

# Double Play: How Major League Baseball Can Fix the Amateur Draft and International Player Acquisition with One Swing

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## I. Introduction

With one minute and seventeen seconds to spare before the Major League Baseball (MLB or major leagues) deadline to sign drafted players, the perennially last-place Washington Nationals agreed to terms with the top pick in the 2009 amateur draft.<sup>1</sup> A towering presence on the mound at six-foot-four-inches tall, Stephen Strasburg instantly became the ace of the Washington Nationals pitching staff despite having turned twenty-one years old less than a month earlier. For \$15 million payable over four years, the Nationals gained the best amateur pitcher in the nation, a hard-throwing right-hander whose fastball was clocked as high as 102 miles per hour.<sup>2</sup> His junior season at San Diego State University was nothing short of dominating; Strasburg won thirteen games, lost only one, and led the National Collegiate Athletic Association (NCAA) Division I in earned run average (ERA),<sup>3</sup> at a microscopic 1.35, and strikeouts, with 195 in only 109 innings pitched.<sup>4,5</sup> These spectacular numbers earned Strasburg the Golden Spikes award as the top amateur baseball player in the United States and the first pick in the MLB amateur draft.<sup>6</sup>

Just a few months later, a similar pitcher entered the MLB market. Hailing from the island of Cuba, Aroldis Chapman was considered by many to be the “left-handed Stephen Strasburg.”<sup>7</sup> He also

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<sup>1</sup> Chico Harlan, *It's a Deal: Strasburg, Nationals Agree*, WASH. POST. Aug. 18, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/17/AR2009081702793.html>.

<sup>2</sup> *Id.*

<sup>3</sup> ERA is a common measure of how well a pitcher has succeeded in avoiding runs given up to the opposing team. It can be calculated by multiplying the total number of earned runs—generally, the number of runs given up while the pitcher was in the game minus any runs scored as a result of an error—by nine, the number of innings of usual baseball game. That number is then divided by the total number of innings pitched by the player to find his average number of runs given up per nine innings pitched, or ERA. In 2009, for comparison, the major league leader in ERA was Zach Greinke, with an amazingly low 2.16. A quick guide to basic baseball statistics can be found on Major League Baseball's website at: [http://mlb.mlb.com/mlb/official\\_info/baseball\\_basics/stats\\_101.jsp](http://mlb.mlb.com/mlb/official_info/baseball_basics/stats_101.jsp).

<sup>4</sup> *Id.*

<sup>5</sup> This equates to 16.1 strikeouts per 9 innings pitched. For comparison, the major league leader in 2009 in this category was Tim Lincecum, who struck out batters at a rate of 10.4 strikeouts per 9 innings pitched.

<sup>6</sup> *Id.*

<sup>7</sup> Jorge Arangure Jr., *Top Cuban Prospect Defects*, ESPN, July 3, 2009, available at <http://sports.espn.go.com/mlb/news/story?id=4302422>.

stood six-feet-four-inches tall<sup>8</sup> and devastated hitters with a 102 miles per hour fastball.<sup>9</sup> Despite these similarities and a few concerns over his maturity level,<sup>10</sup> Chapman received a six-year contract from the Cincinnati Reds worth \$30.25 million,<sup>11</sup> a contract worth over \$1.25 million more per year than Strasburg's deal and worth double overall.

Two pitchers with similar ability received unequal contracts due to the major league's disparate player acquisition systems. Major League Baseball forced the first player into the amateur draft, while the second was allowed to negotiate his own contract with multiple teams as a free agent due simply to the lack of a global draft system; as a result, the top American amateur will earn half of what the international free agent takes home in their respective rookie contracts. To remedy this situation, many have renewed calls for an international draft, which would place international players in the same position as American amateurs. Both groups of players would be drafted by one of thirty major league clubs, who would then own the exclusive right to negotiate with that player, keeping the rookie salaries low and symmetrical.

An international draft, however, cannot solve the problems it is intended to cure and would face multiple legal roadblocks. Instead of implementing an international draft, Major League Baseball should eliminate the amateur draft completely, thereby granting every American amateur player free agent status; this places American amateurs on the same level as international players, reducing contract disparities between the two groups of players, removing artificial caps on rookie salaries that currently exist for American amateurs, and allowing MLB to better deal with the current legal roadblocks to international player acquisition by instituting a new, uniform system globally.

This paper will examine how MLB can eliminate the amateur draft and homogenize its player acquisition regimes. Part II will discuss how the current draft system operates and proposals to fix that system; Part III will examine current legal roadblocks to the implementation of an international draft in MLB; Part IV will explain why an international draft cannot solve the problems currently affecting MLB and offer a simpler solution for the game.

## II. Major League Baseball and the Draft

Rules three and four of The Official Professional Baseball Rules Book set out the current regulations for new player acquisition in MLB.<sup>12</sup> In general, residents of the United States, Canada, Puerto Rico, and other US territories are subject to the annual amateur MLB draft held in June. Due to its place in the Rule Book, this draft is commonly referred to as the "Rule 4 Draft." It lasts for fifty rounds, and each MLB team participates. Players who qualify for the draft include: 1) high school players who have graduated from high school and have not attended a four year or junior college; 2) collegiate players at four year institutions who have either completed their junior year or are at least twenty-one years old; and 3) junior college players of any age or academic rank.<sup>13</sup>

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<sup>8</sup> *Chapman Signs Six Year Contract*, ESPN, Jan. 12, 2010, available at <http://sports.espn.go.com/mlb/news/story?id=4816007> [hereinafter *Chapman*].

<sup>9</sup> Arangure, *supra* note 7.

<sup>10</sup> *Id.*

<sup>11</sup> *Chapman*, *supra* note 8.

<sup>12</sup> Major League Baseball: The Official Professional Baseball Rules Book (2009).

<sup>13</sup> *Id.*

The team that drafts the player retains the exclusive right to negotiate and sign the selected player until a mid-August deadline set by MLB or until the player enters, or returns to, a four year college on a full-time basis.<sup>14</sup> A player that does not sign may re-enter a future draft so long as he is eligible for that draft. A team may not select a player again in a subsequent year without permission from that player. For example, if the Minnesota Twins select a high school graduate in the 2007 Rule 4 Draft, and that player decides to attend the University of Virginia full-time instead of signing a contract with the Twins, he would not be eligible for another MLB draft until after his junior season or his twenty-first birthday. Alternatively, he could opt for a junior college instead of signing with the Twins; in that case, he would be eligible for the 2008 Rule 4 Draft, and the Twins would not be able to draft him without his permission.

