

## THE IMPACT OF THE FLAT WORLD ON PLAYER TRANSFERS IN MAJOR LEAGUE BASEBALL

Scott R. Rosner\*  
William T. Conroy\*\*

### I. INTRODUCTION

Globalization has indeed made the world “flat,” and the sports industry is no exception. Throughout the last two decades, American professional sports leagues have attempted with varying degrees of success to expand worldwide and create global product markets. The impact of this internationalization is apparent—from the success of the World Baseball Classic in 2006 and 2009 to the exploding popularity that has led the National Basketball Association (“NBA”) to announce the creation of NBA China, a Chinese subsidiary league pairing Disney with other local partners.<sup>1</sup> Perhaps the most significant of these effects is that the current player pool for most of the top American professional sports leagues is no longer purely domestic. This sea change is well underway, with international players comprising significant portions of current professional sports rosters across the sporting spectrum.<sup>2</sup> Partly as a result of domestic

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\* Lecturer, Legal Studies and Business Ethics Department, Wharton School, University of Pennsylvania. Professor Rosner is also the Associate Director of the Wharton Sports Business Initiative. The authors would like to thank the following for their helpful feedback: Sandy Alderson, President, San Diego Padres; Adam Fisher, Manager of Baseball Operations, New York Mets; Jeff Kingston, Assistant General Manager, Seattle Mariners; and Gene Orza, Chief Operating Officer, MLBPA. The authors would also like to thank Glenn Valli for his research, Kohei Nakagawa for the very helpful research and translations, and Michael Packard for his editorial assistance.

\*\* Attorney, Englander & Fischer, P.A., St. Petersburg, Florida.

1. Michael J. de la Merced, *Disney Among Firms to Buy Stake in NBA's China Subsidiary*, N.Y. TIMES, Jan. 14, 2008, at C9.

2. There were seventy-seven international players from thirty-two countries and territories on NBA rosters as of January 2009. NBA.com, *NBA Players from Around the World: 2008-09 Season*, [http://www.nba.com/players/int\\_players\\_0809.html](http://www.nba.com/players/int_players_0809.html) (last visited Sept. 20, 2009). On Opening Day 2008, 239 Major League Baseball players (or twenty-eight percent of all players) were international. Larry Fine, *International Players Comprise 28 pct of MLB Rosters*, REUTERS, Apr. 1, 2008,

market saturation, and partly as a result of the sports leagues attempting to expand to global markets, individual clubs are forced to look—and think—globally when seeking top-notch talent. The importation of playing talent into these leagues facilitates their global marketability, as fan affinity in a foreign market is likely to be greater when there is a player from that market in the league. The hope is that the establishment of global labor markets will help the leagues create global product markets.

Major League Baseball (“MLB”) has a unique approach to this global labor exchange. This approach is evidenced by the system that was created to transfer players from the Japanese professional baseball league, Nippon Professional Baseball (“NPB”), to MLB teams following the departures of several high profile players in the mid-1990’s. Over the last thirteen years, a system has evolved whereby the transfer of players from NPB to MLB is governed by a process that allows owners of NPB teams to receive compensation for their players who are still under contract but desire to leave for MLB before they are eligible for free agency in NPB. When a player is under contract with a team in NPB and wishes to sign a contract with an MLB team, he must go through the “posting process.” This process gives every MLB team the opportunity to bid to obtain the rights to negotiate a contract with him. High-profile players such as Ichiro Suzuki and Daisuke Matsuzaka have joined MLB through this process, and as such, there has been considerable public attention directed towards it.<sup>3</sup> While significant media attention was focused on the staggering amount the Boston Red Sox paid for the right to negotiate with Matsuzaka—\$51,111,111.11<sup>4</sup>—there has been scant attention paid to the suboptimal

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<http://www.reuters.com/article/domesticNews/idUSSP8408520080402>. This was down slightly from the all-time high of 246 set in 2007. Jack Curry, *Majors Set Record for International Players*, N.Y. TIMES, Apr. 4, 2007, <http://www.nytimes.com/2007/04/04/sports/baseball/04curry.html>. During the 2007-08 season, there were 273 non-North American players from fourteen different nations in the NHL. This comprised over thirty-three percent of the players in the league. NHL International, NHL.com, <http://www.nhl.com/ice/page.htm?id=26372> (last visited Sept. 20, 2009) [hereinafter NHL International].

3. See Duane Rockerbie, *Peculiarities of the Major League Baseball Posting System* (July 2007) (on file with author) (discussing the increased attention paid to the posting system in recent years). The agreement creating the posting process was in part borne out of the way in which Hideo Nomo, then a star pitcher with the Kintetsu Buffaloes, arrived in MLB. Although still under contract with his NPB team, Nomo had a strong desire to pitch in MLB and sought to get out of his NPB contract. Rather than wait the nine years required to become a free agent, Nomo “retired” from NPB and signed a contract with the Los Angeles Dodgers of MLB. *Id.* Bothered by this strategy, NPB and MLB agreed to the current posting system in hopes of deterring future Japanese stars from pursuing a similar path. *Id.*

4. Posting System, BR Bullpen, Baseball-Reference.com, [http://www.baseball-reference.com/bpv/index.php?title=Posting\\_system](http://www.baseball-reference.com/bpv/index.php?title=Posting_system) (last visited Sept. 26, 2009).

nature of the posting process for at least two of the three stakeholders.<sup>5</sup>

The issue of player transfers is pressing in the National Hockey League (“NHL”) as well, which means that two of the three North American-based professional sports leagues that draw significantly from a global player pool are having issues regarding their player transfer systems.<sup>6</sup> There are several alternatives to the current process that can address the suboptimality of the status quo and provide for more efficient player transfers between leagues. A more efficient posting process is important for historical reasons as well, with the Negro Leagues serving as an example of how an inadequate player transfer system can help lead to the demise of a league.

## II. THE POSTING PROCESS

### A. *History*

A brief examination of the history of the posting process, and the events that led to its development, is essential for understanding why the process exists in its current form. The movement of three players—Hideo Nomo, Hideki Irabu, and Alfonso Soriano—from NPB to MLB in the mid-1990s persuaded the two leagues to complete a formal arrangement for the transfer of players. However, the leagues’ shared history extends long before then. The first Japanese player to appear in MLB was Masanori Murakami.<sup>7</sup> His debut was the product of an exchange program between the Nankai Hawks and the San Francisco Giants, whereby Nankai sent three players to play in the Giants’ minor league system in 1964.<sup>8</sup> Murakami performed so well in the minor leagues that the Giants promoted him to the major leagues later that season, where his continued strong performance led the Giants to seek his return for the 1965 season.<sup>9</sup> While Nankai originally balked at the prospect, the team ultimately capitulated on the condition that Murakami be permanently returned after the season.<sup>10</sup>

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5. See discussion *infra* Part III (describing the suboptimalities of the current posting system).

6. The National Football League, on the other hand, has struggled to establish an international pipeline for player talent.

7. Evan Osborne, *Baseball’s International Division of Labor*, 7 J. OF SPORTS ECON. 150 (2006).

8. Michael Street, *A Brief History of Japanese-American Baseball Relations, Part 1: The Groundbreaker*, Dec. 2, 2008, <http://www.examiner.com/x-739-AsianAmerican-Sports-Examiner~y2008m12d2-A-brief-history-of-JapaneseAmerican-baseball-relations-Part-1-The-Groundbreaker>.

9. *Id.*

10. *Id.*

Despite a successful 1965 season, he was returned to the Japanese team.<sup>11</sup> This led to a “Gentlemen’s Agreement” between MLB and NPB in 1967, whereby MLB teams agreed that they would not sign NPB players unless they were free agents.<sup>12</sup> Though a number of American players pursued careers in NPB (typically after their MLB careers were over), no Japanese player since Murakami moved to MLB until Hideo Nomo left the Kintetsu Buffaloes for the Los Angeles Dodgers in 1995.<sup>13</sup>

Nomo, a bona-fide star in Japan, used a loophole in his NPB contract in order to “retire” from his NPB team at the age of 26 so that he could avoid that league’s free agency restrictions.<sup>14</sup> Nomo’s retirement allowed him to sign a three-year, \$4.3 million contract with the Los Angeles Dodgers, a lucrative move that had a profound impact on both MLB and NPB franchise owners.

More significant than the Nomo retirement, at least in terms of providing the impetus for an agreement for the transfer of players from NPB to MLB, was the movement of star pitcher Hideki Irabu from the Chiba Lotte Marines to the New York Yankees in 1997.<sup>15</sup> Prior to the existence of the formal posting process, the relationships between NPB teams and MLB teams were formed on an ad hoc basis, with the parties sometimes developing “working agreements” between individual clubs.<sup>16</sup> At the time, Irabu’s Japanese team, the Marines, had developed a working agreement with the San Diego Padres of MLB. The working agreement allowed the Padres to buy the exclusive right to negotiate a contract with Irabu, which the Padres did.<sup>17</sup> However, Irabu was unaware of his sale until it was completed without his permission. He then declared his intention to play only for the New York Yankees, maintaining this stance until a trade was worked out between the Padres and Yankees before the 1997 season.<sup>18</sup> Again, the transfer of the Japanese player, and the way in which it transpired, raised sufficient concern on both sides of the Pacific to

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11. *Id.*

12. *Id.*

13. Michael Street, *A Brief History of Japanese-American Baseball Relations, Part 2: The Tornado*, Dec. 3, 2008, <http://www.examiner.com/x-739-AsianAmerican-Sports-Examiner~y2008m12d3-A-brief-history-of-JapaneseAmerican-baseball-relations-Part-2-The-Tornado>.

14. Casey Duncan, *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 (2003).

15. 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, 289 (2007) (discussing the developments that led to the formation of the current posting system).

16. Duncan, *supra* note 14, at 98.

17. Gould, *supra* note 15, at 289.

18. Street, *supra* note 13.

move the two leagues closer to a formal arrangement.

Alfonso Soriano was the final player transferred prior to the adoption of the posting system. In 1998, following the inability of Soriano to reach agreement on a contract with his NPB club, Hiroshima Toyo Carp, he attempted to retire, much in the same way Nomo had done three years earlier.<sup>19</sup> But NPB had closed the loophole that Nomo previously exploited, and believed that it had exclusive rights to Soriano.<sup>20</sup> Over the protests, threats and objections of NPB, Soriano signed a contract with the New York Yankees after a declaration by the MLB Commissioner's Office that Soriano was, in fact, a free agent capable of signing with any team he desired.<sup>21</sup> For NPB, this was a clear-cut sign that a formal agreement between NPB and MLB was the only way to stem the tide of player defections to MLB.

### B. Description of the Posting System

There are three primary actors in the posting process who have a direct stake in the resulting outcome—the NPB team that transfers the player, the MLB team to which the player is transferred, and the player himself. (There is potentially a fourth actor, the player's agent, but because the agent's interests are aligned with the player's in the posting scenario, we consider just the player here.)<sup>22</sup> Japanese players do not become international free agents until after they have played nine years in NPB;<sup>23</sup>

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19. Duncan, *supra* note 14, at 89, 100.

20. *Id.* at 100. Soriano only played the 1997 season for Hiroshima.

21. *Id.*

22. The agent should want to do away with the posting fee because it results in the player's salary decreasing, which in turn decreases the agent's fee (as baseball agents typically work on a percentage basis).

23. There are two categories of free agency in Japanese baseball – international and domestic. Prior to 2008, players could achieve domestic free agency after eight years, and were allowed to move only to other NPB teams; international free agency could be attained after nine years, at which point players could sign with MLB teams with no compensation owed to their former NPB team. *See* 2009 NPB Free Agents, NPB Tracker, <http://www.npbtracker.com/2009-npb-free-agents/> (last visited Sept. 20, 2009) (describing the NPB free agency system). There was fairly little player movement under the previous domestic free agency system from the time that it was introduced in 1993 through 2008. Only thirty-two of the 251 players who became free agents from 2000 to 2003 switched teams. Andrew Zimbalist, *An Exchange of Strategies Could Benefit MLB, Japanese Leagues Alike*, SPORTS BUS. J., July 16, 2007, at 29, available at <http://www.sportsbusinessjournal.com/article/55693>. This was likely due to a compensation structure in which a team signing a free agent was required to pay the player's former team 1.2 times the player's previous salary (or eighty percent of his previous year's salary and a player from the new team's roster). This led to few transfers that did not involve high quality, modestly priced players. *Id.* While the international free agency rules remain unchanged, there was a major change in the domestic free agency rules in 2008. First, the service time required for a player to become a free agent was decreased. Players who

after their ninth year, they are free to sign a contract with any club, including those in MLB, without any transfer fee paid to the former NPB club. Conversely, any Japanese player who has not yet played for nine years in NPB may not sign with an MLB team, having not yet attained international free agent status under NPB rules.<sup>24</sup>

However, a player with less than nine years of experience who wishes to sign with an MLB team may ask his Japanese team to “post” him. If the NPB team agrees to post the player, it notifies the office of the NPB Commissioner, which then notifies the MLB Commissioner, at which point all 30 MLB teams are notified that the player is available.<sup>25</sup>

Once individual MLB teams have been notified, a four-day period begins during which MLB teams may compete in a sealed-bid auction for the exclusive right to negotiate a contract with the posted player.<sup>26</sup> At the end of the four-day period, all bids are collected by the MLB Commissioner’s office and opened. The NPB team is then notified of the amount of the highest bid (but not the identity of the MLB team) and has a four-day period to decide whether or not the winning bid will be accepted.<sup>27</sup> As of yet, in each situation where a winning bid has been submitted, it has been accepted by the NPB team. The amount of the bid is considered the “transfer fee” associated with the movement of the player. Following the acceptance of the highest bid by the NPB club, the MLB team that won the auction then has thirty days to negotiate a contract with the player. Should

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entered NPB during or after the 2007 draft could become free agents after seven years. 2009 NPB Free Agents, *supra*. More importantly, the amount of compensation owed by the teams signing free agent players was decreased greatly. Under the new rule, players are classified into three groups according to their salaries on their prior teams. Interview with Anonymous MLB Executive (July 17, 2008) (notes on file with Professor Rosner). Compensation owed by a team signing one of another team's three highest paid players (called ‘A players’) is eighty percent of the player’s previous year’s salary (or fifty percent and a player), while the compensation owed by the signing team for players whose salaries rank from the fourth highest to the tenth highest on their former team (‘B players’) is 60 percent of their previous year’s salary (or forty percent and a player), and players whose salary ranks eleventh or below on their former team (‘C players’) can be signed without any compensation. *Id.* If the option of taking a lesser amount of monetary compensation and a player is chosen by the free agent’s former team, the player selected as compensation is chosen by the free agent’s former team from among the players on his new team. *Id.* This excludes non-Japanese players and twenty-eighty players that the signing team chooses to protect. *Id.* This could subject the signing team to losing a young prospect and could represent a significant cost. Any compensation owed by a team signing a free agent disincentivizes a team from doing so to some degree. A club desiring a particular free agent must then decide whether that player is worth the cost.

24. Paul White, *Japan Frets Over Talent Exodus to North America*, USA TODAY, Mar. 28, 2007, at 1C.

25. Rokerbie, *supra* note 3.

26. Allan T. Ingraham, *A Fair Posting Process for Japanese Professionals Entering Major League Baseball*, 24 ENT. AND SPORTS LAW. 1, 1 (2007).

27. Rokerbie, *supra* note 3.

the contract negotiation yield a signed deal, the transfer fee is then paid to the NPB team by the MLB team, and the player becomes a member of the MLB team.<sup>28</sup> If the player and the MLB team do not come to an agreement, however, the NPB team does not receive the transfer fee and the player returns to the NPB team under the terms of his original contract with the club.<sup>29</sup> The posting system is unilateral in nature, as it does not apply to MLB players seeking employment in Japan.<sup>30</sup>

The following chart<sup>31</sup> is a complete representation of every player who has been successfully posted, along with the MLB team that “won” the auction and the price that team paid for the rights to negotiate with the player:

DATE	PLAYER	MLB TEAM	TRANSFER FEE (\$US)
2/1999	Alejandro Quezada	Cincinnati Reds	\$400,001
11/2000	Ichiro Suzuki	Seattle Mariners	\$13,125,000
1/2003	Kazuhisa Ishii	Los Angeles Dodgers	\$11,260,000
2/2003	Ramon Ramirez	San Diego Padres	\$300,050
11/2003	Akinori Otsuka	San Diego Padres	\$300,000
1/2005	Norihiro Nakamura	Los Angeles Dodgers	Unknown <sup>32</sup>
12/2005	Shinji Mori	Tampa Bay Devil Rays	\$1,000,000
11/2006	Daisuke Matsuzaka	Boston Red Sox	\$51,111,111.11
11/2006	Akinori Iwamura	Tampa Bay Devil Rays	\$4,500,000
11/2006	Kei Igawa	New York Yankees	\$26,000,194

28. Ingraham, *supra* note 26, at 15.

29. United States – Japanese Player Contract Agreement, [http://jpbpa.net/convention/2001\\_e.pdf](http://jpbpa.net/convention/2001_e.pdf) (last visited Oct. 3, 2009).

