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THE REGULATORY SPACE OF BASEBALL: IS GLOBAL REGULATION NEEDED TO GOVERN THE INTERNATIONAL MOVEMENT OF PLAYERS?

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Occupying baseball's regulatory space are multiple regimes that govern global labour mobility and the international transfer of amateur and professional players. Professional leagues are the key regulatory actors in this space, non-state actors responsible for establishing the controls on a player's labour mobility within the league and to foreign competitions. The dominant regulator in baseball is Major League Baseball ('MLB') that acts as a de facto international sports federation and custodian of baseball. This article uses regulatory space theory to explore how globalisation forced the increased interaction between professional baseball leagues around the world. Despite the subsequent accelerated evolution of the rules and processes governing the international movement of professional baseballers, the global regime primarily consists of bilateral player agreements involving either MLB or Nippon Professional Baseball ('NPB') and other professional leagues in Latin America and Asia. This article will analyse how this system of regulation created numerous problems in the recruitment and movement of amateur and professional players, most notably an exploitative labour system in Latin America that potentially violates various international human rights laws and led to the human trafficking of Cuban baseball players. In response to these regulatory failures the authors propose a number of urgent reforms to ensure the global regulation of labour mobility in baseball facilitates the movement of players in line with international human rights through a global player transfer system that includes independent dispute resolution and that is operated by an independent global regulator.

1 INTRODUCTION

Baseball's unique place in the culture and history of the United States is demonstrated by its long-held status as 'the national pastime'.¹ Such a lofty

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¹ The description of baseball as the national pastime developed in the 1870s as it reflected the popularity of baseball among participants and fans, as well as reflecting American character: John Heylar, *Lords of the Realm: The Real History of Baseball* (Ballantine Sports, 1994) 1-2. While American football now challenges baseball as the most popular spectator and participation sport, baseball is still known in the United States as the national pastime.

standing in society equally applies to other countries, for example Japan, South Korea, the Dominican Republic and Cuba. Evidence of baseball's growing popularity around the world is membership of the World Baseball Softball Confederation ('WBSC'), baseball's global governing organisation, is now made up of five continental associations that comprises 153 nations.² Baseball's international popularity created a 'regulatory space' occupied by the regimes of a diverse mix of professional leagues and amateur sports governing organisations located in multiple countries. Globalisation has led to the regular interaction of many of these regulatory regimes in governing the international movement of professional baseball players.

The labour market in professional baseball differs to other global sports, such as soccer, in that the size of the market is comparably small and only a handful of leagues allow players to earn a full-time living. At the apex of baseball is Major League Baseball ('MLB'), the premier baseball league in the world that has the highest salaries. MLB's 30 clubs also control the bulk of professional jobs in baseball in the multi-tiered development leagues of Minor League Baseball ('MiLB'). The second-tier league in baseball is Nippon Professional Baseball ('NPB') in Japan. The next two levels of leagues encompass the Korean Baseball Organization ('KBO'), the Chinese Professional Baseball League ('CPBL') in Taiwan, Mexico's Liga Mexicana de Béisbol ('LMB') and Liga Mexicana del Pacífico ('LMP'), the Dominican Professional Baseball League, Liga Venezolana de Béisbol Profesional ('LVBP'), Serie Nacional de Béisbol ('Cuban National Series') in Cuba and Puerto Rico's Liga de Béisbol Profesional Roberto Clemente ('LBPRC'). As a result of the absence of a strong global regulator, the dominant status of professional baseball in these countries and each of these competitions representing the only labour markets in baseball, these governing leagues are among the most influential regulatory actors in baseball's regulatory space.

Labour mobility involves the ability of a worker to change jobs and sometimes careers. This article will explore how baseball's regulatory space governs global mobility through labour controls in various agreements contained in multiple regimes of labour regulation. The regulation of global labour mobility in baseball can be contrasted with other professional team sports (see eg, soccer, basketball and ice hockey) as it has no international transfer system,³ formal dispute resolution mechanism or independent global

² World Baseball Softball Confederation, World Baseball Softball Confederation Yearbook 2019-2020, 65-68.

³ See Fédération Internationale de Football Association, *Regulations on the Status and Transfer of Players*, August 2021 edition ('FIFA RSTP 2021'); International Basketball Federation, *Internal Regulations*, Book 3 – Players and Officials 2021, 26 March 2021 ('International Basketball Federation'); International Ice Hockey Federation, 2020-21-2021-22 Season IIHF International Transfer Regulations, 1 June 2020 ('International Ice Hockey Federation').

regulator.⁴ Forming the basis of baseball's international transfer regime is a protocol between MLB and NPB known as the 'Posting Agreement',⁵ which became a 'quasi' or 'de facto' global transfer system in 2018 and 2019 after MLB entered similar agreements with KBO, CPBL, LMB and the Cuban Baseball Federation. While the regulation of global labour mobility was improved, the multitude of agreements, processes and rules continue to result in an 'ad hoc' global transfer system that has no oversight from an independent global regulator.⁶ This produces serious regulatory failures involving exploitative labour practices and human rights violations. This article will address a literature gap in sports law and the international movement of players through the application of regulatory space theory to baseball to further understand the effects labour controls in regimes and regulatory actors have on global labour mobility in sport.

This paper is divided into four parts. Part A sets out concepts of regulatory space and labour mobility in baseball. Next, Part B analyses the key regimes and controls governing global labour mobility. Part C then investigates a number of regulatory failures in baseball's regulatory space for global mobility. Finally, Part D proposes reforms to the regulation of global labour mobility in baseball.

A *The Regulatory Space of Labour Mobility in Baseball*

1 *Conceptualising regulatory space*

Regulatory space theory is an underutilised analytical construct in understanding the regulation of sport.⁷ Hancher and Moran described a regulatory space as consisting of dimensions and occupants that can be studied according to its political, legal and cultural attributes.⁸ Also influencing the contours and climate of a regulatory space are constitutional systems, conventions, customs and institutional and ideational theories. The interaction between these elements determines how regulatory issues are defined and

⁴ See eg, Fédération Internationale de Football Association and the FIFA RSTP 2021 (n 3), <file:///Users/nicholm/Downloads/fifa-regulations-on-the-status-and-transfer-of-players-august-2021.pdf>.

⁵ Major League Baseball and Nippon Professional Baseball, *Agreement between the Office of the Commissioner of Baseball and the Office of the Commissioner of Nippon Professional Baseball* 2017. ('Posting Agreement 2017').

⁶ Matt Nichol, *Globalization, Sports Law and Labour Mobility: The Case of Professional Baseball in the United States* (Edward Elgar, 2019) 177, 181.

⁷ See eg, Matt Nichol and Keiji Kawai, 'The Regulatory Space of Collective Labour Relations in Australian Team Sports' (2021) 14 *Australian and New Zealand Sports Law Journal* 83.

⁸ Leigh Hancher and Michael Moran, 'Organizing Regulatory Space' in Leigh Hancher and Michael Moran (eds) *Capitalism, Culture, and Economic Regulation* (Clarendon Press, 1989) 271, 277.

identified.⁹ Not only does regulation operate in space but in time as there is an evolution in state and non-state actors, the power of actors and response to regulatory challenges.¹⁰ Influencing the nature of this evolution is the fluidity of a regulatory space through the inclusion or exclusion of actors according to the setting of narrow or broad boundaries.¹¹ Multiple regulatory regimes may exist in a space¹² and the resulting level of competition varies in a space and time.¹³ The regimes of professional baseball leagues dominate the regulatory space of baseball. State regimes of labour law and contract law also occupy a dimension in the space depending on time.

2 *Baseball's labour regimes*

The starting point for exploring labour regimes is the distinction between 'amateur' and 'professional' baseball as it results in complexity through creating multiple regimes in a country. Regulatory actors inside baseball's regulatory space determine the status of a league. Amateur baseball generally encompasses junior high school, high school and college competitions and is contrasted with the payment of players in professional leagues. Regimes may class 'semi-professional' baseball as amateur or professional.¹⁴ The amateur-professional dichotomy is important as players with professional experience are prohibited from participation in elite school competitions such as college baseball in the United States¹⁵ and high school and college baseball in Japan.¹⁶ The regulation of amateur high school and college baseball is significant for professional regimes that rely on these players for the majority of their entry-level labour in player drafts.