Foreign players, excluding those from Canada or a US territory, are not eligible for the amateur draft if they do not first establish US residency, a “daunting and undesirable task” for most players.<sup>15</sup> This fact, though, may actually make it easier for the foreign player to sign with a MLB team. Major League Baseball considers foreign players to be international free agents. A free agent, unlike a drafted player, can negotiate and sign with any team as long as he is sixteen years old by the first day of the international signing period (July 2) and will turn seventeen by the end of the next season—a rule that had to be implemented in 1984 after the Toronto Blue Jays signed a thirteen year old Dominican shortstop named Jim Kelly.<sup>16</sup> Unlike the Rule 4 Draft, in which only one team can sign the player, multiple teams compete to sign the same international player;<sup>17</sup> this competition over the contract causes the signing bonus to escalate beyond what a comparable American or Canadian amateur player would receive, as seen in the Strasburg and Chapman comparison in Part I. The lack of a draft system for international players results in a major inequity: foreign players become free agents on their sixteenth birthdays, resulting in bidding wars among multiple teams that produce higher contracts. Players subject to the Rule 4 Draft, on the other hand, feel the ill-effects of monopolistic practices and receive lower contracts despite equal ability.

The recent response to this inequity has been a renewed call for an international draft. Owners have long argued for a global draft in an effort to reign in signing bonuses given to the players.<sup>18</sup> As the current system shows, blocking competition between teams for an individual player reduces the money eventually paid out. An international draft would likely mean lower bonuses for the international players, placing them in the same situation as the amateurs subject to the Rule 4 Draft. The players also have begun to call for a change in the system, without directly agreeing with management’s position on the international draft. Michael Weiner, the executive director of the Major League Baseball Players Association (MLBPA), the union that represents MLB players, recently told reporters, “There was plenty of sentiment [among the players] for saying that players from Texas should be subject to the same rules as

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<sup>14</sup> *Id.*

<sup>15</sup> Heather E. Morrow, Comment, *The Wide World of Sports is Getting Wider: A Look at Drafting Foreign Players Into U.S. Professional Sports*, 26 HOUS. J. INT’L L. 649, 660 (2004).

<sup>16</sup> Melissa Segura, *In International Markets, MLB Teams are Buying Costly Lottery Tickets*, SPORTS ILLUSTRATED, July 2, 2009, available at [http://sportsillustrated.cnn.com/2009/writers/melissa\\_segura/07/02/international.signing/index.html](http://sportsillustrated.cnn.com/2009/writers/melissa_segura/07/02/international.signing/index.html).

<sup>17</sup> Rick J. Lopez, Comment, *Signing Bonus Skimming and a Premature Call for a Global Draft in Major League Baseball*, 41 ARIZ. ST. L.J. 349, 353 (2009).

<sup>18</sup> Jorge Arangure Jr., *An International Draft Primer*, ESPN, Dec. 5, 2009, available at <http://m.espn.go.com/mlb/story?storyId=4713963> (ESPN Insider access required) (on file with author).

players from the Dominican Republic.”<sup>19</sup> While the players would not appreciate the decline in salary that comes with a draft, they may fear that escalating salaries paid to international free agents will have a negative effect on salaries given to older, more established players. In theory, a team may decide to budget more to signing younger players at the expense of the older players.

The adoption of an international draft must occur through collective bargaining negotiations between MLB players and owners.<sup>20</sup> The closest MLB came to instituting an international draft occurred in the Collective Bargaining Agreement (CBA) of 2002. Notable for being the first labor agreement signed without a strike in MLB history,<sup>21</sup> that CBA established a committee that was charged with designing rules for a worldwide amateur draft expected to take place in June of 2003.<sup>22</sup> Among the issues such a committee had to contemplate were whether to incorporate international players into the existing Rule 4 Draft, the number of rounds in the draft, and how a player becomes eligible for the draft.<sup>23</sup> The owners proposed one draft consisting of forty rounds, later lowered to thirty-eight rounds. The players countered with a two draft proposal of eight rounds each, later raised to ten rounds per draft.<sup>24</sup> The difference in plans can again be explained through economics. With one draft, the owners would presumably only have to pay a high bonus for one first-round pick, similar to the current system. On the other hand, a second draft would require paying premiums on *two* first-round picks. Similarly, fewer rounds would allow undrafted players to become free agents and negotiate more favorable contracts with MLB teams than the current draft bonus system would allow. As evidenced by the lack of an international draft, however, no rules were ever established, and no global draft was created.<sup>25</sup>

The current CBA runs through the 2011 season.<sup>26</sup> While MLB Commissioner Allan “Bud” Selig claims that interest in an international draft has increased among management, the current CBA will not be re-opened for negotiations until it expires in 2011.<sup>27</sup> Selig, though, appears ready to push for some change from the current system. Speaking on draft issues recently, Selig stated:

We need an international draft, and we need slotting. There is no question about it. I’ve had many clubs on all sides, small-market, big-market, medium-market—we’re going to have slotting, and we’re going to have an international draft. Those will be two of our great priorities in

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<sup>19</sup> *Id.*

<sup>20</sup> Lopez, *supra* note 17, at 356.

<sup>21</sup> Morrow, *supra* note 15, at 662.

<sup>22</sup> *Four-Year Deal Includes Luxury Tax, No Contraction*, ESPN, Aug. 30, 2002, <http://static.espn.go.com/mlb/news/2002/0830/1425253.html> (on file with author).

<sup>23</sup> Diana L. Spagnuolo, Comment, *Swinging for the Fence: A Call for Institutional Reform as Dominican Boys Risk Their Futures For a Chance in Major League Baseball*, 24 U. PA. J. INT’L ECON. L. 263, 283 (2003).

<sup>24</sup> Morrow, *supra* note 15, at 662-63.

<sup>25</sup> Lopez, *supra* note 17, at 357.

<sup>26</sup> Ronald Blum, *MLB Likely to Defer Worldwide Draft Until '12*, HOUS. CHRON., July 15, 2008, available at <http://www.chron.com/disp/story.mpl/sports/bb/5889555.html>.

<sup>27</sup> *Id.*

2011. There's no question about it. We need that. That is one that really exacerbates the differences [between organizations].<sup>28</sup>

It appears that serious discussion concerning an international draft is on the horizon. In two seasons, when the current CBA expires, the owners and the players will discuss how to remedy the current two-tiered system that places international players and domestic amateurs on unequal playing fields. The system is broken, and all sides agree that a fix is necessary.

