's Pro Basketball Players Got Game, But the CBA Can't Turn Fast Breaks Into Fast Bucks*, 159 TIME ASIA MAGAZINE 7 ¶ 5 (Feb. 25, 2002), at <http://www.time.com/time/asia/biz/magazine/0,9754,203602,00.html> (last visited April 22, 2004).

355. Heisler, *supra* note 348.

356. *Id.*

357. *Id.*

“no brainer.”³⁵⁸ The process of bringing Yao to Texas was not, however, as easy as choosing to draft him.³⁵⁹

Securing a contract with Yao actually required three separate agreements involving the Chinese Basketball Association (Chinese Association), Yao, and the Rockets.³⁶⁰ After Yao agreed to enter into negotiations with the Rockets, the team still needed to iron out two sets of contracts, including securing Yao’s release from the Chinese Association.³⁶¹ Only after securing such a release could negotiations between Yao and the Rockets begin.³⁶² FIBA regulations required the Rockets to obtain the release from Yao’s federation, the Chinese Association, which required a release from Yao’s former team, the Sharks.³⁶³

By the time of the draft, the Sharks had already released Yao to the Rockets, leaving the decision to the Chinese Association whether or not to release him.³⁶⁴ Major concerns for the Chinese Association included Yao’s availability to participate with China’s national team during the World Championships, Olympic Games, and the Asian Games.³⁶⁵ In return, the Rockets sought assurances that Yao would be

358. *Id.* According to Heisler, even though outsiders speculated that the Rockets would choose someone with more experience in America or that China would make it too difficult to draft Yao, the Rockets didn’t need a superstar but a solid center around which to build a team—and Yao was just that building block. *Id.*

359. See Bunn, *supra* note 346.

360. NBA, *The Beat, Report: Yao, Rockets Agree to Contract*, ORLANDO SENTINEL, Oct. 10, 2002, at D3.

361. *Houston ‘still have to negotiate Yao’s release from China’*, AGENCE FR.-PRESSE, June 27, 2002 available at 2002 WL 2440378 [hereinafter *Yao’s Release*].

362. *Id.* Note, however, that the Rockets went ahead in choosing Yao in the NBA draft on June 26, 2002, before all of the details with the Chinese Basketball Association had been solidified. Bunn, *supra* note 346. According to Mike Goldberg, team counsel for the Rockets, verbal promises of the necessary releases were granted prior to the draft. Michael Murphy, *Rockets Stay on Move in Pursuit of Francis, Yao*, HOUS. CHRON., July 27, 2002, at 9, available at 2002 WL 23212328. “We wouldn’t have drafted him if we didn’t think we could have gotten the written agreements,” said Carroll Dawson, Rockets General Manager. *Id.*

363. *Yao’s Release*, *supra* note 361.

364. *Id.*

365. *Id.*

available for the entire NBA season and postseason.³⁶⁶ Perhaps the most noted aspect of the agreement between the Rockets and the Chinese Association was the compensation for Yao's former team and for the Chinese Association.³⁶⁷ Global media seemed suspicious of the compensation, reporting that the Chinese Association sought to "commandeer up to fifty percent of Yao's NBA salary."³⁶⁸ Bai Li, general manager of the Sharks, discounted such reports as rumors stating that fifty percent was too high, but admitting that he did not know how much money the Chinese Association would require before releasing Yao.³⁶⁹ The final deal included a \$350,000 payment to the Sharks, the maximum allowed under NBA rules, as well as a portion of Yao's salary.³⁷⁰ Yao's contract with the Rockets includes \$3.8 million for the 2002-03 season and \$17.8 million over four years, with a fourth season at the team's option.³⁷¹

It may seem odd to many Americans that Yao's contract included payment to a foreign team. It may even seem patently wrong; especially considering that paying the Chinese Association is equivalent to paying the Chinese government.³⁷² Despite its oddity, it is required under FIBA guidelines. Regardless, some may wonder whether it is even legal under

366. Murphy, *supra* note 362, at 9. These concerns were exacerbated by the rumors that Wang Zhizhi refused to return to China to honor his national team obligations, as he had promised before signing with the Mavericks. *Houston Rockets One Agreement Away From Signing China's Yao Ming*, AGENCE FR. PRESSE, July 28, 2002, available at 2002 WL 23567569 [hereinafter *Houston Rockets*].