30. Rockerbie, *supra* note 3.

31. This chart is reproduced from Rockerbie, *supra* note 3.

32. While the actual amount of the posting fee is unknown, it is believed to have been for a nominal amount. Tony Jackson, *Costly Risk Nakamura Leaves Money, Stardom to Join Dodgers*, L.A. DAILY NEWS, Mar. 22, 2005.

The example of Matsuzaka, a star pitcher for the Seibu Lions, is illustrative of the posting process. He had established himself as a premier Japanese professional baseball pitcher.<sup>33</sup> The Boston Red Sox outbid both the New York Mets (who bid a reported \$39 million) and the New York Yankees (who bid \$33 million), determining that the right to negotiate with Matsuzaka was worth an unprecedented \$51.1 million.<sup>34</sup> Following the announcement of its winning bid, the Red Sox then had thirty days to negotiate a contract with Matsuzaka, with the Seibu Lions receiving the \$51.1M upon the signing of the contract. Ultimately, the Red Sox and Matsuzaka agreed to a six-year, \$52 million contract, putting the total expenditures by the Red Sox at \$103.1 million for one player.<sup>35</sup>

### III. THE SUBOPTIMALITIES OF THE POSTING PROCESS

There are several reasons why the posting process is suboptimal, including: 1) it creates windfall profits for the NPB transfer team; 2) the first-price-sealed-bid auction inflates winning bids by MLB teams; 3) individual players are unable to realize their full market value in contract negotiations; 4) individual players have no ability to choose the MLB teams for which they play; 5) the system could adversely affect the competitive balance of MLB teams; and 6) the loss of marquee players negatively impacts NPB as a league. This section is divided into five subsections that each address the posting process and its impact on the actors involved. These sections also explore whether recent developments will alter the relationship between MLB and NPB.

#### A. *Windfall Profits for the NPB Clubs*

The Seibu Lions, as the transferee team and recipient of the \$51.1 million posting fee, is the beneficiary of a system that creates optimal outputs from its perspective. Although the loss of star players certainly impacts the team's prospects for competitive success and its long-term profitability, the transfer fee received by NPB teams is money that the team would otherwise not have received if the player had left as a free agent or had signed with MLB before being drafted by or playing in an NPB organization. Thus, the transfer fee represents a windfall profit for the

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33. Barry M. Bloom, *Red Sox win Matsuzaka bid*, MLB.COM, Nov. 15, 2006, [http://mlb.mlb.com/news/article.jsp?ymd=20061113&content\\_id=1739983&vkey=hotstove2006&fext=.jsp](http://mlb.mlb.com/news/article.jsp?ymd=20061113&content_id=1739983&vkey=hotstove2006&fext=.jsp).

34. *Id.*

35. Gordon Edes, *Matsuzaka, Red Sox Agree to Terms*, BOSTON GLOBE, Dec. 14, 2006, [http://www.boston.com/sports/baseball/redsox/articles/2006/12/14/matsuzaka\\_red\\_sox\\_agree\\_to\\_terms/](http://www.boston.com/sports/baseball/redsox/articles/2006/12/14/matsuzaka_red_sox_agree_to_terms/).



NPB team. In exchange for two years without Matsuzaka (who would have been a free agent after the 2008 season), the Lions received approximately three times the entire team's 2006 payroll, just for owning the rights to the star pitcher.<sup>36</sup> From a financial perspective, the posting system is tilted heavily in favor of the current Japanese team, as Seibu received an amount for the rights to the player that was far in excess of the value of the player's marginal revenue product that Seibu would have received had he played for them in 2007 and 2008.<sup>37</sup>

Another factor contributing to the NPB windfall is that the bidding by MLB teams is conducted as a first-price-sealed-bid auction, where the bidding parties do not know the amount that the others are bidding.<sup>38</sup> Because of the zero-sum nature of this transfer (NPB's financial gain is MLB's loss), a more efficient outcome could be achieved if the MLB teams engaged in an ascending-price auction, where teams are apprised of the value that the other teams attach to the individual player.<sup>39</sup> In the Matsuzaka bidding, the most efficient bid by the Red Sox would have been just \$1 more than the New York Mets (the next highest bidder), a bid that would have been in the \$39 million range.<sup>40</sup> Because the bidding was sealed, however, the Red Sox outbid the Mets by more than \$12 million, an inefficiency directly captured by the Seibu Lions.

While the current posting process is favored by NPB teams that capture the inefficiencies of the first-price-sealed-bid auction, the system is suboptimal for the MLB team paying the transfer fee. Each individual MLB team that bids must make a determination, based upon little market evidence, regarding the optimal price to be paid for the rights to negotiate with the player. While the MLB team wants to win the auction, it wants to bid just \$1 more than the next highest bidder. But in the absence of any reliable information about the presence, identity, and number of other actors in the market, it is extremely difficult to make this precise determination. The result, then, is the possibility that MLB teams who are committed to winning the auction (e.g., the Red Sox) will pay far more for a player than they otherwise would have if the auction were not private.

#### B. *The Player's Loss of Market Value and Freedom of Choice*

The third actor in the process, the individual player, also succumbs to suboptimal outputs because he is unable to capture his full market value

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36. Jeff Sackman, *Putting a Price on Matsuzaka*, THE HARDBALL TIMES, Nov. 1, 2006, <http://www.hardballtimes.com/main/article/putting-a-price-on-matsuzaka/>.

37. Ingraham, *supra* note 26, at 17.

38. *Id.* at 1.

39. *Id.* at 18.

40. Bloom, *supra* note 33.

when signing a contract with the MLB team and cannot choose the MLB club for which he will play. Players (and, consequentially, their agents) are victimized by systemic limitations of the posting process that prevent the player from signing a contract that is truly indicative of his full market value. When computing a value and a price ceiling for an individual player, MLB teams usually consider all of the outlays associated with signing that player to a contract. In the case of acquiring a player from NPB, the MLB team computes the value of the player (the price the team is willing to pay), by adding the transfer fee to the value of the contract.<sup>41</sup> In Matsuzaka's case, the Red Sox attributed a value to the player of \$103.1 million—\$51.1 million in the transfer fee and another \$52 million for the contract itself. Thus, the value attached to Matsuzaka by the Red Sox was nearly double what Matsuzaka actually received in compensation. It is highly likely that the player would have received a higher salary from the club but for the posting fee that was paid to acquire his rights. One commentator estimates that Seibu received 76.7 percent of Matsuzaka's net present value through posting him, whereas he received only 23.3 percent of his own net present value.<sup>42</sup> Thus, the NPB team is grossly

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41. The club must also add to the equation any new or additional luxury tax payment that may have to be paid on the value of the contract that the player signs with the club, though not on the amount of the posting fee paid to acquire the rights to the player. Maury Brown, *Breaking Down MLB's Luxury Tax: 2003-2007*, BIZOFBASEBALL.COM, Dec. 25, 2007,

[http://www.bizofbaseball.com/index.php?option=com\\_content&task=view&id=1805&Itemid=41](http://www.bizofbaseball.com/index.php?option=com_content&task=view&id=1805&Itemid=41). Including the salary paid to Matsuzaka in 2007, the Red Sox had a team payroll of \$155,402,595, and thus had to make a luxury tax payment to Major League Baseball of \$6,064,287. *Id.* The Red Sox paid a tax rate of 40% on this amount, which represents the club's payroll for its forty-man roster, including player salaries and prorated shares of all signing and incentive bonuses, option buyouts, non-cash compensation, and cash transactions. *Id.* Thus, in addition to Matsuzaka's salary, the Red Sox paid an additional luxury tax of approximately \$2,533,333 due to his 2007 salary of \$6 million and the \$333,333.33 signing bonus allocation (representing a prorated share of his \$2 million signing bonus over the six-year life of the contract). Cot's Baseball Contracts, Boston Red Sox, <http://mlbcontracts.blogspot.com/2004/12/boston-red-sox.html> (last visited Oct. 2, 2009). When considering the actual signing bonus payment of \$2 million, playing salary and luxury tax, the club's total expenditure on the player in 2007 was \$10,533,333. *Id.* This sum does not include the value of various perquisites afforded to Matsuzaka, including: the services of a physical therapist, massage therapist, interpreter and a team employee to assist with the Japanese media, eight first-class, round-trip airline tickets per year between Boston and Japan, an annual spring training housing allowance of up to \$25,000, an annual Boston housing allowance of up to \$75,000, a one-time moving allowance of up to \$35,000, the use of a Lincoln Town Car or similar car, and a Red Sox player ticket package, including two field box seats. *Id.*

42. Ingraham, *supra* note 26, at 17. Matsuzaka's contract with the Red Sox was worth approximately \$15.6 million to the player in current dollars, where Seibu received the full amount of the \$51.1 million transfer fee since it was paid up front. *Id.* If he had remained with Seibu, Matsuzaka would have been paid \$4 million in both 2007 and 2008. *Id.* As a nine-year veteran, he would have been eligible to come to MLB after the 2008 season as a

overcompensated and the player dramatically undercompensated.

If Matsuzaka had been a traditional MLB free agent and the Red Sox felt that he was valued at \$103.1 million, then the Red Sox would have been willing to sign him to a contract where he received that full \$103.1 million. When initially discussing contract terms with the Red Sox after the team won the auction, Matsuzaka and his agent, Scott Boras, felt that the transfer fee should not be included in determining the value of Matsuzaka to the Red Sox.<sup>43</sup> Not surprisingly, the Red Sox included the posting fee in all calculations of Matsuzaka's value, based on the theory that regardless of where the money was going, the team had to pay \$103.1 million to get him in a Red Sox uniform. It has been predicted that, if a simple bargaining model were used, Seibu would have received only 54.3 percent of Matsuzaka's value and the player would have received the rest.<sup>44</sup> In other words, had the transfer fee been the product of a negotiation between Matsuzaka and Seibu, it is theorized that the maximum transfer fee would have been \$30.4 million, which is \$20.7 million less than the posting fee paid.<sup>45</sup> Theoretically, then, the posting system also constitutes a loss for all MLB players (and thus the MLBPA), as the amount of the posting fee represents MLB club monies spent on player compensation that does not actually accrue to the players.

While the player does have the ability to walk away from negotiations and not sign a contract with the MLB team, this threat has yet to materialize in any of the ten instances where a player has been posted to a MLB team.<sup>46</sup> For the players, then, there is very little they can do to leverage a fair market deal out of the MLB team. A player must settle for a contract that is not indicative of his actual market value if he chooses to play in MLB; otherwise, he can refuse to sign the contract and return to Japan. In addition, it is unlikely that his Japanese club would want him to return; the club previously decided that it would rather collect the posting fee than retain the player's services. The Seibu Lions received \$51.1 million in exchange for Matsuzaka, instead of losing him without receiving any compensation had he left the team via free agency upon expiration of his contract after the 2008 season.<sup>47</sup>

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free agent. *Id.* The net present value of his contract, had he stayed with Seibu in 2007 and 2008 and then come to MLB as an unrestricted free agent, would have been \$15,518,029, which is just less than the estimated net present value of Matsuzaka's current \$15,552,723 contract with the Red Sox. *Id.* Thus, Matsuzaka earned barely more as a result of coming to MLB via the posting system than he would have by staying in Japan for two years and then coming over as a traditional nine year free agent.

43. Edes, *supra* note 35.

44. Ingraham, *supra* note 26, at 18.

45. *Id.* at 17.

46. Posting System, *supra* note 4.

47. Sackman, *supra* note 36.

An additional concern for the player is his inability to choose which MLB club he will play for if he enters MLB via the posting process. The player has no choice but to play for the team that wins the auction for his services.<sup>48</sup> Particularly with respect to the transfer of native Japanese players, there is additional leverage held by the MLB team—the Japanese player’s desire to save face by not turning down the American team. From a cultural perspective, the loss of face that would be suffered by the player who could not come to a negotiated agreement would be overwhelming, and thus the prospect of this occurring is fairly low. Following the signing of Matsuzaka for a below-market contract (not factoring in the posting fee), many commentaries focused on the fact that Matsuzaka, because of the cultural desire to preserve his image, would never have refused the Red Sox offer and returned to Japan.<sup>49</sup> That was not an option, especially for a player as highly regarded in Japan as Matsuzaka.

The posting system also creates opportunities for moral hazard. There exists the potential for under-the-table dealing between the NPB team and the player in order to facilitate a contractual agreement between the player and the MLB team. The NPB team could conceivably posit to the player, “We’ll offer you \$X million if you sign with the MLB team,” where X represents the gap between the MLB club’s offer and the player’s desired salary. The NPB team does not want the negotiation to fail because it would then lose the posting fee. In addition, the posting system allows for the possibility of foreclosure, or preemptive bidding because one team may potentially bid far higher than the player’s value merely to obtain exclusive negotiating rights with the player. The bidding team would not want to sign the player to a contract, but does so as a defensive tactic to prevent a rival from obtaining the player’s services for the upcoming season, since a player can be posted only once in each offseason.<sup>50</sup> Wide adoption of this strategy could prevent the system from functioning effectively, as the only players who will be successfully posted are those perceived to be of marginal ability.<sup>51</sup>

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48. This current system — that the NPB player can play only for the team that wins his rights through the posting process — is largely a result of the aforementioned transfer of Hideki Irabu from the Chiba Lotte Marines to the San Diego Padres, who subsequently traded his rights to the New York Yankees following a demand by Irabu. Following the Irabu transfer, NPB and MLB teams recognized the danger in permitting individual players to demand to which team they are transferred, and agreed to establish the current posting process. Street, *supra* note 8.

49. Jack Curry, *After Forcing Issue, Red Sox On Verge of Matsuzaka Deal*, N.Y. TIMES, Dec. 14, 2006, at D1.

50. Rockerbie, *supra* note 3.

51. *Id.* at 9.

### C. *The Impact on MLB Competitive Balance*

An equally large concern, particularly for MLB, is that the posting process could adversely affect the competitive balance within the league. If large-revenue MLB teams are the only teams with the financial means to successfully bid on Japanese players, especially when the posting fees for certain players reach into the \$50 million territory, only certain teams will have access to this market of players. Of the ten players who have been successfully posted and transferred to MLB teams, only five have been transferred to large-revenue teams.<sup>52</sup> However, larger revenue clubs have paid the four largest fees, suggesting that they have increased access to the most desirable talent.<sup>53</sup> While the empirical evidence seems to suggest that this issue has not yet reached the level of being a problem requiring immediate attention, the manner in which the Matsuzaka auction was won raises concern for some.<sup>54</sup> If only the largest revenue teams have access to NPB stars in the posting process, then there is at least the possibility that an unbalanced distribution of talent in MLB could result. This is particularly concerning because the posting fee paid by the MLB team does not count against the team's luxury tax number, and thus, is not subject to a luxury tax penalty.<sup>55</sup> Had the Red Sox signed a free agent pitcher from another team within MLB for the \$103.1 million they paid for Matsuzaka, all \$103.1 million of that contract would have been subject to the 40% luxury tax aimed at leveling the playing field in MLB. However, because \$51.1 million of the money paid for Matsuzaka was allocated as a transfer fee (and not subject to the luxury tax), the Red Sox luxury tax figure for the Matsuzaka signing was only \$52 million. This legal loophole circumvents precisely the problem that the luxury tax was aimed at fixing, and furthers the problem of competitive balance in MLB. Given that signing a player from NPB has less of a luxury tax impact than signing a similar MLB free agent, there is a credible risk that only large-market MLB teams will have access to the posting process.<sup>56</sup>

### D. *The Impact on Japanese Baseball*

While the NPB team that successfully posts a player receives short-term windfall profits by doing so, the loss of marquee players has a

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52. Posting System, *supra* note 4.

53. *Id.*

54. See Sean McAdam, *Boston Doesn't Have Any Payroll Limitations*, ESPN.COM, Nov. 15, 2006, <http://sports.espn.go.com/mlb/columns/story?id=2662770> (explaining teams in smaller markets have a hard time competing for high priced talent).

55. Gould, *supra* note 15, at 293.

56. Jim Allen, *Ishii Flies the Nest*, JIM ALLEN'S JAPANESE BASEBALL PAGE, Jan. 10, 2002, <http://www2.gol.com/users/jallen/column/20020110.html>.

deleterious effect on the overall NPB league product and on the medium- and long-term business of the posting team itself. The migration of Hideo Nomo to the Los Angeles Dodgers had a strong influence on both Japanese baseball and MLB. Though Nomo was initially treated as a pariah when he left NPB for America,<sup>57</sup> fans grew to accept his departure and followed *en masse* as the NHK public television network broadcast his games live throughout Japan.<sup>58</sup> His success with the Dodgers increased Japanese interest in MLB and created opportunities for future Japanese players to play in the United States.<sup>59</sup> Since Nomo's 1995 debut, 36 Japanese players have played in MLB regular season games,<sup>60</sup> including sixteen who were on MLB Opening Day rosters in 2008.<sup>61</sup>

Legendary Japanese baseball player Sadaharu Oh stated: "It's been a great plus for baseball in Japan[.] Thanks to Nomo, kids in high school and junior high now have dreams of playing in M.L.B. Going to America and directly competing over there is a much better way to improve the level of play here than the good-will-type all-star exhibition series they used to hold when I was a player. Japan's still inferior to America in baseball, but as more players aim to play over there, the gap will continue to close."<sup>62</sup>

With respect to how Nomo created opportunities for Japanese players in the United States, Oh stated, "He showed that the level of Japanese baseball was not that different from the major leagues[.]"<sup>63</sup>

Though Nomo's successful MLB career positively impacted baseball in both Japan and the United States, Japanese baseball has suffered from the loss of a number of popular star players to MLB through both free agency and posting. Despite three NPB teams generating over \$80 million by posting Matsuzaka, Igawa, and Iwamura prior to the 2007 season, there was despair at the NPB offices over losing such popular players.<sup>64</sup> There seems to be some recognition that the pursuit of the short-term revenues generated by posting could lead to a long-term decrease in revenues. Tohoku Rakuten Golden Eagles manager Katsuya Nomura stated, "If this

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57. Robert Whiting, *Is the MLB Destroying Japan's National Pastime?*, JAPAN TIMES, Apr. 14, 2007, <http://search.japantimes.co.jp/cgi-bin/sb20070411c1.html>; *Baseball Runs for a Fan Base in Japan* (Marketplace radio broadcast Sept. 14, 2007), [http://marketplace.publicradio.org/display/web/2007/09/14/baseball\\_nation/](http://marketplace.publicradio.org/display/web/2007/09/14/baseball_nation/).