### III. Legal Roadblocks to an International Draft

MLB will need to overcome a variety of hurdles before implementing an international draft,<sup>29</sup> including such as the inevitable tension between owners and players on how a draft may be implemented. In addition, two major legal roadblocks stand out. First, MLB will have to deal with the United States' embargo on Cuba that currently blocks signing players directly from the island. Second, MLB will have to renegotiate its agreement with a major Japanese professional league that currently provides an alternative system for acquiring professionals from that league. Conversely, a third potential impediment, US antitrust law, should not be a hurdle for MLB.

#### A. The Cuban Embargo

While Cuban players are not subject to the Rule 4 Draft as draft-eligible amateurs because of their nation of origin, they cannot be considered international free agents due to the US embargo on Cuba. First implemented in 1962, the Cuban embargo is based upon the Trading With the Enemy Act (TWEA), passed in 1917 as a war measure during World War I.<sup>30</sup> As currently written, Section 5(b) of the TWEA allows the President of the United States to:

investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transaction involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States.<sup>31</sup>

The Secretary of the Treasury is given authority to create regulations to enforce TWEA.<sup>32</sup> The Secretary has, in turn, delegated that task to the Office of Foreign Assets Control (OFAC), which

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<sup>28</sup> John Manuel, *Selig Again Comes Out Strong for Slotting*, BASEBALL AMERICA, Oct. 9, 2009, <http://www.baseballamerica.com/blog/draft/?p=1883>.

<sup>29</sup> One such hurdle that will not be discussed in this paper because it should not present much of a problem to an international draft is the process of obtaining a visa from the US government. For an excellent primer on the two types of visas available to international baseball players, see Amy E. Worden, Comment, *Gaining Entry: The New O and P Categories for Nonimmigrant Alien Athletes*, 9 MARQ. SPORTS L.J. 467 (1999).

<sup>30</sup> Lopez, *supra* note 17, at 358.

<sup>31</sup> 50 U.S.C. app. § 5(b)(1)(B) (2006).

<sup>32</sup> 50 U.S.C. app. § 5 notes (2006).

implements and enforces the Cuban Assets Control Regulations (CACR).<sup>33</sup> These regulations codified the Cuban embargo previously enforced under TWEA and added new economic sanctions on Cuba.<sup>34</sup> The CACR expressly prohibits “any payment or transfer to [Cuba] or national thereof.”<sup>35</sup>

The TWEA purports to limit the President’s authority to times of war, but additional provisions to the Act allow the President to “extend the exercise of [the Cuban embargo] for one-year periods upon a determination for each such extension that the exercise of [the embargo] with respect to [Cuba] for another year is in the national interest of the United States.”<sup>36</sup> Essentially, the President is given perpetual one-year options on maintaining the embargo so long as it protects America’s interests, and, to this point, those interests have required the embargo to remain. In effect, these restrictions block MLB teams from signing Cuban nationals or traveling to Cuba to scout or sign players.

Despite these restrictions and strained relations between the US and Cuba, Cuban players do manage to sign with MLB teams and succeed in the major leagues. As Professor Andrea Kupfer Schneider of Marquette University Law School explains:

[The United States’] relationship with Cuba in the last decade has included the shooting down of civilian aircraft by the Cuban Air Force, the Helms-Burton Act which tried to expand the Cuban embargo, and the Elian Gonzales saga. Yet, at the same time, numerous Cuban baseball players have made their way to the United States and the Major League Baseball.<sup>37</sup>

The first Cuban national to find his way to the US and sign with an MLB team was pitcher Rene Arocha in 1991.<sup>38</sup> While his Cuban national team was waiting for a flight at the Miami International Airport, Arocha literally slipped away and defected to the US. “It was easy,” he said later. “All I had to do was find an exit sign.”<sup>39</sup> To determine a winner for Arocha’s services, MLB held a special lottery for the eight teams who showed interest in the pitcher.<sup>40</sup> In response to other defections, MLB altered its rule. Currently, Cuban players who defect to the US are considered draft-eligible and must participate in the Rule 4 Draft.<sup>41</sup>

Perhaps not surprisingly, a loophole to this simple rule was quickly found and exploited. A Cuban-American agent, Joe Cubas,<sup>42</sup> introduced the method by which modern Cuban defectors, including

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<sup>33</sup> 31 C.F.R. § 515.802.

<sup>34</sup> Scott M. Cwiertyny, Note, *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, 396 (2000).

<sup>35</sup> 31 C.F.R. § 515.309(a).

<sup>36</sup> 50 U.S.C. app. § 5 notes (2006).

<sup>37</sup> Andrea Kupfer Schneider, *Baseball Diplomacy*, 12 MARQ. SPORTS L. REV. 473, 473 (2001).

<sup>38</sup> Cwiertyny, *supra* note 34, at 412.

<sup>39</sup> Steve Wulf, *Rene Arocha*, SPORTS ILLUSTRATED, Apr. 19, 1993, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1138159/index.htm>.

<sup>40</sup> Lopez, *supra* note 17, at 359.

<sup>41</sup> Schneider, *supra* note 37, at 480.

<sup>42</sup> For a short biography on Joe Cubas, see Ira Berkow, *Joe Cubas Helps Cuban Ballplayers Defect*, NY TIMES, Aug. 15, 1996, available at <http://tinyurl.com/JoeCubasBio>.

Aroldis Chapman, join MLB teams.<sup>43</sup> If a Cuban player establishes residency in a nation other than the US, such as the Netherlands, where Chapman walked away from his national team, he can be declared an international free agent and negotiate and sign with any team.<sup>44</sup> Cuban players and those who aid in the defections know that they can bypass the amateur draft by establishing residency abroad before breaking into MLB. This route allows them to avoid the Rule 4 Draft and earn more money as a free agent on the open market.

The embargo on Cuba affects Major League Baseball's implementation of an international draft because teams would not be able to draft players directly from Cuba. Aside from violating US foreign policy, an international draft would either have to: 1) attempt to alter the US legislation and create an exception for professional sports; 2) exclude Cuba from the draft altogether; or 3) allow only defectors into the draft pool, regardless of the nation to which they defected.

The first option, creating an exemption in US legislation on the Cuban embargo specifically for professional sports, has little chance of success. In 2009, US Representative Jose Serrano of New York introduced a bill, the Baseball Diplomacy Act, in an attempt "to waive certain prohibitions with respect to nationals of Cuba coming to the United States to play organized professional baseball."<sup>45</sup> The success of such a bill, though, seems minimal since identical legislation has failed in the past.<sup>46, 47</sup>

The second option would likewise fail. Excluding Cuba from the draft would not solve the primary problem that an international draft is intended to solve. Cuban players would still be exempt from the draft pool, so they would be allowed to enter MLB as free agents and command greater rookie contracts. The disparity would still exist. The international free agent pool may be smaller in a system in which only Cuban players were excluded from the draft, but such a system would still create the inequities present under the current regime, albeit on a smaller scale.