⁹ Eric L. Windholz, *Governing through Regulation: Public Policy, Regulation and the Law* (Routledge, 2018) 69-70.

¹⁰ Ibid 284.

¹¹ Ibid 69-70.

¹² Christine Parker, Colin Scott, Nicola Lacey and John Braithwaite, 'Introduction' in Christine Parker, Colin Scott, Nicola Lacey and John Braithwaite (eds), *Regulating Law* (Oxford University Press, 2004) 1, 7.

¹³ Nichol and Kawai (n 7) 84.

¹⁴ Semi-professional baseball involves players receiving remuneration that is insufficient to earn a full-time living. Another relevant factor in many semi-professional leagues connected to income is the shorter length of season compared to professional leagues. Subsequently, most semi-professional players have a full-time job. Depending on the nature of a league and its status within a regime, semi-professional baseball can be amateur or professional. For example, the industrial leagues in Japan are amateur and while the Australian Baseball League is an affiliated professional winter league of MLB, it is a semi-professional league.

¹⁵ NCAA Eligibility Center, *2020-21 Guide for the College-Bound Student Eligibility*, 27.

¹⁶ Japan Student Baseball Association, *Nihon gakusei yakyu kenshou (zenmen kaitei)* [Japan Student Baseball Charter], 24 February 2010, article 12 <<http://www.jhbf.or.jp/rule/charter/index.html>>.

Undermining the WBSC's role as an effective global regulator is its focus on grassroots baseball, international tournaments and MLB's ownership of baseball's premier global tournament, the World Baseball Classic ('WBC').¹⁷ The regulatory consequence is professional leagues and clubs dominating baseball's regulatory space. The power of a league as a regulatory actor is interconnected with its status inside baseball, which is derived from a league's standing as a 'major' or 'minor' league¹⁸ and its rank within the pyramid of professional leagues. Rank is primarily determined based on the prestige of the league, the standard of competition and wage levels. Importantly, MLB sits alone at the apex of professional baseball in all measures of competitive baseball and is the most powerful regulator in baseball. When the regulatory activities of MLB (and its clubs) are combined with its ownership of the WBC, MLB is in effect baseball's global regulator. The power and influence of leagues cascade down the pyramid of professional baseball. NPB is widely considered to be the world's second-best baseball league, followed by the KBO. Encompassing the next level of leagues are Class AAA (MiLB), the CPBL and most of the leagues in Latin America. All other competitions constitute the lowest level of professional baseball.¹⁹

Many professional regimes occupying baseball's regulatory space now regularly engage and compete with other regulatory regimes. One of the most relevant external regimes in the context of labour mobility is the state's labour laws on employment conditions, collective labour relations and contracts. The prominence of labour law in a regime is intrinsically linked to time and when players unionise, as this generally marks the time in space when players decide to challenge the legality of historical labour controls that conflict with standards, rules and practices contained in employment law that govern non-sports industries. Global sports law or *lex sportiva* is a prominent regime in the regulatory space of sport. But the International Olympic Committee ('IOC') and national Olympic committees have little involvement in baseball as it is not an Olympic sport.²⁰ However, the role of global sports law is less prominent in

¹⁷ MLB and the Major league Baseball Players Association ('MLBPA') each own 50 per cent of the WBC: 'About', *World Baseball Classic*, undated <<https://www.mlb.com/world-baseball-classic/about>>.

¹⁸ In the United States Major and Minor Leagues began as competing leagues between the late 1800s and early 1900s. From the 1920s to 1950s, the 'affiliate' relationship evolved so that Major League clubs contracted and paid all Minor League players and controlled their movement between Minor League clubs: Garrett R Broshius, 'Touching Baseball's Untouchables: The Effects of Collective Bargaining on Minor League Baseball Players' (2013) 4 *Harvard Journal of Sports & Entertainment Law* 51, 60-62.

¹⁹ Conversation with Phil Dale, Coordinator Pacific Rim Scouting, Kansas City Royals (Matt Nichol, College of Business, Central Queensland University, Melbourne, June 2021).

²⁰ Baseball lost its status as an Olympic sport after the Beijing 2008 Olympics and while it was temporarily reinstated for Tokyo 2020, the IOC in 2021 failed to permanently reinstate baseball for Paris 2024. No reason was publicly stated for the decision.

baseball due to the limited role of the International Olympic Committee ('IOC') and national Olympic committees and the WBSC not acting as a regulator in professional baseball. *Lex sportiva* is generally limited in the regulation of baseball to the rules sports-governing organisations create.²¹

3 *What is labour mobility?*

A construct of labour mobility is the movement of workers from one employer to another. It takes different forms, for example changing to a similar or different job in the same industry, starting a new occupation or transferring within an organisation. Geographic labour mobility enables a worker to move jobs in a city, region, country or internationally.²² Several concepts and theories underpin modern labour mobility. A fundamental element is Locke's notion of a 'free worker', who possesses the right to reject an offer of employment or leave an employer.²³ The transitional labour market approach is another important theory that views labour mobility as a series of transitions in a worker's career. This approach places a premium on job quality through the creation of employment opportunities connected to the acquisition of professional qualifications.²⁴ The capabilities approach to labour mobility facilitates transitions as a worker's capabilities that are the valuable functioning's achieved from actual abilities.²⁵

4 *The regulation of labour mobility in baseball regimes*

Regimes governing labour mobility restrict the movement and cost of players in a matrix of interlocking labour controls that are common throughout baseball. The structure of a labour market shapes mobility according to the number of clubs²⁶ and size of rosters in a league. Most labour regimes in baseball have a similar number of 'active' rostered players²⁷ due to the nature

²¹ Brendan Schwab, 'Celebrate Humanity': Reconciling Sport and Human Rights Through Athlete Activism' (2018) 28(2) *Journal of Legal Aspects of Sport* 172, 173.

²² Nichol (n 6) 101-102.

²³ John Locke, *Two Treatises of Government: In the Former, The False Principles, and Foundation of Sir Robert Filmer, and His Followers, are Detected and Overthrown. The Latter is an Essay Concerning the True Original, Extent, and End of Civil Government* (1689).

²⁴ Ralf Rogowski and Ton Wilthagen, 'Reflexive Labour Law: An Introduction' in Ralf Rogowski and Ton Wilthagen (eds) *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulations* (Kluwer 1994) 1, 4.

²⁵ Amartya Sen, 'Capability and Well-being' in Daniel M Hausman (ed) *The Philosophy of Economics: An Anthology* (Cambridge University Press, 3rd ed, 2008) 270, 270-71.

²⁶ MLB has 30 clubs, NPB 12 clubs, KBO 10 clubs, CPBL 5 clubs. Latin American league size varies, for example LVBP 8 clubs, Dominican Professional Baseball League ('LIDOM') 5 clubs and LMB 4 clubs.

²⁷ Most baseball leagues have a total roster made up of all reserved/contracted players. Some leagues with smaller total rosters have 'development' rosters. During the season, only players

and volume of games in modern baseball. But differences exist in total rosters and the existence and breadth of minor leagues.

A number of interconnected individual labour controls restrict mobility in baseball, thereby denying players the freedom to choose their employer and to maximise income through selling his services on a free market. For most players in MLB/MiLB and the Asian leagues, labour mobility starts in the 'draft'. Drafts financially disadvantage players as clubs do not compete to secure the services of entry-level players and draftees possess little leverage as they must sign a uniform contract with the selecting club or wait until the next draft. Labour regimes such as MLB further restrict the market power of players by setting assigned bonus caps for draftees.²⁸ Leagues and clubs justify drafts on the policy basis of creating 'competitive balance'²⁹ through the provision of equal access to 'prospects'.

The 'reserve system' exacerbates the adverse effects of the draft on a player's labour mobility. Since its inception in MLB in 1879³⁰ the reserve system has been the cornerstone of labour regulation in the regulatory space of baseball. The modern reserve system gives a club control of a player's right to play professional baseball for a designated number of years. It is now found in a league's by-laws, collective bargaining agreement and uniform player contract or a mix of all three. Players are typically reserved for six to nine years and can only change teams if 'released' (termination of employment), traded³¹ or through the 'waiver' system.³² Upon completing the reserve period, a player

on the 'active' roster can participate in an official game. Active rosters in most professional leagues and international senior competitions are 25 to 28 players.