58. Claire Smith, *Dodgers Look East*, N.Y. TIMES, Feb. 13, 1995, [http://www.nytimes.com/packages/html/sports/year\\_in\\_sports/02.13.html](http://www.nytimes.com/packages/html/sports/year_in_sports/02.13.html).

59. *For the Record*, SPORTS ILLUSTRATED, July 28, 2008, at 20.

60. Brad Lefton, *Sadaharu Oh Still Feels and Thinks the Game*, N.Y. TIMES, May 4, 2008, at B2.

61. *For the Record*, *supra* note 59.

62. Lefton, *supra* note 60.

63. *For the Record*, *supra* note 59.

64. Jack Curry, *From Japan to Tampa, Iwamura Lives Up to the No. 1 on His Back*, N.Y. TIMES, Oct. 25, 2008, at SP3.; Whiting, *supra* note 57.

keeps up, Japanese baseball is truly finished.”<sup>65</sup>

Yomiuri Giants club representative Hidetoshi Kiyotake added, “Seibu might have made a nice profit in the short term, but in the long term, they’re strangling themselves. This is a big loss for the baseball world.”<sup>66</sup>

With NPB players leaving for the challenge of playing in MLB, as well as its increased salaries and better living and working conditions,<sup>67</sup> NPB is likely to lose even more of its players to MLB in the future. The high fee paid for Matsuzaka and his potential for long-term MLB success is a portent for Japanese baseball. Moreover, the fact that the MVP of the Japanese national team left with great fanfare for a successful MLB team that paid him nearly what the top MLB free agent pitchers in the market secured is likely to lead to more NPB players pursuing careers in MLB, which will only further the uncertainty surrounding the future of NPB.<sup>68</sup> This dynamic is heightened by the fact that there is no longer a stigma attached to players leaving NPB; fans are okay with it, as they can still watch their favorite Japanese players on television or the internet rather than in person despite their exit to MLB.<sup>69</sup> In fact, most Japanese fans are proud of these transfers’ accomplishments and identify with them, rather than feeling resentment.<sup>70</sup> It is simply not practical to expect that MLB teams will cease their pursuit of Japanese players, just as it was impractical to think that Japanese automakers would not pursue the U.S. market.<sup>71</sup> To that end, MLB scouts have descended upon Japan in search of talent.<sup>72</sup> Japanese baseball officials are hopeful that a role model effect might be possible, with more of the best young Japanese athletes choosing to play baseball because of the success of the Japanese players in MLB.<sup>73</sup>

While the NPB team receives a windfall profit when it successfully posts one of its players, this short-term cash infusion may be offset by the subsequent impact of the loss of the player on the team’s on-field performance, attendance, public relations, and television ratings<sup>74</sup>—all of

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65. *Id.*

66. *Id.*

67. *Id.* Regarding the fact that players are leaving Japan for the challenge of MLB, Matsuzaka said in an interview with the NHK Network, “It’s only natural to want to test yourself in the best league in the world against the best players. The scale of big league ball is something else.” *Id.* Matsuzaka more than doubled his salary when he signed with the Red Sox. *Id.*

68. *Id.*

69. Robert Whiting, *NPB Players in Need of Strong Union Like MLBPA*, JAPAN TIMES, Apr. 14, 2007, <http://search.japantimes.co.jp/cgi-bin/sb20070414c1.html>.

70. Whiting, *supra* note 57.

71. Whiting, *supra* note 69.

72. *Id.*

73. *Id.*

74. Evidence suggests that this began with Nomo’s departure for Los Angeles, as Japanese fans followed Nomo in MLB at the expense of watching NPB baseball, raising

which could have a deleterious effect on the team's revenues in the medium- to long-term. It is reasonable to expect that an NPB team would be negatively impacted in both winning percentage and attendance when a player is lost through the posting system because the team is losing a high-caliber player who served as a gate attraction for fans. The economic benefits that NPB clubs receive from transfer fees are not necessarily conducive to helping their future on-field success. Japanese teams tend to be more focused on the short-term than on the long-term because of their corporate ownership. As a result, the posting fees received by the teams are either filtered back to the parent corporation or are intended to provide the team with a needed infusion of capital to reduce what is usually a significant cash shortfall; typically, the posting fee is not intended to be used to sign another player in the hope of replacing the lost production of the defected player. Unlike in MLB, where a team may seek to replace a star lost through free agency with another high-caliber player, the limited movement of impact free agents in NPB makes it very difficult to replace a lost player even if the team and its parent corporation are so inclined.

A closer look at the impact of losing a posted player on the on-field performance of his former NPB team yields mixed results. It is difficult to estimate the impact of the loss of these players on each team's win-loss record, as there are clearly a number of other factors that affected their performance. Nonetheless, of the ten players who have been successfully posted, the former team had a worse record in the season immediately after the posting on six occasions and a better record on four occasions.<sup>75</sup> The impact of losing players through the posting system on the attendance of their former NPB teams is also difficult to judge with accuracy because of the lack of reporting standards prior to the 2005 season.<sup>76</sup> Before 2005, NPB teams simply estimated attendance, and these estimates were typically much higher than the actual number of fans who appeared to be in the stadium.<sup>77</sup> It is also reasonable to expect that the team would suffer in its

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concerns that other players would follow him and lead to decreased attendance and television ratings in NPB. Rockerbie, *supra* note 3.

75. The six clubs that fared worse in the season following the posting were Hanshin (.063 worse in 2007), Yakult (.073 worse in 2007), Seibu (.127 worse in the 2007 season following the loss of Matsuzaka), Orix (.079 worse in 2006), Yakult (.023 worse in 2002), and Hiroshima (.022 worse in 1999). The four teams that fared better in the season following the posting were Seibu (.104 better in 2006), Chunichi (.058 better in 2004), Hiroshima (.015 better in 2003), and Orix (.026 better in the 2001 season following the loss of Ichiro). NPB Tracker, *The Effects of NPB Players Leaving for MLB*, part 4, Jan 3, 2009, <http://www.npbtracker.com/2009/01/the-effects-of-npb-players-leaving-for-mlb-part-4/>.

76. Paul White, *Unclear How Fans' Interest Is Affected*, USA TODAY, Mar. 29, 2007, at 2C.

77. Average attendance for Seibu was 16,223 in 2005, increased to 17,597 in 2006 and decreased to 15,187 in 2007. Pacific League, [http://pacific.npb.or.jp/bluebook/blu\\_spect1.html](http://pacific.npb.or.jp/bluebook/blu_spect1.html) (last visited Sept. 26, 2009). Hanshin's



public relations as a result of transferring a star performer. Much as American sports fans protest the loss of a favorite player to another team via free agency by voicing their anger at the team, a Japanese team that posts a player risks incurring the wrath of its fan base. If, as a result, fans stay away from the ballpark and do not watch television broadcasts, then the team's revenues will suffer. While fans tend to be forgiving over the occasional loss of a player, a team that regularly posts players will not be as fortunate.

Finally, the television ratings for NPB games have fallen significantly as an increasing number of the league's better players have moved to MLB.<sup>78</sup> Meanwhile, MLB games are broadcast daily in Japan and receive

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average attendance was 43,218 in 2006 and 43,669 in 2007. *Id.* Average attendance for Yakult Swallows was 18,019 in 2006 and increased to 18,517 in 2007. Central League, <http://www.npb.or.jp/cl/entertainment/report/index3.html> (last visited Oct. 23, 2009). Orix Buffaloes attendance increased from 19,943 in 2005 to 20,445 in 2006. *Id.*

78. Tom Van Riper, *Major League Baseball Goes Global*, FORBES, Dec. 20, 2005, [http://www.forbes.com/2005/12/20/baseball-gm-disney-cx\\_tvr\\_1220baseball.html](http://www.forbes.com/2005/12/20/baseball-gm-disney-cx_tvr_1220baseball.html). Television ratings for games for the Yomiuri Giants, historically the most popular team in Japan, decreased from 21.4 percent in 1996 to 9.7 percent in 2008, according to Video Research, a Tokyo-based TV ratings company. <http://www.videor.co.jp/data/ratedata/program/07giants.htm> (last visited Oct. 4, 2009). Unlike in the United States, the terrestrial broadcasting stations still have a significant share of the market in Japan, and the only team that had its games consistently broadcasted on terrestrial stations was the Yomiuri Giants. Letter from Kohei Nakagawa, Attorney, TMI Associates, to Scott Rosner (Feb. 26, 2009) (on file with author). The games for other teams are broadcast on satellite and cable television but, unfortunately, the ratings for these media are not made public. *Id.* However, the ratings for the terrestrial games are made public. *Id.* The sharp drop in ratings can be attributed in part to Yomiuri's 'Yankees-like' strategy of bringing star players from other NPB teams through domestic free agency, which upset its fan base. However, the loss of Giants and other star NPB players to MLB through both posting and free agency in 2000 and 2001 likely had an even more significant impact on the ratings. Kazu Sasaki was the best closer in Japan, and he pitched especially well against Yomiuri, which became a must-see matchup. *Id.* Ichiro was undoubtedly the most talented hitter and Shinjo was a star player for Hanshin Tigers. *Id.* After they left for MLB, many baseball fans began to feel that perhaps Yomiuri's games were not worth watching any more. *Id.* However, the biggest cause of the Giants' decrease in television ratings was the loss of Hideki Matsui; it was the first time that one of its star players decided to play in MLB. *Id.* The drop in the ratings led the television stations to reduce the number of Yomiuri games they broadcasted nationally. *Id.* In 2008, only half of the Giants games were broadcast on the terrestrial broadcasting channels. *Id.* Demand fell along with the reduced supply, with average ratings dropping below 10 percent. *Id.* When a rating for a prime time (7:00 pm - 9:00 pm) program is below 10 percent in Japan, it is regarded as not a popular program. *Id.* The ratings of the popular programs on the prime time are usually around 16 - 20%. *Id.* The low ratings resulted in lower prices being paid for Yomiuri's broadcasting rights. *Id.* Although the actual price is not made public, it is believed that the price is now about half what it was in the past. *Id.* Other teams' games are mainly broadcasted on local stations or cable channels and the ratings were low from the start. *Id.* Therefore, although the official data is not available, it seems to be that the loss of their star players is not hurting their television ratings as much. *Id.* In fact, due to efforts to operate more wisely by

detailed coverage in Japanese newspapers, with many Japanese fans following MLB closely.<sup>79</sup> More people in Japan watched Matsuzaka pitch his Red Sox games in 2007—all of which were broadcast on NHK-BS satellite, which is available in 13 million Japanese homes—than watched his televised Seibu Lions games in 2006 (which had an estimated viewership of 100,000 fans).<sup>80</sup> MLB has successfully monetized this increased interest, resulting in nearly seventy percent of MLB's international revenue coming from Japan.<sup>81</sup> MLB currently receives close to \$100 million annually from the Japanese marketplace—slightly less than \$50 million from Dentsu (a Japanese advertising agency) and NHK in television rights fees, and approximately \$50 million additionally from licensing, sponsorships, and advertising.<sup>82</sup>

While some believe that a continual draining of the talent pool in NPB will ultimately lead to the demise of NPB,<sup>83</sup> it is far more likely that, with the appropriate reforms to its currently flawed operating structure, NPB will endure. There remains strong fan interest in and passion for the league, it has a long history, it still produces numerous high-quality players, and it may be the only country in the world where baseball is still the national sport.<sup>84</sup> To retain their viability, however, NPB and its teams need to alter their priorities and organization, as currently their structures are suboptimal for both business and player development.

NPB teams are operated in a manner that is quite different from their MLB counterparts. Rather than operating as stand-alone companies, as do the vast majority of teams in MLB, Japanese baseball teams are part of larger corporations that use the team to market and sell their products.<sup>85</sup> For example, the Hokkaido Nippon Ham Fighters are owned by the Nippon Ham meat processing company and exist primarily for the purpose of selling its products.<sup>86</sup> The underlying rationale for using the baseball teams

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focusing their attention on their local markets, some teams (especially those in the Pacific League) are thought to be getting higher local television ratings. *Id.* However, the price of their broadcasting rights seems to have not gone up yet. *Id.* The price for the broadcasting rights of these teams are still traded at much lower prices than those of Yomiuri's games. *Id.*

79. ROBERT K. FITTS & DANIEL K. INOUE, WALLY YONAMINE: THE MAN WHO CHANGED JAPANESE BASEBALL 316-17 (2008).

80. Whiting, *supra* note 57.

81. *Baseball Runs for a Fan Base in Japan*, *supra* note 57.

82. *See* Zimbalist, *supra* note 23.

83. Whiting, *supra* note 57.

84. Whiting, *supra* note 69.

85. Whiting, *supra* note 57.

86. *Id.* The other teams in NPB and its owners are the Yomiuri Giants (Yomiuri media conglomerate); Hiroshima Toyo Carp (Toyo car components Company); Yokohama Bay Stars (Tokyo Broadcasting System); Tokyo Yakult Swallows (Yakult Corporation, a yogurt maker); Hanshin Tigers (Hanshin Electric Railway Company); Chunichi Dragons (Chunichi media group); Fukuoka SoftBank Hawks (SoftBank internet services company); Saitama

in this fashion is that Japanese companies believe it is cheaper to purchase and run the team and get in the media every day through the coverage of the games than it is to advertise on Japanese prime-time television.<sup>87</sup> This belief is reflected in the selection and deployment of their managerial talent. Unlike their American counterparts, Japanese baseball club executives typically are not baseball experts; instead, they are employees who rotate through the team from the parent company's headquarters.<sup>88</sup> The league's fragmented structure is reflected in its flat growth over the past two decades, with attendance hovering around 20 million per year and total league revenues at approximately \$1 billion.<sup>89</sup> Historically, two NPB teams have done well on and off the field; the Yomiuri Giants and Hanshin Tigers both draw 3 million fans annually and are estimated to generate ¥20 billion annually, primarily through gate receipts and television rights fees.<sup>90</sup> The teams hand their profits over to their parent companies.<sup>91</sup> Most other teams suffer operating losses even when successful on the field.<sup>92</sup> For

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Seibu Lions (Seibu railway company); Chiba Lotte Marines (Lotte foods conglomerate); Orix Buffaloes (Orix, a financial services company based in Tokyo); and Tohoku Rakuten Golden Eagles (Rakuten online shopping mall). See *Bay Stars Get New Owners*, JAPAN TIMES, Feb. 2, 2002, <http://search.japantimes.co.jp/cgi-bin/sb20020202a1.html> (discussing ownership of the Yokohama Bay Stars); Kate Berry, *Houlihan Officers Sell Shares as Part of Orix Takeover*, L.A. BUS. J., Nov. 7, 2005, <http://www.thefreelibrary.com/Houlihan+officers+sell+shares+as+part+of+Orix+takeover.-a0139170905> (discussing ownership of the Orix Buffaloes); *Carp Owner Dies*, JAPAN TIMES, July 12, 2002, <http://search.japantimes.co.jp/cgi-bin/sb20020712a2.html> (discussing ownership of the Hiroshima Toyo Carp); *Fukuoka SoftBank Hawks Get Green Light*, JAPAN TIMES, Dec. 25, 2004, <http://search.japantimes.co.jp/cgi-bin/sb20041225a2.html> (discussing SoftBank ownership of the Hawks); Mondo Times, Chunichi Shimbun, <http://www.mondotimes.com/1/world/jp/200/4631/11683> (last visited Oct. 14, 2009) (discussing ownership of the Chunichi Dragons); Michiyo Nakamoto, *Baseball Fans Upset by Shifts in Ownership*, L.A. TIMES, Nov. 7, 2005, <http://articles.latimes.com/2005/nov/07/business/ft-baseball7> (discussing corporate ownership of the Hanshin Tigers, Saitama Seibu Lions, Orix Buffaloes, Yomiuri Giants, and the Tohoku Rakuten Golden Eagles); Eric Neel, *Gaijin No Longer Means "Outsider,"* ESPN.COM, Feb. 28, 2007, [http://sports.espn.go.com/mlb/asia/columns/story?columnist=neel\\_eric&id=2766707](http://sports.espn.go.com/mlb/asia/columns/story?columnist=neel_eric&id=2766707) (discussing ownership of the Tokyo Yakult Swallows); Jeff Passan, *Happy Valentine*, YAHOO SPORTS, Mar. 21, 2008, <http://sports.yahoo.com/mlb/news?slug=jp-valentine032008&prov=yhoo&type=lgns> (discussing ownership of the Chiba Lotte Marines); Michael Westbay, *2009 Japanese Baseball Teams*, PRO YAKYU NOW, <http://japanesebaseball.com/teams/index.gsp> (last visited Oct. 14, 2009) (providing a list of teams for the 2009 season).