Major League Baseball could equalize the treatment of all Cuban defectors by subjecting them to the draft, but this would not halt subversion of Cuban law and US foreign policy, despite the dreams of some who call for an international draft. For example, Cwiertny suggests that a worldwide draft would "reduce the conflict between baseball and the US policy towards Cuban refugees . . . major league teams would have little or no incentive to violate the Cuban embargo, and agents would have little or no incentive to interfere with the process of players gaining political asylum."<sup>48</sup> While it is true that agents would have no incentive to direct defectors to nations other than the United States, it is erroneous to assume that teams would have no incentive to violate the Cuban embargo. Talent would still be trapped on the island by the Cuban embargo, so teams would likely continue to illegally scout players in Cuba and assist

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<sup>43</sup> Murray Chass, *New Route to Majors for Cuban Defectors*, NY TIMES, Dec. 7, 1995, available at <http://www.nytimes.com/1995/12/07/sports/baseball-new-route-to-majors-for-cuban-defectors.html>.

<sup>44</sup> Schneider, *supra* note 37, at 480-81.

<sup>45</sup> Baseball Diplomacy Act, H.R. 187, 111th Cong. (2009).

<sup>46</sup> Lopez, *supra* note 17, at 361 (discussing the failure of the Baseball Diplomacy Act twice before, including when introduced in 2003). See also Matthew N. Greller, Note, *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, 1708-09 (1999) (discussing Congressman Jose Serrano's earlier attempts to pass the Baseball Diplomacy Act in the 106th Congress).

<sup>47</sup> Baseball Diplomacy Act, H.R. 216, 110th Cong. (2008).

<sup>48</sup> Cwiertny, *supra* note 34, at 427.

in defections in order to bring the talent to the United States and have the opportunity to draft the player. The MLB directive that prohibits scouting in Cuba, referred to as the Kuhn Directive after the MLB commissioner who instituted the policy, merely reiterates the restraints imposed by the Cuban embargo.<sup>49</sup> It is not a rule unique to or governed by baseball; it is U.S. legislation. Cuba's gates will not be thrown open because MLB declares Cuban baseball players draft-eligible; it is not MLB that has declared Cuba off-limits to teams and scouts. United States foreign policy must be changed first, and, as previously stated, the chances of such change appear slim.<sup>50</sup>

## B. The Japanese Posting System

Major League Baseball faces a second legal hurdle in the form of other professional baseball leagues, specifically Japan's premier league, Nippon Professional Baseball (NPB). Players in NPB are bound to NPB teams and the league through their Japanese contracts, which are still enforceable in the US.<sup>51</sup> Japanese players, therefore, cannot "defect" from NPB to join an MLB team. Any legal challenge to the enforceability of these contracts would either have to take place under Japanese labor and antitrust law or under extraterritorial application of US laws to the Japanese contracts by a US court.<sup>52</sup>

Currently, Japanese players can join MLB teams in one of three ways. First, a Japanese amateur can opt out of the NPB draft and declare himself an international free agent.<sup>53</sup> This move seems simple, but NPB has made it a risky decision by imposing new restrictions. Any Japanese amateur who skips the NPB draft to turn professional in the U.S. faces a three year ban from NPB upon returning to Japan.<sup>54</sup> Players who participate on college or corporate teams face a two year ban from the Japanese league.<sup>55</sup> A Japanese amateur who decides to enter MLB immediately but does not find success will lose the opportunity to make a living in NPB for three years. Second, the Japanese player can file for international free agency upon the successful completion of his NPB contract.<sup>56</sup> Because an NPB contract binds the player for eight years, the player may spend the prime of his career in the Japanese league.<sup>57</sup>

This problem led to one Japanese player finding and exploiting a loophole in the NPB system. After the 1994 season, Japanese pitcher Hideo Nomo voluntarily retired from his NPB team, forcing that team to release Nomo from his contract.<sup>58</sup> No longer under contract in NPB, Nomo was able to sign with any MLB team as an international free agent. The Japanese league had effectively closed this loophole by 1998—by allowing the team to retain the rights to the player after retirement—when the situation between MLB and NPB came to head in the Alfonso Soriano case. Soriano, then with the Hiroshima

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<sup>49</sup> *Id.* at 412.

<sup>50</sup> See *supra* notes 45–47 and accompanying text.

<sup>51</sup> Lopez, *supra* note 17, at 367–68.

<sup>52</sup> See William B. Gould IV, *Globalization in Collective Bargaining, Baseball, and Matsuzaka: Labor and Antitrust Law on the Diamond*, 28 COMP. LAB. L. & POL'Y J. 283 (2007).

<sup>53</sup> Lopez, *supra* note 17, at 368–69.

<sup>54</sup> *Japan Tries to Discourage Amateurs From Playing in MLB with Ban*, ESPN, Oct. 8, 2008, available at <http://sports.espn.go.com/mlb/news/story?id=3632083>.

<sup>55</sup> *Id.*

<sup>56</sup> Lopez, *supra* note 17, at 369.

<sup>57</sup> *Id.*

<sup>58</sup> Casey Duncan, Note, *Stealing Signs: Is Professional Baseball's United States-Japanese Player Contract Agreement Enough to Avoid Another "Baseball War"?*, 13 MINN. J. GLOBAL TRADE 87, 98 (2004).



Tokyo Carp, attempted to voluntarily retire and move to MLB.<sup>59</sup> The Carp threatened legal action against any MLB team that signed him but, ultimately, settled privately with Soriano when the big-market New York Yankees gave him \$3.1 million to join the club.<sup>60</sup>

In response to the Soriano incident, MLB and NPB entered into the “United States-Japanese Player Contract Agreement” on July 10, 2000. This agreement still controls most player movement from Japan to the US today, and presents a third option for Japanese players moving to MLB.<sup>61</sup> Referred to as the “Posting Agreement,” the current system allows Japanese players to come to the US to play in MLB and provides compensation to their NPB teams for the loss of the individual players. Under the Posting Agreement, a player interested in joining an MLB team can be “posted” by their NPB team between November 1 and March 1.<sup>62</sup> The NPB commissioner’s office then notifies the MLB commissioner, who then notifies every MLB team of the available Japanese player. All interested MLB teams must submit a sealed bid for the player within four days.<sup>63</sup> This bid is the amount of money the MLB team pays the NPB team for the right to negotiate with the player; it is *not* the money paid to the player. The highest bidder is given a thirty day window in which to negotiate terms with the Japanese player.<sup>64</sup> If the two sides cannot agree on a contract in that period, the player is returned to NPB and no money is exchanged. The player cannot be re-posted until the following posting period (i.e. the following November 1).<sup>65</sup> If the player does agree to a contract, the MLB team pays the posting fee to the NPB team and pays the player his separate contract.<sup>66</sup>