²⁸ MLB clubs allocated signing bonus pools for each draft and high draft selections in the first few rounds are designated with a signing bonus known as 'slot money': Major League Baseball and Major League Baseball Players Association, Basic Agreement 2017-2021, Attachment 46, B ('MLB Basic Agreement 2017-2021'). Normative practice further reduces signing bonuses for college seniors who in their last year of draft eligibility are offered a 'take it or leave' bonus: see Jonathon C Gordon, 'Foul Ball: Major League Baseball's CBA Exploits College Seniors in the MLB Draft' (2015) 16(2) *Texas Review of Entertainment & Sports Law* 141.

²⁹ McKeown describes competitive balance as a level of competitiveness and uncertainty that optimises the appeal of a league to fans: James T McKeown, 'The Economics of Competitive Balance: Sports Antitrust Claims after American Needle' (2011) 21(2) *Marquette Sports Law Review* 517, 525. In 2000, MLB defined competitive balance as every well-run club has a 'regularly recurring reasonable hope of reaching post-season play' ('RRRRPP'): Richard C Levin, George J Mitchell, Paul A Volcker and George F Will, *The Report of the Independent Members of the Commissioner's Blue Ribbon Panel Baseball Economics*, July 2000, 8.

³⁰ See Ed Edmonds, 'Arthur Soden's Legacy: The Origins and Early History of Baseball's Reserve System' (2012) 5 *Albany Government Law Review* 38, 47.

³¹ Uniform player contracts require players agree to the 'assignment' of their contract to any club.

³² The waiver system is prominent in the MLB-MiLB system as teams can 'option' a player to the minor league team a set number of times before the player is 'designated' and must clear

becomes a free agent³³ and depending on the regime, is able to negotiate a contract with any club in the league or the world.³⁴ Supporting the effectiveness of the reserve system to monopolise labour and inhibit mobility are domestic and international agreements that require the respect of one another's reserve system and contracting practices.³⁵

B *The Global Regulation of Labour Mobility in Baseball*

1 *The evolution of baseball's de facto global player transfer system*

The origins of baseball's global player transfer system can be traced to 1964 and the controversy surrounding the San Francisco Giants' attempt to exercise a contractual clause to purchase the rights of minor league pitcher Murakami Masanori, a player sent from the Nankai Hawks *ni-gun* ('Division 2') to train in the United States. A bilateral player agreement between MLB and NPB³⁶ was the regulatory response and it mandated that a club wanting to contract a reserved player from the other league contact the player's club.³⁷ For nearly 30 years, the 1967 Agreement effectively blocked the movement of NPB players to the Major Leagues until the management of Nomo Hideo identified a 'loophole' in the NPB's by-laws in 1995. Nomo voluntarily 'retired' from Japanese baseball and signed with the Los Angeles Dodgers without violating the 1967 Agreement. Soon afterwards, several players moved to MLB³⁸ and the resulting contractual uncertainty and lack of compensation for NPB clubs and unequal MLB club access to Japanese players saw MLB and NPB enter the historic Posting Agreement in 2000³⁹ that set the foundation for the future regulation of global labour mobility.

'waivers' to remain at the club. A player can also enter the waiver system when a club terminates their employment through an 'outright' waiver: MLB Basic Agreement 2017-2021 (n 28) article XIX.F.

³³ Players also become free agents when unconditionally released and through other contracting processes in the waiver system.

³⁴ MLB's free agent system allows a player to contract with any club in the world: MLB Basic Agreement 2017-2021 (n 28) article XX.B; NPB has a dual system of domestic and international free agency: Nippon Professional Baseball, *Furijento Kiyaku* [Rule of Free Agent] 2009, article 2(2).

³⁵ These agreements began 1882 with the agreement between the National League of Professional Baseball Clubs and the American Association. In 1901 seven minor leagues entered a similar compact when the National Association Professional Baseball Leagues (Minor League Baseball) and expanded to cover 15 leagues in 1902: Broshius (n 18) 58-60.

³⁶ Major League Baseball and Nippon Professional Baseball, *United States-Japanese Player Contract Agreement*, 17 October 1967 ('1967 Agreement').

³⁷ Ibid articles 1-4.

³⁸ See eg. Takashi Kashiwada, Shigetoshi Hasegawa, Tomokazu Ohka and Alfonso Soriano.

³⁹ Major League Baseball and Nippon Professional Baseball, *United States-Japanese Player Contract Agreement* 2000 ('Posting Agreement 2000').

The original 'posting' system permitted NPB players who were not yet free agents to request an MLB transfer from their Japanese club during the designated transfer period.⁴⁰ If the NPB club approved the request, the player's details were 'posted' to all MLB clubs.⁴¹ Interested clubs had four days to submit to MLB a monetary bid called a posting fee⁴² in what was a 'blind auction' as clubs were not aware of other bidders or bids. The highest bidder received the exclusive and non-assignable rights to negotiate with the player for 30 days.⁴³ Several normative factors discussed below inhibited labour mobility (see Table 1 for all postings) and led to a new agreement in 2013.⁴⁴ The Posting Agreement 2013 shifted the power to set the transfer fee to the NPB club (capped at US\$20 million).⁴⁵ Another major reform allowed any MLB club willing to pay the 'release fee' to negotiate with the player.⁴⁶ Under the Posting Agreement 2013 most transfers involved elite pitchers that attracted the maximum US\$20 million release fee. Less wealthy MLB clubs called for further reforms, resulting in the Posting Agreement 2017.⁴⁷ This agreement again highlighted the evolutionary nature of the regulation of labour mobility in that the mechanism for transfer fees again shifted, this time, to the market. The value of transfer fees was greatly reduced as they are calculated as a percentage of the player's 'guaranteed' contract value.⁴⁸

Release fees are now determined according to the following scale:

- 20 per cent release fee for Major League contracts that guarantee US\$25 million or less.⁴⁹
- 20 per cent fee of the first \$25 million plus 17.5 per cent of any amount exceeding US\$25 million for Major League contracts that guarantee between US\$25,000,001 and US\$50 million.⁵⁰

⁴⁰ *Posting Agreement 2000* (n 39) article 9.

⁴¹ *Ibid* article 8.

⁴² *Ibid* article 10.

⁴³ *Ibid* articles 9, 11.

⁴⁴ Major League Baseball and Nippon Professional Baseball, *Agreement between the Office of the Commissioner of Baseball and the Office of the Commissioner of Nippon Professional Baseball 2013*. ('*Posting Agreement 2013*').

⁴⁵ *Ibid* article 7.

⁴⁶ *Ibid* article 9.

⁴⁷ *Posting Agreement 2017* (n 5) article 7.

⁴⁸ In MLB the 'base' value of a contract is guaranteed as the balance of monies owed are paid to the player if the contract is terminated prior to the expiry of the contract: MLB Basic Agreement 2017-2021 (n 29) article IX.C. Article 9(d) of the *Posting Agreement 2017* (n 5) defines 'guaranteed value' of a Major League contract as salary, signing bonuses, buyout options and vesting or mutual options.

⁴⁹ *Posting Agreement 2017* (n 5) article 9(a)(i).

⁵⁰ *Ibid* article 9(a)(ii).

- 20 per cent of the first US\$25 million plus 17.5 per cent of any amount between US\$25,000,001 and US\$50 million, plus 15 per cent of any guaranteed amount exceeding US\$50 million for Major League contracts.⁵¹
- 15 per cent ‘supplemental release fee’ for bonuses, salary escalators or options attract in a Major League contract.⁵²
- Flat 25 per cent of a signing bonus for Minor League contracts that incur a release fee.⁵³

⁵¹ Ibid article 9(a)(iii).

⁵² Ibid article 9(b).

⁵³ Ibid article 9(d).