87. Whiting, *supra* note 57.

88. *Id.* American sports fans would find it surprising to note that, in 2007, the Orix Buffaloes newly appointed general manager told reporters that he only had heard of one player on the entire team. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

example, when the Nippon Ham Fighters won the title in 2006, “[they] drew 1,635,410 fans. . . . [and they] still needed a multimillion dollar bailout from [their] parent company.”<sup>93</sup> The Chiba Lotte Marines were estimated to have lost over ¥2 billion in 2005 when they won the title, and the Chunichi Dragons won the Central League pennant in both 2005 and 2006, but were estimated to have lost more than ¥10 billion during that period.<sup>94</sup> The decentralized league structure—where there is little cooperation among the teams, no league-wide media, marketing or licensing contracts, and no revenue sharing—results in stark contrasts between revenues generated by individual teams.<sup>95</sup> The revenue disparity is evidenced by television rights deals: Yomiuri sold its 2006 television rights fees for ¥100 million per game and Hanshin for ¥50 million, but Chunichi did the same for only ¥10 million, Nippon Ham for ¥3.8 million, Seibu Lions for ¥700,000, and Chiba Lotte for a mere ¥150,000.<sup>96</sup> Critics place the blame for this anachronistic business model on the Yomiuri corporation’s unwillingness to cede control as the most powerful team in NPB.<sup>97</sup>

Another area in which there is a significant difference between MLB and NPB is in their playing facilities. Whereas most MLB teams either own their own playing facilities or have very favorable lease agreements that allow them to control most of the revenue generated by the facility, NPB teams generally do not own their stadiums (though Seibu does, and yet it still loses money) or control ancillary revenue streams, such as concessions and sponsorships, and must pay hefty rents for their facilities.<sup>98</sup>

NPB teams are slowly beginning to become more focused on the business side of the game. For example, following the lead of the SoftBank Hawks, all of NPB’s Pacific League teams are now streaming their home games live over the internet for free, the Chiba Lotte Marines are running pre- and post-game promotions,<sup>99</sup> and the league adopted interleague play in 2005 and postseason playoffs leading up to the Japan Series in 2007.<sup>100</sup> In addition, mimicking the longstanding practice of North American sports leagues, which have allowed their media rights fees to grow exponentially over time, all of the Pacific League teams sold their broadcasting rights to a

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93. *Id.*

94. *Id.*

95. Robert Whiting, *NPB Needs Major Reform, Vision to Prosper Like MLB*, JAPAN TIMES, Apr. 13, 2007, <http://search.japantimes.co.jp/cgi-bin/sb20070413c1.html>. The NPB league office’s only revenue is derived from an ¥80 million assessment on each team, the league All-Star Game, and the Japan Series. *Id.*

96. Whiting, *supra* note 57.

97. Whiting, *supra* note 95.

98. Whiting, *supra* note 57.

99. Whiting, *supra* note 95.

100. *Id.*

subsidiary of SoftBank, which in turn negotiated with broadcasting stations to give licenses. Though the price agreements reached in these deals are not made public, the Pacific League should see a long-term increase in its rights fees if the North American leagues are any indication. These efforts are all an attempt to generate more revenues from the on-field product.

There are also significant differences in player development between the Japanese and American professional leagues. Most MLB teams have six minor league teams with a total of 125-150 players in their farm systems at any one time. This arrangement cost the average MLB team more than \$20 million in 2007.<sup>101</sup> American minor leaguers spend more time playing games than they do practicing. In contrast, there is comparatively little investment by NPB teams in the Japanese minor league system. Each team only has seventy players in its minor league system, and just one farm team that plays close to 100 games each season.<sup>102</sup> Japanese minor leaguers spend most of their time practicing rather than playing games.<sup>103</sup>

While it could be a reflection of different philosophies of player development, it is likely that NPB parent companies do not want to spend the money on their minor league systems as their American counterparts do.<sup>104</sup> This has a huge impact on player development in Japan and has resulted in a dearth of young stars available to replace players who leave Japan for MLB.<sup>105</sup>

It appears that NPB needs a revamped structure where the clubs are treated as profit-oriented businesses in and of themselves and league operations are more centralized.<sup>106</sup> In addition, although it is highly likely that the top Japanese players will continue to leave for MLB, if Japan and NPB can improve player development to produce more highly skilled players<sup>107</sup>, and complement them with quality players from other Asian countries, then NPB will be well-positioned to monetize its fan base and remain a viable business.<sup>108</sup> Such a business model is reminiscent of many

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101. Andrew Zimbalist, *There's More Than Meets the Eye in Determining Players' Salary Shares*, SPORTS BUS. J., Mar. 10, 2008, at 44, available at <http://www.sportsbusinessjournal.com/article/58351>.

102. Whiting, *supra* note 57.

103. *Id.*

104. Whiting, *supra* note 95.

105. Whiting, *supra* note 57.

106. Whiting, *supra* note 95.

107. Whiting, *supra* note 69.

108. *Id.* While this is certainly a possibility, there is a strong argument that importing other Asian players is not a good answer. Even if the talent level of the players that left NPB and of the players who came to NPB are about the same, it is likely that Japanese fans will not support non-Japanese players to the same degree, such that fan interest in NPB will decrease. This has already been proven in part by Yomiuri's attempt to replace Hideki Matsui with Seung-Yeop Lee, a Korean slugger. Though the two players are considered by

successful domestic soccer leagues around the world; while the local leagues cannot compete with the top European leagues in England, Spain, Italy, Germany, and France, they remain financially viable nonetheless.<sup>109</sup>

Despite NPB's aforementioned problems, it is unclear what incentive individual NPB owners have to change the posting system.<sup>110</sup> The system works well for the many teams in need of a cash infusion.<sup>111</sup> As a result, many NPB owners will be reluctant to make substantial changes to the posting system.

#### E. *The Possible Tazawa Effect*

While the protocol agreement between MLB and NPB establishes the posting process as the transfer process for NPB players with less than nine years of service, allowing NPB players to leave for MLB without compensation after nine years of NPB service, the two leagues have no formal agreement regarding the status of Japanese amateur players who have not yet been drafted by NPB teams.<sup>112</sup> Junichi Tazawa, a 22 year-old Japanese pitcher, became the first Japanese amateur player to publicly announce his desire to forgo NPB in favor of MLB. He requested that he not be drafted in the Japanese system after he led his Nippon Oil team to the semifinals of the Japanese corporate league championship.<sup>113</sup> Despite

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many to be of relatively equal talent and ability, their popularity among Japanese fans cannot be compared. See e.g., NPB Tracker, A Look at Yomiuri's Import Roster, July 11, 2009, <http://www.npbtracker.com/2009/07/a-look-at-yomiuris-import-roster/> (discussing Lee's baseball statistics); NPB Tracker, The Effects of NPB Players Leaving for MLB, Part 3, Dec. 14, 2008, <http://www.npbtracker.com/2008/12/the-effects-of-npb-players-leaving-for-mlb-part-3/#content> (describing the impact that Matsui's departure had on the field and in the team's popularity). This is one of the reasons why television ratings for Yomiuri games decreased. Robert Whiting, *Baseball in Japan: Not All Cheers*, TIME, Mar. 27, 2008 <http://www.time.com/time/world/article/0,8599,1725911,00.html>. Another reason why Japanese fans are unlikely to embrace foreign players is that the league has adopted rules throughout its history that substantially limit the number of foreign players on their teams' game day rosters. *Japanese Baseball Frequently Asked Questions, Foreign Player Restrictions?*, <http://www.japanesebaseball.com/faq/gaijin.jsp> (last visited Oct. 8, 2009). Currently, Japanese teams only are allowed to have four players on their twenty-five man roster. *Id.* Thus, Japanese fans have enjoyed games played by almost-exclusively Japanese players for as long as they can remember.

109. Whiting, *supra* note 69.

110. Robert Whiting, *Foreign Managers Change Face of Japanese Game*, JAPAN TIMES, Apr. 12, 2007, <http://search.japantimes.co.jp/cgi-bin/sb20070412c1.html>.

111. See *id.* (showing how NPB teams are making millions of dollars on posting fees).

112. Alan Schwarz & Brad Lefton, *Japanese Are Irked by U.S. Interest in Pitcher*, N.Y. TIMES, Nov. 20, 2008, at B12.

113. *Japan Tries to Discourage Amateurs from Playing in MLB with Ban*, ESPN.COM, Oct. 8, 2008, <http://sports.espn.go.com/mlb/news/story?id=3632083>; Kaz Tadano and Mac Suzuki are the only Japanese players to have played in MLB without previous NPB experience. *Id.*

pre-draft speculation that he would be the first player selected,<sup>114</sup> NPB teams ultimately agreed to his request and he went undrafted.<sup>115</sup> Tazawa subsequently signed a three-year contract worth approximately \$3 million with the Boston Red Sox.<sup>116</sup>

Despite the lack of any formal agreement regarding amateur players, Japanese baseball executives were understandably upset with this development. The Tazawa affair has strained the relationship between NPB and MLB.<sup>117</sup> NPB officials view the signing of Japanese amateur players by MLB teams as a violation of a well-established understanding. As NPB stated in a news release, “This was more than just a gentlemen’s agreement, but rather an implicit understanding that the major leagues would do no such thing. That a handful of clubs from the majors is trying to break this gentlemen’s agreement is truly regrettable.”<sup>118</sup> In an attempt to disincentivize other players from following in Tazawa’s footsteps, NPB adopted a rule that bans amateur players who sign with foreign professional teams from playing in NPB for three years upon their return to Japan if they sign out of high school, or for two years if they sign out of college or the corporate league.<sup>119</sup> Rob Manfred, MLB’s executive vice president for labor relations, responded, “I’m sure we will have ongoing conversation[s] with them about how we might be able to address their concerns.”<sup>120</sup>

How Tazawa fares in the United States could influence the movement of Japanese amateurs to MLB.<sup>121</sup> If he is successful, there will undoubtedly

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114. *Tazawa to Pass on Japanese Draft, Deal With MLB Teams*, ESPN.COM, Sept. 12, 2008, <http://sports.espn.go.com/mlb/news/story?id=3583362>.

115. Schwarz & Lefton, *supra* note 112.

116. *Report: Japanese Pitcher Tazawa Agrees to Three-year Deal With Red Sox*, ESPN.COM, Dec. 1, 2008, <http://sports.espn.go.com/mlb/news/story?id=3736390>.

117. See Schwarz & Lefton, *supra* note 112 (stating that Japanese teams were upset with MLB when MLB teams were trying to lure Tazawa to MLB). Though the issue was discussed at the annual MLB general managers meeting in November of 2008, there has been no action as of this writing. Jimmie Lee Solomon, MLB executive vice president of baseball operations, stated, “We’re sitting down with the various commissioner’s offices from the various countries and talking with them about our protocol agreements, but nothing definitive.” *Selig Warns GMs About Economic Turmoil as Meetings Begin*, ESPN.COM, Nov. 4, 2008, <http://sports.espn.go.com/mlb/news/story?id=3682935>.

118. Schwarz & Lefton, *supra* note 112. Interestingly, several major league teams agree that Tazawa should not have been signed. New York Yankees General Manager Brian Cashman stated, “I’m old school—there has been an understanding. There’s been a reason that Japanese amateurs haven’t been signed in the past, so we consider him hands off.” *Id.* To this difference in opinion, Rob Manfred stated, “It’s not due to any lack of clarity – it’s just due to the fact that clubs have different views of the world.” *Id.*

119. *Id.*; *Japan Tries to Discourage Amateurs from Playing in MLB with Ban*, *supra* note 113.

120. Schwarz & Lefton, *supra* note 112.

121. See Michael Street, *A Brief History of Japanese-American Baseball Relations, Part 3: The Tazawa Effect*, ASIAN-AM. SPORTS EXAMINER, Dec. 4, 2008, <http://www.examiner.com/x-739-AsianAmerican-Sports-Examiner~y2008m12d4-A-brief->

be others who attempt to follow. If he is not, MLB teams will be (at least temporarily) more resistant to the practice. At the same time, Japanese players may not be nearly as enthusiastic about moving to MLB, considering the ban they would face if they returned to Japan.<sup>122</sup>

Despite an array of opinions by MLB teams regarding the signing of Japanese amateurs, the competitive nature of MLB requires a timely solution of this issue. It is unlikely that teams will allow themselves to be placed at a competitive disadvantage out of deference to an unwritten rule. Los Angeles Dodgers general manager Ned Colletti stated, “[t]here’s a fine line between falling behind the competition because you’re quote being respectful, and competing like others will compete. We have to be wise in our decision-making at the moment of truth.”<sup>123</sup>

The possibility of increased movement of amateur players from Japan to the United States places NPB in a precarious position, as it would further drain the Japanese system of talent.<sup>124</sup> With top veteran players leaving by means of the posting system and top young amateur talent leaving by means of free agency, NPB’s supply of talent could become a barrel tapped at both ends. Ultimately, this could have a meaningful impact on NPB in two different ways. First, a significantly depleted talent pool could have an effect on NPB revenues, as fans may migrate away from a league with a decreased caliber of play. Second, there could be fewer talented players available for posting because they would have already left Japan as amateurs. NPB teams would thus face a long-term loss of posting revenues.

The above prospects could provide NPB teams with the incentive necessary to change the system. If Tazawa’s move has an impact on other young players, MLB could have leverage to negotiate a more favorable posting agreement with NPB. A proposed trade off could be an agreement by MLB not to sign Japanese amateurs in exchange for a change in the posting agreement to one of the alternatives suggested in Part V. Absent that, it is likely to be difficult to convince NPB to consider an alternative to the current player transfer system, despite the aforementioned arguments.

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history-of-JapaneseAmerican-baseball-relations-Part-3-The-Tazawa-Effect (discussing how Tazawa’s performance in MLB will impact how many future Japanese players decide to play in America).

122. *Id.*

123. Schwarz & Lefton, *supra* note 112.

124. To this point, Yomiuri official Hidetoshi Kiyotake recently wrote in Japan’s Weekly Baseball magazine of how South Korea’s major league system had been damaged by the loss of thirty-eight players who signed directly with MLB teams since 1994. He wrote that “[u]nless fans here stand up and proclaim, ‘protect Japanese baseball,’ we’re liable to fall into the same trap as South Korean baseball.” Schwarz & Lefton, *supra* note 112.



#### IV. ALTERNATIVE METHODS OF INTERNATIONAL PLAYER TRANSFER

Various player transfer systems exist to facilitate the global movement of athletes across professional sports leagues. The following describes the various systems for the transfer of professional athletes in basketball, soccer, and hockey, all of which are possible alternatives to the current MLB-NPB transfer system.

##### A. *Basketball*

The ability for professional basketball players to move to a team in another country is governed by regulations set out by the International Basketball Federation (“FIBA”). These standards are permissive and focus on facilitation of player transfer.

The governing regulations state that “[a]ny basketball player shall have the right to play basketball in any country in the world, within the limits established by . . . FIBA . . . .”<sup>125</sup> The process by which this occurs is relatively straightforward. A player seeking transfer to a team in a foreign country must receive a “letter of clearance” from the national basketball governing body in his home country.<sup>126</sup> This letter details the player’s playing history and includes an attestation by the player that he has fulfilled “*all contractual obligations stipulated in any and all contracts between [him]self and any team . . . .*” (emphasis added).<sup>127</sup> Once a player receives the letter of clearance, the only way that the letter can be rejected by the national governing body is if that individual player has not fulfilled his contractual obligations to his transferee team.<sup>128</sup> In essence, the letter of clearance is the final step towards a successful transfer of the player to a team in another country.

As it pertains to the National Basketball Association (“NBA”), the rights to international players may be acquired through the annual NBA Draft, an option not available to MLB teams wishing to acquire players from NPB or most of the rest of the world. NBA teams are free to draft any player who meets the requirements of Article X of the NBA Collective Bargaining Agreement (“NBA CBA”).<sup>129</sup> Once the NBA team has drafted

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125. Fed’n Int’l Basketball Ass’n, REGULATION H – RULES GOVERNING PLAYERS, COACHES, SUPPORT OFFICIALS, AND PLAYERS’ AGENTS 66, 70 (2008) [hereinafter REG. H].

126. *Id.* at 71.

127. USA BASKETBALL APPLICATION FOR LETTER OF CLEARANCE INSTRUCTIONS, available at <http://www.usabasketball.com/loc-application.pdf> (last visited Oct. 4, 2009).