The recent Posting Agreement involving star Japanese pitcher Daisuke Matsuzaka displays how the system works and the inherent inequalities of the agreement that led one major league executive to declare, “It is stupid. It is silly.”<sup>67</sup> In 2006, Matsuzaka was twenty-six years old and coming off a Most Valuable Player performance at the World Baseball Classic when his NPB team, the Seibu Lions, agreed to post him for MLB bids.<sup>68</sup> Bobby Valentine, former manager of the New York Mets, predicted the winning bid would be over \$20 million, well over the previous high of \$13.125 million for Ichiro Suzuki, an eventual American League Most Valuable Player for the Seattle Mariners.<sup>69</sup> Valentine correctly predicted a record-breaking bid, but he grossly underestimated the final amount. The Boston Red Sox won the right to negotiate with Matsuzaka with a bid of \$51.1 million,<sup>70</sup> an amount greater than the entire

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<sup>59</sup> *Id.* at 99.

<sup>60</sup> *Id.* at 99.

<sup>61</sup> *Id.* at 100-01.

<sup>62</sup> Victoria J. Siesta, Note, *Out at Home: Challenging the United States-Japanese Player Contract Agreement Under Japanese Law*, 33 BROOK. J. INT’L L. 1069, 1080 (2008).

<sup>63</sup> *Id.* at 1080.

<sup>64</sup> Lopez, *supra* note 17, at 371.

<sup>65</sup> Gould, *supra* note 52, at 291.

<sup>66</sup> Lopez, *supra* note 17, at 371.

<sup>67</sup> Tim Kurkjian, *Posting Process Needs to be Altered*, ESPN, Dec. 15, 2006, [http://sports.espn.go.com/mlb/columns/story?columnist=kurkjian\\_tim&id=2697354](http://sports.espn.go.com/mlb/columns/story?columnist=kurkjian_tim&id=2697354).

<sup>68</sup> Tyler Kepner, *For the Highest Bidder, a Rising Superstar Awaits*, NY TIMES, Oct. 17, 2006, available at [http://www.nytimes.com/2006/10/17/sports/baseball/17pitcher.html?\\_r=1](http://www.nytimes.com/2006/10/17/sports/baseball/17pitcher.html?_r=1).

<sup>69</sup> *Id.*

<sup>70</sup> Jack Curry, *Matsuzaka’s First Pitch is Welcome Relief for Red Sox*, NY TIMES, Dec. 15, 2006, available at <http://www.nytimes.com/2006/12/15/sports/baseball/15redsox.html>.

payroll of four major league teams for the 2007 season and double the payroll of the Tampa Bay Rays.<sup>71</sup> The exorbitant amount was paid to Seibu as the Red Sox and Matsuzaka agreed to a six year contract worth \$52 million.<sup>72</sup> Following the payment of this astronomical sum, major league executives openly derided the system.<sup>73</sup> The Posting Agreement was designed to give each MLB team an equal opportunity at signing Japanese professional players, but it has turned into another unfairness in which small-market teams with fewer financial resources cannot compete for the best players Japan had to offer.<sup>74</sup> One reason for this disparity is the lack of a luxury tax on the posting fee. While a luxury tax restricts wealthy teams from signing a plethora of free agents in the United States by imposing a fee on the highest payrolls based upon player's salaries, that tax does not apply to the amount paid to the NPB team.<sup>75</sup> In other words, the Red Sox likely had to pay a tax on Matsuzaka's \$52 million salary, but no such tax was imposed on the \$51.1 million posting fee. If a tax were imposed on the posting fee, the Red Sox may have had to make a more difficult decision regarding their bid. Even if a small-market team could not have matched the final sum, they would still have benefited from the tax imposed on the winning team.

Despite these problems, the system remains and would have to change before an international draft could be implemented. A solution under Japanese law is unlikely because the Japanese players' union is reluctant to initiate a lawsuit due to cultural barriers and the extreme length of Japanese trials.<sup>76</sup> Though antitrust policy is a western invention that does not mesh easily with Asian social and cultural norms,<sup>77</sup> Japan does have antitrust laws similar to the U.S. Sherman Act. The principle competition statute in Japan is the Act Concerning Prohibition of Private Monopolization and Maintenance of Free Trade or the Antimonopoly Act.<sup>78</sup> The purpose of the Antimonopoly Act is:

by prohibiting private monopolization, unreasonable restraint of trade and unfair trade practices . . . and all other unjust restriction on business activities . . . to promote free and fair competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities, to heighten the level of employment and actual national income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of general consumers.<sup>79</sup>

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<sup>71</sup> *USA Today Salary Databases*, USA TODAY,

<http://content.usatoday.com/sports/baseball/salaries/totalpayroll.aspx?year=2007>.

<sup>72</sup> Curry, *supra* note 70.

<sup>73</sup> Siesta, *supra* note 62, at 1082.

<sup>74</sup> Lopez, *supra* note 17, at 372.

<sup>75</sup> Gould, *supra* note 52, at 293.

<sup>76</sup> Siesta, *supra* note 62, at 1096.

<sup>77</sup> JEROLD J. DUQUETTE, *REGULATING THE NATIONAL PASTIME: BASEBALL AND ANTITRUST*, 137 (Praeger Publishers 1999).

<sup>78</sup> H. Stephen Harris, Jr., *Competition Law and Patent Protection in Japan: A Half-Century of Progress, a New Millennium of Challenges*, 16 COLUM. J. ASIAN L. 71, 82 (2002).

<sup>79</sup> Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No. 54, Art. 1 (1947) (Japan) (an unofficial English translation is available at [http://www.jftc.go.jp/e-page/legislation/ama/amended\\_ama.pdf](http://www.jftc.go.jp/e-page/legislation/ama/amended_ama.pdf)) [hereinafter Antimonopoly Act].

In Japan, the end goal of the Antimonopoly Act is generally not viewed as the promotion of competition, but rather the assurance that the competition is “free and fair.”<sup>80</sup> Under the Antimonopoly Act, an unfair trade practice is “[a]ny act . . . which tends to impede fair competition and . . . deal[s] with another party on such conditions as will unjustly restrict the business activities of the said party [or] deal[s] with another party by unjust use of one’s bargaining position . . .”<sup>81</sup> The Posting Agreement may violate both of these provisions of the Antimonopoly Act. First, the Posting Agreement restricts the business activities of NPB and MLB teams when dealing with Japanese players. The NPB team is not allowed to negotiate on its own with MLB teams on a transfer price for a certain player. The player must be posted according to the rules of the Posting Agreement. If the NPB team declines the bid from the MLB team, the NPB is restricted from dealing that player to a MLB team for at least six months. Second, the Posting Agreement similarly restricts the Japanese *player’s* business activities. A player is not free to choose which MLB franchise he would like to join. His fate is controlled by the bidding process. If his NPB team accepts a bid, the player is forced to negotiate solely with the winning MLB club. The Japanese player has no choice as to which MLB team he can join, unless he waits for free agency.