Table 1
The History of Posting System Transfers

Year	Agreement Version	Player	NPB Club	MLB Club	Contract Years	Contract Value	Transfer Fee
1999	2000	Alejandro Quezada	Hiroshima Toyo Carp	Cincinnati Reds	Not Available	Not Available	US\$0.4m
1999	2000	Timo Perez	Hiroshima Toyo Carp	None			
2000	2000	Ichiro Suzuki	Orix Blue Wave	Seattle Mariners	3	US\$14m	US\$13.12m
2002	2000	Kazuhisa Ishii	Yakult Swallows	Los Angeles Dodgers	4	US\$12.3m	US\$11.26m
2002	2000	Akinori Otsuka	Chunichi Dragons	None			
2003	2000	Ramon Ramirez	Hiroshima Toyo Carp	New York Yankees	Not Available	Not Available	US\$0.3m
2003	2000	Akinori Otsuka	Chunichi Dragons	San Diego Padres	2	US\$1.8m	US\$0.3m
2005	2000	Norihiro Nakamura	Orix Buffaloes	Los Angeles Dodgers	Not Available	Not Available	Unknown
2005	2000	Yusaku Iriki	Hokkaido Nippon Ham Fighters	None			
2005	2000	Shinji Mori	Seibu Lions	Tampa Bay Devil Rays	2	US\$1.3m	US\$1m
2006	2000	Daisuke Matsuzaka	Seibu Lions	Boston Red Sox	6	US\$52m	US\$51.1m
2006	2000	Akinori Iwamura	Yakult Swallows	Tampa Bay Devil Rays	3	US\$7.7m	US\$4.5m
2006	2000	Kei Igawa	Hanshin Tigers	New York Yankees	5	US\$20m	US\$26m
2008	2000	Koji Mitsui	Saitama Seibu Lions	None			
2009	2000	Koji Mitsui	Saitama Seibu Lions	None			
2010	2000	Hisashi Iwakuma	Osaka Kintetsu Buffaloes	Oakland Athletics	No contract entered	No contract entered	US\$19.1m
2010	2000	Tsuyoshi Nishioka	Chiba Lotte Marines	Minnesota Twins	2	US\$9.25m	US\$5.32m
2011	2000	Hiroki Sanada	Yomiuri Giants	None			
2011	2000	Hirofumi Nakajima	Saitama Seibu Lions	New York Yankees	No contract	No contract	US\$2m

Year	Agreement Version	Player	NPB Club	MLB Club	Contract Years	Contract Value	Transfer Fee
					entered	entered	
2011	2000	Yu Darvish	Hokkaido Nippon Ham Fighters	Texas Rangers	6	US\$60m	US\$51.7m
2011	2000	Norichika Aoki	Yakult Swallows	Milwaukee Brewers	2	Not available	US\$2.5m
2013	2013	Masahiro Tanaka	Tohoku Rakuten Golden Eagles	New York Yankees	7	US\$155m	US\$20m
2015	2013	Tony Barnette	Yakult Swallows	None	Barnette moved to the Texas Rangers after negotiations between Texas and the Tokyo Yakult Swallows		
2015	2013	Kenta Maeda	Hiroshima Toyo Carp	Los Angeles Dodgers	8	US\$25m	US\$20m
2017	2013	Shohei Ohtani	Hokkaido Nippon Ham Fighters	Los Angeles Angels	6	US \$2.31 m signing bonus	US\$20m
2017	2013	Kazuhisa Makita	Saitama Seibu Lions	San Diego Padres	2	US\$3.8m	US\$0.5m
2018	2017	Yusei Kikuchi	Saitama Seibu Lions	Seattle Mariners	3	US\$43m	US\$10.75m
2019	2017	Yoshitomo Tsutsugo	Yokohama DENA BayStars	Tampa Bay Rays	2	US\$12m	US\$2.4m
2019	2017	Ryosuke Kikuchi	Hiroshima Toyo Carp	None			
2019	2017	Shun Yamaguchi	Yomiuri Giants	Toronto Blue Jays	2	US\$6.35m	US\$1.2m
2019	2017	Kohei Arihara	Hokkaido Nippon Ham Fighters	Texas Rangers	2	US\$6.2m	US\$1.2m
2020	2017	Haruki Nishikawa	Hokkaido Nippon Ham Fighters	None			
2020	2017	Tomoyuki Sugano	Yomiuri Giants	None			
2021	2017	Seiya Suzuki	Hiroshima Toyo Carp	Chicago Cubs	5	US\$85m	US\$12.375m

2 *Major League Baseball's transfer regime for international professionals*

Global labour mobility forced regimes in baseball's regulatory space to interact on a regular basis. A key source of recent interactions is MLB's increased regulation of global labour mobility. In 2017 the new Major League collective agreement required the harmonisation of player transfer rules with foreign professional leagues,⁵⁴ a process reliant on the Posting Agreement 2017. Subsequently, the posting protocols became a de facto global player transfer system or 'model' regulation. Between 2018 and 2019, MLB replicated the key posting rules and processes in agreements with the premier leagues in South Korea,⁵⁵ Taiwan,⁵⁶ Mexico⁵⁷ and Cuba.⁵⁸ Another important method in which the MLB Basic Agreement 2017-2021 shaped global labour mobility is designating foreign players subject to posting system agreements as amateurs or professionals. The MLB regime deems international foreign players as amateurs if they are younger than 25 years and have less than six years of professional experience.⁵⁹ Foreign amateurs can only sign a Minor League contract and receive signing bonuses that can be less than US\$100,000 and sometimes a maximum of US\$1 million to US\$2 million.⁶⁰ Professionals can be posted and negotiate market salaries.

3 *Limitations of the posting system as a global transfer regime*

Several factors impede the ability of the posting system to be a global system. The current posting system is a regulatory product of the historical interaction between the MLB and NPB regimes and regulatory actors. As the

⁵⁴ MLB Basic Agreement 2017-2021 (n 28) Attachment 46, clause I(1).

⁵⁵ 'S. Korea, U.S. pro baseball leagues agree on new posting system', *Yonhap News*, 12 July 2018 <<https://en.yna.co.kr/view/AEN20180712010600315>>.

⁵⁶ 'MLB, CPBL Agreed on Posting System', *CPBL Stats*, 9 March 2019 <<http://cpblstats.com/mlb-cpbl-signs-players-agreement-posting-system/>>.

⁵⁷ 'MLB executes player transfer agreement with Mexican Baseball League; MLBPA approves', *MLB.com*, 5 March 2019 <<https://www.mlb.com/press-release/mlb-mexican-baseball-league-agree-on-player-transfers>>.

⁵⁸ 'MLB, MLBPA reach deal with Cuban Federation', *MLB.com*, 19 December 2018 <<https://www.mlb.com/news/mlb-announces-deal-with-cuban-federation-c302036110>>.

⁵⁹ MLB Basic Agreement 2017-2021 (n 28) Attachment 46, clause F(1)(b).

⁶⁰ Demonstrating this rule's potential negative effect on salary is the transfer of Shohei Ohtani. The Nippon Ham Fighters lobbied NPB to delay the implementation of the Posting Agreement 2017 by one year so that they could post 'two-way' (players who are pitchers and hitters) phenomenon Ohtani and receive the US\$20 million release fee. Attracting little attention from Ohtani's rise to MLB superstar is his designation as an amateur when posted to the Los Angeles Angels. Instead of a contract exceeding \$200 million, Ohtani received a US\$2.31 million signing bonus after signing a Minor League contract. As a Major League player, Ohtani received the league minimum wage of US\$535,00 per season until the end of his third season when salary arbitration saw him to negotiate a two-year US\$8.5 million deal. Ohtani will not be able to negotiate a contract that represents his market value until he is a free agent in 2024.

historical overview of NPB postings in Table 1 evidences, the normative operation of the Posting Agreement necessitates regular review and amendment. Therefore, all five agreements require annual review and any modifications must be across all agreements to maintain consistency and uniformity. Even though all players have a formal right to be posted at any time, most posted players are either stars or solid *ichi-gun* ('Division 1') performers who are transferred the year before international free agent eligibility (clubs receive no compensation for international free agents). Not all players enjoyed the same formal right posting as the Yomiuri Giants refused to post players until 2019.⁶¹ Some unfairness exists as posted players who attract no offers (or failed to enter a contract prior to 2013) must return to the NPB despite receiving their club's approval to embark on an MLB career. Another limitation is the need for formal independent dispute resolution.⁶²

4 *Major League Baseball's regulation of 'winter' leagues in Latin America*

Underlining MLB's status as baseball's default global regulator is the level of control it exerts over foreign 'winter' leagues in Latin America. Due to a combination of the high number of Latinos in the Major and Minor Leagues and the increase in the cost of labour flowing from free agency (and salary arbitration),⁶³ winter leagues in the Dominican Republic, Puerto Rico, Cuba,

⁶¹ Contracting practices play an important role for the posting of Yomiuri players and others. In 2019 Yomiuri posted Shun Yamaguchi after contractually agreeing to a future posting when recruited as a free agent in 2016. Another factor influencing the Giants is the change in the position of ownership. Club president Imamura Tsukasa recognised the desire of players to test their skill at the highest level and stated that becoming a national hero does not prevent players from competing on the world stage: Masayuki Shinoyama, 'Shiomekawaruka kyojin no posting younin no imi?' [Will the tide change? Meaning of Giants' Post Acceptance], *Nikkei*, 26 November 2019 <<https://www.nikkei.com/article/DGXMZO52551090U9A121C1000000/>>.