128. REG. H, *supra* note 125, at 71.

129. NBA Collective Bargaining Agreement, Art. X: Player Eligibility and NBA Draft, [http://www.nbpa.com/cba\\_articles/article-X.php](http://www.nbpa.com/cba_articles/article-X.php) (last visited Oct. 1, 2009) [hereinafter NBA CBA]. Just like every domestic player drafted by the NBA, an international player must be at least nineteen years old during the calendar year of the draft. However, the NBA CBA

the rights to a player, the team has exclusive negotiation rights with that player for a period of one year.<sup>130</sup>

In both of the acquisition situations—where a player requests a letter of clearance to join a foreign team and where that player is drafted by an NBA team (*after* acquiring the letter of clearance)—the individual player is the party negotiating with his own team for his release from any current contract. Perhaps the highest profile international transfer to date is that of Yao Ming. The Chinese star was drafted as the number one pick in 2002 by the NBA's Houston Rockets, at which time the Rockets began discussions with Yao's Chinese team for his contractual release (discussions also included Chinese officials because of Yao's required playing service to the Chinese national team).<sup>131</sup> Ultimately, the Rockets paid Yao's former team a \$350,000 transfer fee for the ability to sign Yao to an NBA contract.<sup>132</sup> Unlike the MLB-NPB transfer agreement, where the acquiring team is bidding for the rights to negotiate with the player (which operates as the buy-out provision of the player's contract), the FIBA system allows for the two teams to directly negotiate with one another, a more efficient process than the first-price bidding.<sup>133</sup> The player transferred to the NBA is then free to negotiate a playing contract within the confines of the NBA CBA with the team possessing his rights.<sup>134</sup>

## B. Hockey<sup>135</sup>

### 1. Background

The National Hockey League ("NHL") workforce was predominantly North American until the 1972–73 season when a group of Swedish players became regular contributors to NHL teams.<sup>136</sup> The initial influx of

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exempts all "international players" from the requirement that "at least one (1) NBA Season has elapsed since the player's graduation from high school . . ." *Id.* at sec. 1. Instead, the international player must fulfill the 19-years old requirement, and "express his desire to be selected in the Draft in a writing received by the NBA at least sixty (60) days prior to such Draft." *Id.*

130. *Id.* at sec. 5.

131. See Josh Tyrangiel, *The NBA's Center of Attention*, TIME, Feb. 10, 2003, at 68, (explaining Chinese officials' involvement in Yao's move to the NBA).

132. *Id.*

133. See discussion *supra* Part IV, Section A (discussing FIBA's player transfer process and associated regulations).

134. NBA CBA, *supra* note 129, at sec. 7.

135. At the time this paper was written, the NHL and the International Ice Hockey Federation ("IIHF") had agreed to open their existing player transfer agreement in an attempt to renegotiate the terms.

136. INT'L ICE HOCKEY FED'N, IIHF STUDY ON EUROPEANS GOING TO NORTH AM. 5

European players was limited to Swedes and Finns for approximately fifteen years until the fall of the Iron Curtain, when Russian, Czech, and eventually Slovak players began to migrate to the NHL.<sup>137</sup> In the 2007–08 season, over thirty-three percent of players who appeared on an NHL roster hailed from outside of North America.<sup>138</sup>

Because modern hockey has a global labor market, it is critical for international hockey to have a transfer agreement in place to regulate and control the flow of players across international leagues. The NHL, the National Hockey League Players' Association ("NHLPA"), and the International Ice Hockey Federation ("IIHF") and its member hockey associations reached their first Player Transfer Agreement in 2001.<sup>139</sup> Covering the 2001-04 seasons, this agreement regulated the transfer of players from one national league to another, although this transfer happened primarily when players moved from non-North American teams to teams within the NHL.<sup>140</sup> The agreement provided that an NHL team would compensate its European counterpart whenever a European player was signed.<sup>141</sup> This arrangement led to NHL teams paying European teams \$28.8 million for the right to sign 185 players during the covered term.<sup>142</sup> This deal was followed by a two-year agreement that began after the conclusion of the 2004-05 NHL lockout.<sup>143</sup> Notably, however, the Russian Ice Hockey Federation opted not to participate in the second agreement due to its dissatisfaction with the financial compensation owed by the NHL team upon signing the player, limitations on the number of players that could be signed, and the deadline for signing such players.<sup>144</sup> This two-year deal was followed by an agreement that again excluded the Russian Federation and was scheduled to be in effect over the 2007-11 seasons.<sup>145</sup> However, the European nations exercised a contractual right to re-open the deal after the 2007-08 season.<sup>146</sup> As of this writing, no new agreement has

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(2006), available at [http://www.iihf.com/fileadmin/user\\_upload/PDF/IIHF\\_Study.pdf](http://www.iihf.com/fileadmin/user_upload/PDF/IIHF_Study.pdf) [hereinafter IIHF STUDY].

137. *Id.*

138. NHL International, *supra* note 2.

139. IIHF, Zherdev Last Player to Sign Under Expiring IIHF-NHL-NHLPA Deal, <http://www.iihf.com/news/iihfr4003.htm> (last visited Oct. 6, 2009).

140. Jeffrey P. Gleason, Comment, *From Russia with Love: The Legal Repercussions of the Recruitment and Contracting of Foreign Players in the National Hockey League*, 56 BUFF. L. REV. 599, 604 (2008).

141. *Id.*

142. *Id.*

143. *Id.* at 605.

144. *Id.*

145. Canadian Press, Six Countries Ratify IIHF Agreement, July 13, 2007, [http://www.tsn.ca/nhl/news\\_story/?ID=213424&hubname=nhl](http://www.tsn.ca/nhl/news_story/?ID=213424&hubname=nhl).

146. Int'l Ice Hockey Fed'n, IIHF-NHL Transfer Agreement Re-opened, Dec. 13, 2007, <http://www.iihf.com>.

been reached. While there have been no negotiations of late with the Russian Federation,<sup>147</sup> the other European nations are still in talks with the NHL.<sup>148</sup>

## 2. Problems with the Previous Transfer Agreement

The initial IIHF Player Transfer Agreement, along with the NHL-NHLPA Collective Bargaining Agreement (“NHL-NHLPA CBA”), governed the global movement of players, with the specific intention of compensating non-NHL teams when their star players left for the riches of the NHL. Players who were not currently under contract with an IIHF team were free to sign with any NHL team that they wished (or any other team for that matter).<sup>149</sup> If however, an NHL team drafted and signed a player while that player was under contract with an IIHF team (or while an IIHF team held the player’s rights) from a federation that had signed the Player Transfer Agreement, the NHL paid that country’s governing body a fee of about \$200,000 in exchange for that player being free to leave his contract and come to the NHL.<sup>150</sup> This was in addition to the value of the playing contract that the player ultimately signed with the NHL club.<sup>151</sup>

For many European nations, and for the Russian Federation in

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147. Jeff Klein & Stu Hackel, *Chiding N.H.L. for Not Committing to 2014 Games*, N.Y. TIMES, Feb. 15, 2009, at SP8.

148. Int’l Ice Hockey Fed’n, *Global Agreement Coming Closer*, Oct. 1, 2008, [http://www.iihf.com/home-of-hockey/news/news-singleview/article/global-agreement-coming-closer.html?tx\\_ttnews%5BbackPid%5D=1&cHash=e7ce908d1d](http://www.iihf.com/home-of-hockey/news/news-singleview/article/global-agreement-coming-closer.html?tx_ttnews%5BbackPid%5D=1&cHash=e7ce908d1d) [hereinafter *Global Agreement Coming Closer*]. However, there is little optimism that a deal is forthcoming in the near future. Peter Gudmundson, managing director of the Swedish Hockey League, stated, “I don’t think there will be a new transfer agreement now. I don’t know if there will be an agreement in the future. If there will be an agreement in the future, I think it will take some years.” Allan Hougaard, *IIHF Transfer Agreement Falls Apart After Czechs Opt Not to Extend Deal*, THE HOCKEY NEWS, May 1, 2008, <http://www.thehockeynews.com/articles/15728-IIHF-transfer-agreement-falls-apart-after-Czechs-opt-not-to-extend-deal.html>.

149. *See* Int’l Ice Hockey Fed’n, *Life Without a Transfer Deal*, June 16, 2008, <http://www.iihf.com/home-of-hockey/news/news-singleview/browse/2/article/life-without-a-transfer-deal.html?> (explaining how NHL teams may acquire “free-agent” players from Europe) [hereinafter *Life Without a Transfer Deal*].

150. *Id.*

151. Unlike the NBA, which requires that international players be 19 years old before being permitted in the draft, NBA Collective Bargaining Agreement, *supra* note 129, the NHL-NHLPA CBA only stipulates that “[a]ll Players age 18 or older are eligible for claim in the Entry Draft . . .” where “‘age 18’ means a [p]layer reaching his eighteenth birthday between January 1 next preceding the Entry Draft and September 15 next following the Entry Draft, both dates included . . .” COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS’ ASSOCIATION, ART. 8, SECS. 4, 10, July 22, 2005, available at <http://www.nhl.com/cba/2005-CBA.pdf> [hereinafter *NHL-NHLPA CBA*].

particular, the problem with the previous system was the perceived inadequacy of the payment for players. The \$200,000 fee was deemed insufficient to compensate the former club for the loss of talented star players such as Evgeni Malkin and Alexander Ovechkin.<sup>152</sup> Russian Ice Hockey Federation president Vladislav Tretiak stated, “Russian teams would rather lose players to the NHL for nothing than sign a contract that pays them what they consider a disrespectful amount of money . . . .”<sup>153</sup> Russia did not sign either the 2005-07 or 2007-11 IIHF-NHL Player Transfer Agreements. As a result, the NHL, the Russian Federation, and the players were not bound by the terms of the Player Transfer Agreement when a Russian player was drafted by an NHL team.<sup>154</sup> When star players Malkin (second overall pick in the 2004 NHL Draft) and Ovechkin (first overall pick in the 2004 NHL Draft) joined the NHL, their former teams did not receive any compensation because no agreement existed.<sup>155</sup> The lack of Russian participation in the Player Transfer Agreement signaled a problem that is the complete opposite of that faced by NPB and MLB.<sup>156</sup> In hockey, the transferee team receives too little compensation.

Though the controversy centers primarily around compensation, the European federations have other issues surrounding player transfer agreements. First, the fact that many players leave the European leagues and languish in North American minor leagues without ever making it to the NHL indicates that NHL clubs have been stockpiling young European players in their minor league systems.<sup>157</sup> In the 2007 – 08 season, there were fifty-nine European players who signed with NHL teams: six played in the NHL that season, seven were returned to their European teams, and forty-six played in North American minor leagues.<sup>158</sup> One underlying reason for this stockpiling is a clause in the 2005 NHL-NHLPA CBA that

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152. See Gennady Fyodorov, *Russians Ready to Say “Nyet” to NHL Transfer Deal*, REUTERS, May 8, 2007, <http://www.reuters.com/article/sportsNews/idUSL088285920070508> (explaining the IIHF rejected a new transfer agreement with the NHL because it felt its teams were not being properly compensated when players left for the NHL).

153. Gleason, *supra* note 140, at 606 (citing NHL.com, *Russians Turn Down Transfer Agreement, Club Teams Want More Respect*, May 9, 2007, <http://www.nhl.com/nhl/app?articleid=305462&page=NewsPage&service=page>).

154. See John Dellapina, *Ranger Pick is Russian Over*, N.Y. DAILY NEWS, June 24, 2007, at 63 (discussing how the New York Rangers worked to draft a top Russian player).

155. See Fyodorov, *supra* note 152 (discussing the Russian Ice Hockey Federation’s response to Malkin and Ovechkin’s transfers).

156. See discussion *supra* Part III (discussing transfers between NPB and MLB).

157. See Int’l Ice Hockey Fed’n, Q & A with René Fasel, Dec. 17, 2007, <http://www.iihf.com/home-of-hockey/news/news-singleview/article/q-a-with-rene-fasel.html> (noting that NHL teams sign many European players before they are ready to play in the NHL) [hereinafter Q & A with René Fasel].

158. *Id.*

requires players to be signed by June 1 of the calendar year following the year in which they were drafted.<sup>159</sup> The European federations believe that this system has a deleterious effect on player development as young players leaving their home environments prematurely may never reach their potential.<sup>160</sup> In addition, the European teams lose the services of young talented players who could become attractions in their home countries instead of playing in North American minor leagues for a few seasons.<sup>161</sup> The 2007-11 Player Transfer Agreement requires that a player under the age of twenty, who is under contract with an IIHF team, be offered back to his European team; the European federations would like to increase this age requirement to twenty-two.<sup>162</sup>

The second concern for the European federations involves the transfer deadline for players to sign with NHL teams.<sup>163</sup> The European teams found it difficult to replace players who went to the NHL for the upcoming season due to the fifteenth of June deadline that existed under the previous agreement; thus, they would prefer an earlier deadline that allows them ample time to find a replacement.<sup>164</sup>

The third issue for the European federations is related to compensation.<sup>165</sup> Transfer fees under the previous agreements were paid in American dollars, but the decline of the dollar against the Euro and other European currencies means that the \$200,000 fees were worth substantially less in 2007 than they were in 2005.<sup>166</sup> Given these concerns, the European federations are in search of corrective measures.<sup>167</sup>

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159. NHL-NHLPA CBA, *supra* note 151, at art. 8, sec. 6. This is a change from the previous agreement where the NHL team had the right to the player so long as he played in Europe. See CBA BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION, ART. 8, SEC.6(c)(1997). Thus, under the previous NHL-NHLPA CBA there was less incentive to sign young European players to contracts because the NHL teams retained their rights for an extended period of time, allowing the NHL team to follow a player's development and sign him to a contract only if he was deemed a true prospect.

160. Q & A with René Fasel, *supra* note 157.

161. See *Id.* (discussing the problems relating to European players playing in North American minor leagues in large numbers).

162. First round draft picks would be exempted from this requirement. See Int'l Ice Hockey Fed'n, NHL/NHLPA Responsive to IIHF Concerns About Too Many Young European Players Going to Minor Leagues, Jan. 17, 2008, <http://www.iihf.com> (discussing how the NHL, NHLPA, and IIHF are trying to alleviate IIHF concerns about the number of European players playing for NHL minor league teams).

163. Q & A with René Fasel, *supra* note 157.

164. *Id.*

165. *Id.*

166. *Id.* The dollar declined in value by approximately one-third from 2002 – 07, though it has been resurgent recently. Peter Gumbel, *Why Europe Should Stop Whining*, CNNMONEY.COM, Dec. 7, 2007, [http://money.cnn.com/2007/11/15/magazines/fortune/gumbel\\_euro.fortune/index.htm](http://money.cnn.com/2007/11/15/magazines/fortune/gumbel_euro.fortune/index.htm).

167. *Id.*

### 3. Implications of the Absence of a Player Transfer Agreement

Fifty-one Russians played in the NHL in the 2005-06 season while the rights to forty-one Russian players were transferred to NHL teams under the 2001 – 04 Player Transfer Agreement.<sup>168</sup> In addition, thirteen Russian players signed contracts with NHL teams under the 2005-07 Player Transfer Agreement. However, the exclusion of the Russian Federation from the 2005-07 agreement made these transfers ‘free’ as NHL teams paid no compensation to their Russian counterparts for signing their players. Under the agreement, NHL teams would have been required to pay \$2.6 million in fees.<sup>169</sup> The expiration of the most recent Player Transfer Agreement means all European hockey teams now face the potential loss of their players to NHL teams without compensation.<sup>170</sup> If NHL teams were to sign fifty-nine European players, as they did in the 2007-08 season,<sup>171</sup> they would save \$11.8 million.<sup>172</sup>

There is also the possibility of the unregulated landscape leading to a lack of mutual respect of contracts. Such behavior may lead to teams signing (or “stealing”) players who have valid and binding contracts with other teams.<sup>173</sup> This has already occurred with a handful of players who signed with Russian teams despite having valid contracts with NHL teams. Most notably, Alexander Radulov of the NHL’s Nashville Predators signed a deal with Salavat Yulayev Ufa of the Russian Kontinental Hockey League (“KHL”) despite the fact that his contract with Nashville had not expired.<sup>174</sup> An IIHF investigation found the existence of a valid contract with Nashville but also determined that the IIHF did not have the power to sanction Radulov from playing hockey in a domestic league due to its bylaws and the absence of a valid player transfer agreement between the NHL and the Russian Federation.<sup>175</sup>

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168. Gleason, *supra* note 140, at 605 (citing IIHF STUDY, *supra* note 136 and Int’l Ice Hockey Fed’n, IIHF-NHL Player Transfer Agreement Involving Six Euro Countries, <http://www.iihf.com/news/iihfpr8405.htm> (last visited Oct. 21, 2006)).

169. Gleason, *supra* note 140, at n.42 (citing NHL.com, *Russians Turn Down Transfer Agreement, Club Teams Want More Respect*, May 9, 2007, <http://www.nhl.com/nhl/app?articleid=305462&page=NewsPage&service=page>). This figure is calculated by multiplying the number of players signed (thirteen) by the \$200,000 fee due under the 2006-07 Player Transfer Agreement.