Finally, NPB and MLB perhaps unjustly exercise superior bargaining positions over the players in the posting process. A player’s NPB team controls the right to even post a player in the first place. The NPB team can also reject a bid, forcing the player to remain in NPB for at least one more year. The MLB team can also exercise undue control over the process once a bid is accepted. Because the winning MLB team retains the sole negotiating rights to that player, the player must choose between accepting a contract with that MLB team or returning to NPB for another season. The professional leagues control the process, and the players have little power. A player can request a posting by his NPB team, but the team ultimately controls that decision. Similarly, a player could reject the MLB team’s contract offer, but the player could not then negotiate with other MLB teams; he must return to his Japanese team until the following posting period.

In spite of these possible avenues for attack under the Antimonopoly Act, the Posting Agreement is unlikely to be challenged under Japanese law. The Japanese culture makes it difficult for the players to engage in a labor strike or challenge the system for fear of disrupting social harmony.<sup>82</sup> Furthermore, according to the Japanese players’ union, it is nearly useless to bring a challenge in Japanese courts because trials can “last forever.”<sup>83</sup> In fact, MLBPA has offered to provide assistance to the Japanese players’ union on a challenge to the Posting Agreement under Japanese law in Japan or the United States, but that offer was rejected.<sup>84</sup> A challenge under US law is possible though the extraterritorial issues would be complex and relatively untested in American courts.<sup>85</sup> Furthermore, NPB will probably not remove its contractual restrictions over Japanese players to assist an MLB team in acquiring talent. The Japanese league does not want to become a farm system for MLB and continually groom talent that will bolt for the

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<sup>80</sup> Harris, *supra* note 78, at 93.

<sup>81</sup> Antimonopoly Act, Art. 2, § 9(vi)(d-e).

<sup>82</sup> Lopez, *supra* note 17, at 368.

<sup>83</sup> Siesta, *supra* note 62, at 1093 (quoting Robert Whiting, *Batting Out of Their League*, TIME MAG., Apr. 30, 2001, at 24, available at [http://www.time.com/time/asia/features/japan\\_view/baseball.html](http://www.time.com/time/asia/features/japan_view/baseball.html)).

<sup>84</sup> Siesta, *supra* note 62, at 1093.

<sup>85</sup> See Gould, *supra* note 52.

US.<sup>86</sup> The Japanese teams have little to no incentive to give up a system that allows them to either retain their top talent or receive large amounts of money from MLB teams through posting fees.

A legal challenge against NPB would either have to take place in Japan or in uncharted waters in American courts. Cultural norms and the burdensome Japanese legal system make a challenge under Japanese law unlikely. Indeed, the Japanese players' union has shown a reluctance to challenge NPB in court. Because the system benefits NPB teams and protects Japanese sensitivities concerning MLB imperialism, it is unlikely that NPB would agree to scrap the agreement in favor of an international draft that allows Japanese players to enter MLB freely.

### C. United States Antitrust Law: The Exception and the Anomaly

For purposes of antitrust law,<sup>87</sup> American courts have consistently held American sports separate from normal business considerations, and the US government has not subjected sports leagues to the same scrutiny as other businesses.<sup>88</sup> This is even more true for baseball, which has long been exempt from antitrust laws, beginning with the Supreme Court's decision in *Federal Baseball Club of Baltimore* in 1922<sup>89</sup> and most recently affirmed in *Flood v. Kuhn* in 1972.<sup>90</sup> In *Federal Baseball*, Justice Oliver Wendell Holmes wrote that, "The business is giving exhibitions of base ball [sic], which are purely state affairs" and, therefore, outside the scope of antitrust laws.<sup>91</sup> Despite recognition by the Supreme Court that by 1972 MLB "engaged in interstate commerce"<sup>92</sup> and should be subject to antitrust laws, *Flood* upheld the ruling in *Federal Baseball* and re-established baseball's "exemption" from those laws. Justice Blackmun wrote that the Court "loath[ed], [fifty] years after *Federal Baseball* . . . to overturn [that case] judicially when Congress, by its positive inaction, has allowed [it] to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively."<sup>93</sup> In a decision labeled "embarrassing" and "bewildering,"<sup>94</sup> the Supreme Court adhered unbendingly to *stare decisis* to uphold baseball's exemption, pointing to congressional "positive inaction," a confusing and oxymoronic turn of phrase, as legislative acceptance of *Federal Baseball*. Other professional sports do not enjoy such protection from the Sherman Act.<sup>95</sup> Indeed, Blackmun famously referred to baseball as the "exception and an anomaly" in the *Flood* opinion.<sup>96</sup>

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<sup>86</sup> *Id.* at 292-93.

<sup>87</sup> Much has been written about baseball and antitrust law in the United States, so this Note will only provide the basics of antitrust law in relation to baseball for the purposes of an international draft. For a more in-depth history of baseball's relationship with antitrust law, see Duquette, *supra* note 77. For a short summary of that history, see Roger Abrams, *Before the Flood: The History of Baseball's Antitrust Exemption*, 9 MARQ. SPORTS L.J. 307 (1999).

<sup>88</sup> Jesse Gary, Note, *The Demise of Sport? The Effect of Judicially Mandated Free Agency on European Football and American Baseball*, 38 CORNELL INT'L L.J. 293, 307 (2005).

<sup>89</sup> *Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Base Ball Clubs*, 259 U.S. 200 (1922) [hereinafter *Fed. Baseball*].

<sup>90</sup> *Flood v. Kuhn*, 407 U.S. 258 (1972).

<sup>91</sup> *Fed. Baseball*, at 208.

<sup>92</sup> *Flood*, at 282.

<sup>93</sup> *Id.* at 283-84 (emphasis added).

<sup>94</sup> See Abrams, *supra* note 87.

<sup>95</sup> Morrow, *supra* note 15, at 677.

<sup>96</sup> *Flood*, at 282.