367. See *Houston Rockets*, *supra* note 366. Remember that FIBA requires the team acquiring the foreign player to compensate the player's former team if the player transfers before his contractual obligation is fulfilled. FIBA INTERNAL REGULATIONS, WORLD EDITION art. 4.3.2 (2002).

368. See *Yao's Release*, *supra* note 361; *Houston Rockets*, *supra* note 366 (reporting that Chinese rules require up to fifty percent of Yao's NBA salary to be paid to the Chinese Association and China's Sports Ministry, while the Sharks would be entitled to a share of the remainder).

369. *Yao's Release*, *supra* note 361.

370. Jonathan Feigen, *Rockets Get Yao's Release in Writing*, HOUS. CHRON., Aug. 1, 2002, at B1.

371. Jonathan Feigen, *Yao Agrees to Deal: Rockets Still Need CBA's Approval*, HOUS. CHRON., Oct. 9, 2002, at B1.

372. The Chinese Association and China's Sports Ministry share profits under Chinese rules. See *Houston Rockets*, *supra* note 366.

U.S. laws. The governing legal authority for such issues is the Foreign Corrupt Practices Act (FCPA).³⁷³ The FCPA provides, in pertinent part, that it is unlawful for an American company to use interstate commerce corruptly to make a payment to influence a foreign official in his decision-making capacity.³⁷⁴ At first glance, it may appear that the Rockets' payment to the Chinese Association violates such a provision. The FCPA also provides, however, that such payments do not violate the act if they are lawful under the written laws of the foreign official's country or are reasonable and directly related to the execution of a contract with a foreign agency.³⁷⁵ Yao's contract falls under this exception, given that compensation to the Chinese Association and to the Sharks is provided for in China's laws, and that it involved a contract between the United States and China.

V. POST-GAME WRAP-UP: COMPARING MLB AND THE NBA

A. *Global Draft is Necessary*

Antitrust legislation and jurisprudence shows that competitive balance is necessary in order to maintain healthy competition between sports teams and within sports leagues.³⁷⁶ At the heart of competitive balance is consistent compromise between players and owners. The utilization of global drafting systems in U.S. professional sports clearly depicts this compromise and its necessity in preserving the vitality of the sports industry.

MLB has been plagued with bitter labor battles for most of its existence, while the NBA has not.³⁷⁷ Now that MLB is on the verge of implementing a worldwide draft, the timing is ripe to assert that doing so will help secure greater competitive balance in baseball.³⁷⁸ This may possibly ease decades of strife between

373. 15 U.S.C. § 78dd-1 (2000).

374. § 78dd-1(a)(1).

375. § 78dd-1(c).

376. *See supra* Part II.C.

377. *See* Hwang, *supra* note 65.

378. *See id.* (asserting that a comprehensive international draft should be coupled

players and owners. Talk of instituting a worldwide draft—like the system used by the NBA for almost a decade—has finally come to fruition.³⁷⁹ According to MLB, the purpose of the draft system is to maintain “competitive balance and equality among all MLB teams.”³⁸⁰ However, because foreign players are not eligible for the draft and are free to sign with the highest bidding team, the bidding wars and big bonuses which characterized MLB before the implementation of the draft four decades ago are back in force.³⁸¹

Players may be tempted to dismiss bidding wars as a management problem and continue to assert their freedom of contract as unlawfully impinged by the draft—global or otherwise. Hopefully, MLB players have realized they need a global draft as much as management needs it. The draft does restrict player movement and freedom in ways that appear to violate antitrust law. However, no court has directly considered the question of whether the draft system contradicts antitrust law.³⁸²

Two overriding principles indicate that no court is likely to answer that question in favor of players who oppose the draft. First, the Sherman Antitrust Act prohibits organizations from monopolizing any aspect of trade or commerce.³⁸³ A system of bidding wars for the best players is a system in which wealthier teams hold a virtual monopoly of those players. Actions like domestic and global drafts, taken to avoid such a result, are in-line with antitrust law because the competitive benefit outweighs the obvious infringement on players’ individual interests.³⁸⁴

Second, the draft is exempt from antitrust scrutiny because it results from collective bargaining between players and owners.³⁸⁵ Players may not agree with being subjected to the

with a hard salary cap).