170. See Q & A with René Fasel, *supra* note 157 (exploring the benefits and risks of re-opening negotiations for a Player Transfer Agreement).

171. *Id.*

172. Fifty-nine players at \$200,000 per player.

173. See Global Agreement Coming Closer, *supra* note 148 (discussing the investigation of Alexander Radulov who signed with a Russian team while under contract with an NHL team).

174. *Id.*

175. *Id.*

While the Russian Federation would prefer a system similar to that in international soccer that would require the NHL teams to negotiate directly with Russian teams over the terms of player transfers, the NHL has understandably balked at such a request.<sup>176</sup> The NHL-NHLPA CBA prohibits NHL teams from negotiating directly with European clubs and prevents circumvention of this clause through threats of severe penalties, including significant fines and loss of draft picks.<sup>177</sup> Any prolonged period without a Player Transfer Agreement could impact the number of European players selected in the NHL entry draft, with NHL teams reluctant to waste valuable draft picks on players who they may be unable to sign. This scenario has already manifested itself with Russian players: only fifteen were selected in the 2006 NHL entry draft and nine in both the 2007 and 2008 versions, compared with forty-four in 2000.<sup>178</sup>

The NHL and its teams, the KHL and other European leagues, the various European federations, and the players themselves will all feel the long-term impact of a period without a player transfer agreement. Although NHL teams are realizing the savings of a free transfer system in the near term, the long-term costs could be troublesome. If the migration of talented European players to the NHL slows dramatically—as has already happened with Russians—the drop-off in talent may be reflected in lower quality of play. This drop in talent, in turn, could have a negative impact on league revenues, as fans might find NHL hockey less entertaining. Nonetheless, if the most talented Europeans continue to pursue their dreams of playing in the top hockey league in the world and securing the larger contracts that come with it, then this drop in revenues is unlikely to occur. Conversely, while the KHL and other European leagues would certainly lose out on the compensation received when their top players are lost, they could see an increase in their overall quality of play as more players choose to stay at home. The increased quality of play would make the sport more attractive to consumers and revenues would be expected to increase. This is likely to be of some benefit to the KHL as it

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176. See *Life Without a Transfer Deal*, *supra* note 149 (describing the Russian Federation's concerns with the Player Transfer Agreement); See also Eric McEriain, *Russian Hockey Plans a Resurgence*, SPORTING NEWS, Feb. 6, 2008, <http://www.sportingnews.com/yourturn/viewtopic.php?t=347960> (explaining the Russian Federation's preference for a player transfer system similar to that used in international soccer leagues).

177. *Life Without a Transfer Deal*, *supra* note 149.

178. Simon Richard, *2008 Prospects: Nikita Filatov*, HOCKEY'S FUTURE, Jan. 4, 2008, [http://www.hockeysfuture.com/articles/10114/2008\\_prospects\\_nikita\\_filatov/](http://www.hockeysfuture.com/articles/10114/2008_prospects_nikita_filatov/); See also Eugene Belashchenko, *2008 Russian Draft Review*, HOCKEY'S FUTURE, July 11, 2008, [http://www.hockeysfuture.com/articles/10485/russian2008\\_draft\\_review/](http://www.hockeysfuture.com/articles/10485/russian2008_draft_review/) (evaluating the 2008 NHL Russian draft picks).



attempts to grow.<sup>179</sup> Ultimately, the KHL could compete with the NHL to become the top hockey league in the world, if it is successful in the long-term in developing young Russian players, keeping them at home, and attracting talented European players. Not surprisingly, the dispute between the NHL, KHL, and the Russian Federation over the Player Transfer Agreement is most likely about each league's desire to create an increasingly global product and realize the attendant revenue increase.

Ice hockey is very popular in many European countries, but this popularity is currently monetized by the domestic professional hockey leagues in these nations rather than by the NHL or KHL. Though the NHL has long attempted to tap the European market, it has increased these efforts substantially in recent years. In addition to playing regular season games in select cities, the NHL has established the Victoria Cup preseason competition and participates in a marketing partnership with the European Champions Hockey League.<sup>180</sup> These efforts could be a prelude to the NHL investing in the Champions Hockey League and eventually placing franchises in Europe. Though still in its infancy, the KHL is similarly eyeing a future European expansion.<sup>181</sup>

Despite all of this activity, if a player transfer agreement does not come to fruition, the players themselves could be the biggest long-term losers. Though salaries could increase due to the presence of multiple bidders for their services, players may suffer. In the absence of a player transfer agreement that establishes a smooth bidding process, it could be far more difficult for them to be able to play for the team and in the league that they desire. In addition, there is currently no agreement for the NHL to allow its players to participate in the 2014 Olympics in Sochi, Russia, as they have done since the Nagano Games in 1998. The Russian Federation would obviously greatly prefer that the best players be available to participate in what will be one of the showcase events of the Games. However, given the tenuous relationship between the NHL, KHL, and the

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179. A replacement for the Russian Super League, the KHL launched as a twenty-four-team league in 2008-09 with the support of Gazprom and other state-controlled companies that invested a reported \$100 million at the behest of President Vladimir Putin. Putin views the league as a matter of national pride. Teams play a 56-game schedule and have a \$24.5 million salary cap, excluding foreign players (of whom there are ninety-seven throughout the KHL). Each team is limited to five foreigners, who are frequently given free use of cars and apartments and whose salaries are paid in U.S. dollars that are subject only to a thirteen percent Russian tax. See Rick Westhead, *Does Russia's Kontinental League Threaten NHL?*, TORONTO STAR, Dec. 14, 2008, <http://www.thestar.com/Sports/Hockey/article/553524> (discussing the first year of the KHL).

180. *NHL Strikes Marketing Alliance with Champions League Hockey*, NAT'L POST, Nov. 25, 1998, <http://www.nationalpost.com/sports/story.html?id=991139>.

181. *Russian League Takes Action to Boost Clubs*, SPORTS BUS. J., Feb. 16, 2009, <http://www.sportsbusinessjournal.com/article/61559>.

Russian Federation, NHL player participation in the 2014 Olympic tournament is anything but certain. It is clear that a ‘Cold War’ in international hockey leads to multilateral losses in the long-term and must be remedied.

C. *Union of European Football Associations (UEFA)*

There are few similarities, as well as numerous differences, between the European soccer transfer system and the baseball posting system.<sup>182</sup> The transfer of European soccer players from one team to another closely resembles a free market system and is more efficient than any of the aforementioned systems. In the Union of European Football Associations (“UEFA”), the transferor<sup>183</sup> team is permitted to conduct a direct business-to-business negotiation with the transferee team.<sup>184</sup> Although there are restrictions governing which players may be transferred, the fact that more than one transferor team can solicit the services of the individual player allows for the possibility of an ascending price auction.<sup>185</sup>

In similar fashion to the MLB-NPB posting process, following the conclusion of the playing season, individual teams produce a list of players who are available for transfer to other clubs.<sup>186</sup> These players are currently under contract to the listing club, and, without being transferred, would be forced to play out the duration of their contracts with their current club.<sup>187</sup> Once the player is eligible to be transferred (i.e., his name has been listed by his current club), and there is another team interested in acquiring the player, then the two teams can begin negotiating the transfer price of the player.<sup>188</sup> The final transfer value is determined based on these direct negotiations.<sup>189</sup>

An interesting component of the UEFA system also addresses the apprehension felt by the Europeans under the former NHL-IIHF agreement: compensation for the training of younger players. A specific formula is in

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182. Rockerbie, *supra* note 3.

183. In this discussion, the transferor team is the team soliciting the transferee team’s player.

184. *Id.* at 7.

185. *Id.*

186. Thomas M. Schiera, *Balancing Act: Will the European Commission Allow European Football to Reestablish the Competitive Balance that It Helped Destroy?*, 32 BROOK. J. INT’L L. 709, 713 (2007).

187. *Id.* at 714. Before the decision in *Union Royale Belge des Societes de Football Assoc. ASBL v. Bosman*, Case C-415/93, 1995 I-4921, was handed down by the European Court of Justice, players whose contracts had expired were also subject to the restrictions of the transfer system. *Id.* The Court invalidated the transfer system as it applied to players whose contracts with the listing team had already expired. *Id.* at 716.

188. *Id.* at 713-14.

189. Rockerbie, *supra* note 3.

place to determine extra compensation paid to a transferee team when a player under the age of twenty-three is being transferred.<sup>190</sup> This formulaic compensation only applies to the transfer of players under this age threshold, but the system is in place in order to compensate the typically lower-revenue clubs for the development, and subsequent loss, of star players transferring to typically higher-revenue teams.<sup>191</sup> The loss of promising young players, who tend to be less expensive than older players of comparable skill, especially if they have not yet attained free agency, can promote competitive imbalance where the transferee teams are typically smaller, lower-revenue clubs. Thus, the extra payment for players under age twenty-three seeks to remedy the perceived imbalance that could result from these transfers of players.

In the absence of the additional payment for younger players, teams are free to negotiate whatever transfer fee they can for their players. There are currently two windows during the year that teams can transfer players: one window during the summer and another during the middle of the playing season.<sup>192</sup> Historically, teams assigned a transfer value to each of the players who had been listed for transfer.<sup>193</sup> Unlike the baseball transfer system, where the bidding teams must bid in secrecy in a sealed bid auction, UEFA's system allows for more full market participation, because each of the interested teams will know the transfer price attached to the player by the listing team. Football teams can negotiate with an unlimited number of other teams over the transfer fee, and the result is typically a winning bid that is minimally above the next highest bid.<sup>194</sup> The inefficiencies of the MLB system, where, for example, the Red Sox bid almost \$12 million more than the next highest bidder for Matsuzaka, would never occur in the UEFA system; the winner would theoretically bid just \$1 more than the next highest bidder.

Much like the NBA system, the transferee team and the individual player are the beneficiaries of this type of transfer system. Though the transferee team loses the services of a player who has marketable skills, it nonetheless receives financial compensation for this loss. Given the alternative—that the player leaves via free agency after the expiration of his contract without any compensation being paid to his former team—

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190. Schiera, *supra* note 186, at 717.

191. *Id.* Furthermore, should a player under the age of twenty-three be transferred before his contract has been completed, an additional payment is to be made. The rules require that five percent of the transfer fee paid to the listing team be distributed among the teams for whom the player was a member between his twelfth and twenty-third birthdays. *Id.* at 718.

192. *Id.* at 717.

193. James G. Irving, *Red Card: The Battle over European Football's Transfer System*, 56 U. MIAMI L. REV. 667, 669 (2002).

194. Rockerbie, *supra* note 3.

receipt of payment for the transfer of the player is a positive outcome, even if it is not optimal. For the individual player, the transfer system is an excellent lever to increase financial outcomes. In the absence of the transfer mechanism (and free agency), a player whose rights were initially acquired by a small market team would be subject to the budgetary restraints of that team for his entire career. The transfer system almost surely guarantees that a player will be moving to the team that most highly values his services; often, this team will be larger and more highly monetized, with deeper pockets to pay its players.

There is also an argument to be made that the transfer system is better for the transferor team (the team paying the transfer fee) as well. If the transferor team is a large revenue club that is not particularly adept at developing its talent from within, and instead focuses its efforts on placing the highest quality team on the field at any given moment, then the transferor team may view the payment of the transfer fee as simply a cost of acquiring talent. Although signing a player as a twelve-year old with potential is less expensive than signing a twenty-three-year old superstar, for a large revenue team without the skill to develop that twelve-year old, payment of the transfer fee may be the best option for fielding the best team.

## V. ALTERNATIVES TO THE CURRENT POSTING PROCESS

### A. *Worldwide Draft*

One alternative to the current posting process between NPB and MLB is to have a worldwide draft, an option that MLB is likely to pursue in the next collective bargaining negotiations with MLBPA, as the 2011 expiration of the current agreement approaches.<sup>195</sup> In both the NBA and NHL, an individual team is allowed to draft players from any country in the world, so long as those players meet the criteria of that league's collective bargaining agreement (i.e., minimum age requirements in both leagues).<sup>196</sup> For MLB teams, however, the pool of players from which the teams can draft is confined to those players who are American citizens (or from American territories), Canadian citizens, or anyone who has attended either

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

196. See discussion *supra* Part IV. See also NHL COLLECTIVE BARGAINING AGREEMENT, SEC. 8.4(a) (2005), <http://www.nhl.com/cba/2005-CBA.pdf> (requiring that players eligible for the draft be at least 18 years of age or older); NBA COLLECTIVE BARGAINING AGREEMENT, ARTICLE X, SEC. 1, [http://www.nbpa.com/cba\\_articles/article-X.php](http://www.nbpa.com/cba_articles/article-X.php) (stipulating that the player must be at least 19 years old and have met certain educational criteria related to high school or college).

high school or college in the United States.<sup>197</sup> Because the MLB teams are not allowed to draft foreign players, the resulting framework is a collection of individual agreements with foreign federations regarding the way in which foreign players are transferred to MLB teams. In most instances, MLB teams are free to sign players from foreign countries in a way that very closely approximates a free transfer system. These transfers, though, are subject to the agreements that MLB has in place with the governing federations, as is the case with both Japan and Korea.<sup>198</sup>

Because of the suboptimality of the current posting process for the transfer of players from NPB to MLB, there is room for improvement in this system. A worldwide draft would change the economics of global talent acquisition, though it is unclear exactly how this would occur.<sup>199</sup> Proponents of a worldwide draft believe that it would decrease prices paid for high-quality international players and reduce signing bonuses by providing MLB teams with leverage, since the clubs would have exclusive negotiating rights with the player, rather than allowing the player to engage the clubs in a competitive bidding situation.<sup>200</sup> Those opposed to a worldwide draft believe that it would increase player development costs by eliminating the possibility of signing a large number of players to low cost contracts and would disincentivize teams from scouting internationally, since the players they develop would be subject to selection by another team.<sup>201</sup>

The reality is that both parties are correct to some degree. Prices for high-end talent would likely fall due to the exclusive nature of the drafting rights, but the finite (and likely decreased) number of draft rounds would

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197. MLB.com, First Year Player Draft: Official Rules, <http://mlb.mlb.com/mlb/draftday/rules.jsp> (last visited Oct. 8, 2009) [*hereinafter* First Year Player Draft].

198. See Gould, *supra* note 15, at 290 (discussing the negotiated protocol between the U.S. and Japan). See also Barry M. Bloom, *Tazawa Unlikely to Alter Asian Market*, MLB.COM, Nov. 8, 2008, [http://mlb.mlb.com/news/article.jsp?ymd=20081105&content\\_id=3665291&vkey=hotstove2008&fext=.jsp](http://mlb.mlb.com/news/article.jsp?ymd=20081105&content_id=3665291&vkey=hotstove2008&fext=.jsp) (explaining the Japanese and Korean federation player transfer agreements).

199. Bill King, *Global Draft Building Army of Supporters*, SPORTS BUS. J., Jan. 3, 2000, <http://www.sportsbusinessjournal.com/article/15318>.

200. *Id.* The 2008 MLB international signing bonus period from July 2-August 31, 2008 resulted in five of the top ten all-time highest bonuses paid to international players, including the three most lucrative deals ever bestowed—the richest being a \$4.25 million bonus given by the Oakland A's to sixteen-year old Dominican pitcher Michael Inoa. Baseball Am., *Prospects: International Affairs: Top 20 2008 International Signing Period Bonuses*, Sept. 24, 2008, <http://www.baseballamerica.com/online/prospects/international-affairs/2008/266917.html>.

201. King, *supra* note 199. One MLB team's scouting director stated, "Right now, you can sign 10 players for \$2,000 each and, with development, one or two might make it to the big leagues[.] You make what by comparison are modest investments in scouting and development and it pays off. I'm not sure I like a system that takes that away." *Id.*

still allow teams to mine baseball-rich countries for undrafted talent at a reasonable price.<sup>202</sup> A worldwide draft would also eliminate a great deal of the malfeasance surrounding the signing bonuses paid to high-end international players.<sup>203</sup> In fact, the FBI has been investigating whether scouts and team executives have skimmed money off the top of the bonuses paid to Latin American prospects.<sup>204</sup>

A worldwide draft, or at least a United States and Japan draft, would partially alleviate the suboptimality of the current system by allowing MLB teams to assign a quasi-market value to Japanese players whose services were desired by MLB teams. By drafting the rights to NPB players in a draft that includes American players as well, MLB teams would be able to assign a value to NPB players that approximated the players' market value by drafting more valuable players in earlier rounds and less desirable players in later rounds.

The movement of players between NPB and MLB would increase as a result of a worldwide draft because more players would move to MLB, or the MLB minor leagues, than under the current system. By allowing more players to move from one league to another, the artificial premium currently paid for Japanese players under the posting process would be reduced as more and more NPB players moved across the Pacific. MLB teams, instead of having to pay upwards of \$50 million just for the chance to negotiate with a NPB player, would instead be able to draft that player, which would constitute a more efficient and lower-cost method of acquiring the rights.<sup>205</sup>

A draft where all thirty MLB teams participate against one another to acquire the rights to the best talent allows clubs to understand the markets

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202. For example, according to a high-ranking MLB executive who spoke with Professor Rosner on the condition of anonymity, twenty-nine of the thirty teams currently operate developmental baseball academies in the Dominican Republic. Players can be signed to contracts at sixteen years of age, and each team has approximately thirty to thirty-five players in its academy at any one time. The average player is in the academy for between two and three years, and approximately 10% of the academy players make it to the MLB club's United States minor league system. Interview with Anonymous MLB Executive (July 17, 2008) (notes on file with Professor Rosner). Chris Kraul, *Finding Diamonds in the Rough*, L.A. TIMES, Jan. 28, 2008, at D3; Kat O'Brien, *In Dominican Republic, Baseball is a Way Out*, NEWSDAY, Feb. 28, 2009, <http://www.newsday.com/sports/in-dominican-republic-baseball-is-a-way-out-1.895448>.