⁶² In 2003, the Chunichi Dragons were unable to use dispute resolution to resolve the failed transfer of Kevin Millar. The Florida Marlins sold Millar's reserve rights to the Chunichi for US\$1.25 million and he entered a lucrative two-year contract. But Millar changed his mind and the Boston Red Sox claimed him through waivers. The subsequent protracted dispute saw Millar apologise to the Dragons, pay damages of US\$1.25 million and penalties of 144 million yen (the Red Sox paid the Marlins US\$1.25 million after the Dragons returned the fee): 'Red Sox announce acquisition of Miller, who signed with Chunichi Big League', *Morning Edition Sports*, 17 February 2003. Most Japanese players have multiple posting requests denied by their club and could utilise dispute resolution if it were available. Ohtani had a legitimate dispute when Nippon Ham delayed the introduction of the Posting Agreement 2017 in order to receive a US\$20 million transfer fee as opposed to a set percentage of the signing bonus in a Minor League contract.

⁶³ Since the 1970s, the collectively bargained regulation of Major League wages involves three groups of players. First, players who receive the minimum wage. Second, players who after two to three years of Major League service become eligible for salary arbitration and receive performance-based salary increases in contract negotiations or through the use of arbitration.

Venezuela and Mexico are no longer limited to providing offseason development and financial opportunities. Since the 1990s, MLB clubs use the Winter League Agreement with the Confederation of Caribbean Professional Baseball Leagues⁶⁴ (and winter leagues)⁶⁵ to protect their investment in Latin American players. The Agreement's 'extreme fatigue' clause allows MLB clubs to prohibit the participation of 'local' players.⁶⁶ Players are ineligible if recovering from a recognised injury or over one or two consecutive seasons reach a designated number of innings pitched, plate appearances (position players) or innings played (catchers) that are scaled through the Minor Leagues to Major Leagues.⁶⁷ The Winter League Agreement also gives MLB the power to establish standards on umpires, league administration, facilities and stadiums, medical services and player salaries.⁶⁸

5 *Nippon Professional Baseball's transfer regime for international professionals*

The NPB uses its political and economic influence as a regulatory actor in Asia in a similar way to MLB in Latin America. In the early 2000s, the NPB entered almost identical player transfer agreements with the KBO, the CPBL and the Chinese Baseball League⁶⁹ that adopted the provisions in the 1967 Agreement. These agreements are different to the 1967 Agreement and the three Posting Agreements as a league must be 'aware' of the other country's amateur recruitment rules.⁷⁰ Though the agreements set out no specific rules, it can be implied that clubs must comply with a country's relevant amateur regulations. The interaction of these four regulatory regimes is not surprising as historically many South Korean, Taiwanese and Chinese players play in the higher level of competition in NPB where they earn significantly higher incomes and receive greater exposure to MLB scouts.

Third, players who after six years of Major League service are free agents and can negotiate market-based wages.

⁶⁴ Commissioner of Baseball and Commissioner of the Caribbean Confederation, Winter League Agreement, 2014-2021. ('Winter League Agreement 2014-2021'). A new agreement was entered into in August 2021: Rodolfo Scott, 'MLB and Caribbean have an agreement: MLBPA approval is lacking', *ActionPush*, 27 August 2021 <<https://actionpush.com/baseball/mlb-and-caribbean-have-an-agreement-mlbpa-approval-is-lacking/>>.

⁶⁵ These leagues are the LBPRC (Puerto Rico), the LVBP (Venezuela) and the LMP (Mexico).

⁶⁶ Arturo J Marcano and David P Fidler, 'Venezuela: The Passion and Politics of Baseball' in George Gmelch and Daniel A Nathan (eds) *Baseball Beyond Our Borders: An International Pastime* (University of Nebraska Kindle Edition, 2017) 2475.

⁶⁷ Winter League Agreement 2014-2021 (n 64) article 3(e)(1)(A)(B).

⁶⁸ Ibid articles V, VI, VII and VIII.

⁶⁹ Japan-Korea Player Contract Agreement 2001, articles 1-7; Japan-Taiwan Player Contract Agreement 2004, articles 1-7; Japan-China Player Contract Agreement 2005, articles 1-7.

⁷⁰ Ibid.

6 *The regulation of the recruitment of international amateurs*

A major void in the baseball's regulatory space is the failure to regulate the global labour of foreign amateurs. Some leagues, such as MLB, govern aspects of foreign amateur recruitment and require amateurs be 16 years to sign a contract, players can only be recruited in a designated period and signing bonuses are regulated.⁷¹ In contrast, the amateur provisions in the NPB's agreements with Asian leagues are vague and broad in nature.⁷² The absence of clear regulation exposes amateurs in Japan and South Korea to penalties and restraints of trade when recruited by MLB clubs but similar transfers in Taiwan⁷³ and China⁷⁴ cause little issue.⁷⁵

As will now be seen, the informal 'gentlemen's agreement' between MLB and NPB that permitted Major League clubs to recruit Japanese amateur 'prospects' not selected in the NPB draft is now largely ineffective. In 2008, industrial league pitcher Junichi Tazawa requested clubs not select him in the NPB draft. He then signed a contract with the Boston Red Sox and received a two-year ban from the NPB upon returning to play in Japan.⁷⁶ No penalty was imposed on the Red Sox. Recently, the NPB was forced to abolish the Tazawa rule after the Fair Trade Commission ruled it violated competition law in

⁷¹ MLB Basic Agreement 2017-2021 (n 28) Attachment 46, B.

⁷² Japan-Korea Player Contract Agreement 2001, articles 1-7; Japan-Taiwan Player Contract Agreement 2004, articles 1-7; Japan-China Player Contract Agreement 2005, articles 1-7.

⁷³ See eg, Lin Yu-min in 2021: 'Lin Yu-min agrees to terms with Arizona Diamondbacks', *CPBL Stats*, 17 December 2021 <<http://cpblstats.com/arizona-diamondbacks-sign-lin-yu-min/>>; Po-yu Chen in 2020: Mike Persak, 'Why Po-yu Chen signed with Pirates last year and what's next in his development', *Pittsburgh Post-Gazette*, 18 September 2021 <<https://www.post-gazette.com/sports/pirates/2021/09/17/pirates-po-yu-chen-international-signing-bradenton-ben-cherington-fangraphs-prospects-cruz-gonzales-davis-priester/stories/202109170114>>.

⁷⁴ The Milwaukee Brewers is the most active MLB club in China and simultaneously signed three of the seven players recruited from MLB's Chinese development centre in 2019: Li Xiang, 'Three Chinese players sign with the MLB's Milwaukee Brewers', *CGTN*, 28 February 2019 <<https://news.cgtn.com/news/3d3d674e7745444d33457a6333566d54/index.html>>.

⁷⁵ Limited literature exists to explain the different responses. One possible explanation is that professional baseball in Taiwan and China is relatively small. Therefore, the professional leagues and amateur sports governing organisations have little economic and political influence, in particular, when compared to NPB and the KBO. In addition, the standard of play and remuneration in Taiwanese professional baseball are low. Opportunities to directly enter the MiLB system presents an opportunity for players and promotes the talent development systems in both countries.