379. Coffey, *supra* note 1.

380. Varela, *supra* note 32.

381. Coffey, *supra* note 1.

382. *See supra* Part II.C.

383. 15 U.S.C. § 1 (2000); *see also* Kaplan, *supra* note 117.

384. *See* Perrine, *supra* note 120, at 811.

385. *See supra* Part II.C; *see also* 15 U.S.C. § 17.

draft and may be more opposed to subjecting foreign players to it.³⁸⁶ However, the only way to challenge it is to give up their right to negotiate with owners about their employment as professional athletes. MLB players seem to have realized that their best course of action is to adhere to the adage “if you can’t beat ‘em, join ‘em.”

Since courts probably will not eliminate the draft, players should embrace it and use it to their advantage. Global drafting will remove foreign baseball players’ advantage over American players by eliminating the fast track to free agency. This will increase the amount of money teams have available for salaries and will enable more teams to have access to top players. All of this will enhance the overall competition of professional sports by encouraging players worldwide to play their best, because they know the rules provide an even playing field. Most obviously, global drafting will create a more enticing product for the consumers—the fans—by allowing all teams access to high profile players. A better product for fans means job security for players.

Players are not the only ones who oppose global drafting. Alan Nero, CEO of CSMG Sports, Ltd. (the premier agency handling foreign players) has called MLB’s worldwide draft “another infiltration of communism . . . anti-competition, anti-American.”³⁸⁷ Representing players who will no longer be able to step directly into the lucrative shoes of free agency, it is tempting for him to make such statements, but his adamant distaste is unfounded. Equalizing access to the top players and teams is far from Marxist; rather, it promotes American ideals of equal opportunity for all. Allowing such equality can enhance

386. Baseball players are not the only ones concerned about the ramifications of drafting foreign players. In the most recent NBA draft, many American players ineligible for the draft just out of high school, took a back seat to foreign players drafted in their place. See Steve Wilstein, *Draft Goes Global: International Stars Could Bounce Americans Out of Draft Selection*, SAN DIEGO UNION-TRIB., June 23, 2002, at C1, available at 2002 WL 4610866. Some players have tried to blame the current CBA, but the reality is that more foreign players means fewer available jobs for American players. See Chris McCosky, *Some Players Soured on Economic Climate*, DETROIT NEWS, Nov. 10, 2002, at 15, available at 2002 WL 102336212. Still, those same players point to the fact that most players without jobs could have worked harder to get the jobs they wanted. *Id.*

387. Coffey, *supra* note 1.

competition by allowing all teams to compete effectively, and by encouraging all players to rise to the challenge of global competition.

With competitive balance as the goal, what better option exists for professional sports? Imposing stricter salary caps to combat bidding wars is certainly more anti-American than creating a global playing field. Allowing all players to compete as free agents would soon put them out of a job as skyrocketing salaries would destroy the business of baseball. MLB players have recently realized—and NBA players have long understood—that compromise is the key to preserving the most for each side. Embracing the inevitable expansion of American sports to the world benefits players more than it harms them.

B. Baseball Should Learn From Basketball

With the worldwide draft on the horizon, MLB is in a unique position to learn a few things before forging ahead. The unprecedented agreement by players to the worldwide draft should give MLB management pause and should signal it to consider that this could be a much-needed turning point in MLB's labor history. In order to avoid continuing a pattern of struggle, MLB should look to the NBA in implementing a worldwide draft.³⁸⁸ The NBA, though not without problems between players and owners,³⁸⁹ has operated on a global scale for decades with few difficulties. Certain NBA procedures, such as the number of draft rounds and global procedures like those put in place by FIBA have helped eliminate the problems seen in MLB.