This judicial antitrust exemption was narrowed by Congress in the Curt Flood Act of 1998,<sup>97</sup> which provided major league players the right to sue for any conduct that hurt their chance to sign future MLB contracts.<sup>98</sup> This Act, though, only applies to major league contracts and explicitly denies standing to sue to minor league players and draftees, leaving minor league contracts and draftees subject to the longstanding antitrust exemption.<sup>99</sup> The Curt Flood Act has little effect on a draft because the Act preserved baseball's non-statutory labor exemption from antitrust liability.<sup>100</sup> This exemption applies in situations in which labor and management are involved in a collective bargaining relationship.<sup>101</sup> As a result, an international draft is relatively free from federal oversight, and negotiations would be an entirely internal matter between MLB and the players under the CBA.<sup>102</sup>

The Curt Flood Act and the direction of the courts in sports-related antitrust cases, however, portends a continued narrowing of baseball's anomalous status as a sport exempt from the Sherman Act.<sup>103</sup> It is thus easy to imagine a world in which an international draft must be mindful of antitrust law, especially if Congress attempts to close off the non-statutory labor exemption. According to Section 1 of the Sherman Antitrust Act, any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."<sup>104</sup> Punishment under the Act occurs when: 1) the activity restrains trade or commerce; 2) the activity is an unreasonable restraint; and 3) the activity is not exempt from antitrust laws.<sup>105</sup> To determine whether the activity is "unreasonable," courts use two complementary tests: first, if the activity has no competitive benefits, it is unreasonable and illegal; second, the activity is illegal if its anticompetitive effects outweigh its pro-competitive benefits under a "rule of reason" test.<sup>106</sup>

Antitrust issues could easily arise under a system that forces all players into a draft. For example, a draft inhibits a player's ability to freely negotiate a contract with the team of his choice. In addition, after a single MLB team has drafted a player, the other twenty-nine clubs agree to not negotiate with that player. Such activity appears to restrain trade by blocking a player from the league unless he agrees to the monopolistic practice of a draft. On the other hand, a draft may actually enhance the competitiveness of sports leagues by distributing talent among teams. Baseball could argue that a draft increases competitiveness of the league by ensuring that all clubs, regardless of finances, have access to all players.<sup>107</sup>

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<sup>97</sup> The Curt Flood Act is named after Curt Flood, an outfielder for the St. Louis Cardinals who lost his fight for free agency in *Flood v. Kuhn*. For a detailed account of Flood's story, see SNYDER, BRAD. *A WELL-PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS* (Plume Books 2006).

<sup>98</sup> Lopez, *supra* note 17, at 356.

<sup>99</sup> Siesta, *supra* note 62, at 1086.

<sup>100</sup> Elliott Z. Stein, Note, *Coming to America: Protecting Japanese Baseball Players Who Want to Play in the Major Leagues*, 13 CARDOZO J. INT'L & COMP. L. 261, 279 (2005).

<sup>101</sup> *Id.* at 280.

<sup>102</sup> Lopez, *supra* note 17, at 356.

<sup>103</sup> Duquette, *supra* note 77, at 139.

<sup>104</sup> 15 U.S.C. § 1 (2006).

<sup>105</sup> Morrow, *supra* note 15, at 669.

<sup>106</sup> *Id.* at 669.

<sup>107</sup> This argument may be false, however, as will be discussed in Part IV.

As stated previously, however, in most professional sports, courts generally allow the league to bypass the Sherman Act through the non-statutory labor exemption when collective bargaining occurs between the owners and the players' union. Major League Baseball could use the same exemption by instituting an international draft through a new CBA negotiated between the owners and the MLBPA. The current antitrust exemption for MLB will allow an international draft, and, in the event Congress eliminates this exemption, the non-statutory labor exemption would likely support a draft as well.

#### IV. The Solution

To implement an international draft, MLB would have to overcome each legal roadblock described above in addition to other major administrative obstacles, including substantial budgetary increases to cover the staff necessary for a global draft.<sup>108</sup> In return, most supporters of an international draft claim the result will be greater oversight of international scouting and a more equitable system that benefits small-market teams who cannot compete financially with the deep-pocketed, large-market clubs for players in an open system.<sup>109</sup> Without even greater restrictions, however, an international draft will not produce such benefits. The current Rule 4 Draft does not always allow small-market teams access to the top talent. For example, Rick Porcello, a talented pitcher projected as the first overall pick in the 2007 Rule 4 Draft,<sup>110</sup> fell to the 27th pick when teams learned of his high salary demands.<sup>111</sup> Furthermore, an international draft could encourage teams and scouts to "hide" foreign players in exchange for a promise to draft them in later rounds or sign them as undrafted free agents and offer a "pittance" for the trouble.<sup>112</sup> The international draft will not "secure greater competitive balance in baseball"<sup>113</sup> or create a more transparent system. Instead, it will artificially reduce player salaries by subjecting all amateur and international players to a monopolistic draft.

A better and simpler solution for baseball's international dilemma is the elimination of the amateur draft. This places players currently subject to the Rule 4 Draft on an equal playing field with the international free agents, a goal pushed by proponents of the international draft, and allows MLB to overcome or avoid the legal hurdles outlined above. Amateurs currently subject to the draft will be able to freely negotiate contracts with any MLB team and be paid their "worth"—exactly like international free agents under the current system. This eliminates any issue a draft may encounter with the Sherman Act because a significant restraint of trade is gone. Stephen Strasburg can earn a contract similar to the one given Aroldis Chapman.

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<sup>108</sup> See, e.g., Jeff Passan, *Rethinking the International Draft*, YAHOO SPORTS, June 5, 2006, <http://sports.yahoo.com/mlb/news?slug=jp-draft060506&prov=yhoo&type=lgns>.

<sup>109</sup> Alan Schwarz, *Pressure Building for Draft of Players from Outside U.S.*, NY TIMES, July 13, 2008, available at <http://query.nytimes.com/gst/fullpage.html?res=9D0CE1DF1E39F930A25754C0A96E9C8B63>.

<sup>110</sup> Matt Remsberg, *Porcello Heads Class of 2007's MLB Draft Prospects*, SPORTS ILLUSTRATED, June 6, 2007, available at <http://sportsillustrated.cnn.com/2007/highschool/06/06/top.20/>.

<sup>111</sup> Jonathan Mayo, *Does Draft System Need Reform?*, MLB.COM, Aug. 23, 2009, [http://mlb.mlb.com/news/print.jsp?ymd=20090822&content\\_id=6562106&vkey=news\\_mlb&fext=.jsp&c\\_id=mlb](http://mlb.mlb.com/news/print.jsp?ymd=20090822&content_id=6562106&vkey=news_mlb&fext=.jsp&c_id=mlb).

<sup>112</sup> Passan, *supra* note 108.

<sup>113</sup> Morrow, *supra* note 15, at 700.