⁷⁶ Industrial league and college players adopting a similar strategy faced a two-year prohibition and high school players a three-year ban: Fair Trade Commission, 'Nippon professional yakyuusoshiki ni taisuru dokusen kinshihouihan higijiken no shorinitsuite' [Regarding the handling of alleged violations of the Anti-Monopoly Act against Japanese Professional Baseball Organizations], 5 November 2020 <<https://www.jftc.go.jp/houdou/pressrelease/2020/nov/201105.html>> ('Fair Trade Commission').

2020⁷⁷ when he became eligible for the draft.⁷⁸ Yet Tazawa's punishment continued normatively as no team selected him in the *ikusei* ('development') draft.⁷⁹ Inflating Japanese concerns of a 'talent drain' were star *koshien* (high school baseball tournament) pitchers Yusei Kikuchi (2009)⁸⁰ and Ohtani (2012),⁸¹ expressing an intention to bypass the NPB and immediately pursue a MLB career (both players stayed in Japan). Fears of a talent drain may have since subsided. In 2018, the recruitment of junior high school pitcher Yuki Saito by the Kansas City Royals⁸² and not a high school team attracted little attention. Similar problems have occurred in South Korea when MLB clubs recruited high school prospects.⁸³

⁷⁷ Shiteki-dokusen no Kinshi oyobi Kôseitorihiki no Kakuho ni Kansuru Hôritsu [*Act on Prohibition of Private Monopolization and Maintenance of Fair Trade*] [Act No. 54 of 1947, amended by Act No. 51 of 2009]; Fair Trade Commission (n 77).

⁷⁸ 'NPB to abolish "Tazawa rule", welcome back players who sign outside Japan', *WBSC*, 14 September 2020 <<https://www.wbcs.org/news/npb-to-abolish-tazawa-rule-welcome-back-players-who-sign-outside-japan>>.

⁷⁹ Kaz Nagatsuka, 'Heat Bears officials stunned after Junichi Tazawa goes undrafted', *The Japan Times*, 27 October 2020 <<https://www.japantimes.co.jp/sports/2020/10/27/baseball/japanese-baseball/heat-bears-junichi-tazawa-undrafted/>>. Tazawa then transferred to the CPBL in 2021: 'CPBL expansion team Wei Chuan Dragons sign Junichi Tazawa', *WBSC*, 7 January 2021 <<https://www.wbcs.org/news/cpbl-expansion-team-wei-chuan-dragons-show-interest-in-junichi-tazawa>>. In 2013, the Japan Amateur Baseball Association penalised industrial league pitcher Takumi Nakata for violating its rules and procedures when he signed with the Los Angeles Dodgers: 'Numata mondai: genbatsu wo motte saiatsu boushi wo hakaru' [Numata problem: preventive step taken with severe punishment], *Nikkan Sports*, 26 September 2013 <<http://www.nikkansports.com/baseball/news/f-bb-tp3-20130926-1195463.html>>.

⁸⁰ Stuart Biggs, 'Japan Teen's 94-mph Fastball May Spur U.S. migration', *Bloomberg*, 20 August 2009 <<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a.X6E.DD0.XI>>.

⁸¹ Ryouji Yoshimura, 'Hanamakihigasikou Ôtani tousyu 'Wakai utikara ikitai' mejya- chousen wo hyoumei' [Ôtani's desire: I want to go to MLB when I am still young], *The Asahi Shimbun*, 22 October 2012, 14.

⁸² 'Teenage prospect Kaito Yuki targets Major League career after choosing Royals over Koshien', *The Japan Times*, 8 July 2018 <<https://www.japantimes.co.jp/sports/2018/07/08/baseball/japanese-baseball/teenage-prospect-kaito-yuki-targets-major-league-career-choosing-royals-koshien/#.XpfejVIZao>>.

⁸³ See eg, Baltimore Oriole's failed attempt to recruit Kim Seong-min in 2012: 'Local baseball governing body bans Baltimore's scouts after controversial signing', *Yonhap News*, 9 February 2012 <<http://english.yonhapnews.co.kr/culturesports/2012/02/09/93/0702000000AEN20120209006100315F.HTML>>; high school outfielder Cho Won-bin withdrawal from the KBO draft in 2021 to pursue a MLB career: 'Intent on signing with MLB team, high school baseball prospect pulls out of KBO draft', *Yonhap News*, 19 August 2021 <<https://en.yna.co.kr/view/AEN20210819007800315>>.

C *Problems in the Global Regulation of Labour Mobility in Baseball*

1 *The cheap labour markets of Latin America*

The internationalisation of professional baseball's labour supply resulted in MLB as the prime benefactor through its use of foreign players to maintain its status as the world's premier baseball league and its standing as among the top four American professional sports. Bailey and Shepherd argue the introduction of the draft and age restrictions on the recruitment of American players saw MLB clubs abandon the development of African American players (and other Americans) in preference to foreign players.⁸⁴ Influencing this decision is a mix of development and financial factors as international amateurs can be trained and signed at 16 years of age and there is no risk another club will receive the benefit of this investment of time and money through drafting the player.⁸⁵ Another important factor Marcano and Fidler identify is the dramatic effect of free agency on player salaries requiring clubs to find cheap labour supply in foreign markets.⁸⁶ The result is that foreign players are now a vital aspect of player labour in the MLB-MiLB system and the core of these players are from the Dominican Republic, Venezuela, Mexico and Cuba as Major League clubs annually invest hundreds of millions of dollars in talent identification, development and recruitment in Latin America.⁸⁷ Foreigners now make up 60 percent of players in Class Rookie and the combined A classifications and while this proportion decreases as players progress through the hierarchy of Minor Leagues the number of foreign players on rosters in Class AA, Class AAA and the Major Leagues ranges between 24 and 30 per cent.⁸⁸

Impoverished Latin American countries fuel MLB's demand for foreign players⁸⁹ as clubs attempt to exploit the desperation of families to escape poverty through baseball.⁹⁰ The labour practices of clubs push ethical and legal boundaries conduct in an unregulated space that is described as a 'free-for-all',⁹¹

⁸⁴ Joanna Shepherd Bailey and George B Shepherd, 'Baseball's Accidental Racism: The Draft, African-American Players, and the Law' (2011) 4(1) *Connecticut Law Review* 197, 206-210.

⁸⁵ Ibid.

⁸⁶ Marcano and Fidler (n 66) 2409.

⁸⁷ Adam Wasch, 'Children Left Behind: The Effect of Major League Baseball on Education in the Dominican Republic' (2009) 11(1) *Texas Review of Entertainment & Sports Law* 99, 119; Shepherd Bailey and Shepherd (n 84) 215.

⁸⁸ Data on the nationality of all Major and Minor League players from rosters on MLB club websites collected by Matt Nichol in 2017 ('Nichol Data 2017').

⁸⁹ Renos Vakis, Jamele Rigolini and Leonardo Lucchetti, 'Left Behind: Chronic Poverty in Latin America and the Caribbean', World Bank, 2015, 12.

⁹⁰ In Latin America one in five people are 'chronically poor': ibid.

⁹¹ Matt Kalthoff, 'Out of Sight, out of Mind: Confronting Legal, Economic and Social Issues Raised by Major League Baseball's Peculiar Treatment of Foreign Talent' (2014) 29 *Connecticut Journal of International Law* 353, 372.

a ‘freewheeling, unpoliced atmosphere’,⁹² the ‘Wild, Wild West in Latin America’⁹³ and an ‘out of control and exploitative labour system’.⁹⁴ The labour practices in the recruitment and development of Latin American players that will now be examined, commodify labour⁹⁵ and thereby breach international labour law⁹⁶ and American law.⁹⁷ In addition, they may also violate the International Labour Organization’s conventions on the prohibition of child labour,⁹⁸ minimum work age,⁹⁹ worst forms of child labour¹⁰⁰ and international laws protecting a child’s right to education.¹⁰¹

2 *Labour practices of Major League Baseball in Latin America*

Underpinning the labour practices of MLB clubs in Latin America is the ‘boatload’ approach to recruitment, a practice that sees clubs sign as many young Latino players to below market value contracts.¹⁰² The basis of this policy is the belief a boatload of Dominicans or Venezuelans is equivalent to

⁹² Wasch (n 87) 117.