The NBA operates a single two-round draft, encompassing both foreign and domestic players.³⁹⁰ The low number of rounds allows less talented players an opportunity to negotiate with good teams and allows undrafted players to try out for any team.³⁹¹ Although MLB owners balked at the players' proposal of

388. See generally Hwang, *supra* note 65 (suggesting that the NBA's draft system provides a good example for MLB).

389. The current collective bargaining agreement in the NBA was signed by the Players' Association in 1999 after a lockout. McCosky, *supra* note 386.

390. See Hwang, *supra* note 65.

391. See *NBA Draft History*, *supra* note 86.

sixteen rounds,³⁹² they should reconsider operating a worldwide draft with a low number of rounds. As shown by the NBA, a lower number of rounds facilitate the desire for competitive balance by spreading non-superstars throughout the league. It would promote relative peace with the players by offering a concession in return for their agreement to a worldwide draft.

The second, and more important, hint for MLB to take from the NBA is the formation of a global governing body such as FIBA. That basketball is played on a global scale and is monitored by a central global body has provided otherwise unavailable stability to the game and business. One concern for MLB is the unwillingness of foreign countries developing professional baseball leagues to give up their star players.³⁹³ If MLB facilitated the formation of an objective global governing body, this fear could be relieved. FIBA regulates the exchange of players between countries, providing benefits such as compensation to countries losing players to foreign teams, so that basketball remains vibrant in all its member countries. This regulation ensures that exchanges between nations are done fairly according to set standards, and ensures that foreign countries are able to maintain the growth of their own basketball teams while losing players to the NBA.

Adhering to global standards allows reciprocity among nations. The NBA is able to recruit foreign players and American players are able to compete in foreign countries.³⁹⁴ Were global baseball to move toward a similar structure, players would not fear losing jobs or the ability to compete. As an example, Pat Burke, drafted by the Orlando Magic in June 2002, played in Greece and Spain before returning to the United States at the age of twenty-eight.³⁹⁵ Burke had the opportunity to hone his skills overseas and returned home able to compete in

392. See Price-Brown, *supra* note 71.

393. See Coffey, *supra* note 1 (noting the opinion that foreign ball teams are company-owned teams, whose stock will go down if they lose their young talent and end up with a losing product).

394. See Peter May, *A Late Start is No Problem: the Older Rookies Feel Born Again*, BOSTON GLOBE, Nov. 3, 2002, at C13, available at 2002 WL 101981579.

395. *Id.*

the NBA, the best league in the world.³⁹⁶ He did not sacrifice much to play overseas—he had NBA offers, but the money was too tempting overseas.³⁹⁷ After gaining international experience, Burke was ready to return to the United States and command a starting position.³⁹⁸ MLB players concerned about losing their competitive edge should make Burke their poster child for how to implement a global draft.

Creating a baseball counterpart to FIBA is no small undertaking and will not happen by the time the details of the MLB worldwide draft are decided. In deciding those details, MLB management would be wise to follow the path of basketball, which has been a global sport much longer than has baseball. If the draft is set up with the intent of moving toward a global baseball organization, concerns of all sides—owners, players, and foreign countries—should be addressed before another MLB labor battle results in strike.

VI. CONCLUSION

There was a time when most Americans considered the activities of other countries too distant to affect their lives. There was no reason to concern themselves with the world beyond U.S. borders because they had everything they could possibly need right here, from sea to shining sea. Today, however, most Americans would not dream of doing business, conducting politics, or even planning a vacation without looking to the rest of the world. The time has come to look to the rest of the world in embarking upon a new millennium of professional sports. The world of sports is not flat, and realizing that the rest of the world can be a part of American pastimes will not cause American sports to fail.

The worldwide draft is an inevitable expansion of baseball, and has been part of basketball's enjoyment for years. Fans, players, and owners should not fight the inevitable expansion, but embrace it as the necessary and beneficial next step. Legally, players have little recourse, should they choose to fight

396. *Id.*

397. *Id.*

398. *Id.*

it. Alternatively, choosing to embrace a worldwide draft will only increase the competition promoting their livelihood. U.S. sports' management should not simply take advantage of players' willingness to accept a worldwide draft with their eyes closed. Instead, they should continue to look ahead to the global nature and appeal of sports in general, and should facilitate its growth through global governing bodies such as FIBA. Taking these steps—even if they are small ones initially—will further the ideals of competition and equality that American sports embody.

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