203. Alan Schwarz, *Pressure Building for Draft of Players From Outside U.S.*, N.Y. TIMES, July 13, 2008, at Sports 4.

204. *Id.* Mike Arbuckle, then the Philadelphia Phillies' assistant general manager, stated, "The reality is, we're finding that there have been dollars not going to players—guys who used to get \$30,000 but are now getting reported bonuses of \$350,000 are actually getting \$75,000 and the rest is going to other places[.] The whole business down there, the F.B.I. and baseball have decided to take a hard look at it. And part of the response is, we eliminate a lot if we just put these guys into the draft. This is a way of cleaning it up." *Id.*

205. Ruckerbie, *supra* note 3.

for individual players more fully, because the system of drafting players is public and each team knows the relative values placed on players by the drafting teams.<sup>206</sup>

There are, however, several significant hurdles to overcome before such a system could be implemented, as both the MLBPA and the NPB owners would have concerns that need to be addressed. In exchange for

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206. However, the potential danger of expanding the draft to include Japan and Korea, and continuing to exclude the rest of the world is a concern. In 1989, MLB expanded its draft to include Puerto Rico. See Rafael Hermoso, *Baseball and Books*, N.Y. TIMES, Apr. 13, 2003, at Sports 1 (discussing historical barriers to entry in major league baseball experienced by many Puerto Ricans). Fifty-five Puerto Rican players were selected in the MLB Rule IV (entry) draft in 1989. *Id.* At the time, there were thirty-two Puerto Rican players in MLB and the island had a successful winter league. Baseball-Almanac, Major League Baseball Players by Birthplace During the 1989 Season, <http://www.baseball-almanac.com/players/birthplace.php?y=1989> (last visited Oct. 7, 2009). In 2008, twenty-six Puerto Rican players were selected in the draft. MLB.com, Highlights, Details of Major League Baseball's 2008 First-Year Player Draft announced, June 12, 2008, [http://tampabay.rays.mlb.com/content/printer\\_friendly/mlb/y2008/m06/d12/c2900909.jsp](http://tampabay.rays.mlb.com/content/printer_friendly/mlb/y2008/m06/d12/c2900909.jsp). That same year, the number of Puerto Rican players in MLB dropped to twenty-nine and the winter league had to suspend operations after playing for sixty-nine consecutive years. Jesse Sanchez, *Baseball Academy a Hit in Puerto Rico*, MLB.COM, Nov. 29, 2008, [http://mlb.mlb.com/news/article.jsp?ymd=20081126&content\\_id=3693851&vkey=news\\_mlb&fext=.jsp&c\\_id=mlb&partnerId=rss\\_mlb](http://mlb.mlb.com/news/article.jsp?ymd=20081126&content_id=3693851&vkey=news_mlb&fext=.jsp&c_id=mlb&partnerId=rss_mlb). Puerto Rican baseball officials attribute the demise of baseball on the island in part to its inclusion in the MLB draft. Hermoso, *supra* note 206. MLB clubs pay less attention to Puerto Rico and deploy fewer scouts to mine the island for hidden talent, as any player found cannot be signed; rather, the MLB team must draft the player. Schwarz, *supra* note 203. Since the MLB team has only a one in thirty chance of doing so, the odds that the team will reap the rewards of its scouting expertise are minimal. *Id.* Thus, the clubs focus their attention elsewhere—the other Caribbean nations and Latin America—where they are able to sign any discovered talent and fully capitalize on their scouting expertise. *Id.*

Since including players in a draft reduces the compensation that they receive, individuals residing in a country that is included in a worldwide draft are disincentivized financially from playing the sport. This could lead to decreased participation in the sport in that country. A goal of any sports league should be to increase participation in the sport, so including players in a draft could be counterproductive. Nonetheless, the relative impact of including a country in a worldwide draft is decreased if the draft is truly global in nature; that is, every country in the world would be subject to the draft, without exception. The scouting impact would be eliminated, as MLB teams would deploy scouts to the countries where they are most likely to find talented players. Other caveats regarding the implementation of a worldwide draft involve the creation of a system that provides for the verifiable documentation of player ages to ensure they are indeed their stated age and the development of a training protocol for the two-year period of time between the ages of 16 (when international players can currently be signed) and 18 (when they would be eligible for selection in a worldwide draft). This is especially important because there is no organized high school baseball in many Latin American countries. Gabrielle Paese, *Baseball School Aims To Place More Puerto Rican Players In Major Leagues*, P. R. HERALD, Dec. 13, 2002, <http://www.puertorico-herald.org/issues/2002/vol6n50/PRSportsBeat0650-en.html>. By way of contrast, baseball is played in Japanese high schools, similar to the United States. Jim Allen's Japanese Baseball Page, <http://www2.gol.com/users/jallen/jimball.html> (last visited Oct. 13, 2009).

subjecting a larger number of future union members to a draft system (where an MLB team acquires the rights to that player for at least six years), the MLBPA would likely want the number of rounds of the draft to be shortened significantly from its current maximum length of 50 rounds. This would allow the MLBPA to get more prospective players inked to contracts with teams that had demonstrated needs for that player, instead of the player being forced to sign with the team who drafted his rights; or, in the alternative, not sign with the drafting team and be eligible for the draft in the following year.<sup>207</sup>

Even more significant are the concerns of the NPB team owners. Under the current posting process system, they are the constituency for whom the posting fee pays the greatest dividend; thus, the NPB owners are the group least likely to desire change from the status quo. While the short-term interests of NPB is arguably maximized when MLB teams pay posting fees for the rights to NPB players, an argument can be made that having NPB players eligible for the MLB Draft is in the long-term best interests of NPB. That is, subjecting NPB players to a worldwide draft in which MLB teams could draft the rights to Japanese players would almost surely guarantee long-term survival for NPB—even if only as an unofficial minor league for MLB. The focus of NPB, and many other professional leagues whose players would be subject to the MLB Draft, could shift to player development as a pseudo-minor league system. While NPB owners may be reluctant to move to this type of model, it could be their best long-term option.

Again, the leverage that MLB potentially has over NPB due to the Tazawa signing could provide NPB with the incentive necessary to change the system and accept a worldwide draft. If Tazawa's move has precedential impact on other young players and MLB teams, then MLB could have the leverage to negotiate the inclusion of Japanese players into a

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207. First Year Player Draft, *supra* note 197. There is evidence that the MLBPA and the MLB owners have considered such a worldwide draft proposal before, but because there was not enough time to consider the proposal fully, the sides decided to shelve the issue. See MLB-MLBPA BASIC AGREEMENT, 2003-2006, ATTACHMENT 24 (WORLD-WIDE DRAFT) 202-03 (proposing a World-Wide Draft Subcommittee gather to take-up issues raised by the negotiated expansion). In this attachment, the consideration was to expand the First-Year Player Draft to "all players who are first entering Major League or Minor League baseball, regardless of the player's residence." *Id.* The proposal and agreement to consider the issue further mentions that the First Year Player Draft would be shortened to "at least 20" rounds and "no more than 38," a concession granted by management in order to draw more international players into the relevant player pool. *Id.* However, the joint committee hardly met in the face of MLB's decreased interest in the idea and it was barely discussed in the subsequent collective bargaining negotiations. Schwarz, *supra* note 203. For smaller-market clubs, who may not have the financial resources of their large market counterparts, having a worldwide draft could realistically increase the club's ability to compete for international players.



worldwide draft. The proposed trade off to this agreement could be an agreement by MLB not to sign other non-drafted Japanese amateurs and maintenance of the status quo vis-à-vis the posting agreement. Absent this leverage, it is likely to be very difficult to convince NPB to accept inclusion in a worldwide draft, despite the aforementioned arguments.

Undoubtedly, the long-term dilemma facing NPB is a difficult one: try to forestall the internationalization of the game and risk losing even more star players to MLB, or accept the globalization of the game as reality and preserve a meaningful role. Though unlikely to occur, the greatest risk for NPB is the possibility that it could lose its relevance following the continued loss of major talent to MLB. Unlike the Negro Leagues (which folded soon after integration led to most of the best black players moving to MLB), extinction is not as grave a risk for NPB because of the geographic boundaries separating the two leagues. After integration of American baseball, often the Negro League and MLB teams were competing in the same cities for the same fans, at a moment when the talent of MLB teams was far superior.<sup>208</sup> In the hypothetical situation of the best Japanese players moving *en masse* to MLB, NPB is protected by the Pacific Ocean. Although technological advancements allow Japanese fans to watch Japanese players who are playing in MLB, this does not mean that those same Japanese fans can see their favorite players in person. If for no other reason than ensuring the continuation of the culturally important performance of live professional baseball in Japan, NPB will still have a niche.

#### B. Flat Fee Paid by MLB to NPB

The presence of a strong Japanese professional baseball league is of great benefit to MLB. Beyond serving as a pool of playing talent for MLB clubs, NPB keeps the sport of baseball culturally relevant and popular in Japan. That which is good for baseball is good for MLB, especially in the ever-flattening global sports marketplace. The fact that the sport is ingrained into Japanese culture clearly makes the selling of American baseball in Japan a much easier task than it is in countries where the game does not have a fervent fan base. Just as the minor leagues serve a grassroots function for MLB within the United States, NPB allows fans to develop a passion for the sport and experience it in a way that is otherwise unavailable through the mere watching of televised games. It is easier to sell MLB—the top professional baseball league in the world—to a country that already has a strong interest in the sport. An NPB that is so weakened

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208. Rodney Fort and Joel Maxcy, *The Demise of African American Baseball Leagues: A Rival League Explanation*, 2 J. SPORTS ECON. 35, 44-45 (2001).

by player defections to America that fan interest in NPB dissipates is self-defeating for MLB, and the league must remain sensitive to this issue. To this end, it would make sense for MLB to pay NPB an annual fee to allow its players to be selected in the MLB Rule 4 draft. NPB could allocate this money amongst its teams however it wanted, with the desired result being that the teams reinvest the money back into player development budgets so as to maintain a high quality of play in the league. The annual fee paid by MLB could take several forms.<sup>209</sup> It could be a fixed amount, or based on the number and placement of the players selected in the MLB draft, or a combination of both. It may be difficult to convince the Japanese teams of the merits of this system because the corporate operating structure makes the owners less likely to reinvest these funds into the teams themselves and much more likely to extract the proceeds from the teams.<sup>210</sup>

*C. Per-Player Transfer Fee to be Negotiated by Individual Stakeholders*

A third way to address the suboptimality of the NPB-MLB posting process is to have the transferor and transferee teams negotiate directly with one another for the appropriate transfer fee, in a similar fashion to the current system in place in the NBA and UEFA. This system would ideally be layered upon a worldwide draft, such that the transferor team in MLB would have already drafted the rights to the individual player (giving the MLB team exclusive negotiating rights vis-à-vis other MLB teams) and would then engage in direct, face-to-face negotiations with the player's former team.

Unlike the posting process, where there is no direct negotiation between NPB and MLB teams involved in the player transfer, this system would allow the two teams to bargain over terms of the transfer fee. In strict financial terms, the benefactors of this proposed system would be MLB teams, because rather than overbidding for players as a result of the first-price-sealed-bid auction, an MLB team would only have to spend the precise value that an NPB team attached to the individual player in order to acquire the player's rights. In the example of Matsuzaka and the Red Sox, instead of offering a transfer fee that was \$12 million more than the next highest bidder, the Red Sox would only have had to spend \$1 more than the value which the Seibu Lions had attached to Matsuzaka.<sup>211</sup> There is no definitive evidence to prove that \$51.1 million, the price paid by the Red

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209. The payment should be made directly from MLB's Central Fund, so that each MLB team contributes an equal amount.

210. See discussion *supra* p. 29 (explaining that NPB teams are owned by large corporations usually more interested in maximizing short-term returns over long-term value).

211. Bloom, *supra* note 33.

Sox to negotiate with Matsuzaka, was the precise value assigned by Seibu to Matsuzaka. In fact, many commentators, prior to the revelation that the Red Sox had bid \$51.1 million to win the rights, had said the transfer fee would probably be between \$20-30 million.<sup>212</sup> There was little to no indication by any of the same commentators that a bid in the \$20-30 million range would have been unacceptable to the Seibu Lions; in fact, because Matsuzaka would have become a free agent after the 2008 season, the Lions wanted to ensure that they received some compensation for Matsuzaka and probably would have accepted a bid substantially lower than \$51.1 million. Had the Red Sox been able to directly negotiate with the Lions, after having drafted Matsuzaka's rights, the dollar value of the transfer fee would have more accurately represented the two sides' view of Matsuzaka's value. Instead of the Lions capturing the entire inefficiency of the posting process, the Red Sox could have reduced the inefficiencies within the transfer fee by bargaining directly with Seibu.

A potential concern regarding the implementation of the individually negotiated transfer fees is that the NPB team could dictate to which team the player is transferred by refusing to negotiate with certain MLB teams or declaring his price prospectively.<sup>213</sup> For example, an NPB team seeking to prevent its star pitcher from going anywhere but the Red Sox or Mets could effectively put information into the marketplace that teams other than the Red Sox or Mets should abstain from drafting the rights to the pitcher, because the only two teams with which the NPB team would negotiate are the Red Sox or Mets. From an economic standpoint, it is in the best interest of individual NPB teams, and the Japanese leagues as a whole, to have NPB players drafted exclusively by MLB teams with high payrolls. NPB and its teams likely would receive higher transfer fees from large-revenue teams like the Red Sox, Mets, and Yankees than from small-revenue clubs like the Tampa Bay Rays, Florida Marlins, Pittsburgh Pirates, or Kansas City Royals.<sup>214</sup> This unilateral power of NPB teams to

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212. Sackman, *supra* note 36; McAdam, *supra* note 54.

213. This tactic has been seen in the MLB Amateur Draft, whereby individual players sometimes disseminate information into the marketplace regarding their "signability"—namely, the amount it will take to sign the player. This raises competitive balance concerns because, traditionally, there has been a correlation between overall payroll and team performance. If the lower payroll teams draft first (as a result of the reverse order of final standing draft model used by MLB), and the best players are refusing to sign unless it is with a team that can meet their contract demands, this could lead to a situation where the best teams get the best new talent based solely on the fact that the best talent make contract demands that only the best teams can afford. This perverse result could have a direct impact on competitive balance within the league.

214. See Salaries Database, USA TODAY, <http://asp.usatoday.com/sports/baseball/salaries/totalpayroll.aspx?year=2007> (last visited Sept. 15, 2009)(highlighting the multi-million dollar payroll gap between large- and small-revenue MLB teams).

dictate the teams to which their players are transferred could seriously undermine the efficacy of the draft and individually negotiated transfer fees to promote an efficient marketplace for the exchange of player services.

Should the individual NPB team be able to effectively control where its players can be transferred, the NPB team may become unnecessarily powerful and there will be greater implications on competitive balance in the MLB. Smaller revenue MLB clubs, like the aforementioned Rays, Marlins, Pirates, or Royals will not benefit from the talents of NPB players in the same way that the larger revenue clubs could. The existence of the worldwide draft would be far more equitable in the distribution of talent across MLB teams, but this equity could be eviscerated if NPB teams (who have a direct financial incentive) strong arm negotiations so that only the large revenue teams have a realistic chance to sign NPB players.

#### *D. Per Player Transfer Fee; Uniform*

A fourth alternative to the current posting system is to have a transfer agreement that mandates a fixed, per-player transfer fee that is paid each time a player under contract with the NPB team is signed by an MLB club. A variation of this model was used by the NHL in its most recent Player Transfer Agreement with the European hockey federations (minus Russia)—for each player under contract that was signed by an NHL club, the transferee team received \$200,000.<sup>215</sup>

Whether or not this system contributed to the prevalence of international players in the NHL is uncertain, but one thing the uniform transfer fee certainly did was reduce the transaction costs of player movement to the NHL. Because all three parties knew that \$200,000 was the amount the transferee team would receive each time one of their players under contract signed a deal with an NHL club, there was no negotiating that needed to take place. This uniform transfer fee was not the most desirable option for the transferee team; however, it was preferable to the current system where there is the possibility of the transferee team receiving no compensation for the loss of its star players.<sup>216</sup>

The NHL team and transferred player both directly benefitted in instances where the \$200,000 fee represented less than market value for the transfer of the player. This was typically in instances where the player being transferred was an international star, or where the player demonstrated the potential to be an NHL star. It was also these instances

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215. Canadian Press, *supra* note 145.