⁹³ Ibid 120.

⁹⁴ Angel Vargas, ‘The Globalization of Baseball: A Latin American Perspective’ (2000) 8 *Indiana Journal of Global Legal Studies* 21, 33.

⁹⁵ Nichol (n 6) 160-176.

⁹⁶ Treaty of Versailles, 28 June 1919, part XII, article 427; International Labour Conference, Declaration Concerning the Aims and Purposes of the International Labour Organisation (adopted by the Conference at its Twenty-sixth Session Philadelphia, 10 May 1944; International Labour Organization, Constitution of the International Labour Organization, 1 April 1919, annexe I(a).

⁹⁷ *Clayton Antitrust Act of 1914*, 15 October 1914, Pub. L. 63-212, 38 Stat. 730 (15 U.S.C. § 12-27, 29, 52-3).

⁹⁸ International Labour Organization, *Declaration on Fundamental Principles and Rights at Work and Its Follow Up*, adopted by the International Labour Conference at its Eighty-sixth Session at Geneva, 18 June 1998 (Annex revised 15 June 2010), article 2(c).

⁹⁹ International Labour Organization, Minimum Age Convention, 1973 (No. 138), adopted on 26 June 1973 by the General Conference of the International Labour Organisation at its fifty-eighth session, entry into force 19 June 1976.

¹⁰⁰ International Labour Organization, Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999 (No. 182), adopted by the 87th ILC session in Geneva, entry into force 17 June 1999.

¹⁰¹ United Nations, Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, article 28; United Nations, Declaration of the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, 19; United Nations, Convention Against Discrimination in Education, adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization on 14 December 1960, entry into force 22 May 1962, article 5.

¹⁰² Kalthoff (n 91) 360.

the cost of one or two Americans.¹⁰³ Evidence of the boatload approach is the signing bonuses of Latin Americans frequently represents a fraction of the bonus paid to equivalent American players,¹⁰⁴ the length of career and the average player's progress through American professional baseball. In the Dominican Republic, only one in 40 boys ever play in an MLB club academy,¹⁰⁵ few academy players reach the Minor Leagues¹⁰⁶ and less than one per cent of academy players play in the Major Leagues.¹⁰⁷ Similar practices exist in Venezuela, where the excessive numbers of players signed each year sees an average career length of two years.¹⁰⁸ The treatment of children resulting from the labour practices that grew out of the competition among MLB clubs to find the elusive Major League player in the 'boatload' of recruits has long-term effects on the Dominican and Venezuelan society as the vast numbers of children that enter the baseball industry do not return to school when their Major League dream abruptly ends and they enter society and the workforce with little education.¹⁰⁹

The bulk of the human and worker rights problems in Latin America stem from the baseball academy system. After Ralph Avila opened the first academy with the Dodgers in the Dominican Republic in 1986 as a means of preparing players for living and working in the United States, the academy system rapidly developed into the cornerstone of player development in Latin America by the end of the 20th century.¹¹⁰ Living and working conditions in Dominican and Venezuelan academies are criticised for perpetuating poverty through the provision of little or poor education,¹¹¹ insufficient food and clean water, a lack of security and no trained medical staff.¹¹² To hide talented players some

¹⁰³ Jeremi N Duru, 'This Field Is Our Field: Foreign Players, Domestic Leagues, and the Unlawful Racial Manipulation of American Sport' (2010) 84 *Tulane Law Review* 613, 669-670.

¹⁰⁴ Ryan S Hanlon, 'School's Out Forever: The Applicability of International Human Rights Law to Major League Baseball Academies in The Dominican Republic' (2013) 16 *Global Business & Development Law Journal* 235, 252.

¹⁰⁵ *Ibid* 239.

¹⁰⁶ William B. Gould, 'Bargaining, Race, and Globalization: How Baseball and Other Sports Mirror Collective Bargaining, Law, and Life' (2013) 48 *University of San Francisco Law Review* 1, 16-19.

¹⁰⁷ Kalthoff (n 91) 363; Anna Rosenblatt, 'Turning Japanese in the Dominican Republic: Baseball in the United States, Dominican Republic and Japan and Implementing the United States-Japanese Posting System Model in the Dominican Republic' (2014) 15 *Rutgers Race and Law Review* 339, 344-345.

¹⁰⁸ Vargas (n 94) 27.

¹⁰⁹ *Ibid* 32. This trend is also demonstrated by the percentage of foreign players in each Minor League classification: see Nichol Data 2017 (n 88).

¹¹⁰ Alan Klein, 'Dominican Republic: From Paternalism to Parity' in George Gmelch and Daniel A Nathan (eds) *Baseball Beyond Our Borders: An International Pastime* (2017, University of Nebraska Kindle Edition), 833, 838.

¹¹¹ *Ibid* 354.

¹¹² Vargas (n 94) 29.

academies recruit uncontracted children as young as 12 years, who are required to do the same work as contracted players, receive no formal schooling and face an increased risk of injury as training programs are designed for older teenagers.¹¹³ Academies represent a major source of unregulated labour as each year approximately 500 players enter a MLB club academy in the Dominican Republic alone.¹¹⁴

3 *Buscone and the Dominican Republic*

Buscone are player agents that sit at the centre of many of the exploitative labour practices in Latin America. The job of a *buscone* is diverse and involves scouting, coaching and representation through identifying, recruiting, developing and then ‘selling’ players to the highest bidding Major League club. For over 20 years, *buscone* have controlled talent development in the Dominican Republic through the demand for players in the academy system.¹¹⁵ The competition among the 2,000 to 3,000 *buscone* in the Dominican Republic is fierce¹¹⁶ and unregulated as the representation of players signing Minor League contracts falls outside the regulatory scope of the MLBPA’s accredited agent scheme for Major League players.¹¹⁷

How *buscone* treat their clients, the majority of whom are children, presents serious ethical, legal and human rights issues. Not only do *buscone* receive up to 30 per cent of a player’s signing bonus,¹¹⁸ some ‘skim’ money from the bonus with a scout by inflating the amount of a bonus reported to the club and then sharing the difference between the actual and reported bonuses.¹¹⁹ A more sophisticated form of skimming to surface over the past ten years is an ‘assigned contract agreement’.¹²⁰ This arrangement sees prominent American player agents and ‘investors’ work with *buscone* to loan significant amounts of

¹¹³ Hanlon (n 104) 240, 248.

¹¹⁴ Rosenblatt (n 107) 344-45.

¹¹⁵ Klein (n 110) 899, 906.

¹¹⁶ Jeffrey J Tiedeman, ‘MLB International Player Draft: Home Run or Headache?’ (2014) 21 *Sports Lawyers Journal* 255, 272.

¹¹⁷ The MLBPA is the ‘sole and exclusive’ bargaining agent for all individuals who may become Major League Baseball players: *National Labor Relations Act of 1935*, (49 Stat 449) 29 U.S.C § 151–169, section 9(a). MLB Basic Agreement 2017-2021 (n 28) articles II, 4; Major League Baseball Players Association, *MLBPA Regulations Governing Agents*, amended effective 4 December 2019, §1(B), 2(B).

¹¹⁸ Rosenblatt (n 107) 352-353; Kalthoff (n 91) 360-364.

¹¹⁹ Jeffrey S Storms, ‘El Monticulo (“The Mound”): The Disparate Treatment of Latin American Baseball Players in Major League Baseball’ (2008) 2(1) *University of St Thomas Journal of Law and Public Policy* 81, 93. Scouts adapted skimming through the deduction of a ‘finder’s fee’ from a bonus.