Concerns that big-market teams would dominate such a system are likely unfounded.<sup>114</sup> Recent history shows that small-market teams do very well in international free agency. The Cincinnati Reds, winners of the Chapman sweepstakes, had a payroll of just over \$73 million in 2009, only 19th highest in MLB.<sup>115</sup> Similarly, the Kansas City Royals, with the 21st highest payroll in MLB, snagged “big-ticket” Cuban defector Noel Argüelles this year, and the Minnesota Twins reeled in Max Kepler-Rozycki, the best amateur player in Europe, despite the 24th highest payroll in MLB out of 30 teams.<sup>116, 117</sup> Small-market clubs can and do compete in an open market. Economists have isolated the effects of free agency on competitive balance and found little effect on competitive balance as measured by the standard deviation of teams’ winning percentages over time.<sup>118</sup> Greater competitive balance needs to come from greater economic reform in MLB, *not* from eliminating international free agency, an area in which lower-revenue clubs can compete and are currently finding success.

Like an international draft, amateur free agency cannot change US foreign policy with respect to the Cuban embargo. It can, however, achieve the same results as an international draft by eliminating the incentive for Cuban players to defect to other nations before joining MLB. All Cuban players will have the same opportunities no matter how they defect, and no Cuban player will have an advantage over American amateurs.

The true international advantage for elimination of the amateur draft comes in being able to work within the existing framework of the major league’s agreement with NPB in Japan. With a slight tweak, the Posting Agreement can continue. Instead of allowing teams to submit bids for the exclusive right to negotiate with a player, MLB should couple draft reform with relatively minor changes in the Posting Agreement. Specifically, MLB should negotiate a flat rate paid by all MLB clubs to NPB for the right to negotiate with posted players; this rate would then be supplemented by a tax on the MLB team that finalizes a contract with the Japanese player. For example, all MLB teams would pay a flat fee of \$5 million into a pot that goes directly to NPB.<sup>119</sup> The Japanese league would receive a minimum of \$150

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<sup>114</sup> For an example of these concerns, some authors argue that only a few select teams can afford to “readily locate international talent” and compete in the international free agent market. Greller *supra* note 46, at 1681. These concerns, though based in the economic realities of MLB, do not seem to play out in reality as small-market clubs can and do compete for the best international talent.

<sup>115</sup> *USA Today Salary Databases*, USA TODAY, <http://content.usatoday.com/sports/baseball/salaries/totalpayroll.aspx?year=2009>.

<sup>116</sup> Keith Law, *Chapman Deal Cincy’s Gain, MLB’s Blunder*, ESPN, Jan. 11, 2010, [http://insider.espn.go.com/espn/blog/index?entryID=4815478&name=law\\_keith](http://insider.espn.go.com/espn/blog/index?entryID=4815478&name=law_keith).

<sup>117</sup> USA Today, *supra* note 115.

<sup>118</sup> Gary, *supra* note 88, at 317.

<sup>119</sup> Alternatively, MLB could require each team to pay a percentage of their major league payroll into the Japanese Posting Agreement pool. In essence, this is a Posting Agreement Tax. In the absence of economic reform in MLB, this proposal has the advantage of helping low payroll teams and putting the largest burden on the big market clubs that can most afford it. This system would act as an extension of the luxury tax, forcing teams with the biggest payrolls to pay the largest amounts into the posting pot. For example, suppose the 2010 MLB season began with Team A spending \$200 million for their payroll, while, at the other end of the spectrum, Team Z spends only \$50 million. A Posting Agreement Tax of 5% would force Team A to pay \$10 million, but Team Z would only have to pay \$2.5 million. While perhaps economically just, this plan has two drawbacks: first, clubs would have a (small) incentive to reduce payroll to avoid the tax, especially if they know that they will likely not sign a Japanese player; second, large market teams already bear the burden of the luxury tax. Forcing these teams to pay another form of the

million or \$12.5 million per team; it would be left to NPB to determine an equitable distribution of these funds. In addition, the MLB team that signs a Japanese player would increase their payment by a 5% tax on the contract. In the case of Daisuke Matsuzaka, the Red Sox would add 5% of \$52 million or \$2.6 million payable directly to the Seibu Lions.

This new system would continue to protect the NPB interests in retaining Japanese players and in avoiding becoming a farm system for MLB by not allowing MLB teams to sign Japanese players until they are posted by their NPB team. Furthermore, the NPB team would be compensated for the loss of its player through the money paid by MLB teams, approximately \$12.5 million plus any contract taxes for lost individual players. While this amount may be less than the \$51.1 million received by the Seibu Lions for Matsuzaka, NPB teams would actually benefit in the long run. The Seibu Lions do not have a Matsuzaka to post each year, so the current system gives short-term, one-shot benefits. This proposed change would ensure a steady stream of income for NPB teams, providing yearly payments to each team.

For MLB teams, the new system would have the advantage of allowing all teams, regardless of available non-payroll finances, an opportunity to bid on Japanese stars. Big-market clubs would not be able to spend outrageous sums for the exclusive right to bid on a player, and small-market teams would not have to budget large amounts of additional funds on top of payroll obligations in order to compensate the Japanese team via a posting fee. Additionally, the winning MLB team would be forced to pay an extra amount. This added tax may discourage the team from bidding on every Japanese player and allow multiple teams a chance to compete in the Japanese market.

Proponents of an international draft claim that it would allow MLB greater oversight over the system and the opportunity to ensure international players finish high school, as currently expected of American amateur players. It is not necessary to implement a draft to achieve these results. The major leagues could institute new eligibility rules applicable to all players entering MLB through free agency. For instance, MLB could dictate that a team may not sign any player unless that player received his high school diploma and turned seventeen years old by the end of the year. A draft does not equate to greater oversight; MLB can increase its governance of the sport through any system of player acquisition.

## **V. Conclusion**

Despite calls for an international draft by many major league executives and other authorities, it is the elimination of the amateur draft altogether that would best serve MLB. Creating a system of total free agency would allow players to negotiate with teams for contracts that truly pay the player's worth. A draft creates monopolistic negotiating situations that artificially lower the player's salary. In addition, the draft cannot overcome various legal obstacles, including the Cuban embargo or the agreements with NPB. Complete free agency would work within the existing legal framework and allow MLB to restructure its agreement with NPB to reduce exorbitant posting fees. Evidence shows that elimination of the draft will not destroy competitive balance because small-market teams can and do compete in the amateur free agent market. It is time for the Stephen Strasburgs of the world to be given the same opportunities as the Aroldis Chapmans. This proposal ushers in a new era of economic freedom for players.

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luxury tax and assist small market clubs in acquiring international talent by paying the largest chunk of the Posting Agreement fee would be a hard sell.

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