216. This is currently the situation with Russian hockey teams, where the Russian Ice Hockey Federation has thus far refused to sign the current deal. *See* discussion *supra* pp. 50-55 (discussing the state of player transfer agreements, including with the Russian Federation).

where the transfer is suboptimal for the transferee team. The NHL team, however, captured the inefficiencies of this transaction because it did not have to pay the “true” transfer value of the player and could instead acquire the rights to the player for less than what they would have had to pay in an open marketplace.<sup>217</sup> If this system were applied to the NPB-MLB relationship, MLB teams would prefer the uniform transfer fee arrangement to both the current posting process and the individually negotiated transfer fee systems, because the uniform transfer fee system, like that used in the NHL, best allows the transferor team to protect its financial interests.

The individual players being transferred also prefer the uniform transfer fee to both the posting process and the individually negotiated transfer fee because it allows the player to capture more of his market value once the player and the transferor team begin contract negotiations. The value a team places on a player will be measured by the total amount of money that the team is willing to spend on the acquisition of the player (both transfer fee and eventual player contract), and if a team spends less than market value on the transfer fee, it follows that the team then has more money to spend on the eventual player contract. Matsuzaka was valued by the Red Sox at \$103.1 million, and if the Red Sox paid less than \$51.1 million on the transfer fee, there would have been more than \$52 million left to negotiate an actual contract with the player.<sup>218</sup> While Matsuzaka probably would not have captured his full \$103.1 million value under the uniform player transfer fee, it is reasonable to surmise that the contract the pitcher ultimately received would have represented more than the fifty percent of the pitcher’s overall value that he received under the existing system.

The clear loser under this framework is the transferee team. Teams will not sign players whose value is less than the uniform transfer fee, and will instead focus on players whose value is significantly greater than the predetermined transfer fee amount. While there would undoubtedly be an increase in the overall number of transfers from NPB teams to MLB teams, the overall value of the transfer fees would not approximate the value under the current system. Assuming that the NHL transfer fee of \$200,000 per player is adopted, it would take 250 player transfers for the Seibu Lions to get the same amount as they did under the Matsuzaka transfer!

In order for a uniform player transfer fee to be effective, the system must be implemented by all of the countries from which foreign players are

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217. Logically, the NHL team more often than not captures these inefficiencies—at the expense of the transferee team—because if an NHL team determines that a player’s transfer value is less than the uniform \$200K fee, the NHL team would not only abstain from paying the fee, the team would also probably abstain from drafting the player in the first place.

218. See *supra* text accompanying note 41 (discussing Matsuzaka’s share of the \$103.1 million the Red Sox paid in transfer and contract fees).

drawn. This has been a major issue faced by the IIHF and encountered in the implementation of the International Player Transfer Agreement. Because the Russian Federation was not party to the Agreement, the signing of players under contract with a Russian club by an NHL team did not require the payment of a transfer fee.<sup>219</sup> The major stumbling block preventing the signing of the agreement by the Russians was that the compensation for their star players like Alex Ovechkin and Evgeni Malkin fell woefully short of the players' actual value.

*E. Per Player Transfer Fee; Uniform with Classes of Players*

A fifth alternative to the posting process is to utilize the uniform per player transfer fee, but have several different levels of transfer fees based upon the varying degrees of a player's performance and skill set. Teams transferring star players would receive significantly more in transfer fees than would teams losing older, marginal players. Likewise, the transferor teams would have to pay premiums for star players, which is precisely what would happen in the open marketplace. Although this system is not optimal for the players being transferred, it does represent a middle point on the continuum between strictly uniform transfer fees and the current posting process.

Formation of this system would require input from both the NPB and MLB on the classification of a player, particularly if the amount of the transfer fee were dependent upon a classification of the individual player's skill level. First, a classification scheme would have to be created, with varying compensation figures attaching to the different types of players. For example, a star right-handed pitcher like Matsuzaka would have a higher transfer fee than an older utility infielder. Determining a player's classification, however, is where the creation of this system becomes most difficult. Therefore, it would be necessary to have an independent third-party, selected using criteria agreed upon by both NPB and MLB, as the final decision-maker on disagreements of player classification.<sup>220</sup> Particularly with regards to determining the differences between star and superstar players, these classifications could have significant financial impacts.

This proposed system addresses the concerns an NPB team would have regarding the uniform player transfer fee; namely, that the team is not being compensated fairly for the loss of its best players. With regards to the IIHF-NHL Transfer Agreement, lack of fair compensation for star

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219. Canadian Press, *supra* note 145.

220. Such a system already exists in MLB, with Elias Sports Bureau ranking the players into different categories (Types A and B) in order to determine the compensation owed to the player's former team should he sign with a new club via free agency.

players was the precise reason given by the Russian Federation for not being party to the agreement.<sup>221</sup> While these levels of player transfer fees will be both over-inclusive and under-inclusive, this system would yield a more efficient transfer fee than would a uniform system. At the same time, the individual player's ability to capture his true market value would again suffer as a result of the transferor team being forced to pay a sizeable portion of the player's value to someone other than the player himself.

*F. Percentage System*

Another proposal for reform of the current NPB-MLB transfer system is to have the transfer fee amount determined as a percentage of the ultimate contract signed by the player with the MLB team. Under this system, the NPB team would again only receive compensation if the player signed a contract with the MLB team, and that compensation would be subject to the market forces of direct contract negotiation. Unlike the current system, where only one team may negotiate with the NPB player, this system would allow for direct solicitation of the player's services by any and all teams that desired him. The percentage payment to the NPB team would be in addition to, and not subtracted from, the final contract amount received by the player. The cost of signing the player, then, is the value of the contract plus the percentage-based transfer fee.

This proposed system is the most optimal for the player, and represents a far superior outcome than is achieved in the current posting process. Rather than have situations where MLB teams are calculating player values using dollar amounts paid to the NPB team and not the player, the player in this system would receive very near his market value. This is especially true if more than one team is permitted to negotiate with the player. But there is still the possibility that the ultimate contract received does not represent the player's true market value if teams incorporate the percentage fee into the amount it is willing to pay the player. Despite this possibility, this system does not impact the total amount of the compensation received by the player nearly as much as the current posting system, especially if the new system allows for multiple suitors to pursue each player.

NPB owners may not prefer this proposed system to the one currently in place, but there are structural factors built into the proposal that ensure that NPB teams are fairly compensated for the caliber of players lost. Because the payment to the NPB team is a function of the total value of the contract given to the player by the MLB team, it follows that the NPB team will receive more money when it loses a star player compared to a role

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221. Fyodorov, *supra* note 152.

player. While a percentage-based payment would probably not yield the same possibilities of the current system's payment, from the NPB's perspective, the percentage system ensures that the loss of the best players yields the highest transfer payments.

Whether or not MLB teams would prefer a percentage-based payment model depends entirely on the percentage payment established. Should the percentage rise above twenty-five percent, it is conceivable that MLB teams would prefer, or at least be impartial to, the current system. The preferred aspect of this proposed system, from the perspective of MLB teams, is that individual teams can negotiate with the player directly, without the sealed bidding of the current auction. This transparency will prevent the type of overbidding evidenced by the Red Sox's \$12 million overpayment for Matsuzaka's services. This system, however, still has limitations. NPB teams could hijack the transfer of players, and skew MLB's competitive balance, by only negotiating with deep-pocketed teams. This system may lead to competitive balance issues if small market teams are entirely excluded from this labor pool. Further, the more efficient transfers that would result from applying a percentage-based system would favor Japanese players attempting to transfer and MLB teams, defeating NPB's intent to prevent an exodus of talent from NPB to MLB.

## VI. HISTORICAL PRECEDENT

This is not the first instance of a player transfer system being critical to determining the relationship between MLB and another league. After Jackie Robinson integrated MLB in 1947, the relationship between MLB and the Negro Leagues was forever changed by the influx of African-American players into MLB.<sup>222</sup> Had a more comprehensive and effective transfer system been in place, it is possible that the Negro Leagues would not have vanished as a viable economic entity. There is undoubtedly an irreversible trend of NPB players coming across the Pacific to the riches of MLB. If the trend continues, the Japanese league risks becoming a league bereft of its star players.

A formal relationship never existed, pre-integration, between MLB and the Negro Leagues. This lack of protocol was one of the main reasons the Negro Leagues diminished in popularity and ultimately folded in 1957, ten years after Jackie Robinson's historic feat.<sup>223</sup> There was no posting process and no system of payment for the transfer of players. Negotiations were typically between the Negro League player and the MLB team. In

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222. NEIL LANCTOT, *NEGRO LEAGUE BASEBALL: THE RISE AND RUIN OF A BLACK INSTITUTION* 386 (2004).

223. *Id.*



many cases, the Negro League club with whom the player was under contract was omitted from the conversation entirely.<sup>224</sup> This situation was particularly true during the earliest player signings. As was typically the case in the Negro Leagues at the time, Jackie Robinson was reportedly operating under an oral agreement with his Negro League club, the Kansas City Monarchs.<sup>225</sup> The contract that he signed to play for the Brooklyn Dodgers' top minor league affiliate in Montreal in 1946 provided him with a salary of \$600 per month and a \$3,500 signing bonus, but more importantly it contained a clause stating that he was free of any obligation to any other club with no compensation owed from the Dodgers.<sup>226</sup> While the white owners of the Kansas City Monarchs alleged that the club had a written contract with Robinson and threatened both to protest to MLB Commissioner Albert 'Happy' Chandler and to file a lawsuit against the Dodgers, they backed down from these threats amidst public pressure from the African-American community and media desiring integration, and agreed to allow Robinson to play for the organization.<sup>227</sup> Nonetheless, they publicly stated that they felt that Dodgers owed them compensation.<sup>228</sup>

Though no litigation was ever commenced, these complaints were subsequently echoed by other Negro League owners, who argued to Commissioner Chandler that MLB teams should negotiate with Negro League clubs directly rather than with the players, explaining "that while they were 'glad to see [their] players get the opportunity to play in white baseball, [they were] simply protesting the way it was done.'"<sup>229</sup> The Negro Leagues' commissioners requested the leagues be formally recognized by MLB as either minor or major leagues, which would have allowed them to participate in the compensation scheme that had been established between MLB and its affiliated minor leagues.<sup>230</sup> MLB Commissioner Chandler met these complaints with derision.<sup>231</sup> Though no formal player transfer agreement or protocol was ever reached between the leagues, subsequent signings of Negro League players by MLB teams were negotiated between the respective clubs rather than between the player and

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224. MARK RIBOWSKY, A COMPLETE HISTORY OF THE NEGRO LEAGUES, 1884 TO 1955 285 (1995).

225. *Id.* at 284. It was not until 1946 that the Negro League teams adopted the language of MLB player contracts verbatim in an effort to stem the flow of their players to MLB. *Id.*

226. *Id.* at 276.

227. *Id.* at 284-85.

228. *Id.* at 283-85. The Dodgers also signed Negro League players such as Don Newcombe, Roy Campanella, John Wright and Roy Partlow without compensating their former clubs. *Id.* at 285, 289-90.

229. RIBOWSKY, *supra* note 224, at 285.

230. *Id.* at 285. See also James R. Devine, *The Racial Re-integration of Major League Baseball: A Business Rather Than a Moral Decision; Why Motive Matters*, 11 SETON HALL J. SPORTS L. 1, 54-62 (2001).

231. RIBOWSKY, *supra* note 224, at 285.

the MLB team.<sup>232</sup> Negro League owners hoped to realize significant revenues by selling players to MLB, but this never came to fruition because the Negro Leagues were unable to respond adequately to the MLB teams raiding their teams' rosters by doing so in kind, and they had no other outlet with which to align themselves.<sup>233</sup> Thus, MLB teams rarely paid a fair market transfer fee, in large part because the Negro League clubs felt that they lacked the leverage to negotiate.<sup>234</sup> After the owner of his Negro League team was rebuffed in an attempt to sell his rights to the New York Yankees for \$100,000, Larry Doby became the first African-American to play in the American League in 1947.<sup>235</sup> MLB's Cleveland Indians purchased his rights from his Negro League team for \$10,000 plus an additional \$5,000 bonus, payable if he was able to complete thirty days on Cleveland's roster.<sup>236</sup> The rights to Satchel Paige were sold by the Kansas City Monarchs to the Cleveland Indians in 1948 for a mere \$5,000.<sup>237</sup>

Nonetheless, these small transfer fees<sup>238</sup> became a needed source of revenue for the Negro League clubs, and the exodus of players to MLB clubs accelerated in 1948.<sup>239</sup> This caused a decrease in the quality of play in the Negro Leagues<sup>240</sup> and fans stopped coming to the ballparks and supporting their favorite Negro League teams as a result.<sup>241</sup> Negro Leagues attendance dropped precipitously from 1946 (the last season pre-integration) to 1948; for example, the Newark Eagles' home attendance declined seventy-one percent.<sup>242</sup> By 1949, there were thirty-six former Negro Leaguers in MLB and their former league was well into its demise.<sup>243</sup> When taken in combination with the desire of African-American baseball fans to support an interracial business that more closely reflected their goal of an integrated society, the poor organizational structure of the Negro Leagues, and the typically poor team management, the Negro Leagues finally had too many obstacles to overcome.<sup>244</sup> The Negro

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232. *Id.* at 299, 303, 307.

233. Fort & Maxcy, *supra* note 208, at 40.

234. Some of this lack of leverage came from the black media's unfavorable treatment afforded to Negro League team owners who attempted to receive compensation for their players. RIBOWSKY, *supra* note 224, at 299.

235. *Id.*

236. *Id.*

237. *Id.* at 303.

238. LANCTOT, *supra* note 222, at 314.

239. RIBOWSKY, *supra* note 224, at 305.

240. By 1959, every MLB team had fielded at least one African-American player. LANCTOT, *supra* note 222, at 391-92. By 1961, seventy-seven of the then 450 MLB players were black. *Id.* at 391.

241. *Id.* at 306.

242. *Id.*

243. Fort & Maxcy, *supra* note 208.

244. LANCTOT, *supra* note 222, at 395-96.

National League folded after the 1948 season, with two of its clubs disbanding and a third focusing on barnstorming.<sup>245</sup> While the Negro American League reconstituted itself and continued to plod along, a lack of interest, combined with other obstacles, undermined the viability of the league as a whole. The Negro American League struggled until the last Negro League game was played in 1957.<sup>246</sup> Ultimately, while there is no doubt that society as a whole benefited from the integration of the major leagues, integration was not without its costs to the Negro League fans, owners, and former players who did not make it to MLB.<sup>247</sup>

The current MLB-NPB system presents many of the same issues, particularly with regards to player movement and the impact that movement has on the health of the individual leagues. There is a compelling argument that it is in the best interests of MLB to preserve the long-term health of NPB, unlike what happened with the Negro Leagues, because NPB (and not MLB) is the best cultivator of Japanese talent. The owners of NPB teams have an interest in preserving the health of their league, while MLB owners have a similar interest in their own league. Any player transfer agreement would seemingly have to address both of these competing desires, although the place on the spectrum between where the self-preservation ends and the actual agreement falls will be the product of negotiation.

As previously noted, one critical difference between the circumstances surrounding the disappearance of the Negro Leagues and the current state of NPB is the geographic proximity of the competitor league. During the late 1940s, after MLB had been integrated, many Negro League teams competed in the same cities as their MLB counterparts. In an era when gate receipts were the primary source of team revenue, the fact that many fans went to the higher quality MLB games had a direct effect on the lack of monetization for the Negro Leagues.

In the current situation, however, it cannot be said that fans are choosing to attend MLB games instead of NPB games. A more accurate characterization may be that NPB fans are now following former NPB players who have signed with MLB teams (at the expense of following an NPB team) through digital media. But to what extent the following of MLB via digital media will erode a revenue stream (gate receipts) for NPB is uncertain. Another difference in the current situation is cultural. Baseball has long been a very important part of the fabric of Japanese culture and it remains the national pastime. There is simply too much pride in Japanese baseball to allow the long-standing, deep-pocketed professional

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245. RIBOWSKY, *supra* note 224, at 306-07.

246. *Id.* at 314.

247. *See* Fort & Maxcy, *supra* note 208, at 45, 47-48 (discussing the gains and losses that came with the demise of the Negro Leagues).

league to fail. Despite the conceptual similarities, there are substantial differences between the Negro Leagues and NPB that are likely to lead to a different end result and allow NPB to survive notwithstanding the suboptimality of the player transfer agreement.

## VII. CONCLUSION

In the ever-flattening world, the challenge for MLB and NPB is to create a transfer system that is more efficient than the current model, while at the same time preserving NPB's status as a viable economic entity. It is imperative for the sport of baseball that NPB remain intact; the demise of the second-strongest professional baseball league in the world would have a deleterious effect on the global growth of the sport and, ultimately, on MLB. The triumvirate of key stakeholders must all agree to effectuate any of the proposed alternatives, and there is an implicit tension between the desires of NPB, MLB, and MLBPA. Two alternatives stand out from the others. The first is a global draft layered upon a NBA/UEFA-esque system of team-to-team negotiation. The second is a percentage-based system, where the transfer fee paid to the NPB team is determined as a percentage of the ultimate contract signed by the player with the MLB team. It is left to the stakeholders to determine the system that best fits their needs.