¹²⁰ In soccer, this practice is called ‘third party ownership’ of players and arose in the early 2000s as a means for clubs to sell an ‘interest’ in a player to hedge funds or investors to fund the growing cost of player labour: see KPMG, *Project TPO*, 8 August 2013.

money to young Dominican players in exchange for up to 50 per cent of a player's future signing bonus.¹²¹ The most alarming practice sees some *buscone* giving children banned performance enhancing drugs or fraudulent documentation to prove they are under 18 years (many clubs do not sign older teenagers).¹²²

4 *The human trafficking of Cuban baseballers*

For decades, Cuban baseball players fled the island nation's constraints on freedom and poverty wages in professional baseball¹²³ to pursue life in America and a career in MLB via the dangerous route of defecting to a third country. Violent gangs, drug cartels, smugglers and human traffickers facilitate the escape of players, who receive a percentage of a player's MLB contract (potentially millions of dollars) if successful. Trafficking encompasses a multitude of legal, political, ethical and sport-specific issues¹²⁴ and a number of factors create a market for traffickers. The Congressional embargo on trade between the United States and Cuba¹²⁵ and foreign asset regulations¹²⁶ prohibit American businesses (including MLB clubs) from contracting with Cuban nationals. Players therefore need to defect from Cuba to obtain employment in the Major Leagues. However, defection at international tournaments by a player as part of the Cuban national team is now extremely difficult due to increased security measures and the selection of players based on age and 'flight risk'. MLB's amateur recruitment rules disincentivise Cubans to seek asylum in the United States as they would be subject to the amateur draft and low signing bonuses.¹²⁷

The path to ending the trafficking of baseballers began when the Cuban government permitted athletes to sign contracts in foreign leagues in 2013.¹²⁸ The following year, the Cuban Baseball Federation, who is reported to be controlled by the Cuban government, entered a player transfer agreement with the NPB that allows Cubans to play in Japan. Players signed by an NPB club must pay 20 per cent of their salary and additional income tax to the Cuban

¹²¹ Jeffrey Standen, 'The Demise of the African American Baseball Player' (2014) 18(2) *Lewis and Clark Law Review* 421, 425.

¹²² Rosenblatt (n 107) 352-353; Kalthoff (n 91) 360-364.

¹²³ In 2013, the monthly wages of a baseball player increased from US\$17 to US\$40: Nicole Zaworska, 'Striking Out the Cuban Trade Embargo: A Contractual Approach to the Transfer of Cuban Baseball Players to the Big Leagues' (2017) 24 *Sports Lawyers Journal* 135, 146-147.

¹²⁴ Drew M Goorabian, 'Baseball's Cuban Missile Crisis: How the United States and Major League Baseball Can End Cuban Ballplayer Trafficking' (2016) 20 *UCLA Journal of International Law and Foreign Affairs* 425, 430.

¹²⁵ *Foreign Assistance Act of 1961*, 22 U.S.C. 2151 et seq, § 2370(a)(2).

¹²⁶ *Cuban Assets Control Regulations*, 31 C.F.R. §515.505 (2016).

¹²⁷ Major League Baseball, Major League Rules 2020, rule 3(a)(1)(b).

¹²⁸ Zaworska (n 123) 156.

government.¹²⁹ The Cuban Baseball Federation entered similar arrangements in 2016 with leagues in Mexico, South Korea and Taiwan.¹³⁰ Then, in 2018, MLB, the MLBPA and the Cuban Baseball Federation formed a historic agreement enabling MLB clubs to sign players living in Cuba and permit them to travel to the United States on a visa and return to Cuba at any time. But the Trump administration quickly declared the agreement illegal in 2019 as a violation of the embargo.¹³¹ The payment of transfer fees to the Cuban Baseball Federation were viewed as payments to the Cuban government,¹³² despite the Cuban government arguing the Cuban Olympic Committee owns the Federation and reports to the IOC and the economic value of transfers estimated at less than US\$2 million a year.¹³³ The safety of the 34 players who received permission to sign with MLB clubs is concerning.¹³⁴ Ultimately, President Trump prioritised the embargo and diplomacy over the Palermo Protocols' prohibition on smuggling migrants¹³⁵ (and similar American laws),¹³⁶ adding weight to Zaworska's position that terminating the embargo is fundamental to stopping the trafficking of Cuban baseballers.¹³⁷

¹²⁹ Ibid. In 2021, Softbank *ikusei* pitcher Andy Rodriguez became the first player to violate this agreement (and breach his contract) when he defected in the United States while at a pre-Olympics tournament in Florida. By filing for asylum in the United States Rodriguez elected to enter the MLB amateur draft: 'Fourth member of Cuban baseball delegation defects to US', *Agence-France Presse*, 8 June 2021 <https://au.sports.yahoo.com/fourth-member-cuban-baseball-delegation-165450681.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAHyUCswA0TXPvxGTz8Fp2L6ltOUMdpnu-0b2cw9hjwiP-R44vNf6er2pypvo67fnTx_nSYpLuxEilckU1g60JFAfLcZW4cFsSIW2otlo-uOVS3xsUaIHxY1Z3qPQnNqmqzLDmyEi-c6-paxxFRNWpSHgPPr1ieS9XvNaaxNC49MDu>.

¹³⁰ Aaron Kleine and Jake Marcus, 'United States-Cuba Normalized Relations and the MLB Influence: The Baseball Coalition Committee' (2016) 47(2) *Inter-American Law Review* 258, 274.

¹³¹ 'MLB, MLBPA reach agreement with Cuban Federation', *MLB.com*, 19 December 2018 <<https://www.mlb.com/news/mlb-announces-deal-with-cuban-federation/c-302036110>>.

¹³² Karen DeYoung, 'Trump administration cancels Major League Baseball deal with Cuba', *The Washington Post*, 9 April 2019 <https://www.washingtonpost.com/world/national-security/trump-administration-cancels-mlb-deal-with-cuba/2019/04/08/99c7d9be-5a2f-11e9-842d-7d3ed7eb3957_story.html>.

¹³³ Cole Burton, 'America's Pastime: Human Trafficking, Cuba and the Road to the Show' (2020) 40(3) *Northern Illinois University Law Review* 286, 295, 298.

¹³⁴ Ibid 297.

¹³⁵ United Nations, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 on 15 November 2000.

¹³⁶ *Immigration and Nationality Act of 1965*, H.R. 2580, Pub. L. 89-236, 79 Stat. 211, enacted 30 June 1968, § 274.

¹³⁷ Zaworska (n 123) 155.

5 *Labour practices of Nippon Professional Baseball in Latin America*

The only other foreign league to actively recruit Latin American players is NPB. Japanese clubs have also faced accusations of exploitative labour practices in Latin America¹³⁸ but cost and cheap labour are not the sole factors stimulating demand for Latinos. NPB clubs believe Latin Americans have a greater chance of success in Japan than Americans as they are more likely to accept Japan's style of baseball education and training and adjust to local culture through their previous experiences in the United States.¹³⁹

The Hiroshima Toyo Carp is the only Japanese club operating an academy in Latin America. The Carp Academy that opened in 1990¹⁴⁰ is comparably smaller than MLB academies as there are approximately 30 players. Carp academy players are also older as players are 17 to 23 years and recruited when released from an MLB academy or the Minor Leagues. The Carp Academy aims to 'rebirth' players through the teaching of Japanese baseball.¹⁴¹ But Latin Americans as a cheap labour supply plays a role in the Carp Academy and the general recruitment practices of NPB clubs. In the 1990s, Hiroshima recruited academy outfielder Alfonso Soriano to a salary of US\$45,000, who failed in arbitration to increase his salary to a level similar to other foreign players after a successful NPB season.¹⁴² Shaping the salaries of academy recruits, such as Soriano, is a mix of exploitative and normative wage setting practices. As Carp academy recruits have no other option after being released from an MLB club and possess little leverage, they are signed to contracts on reduced wages. Two key norms factors in setting wages in the NPB are a player's circumstances prior to employment and any expected post-employment relationship (eg, contribution to Japanese baseball). Foreign players who are recruited from the Carp academy or a club in the Japanese independent leagues will receive lower than market wages as a product of Japanese baseball. Thus, Carp Academy

¹³⁸ David L. Snyder, 'Automatic Outs: Salary Arbitration in Nippon Professional Baseball' (2009) 20(1) *Marquette Sports Law Review* 79, 90.

¹³⁹ Interview with Yoshinori Hasegawa, MLBPA Certified Agent and Director of Pacific Rim, Octagon Baseball (Keiji Kawai, Graduate School of Policy and Management, Doshisha University, Online, 3 December 2021) ('Yoshinori Hasegawa Interview').

¹⁴⁰ 'Future helpers to be raised in Central America, Hiroshima, Dominican Republic 25 years of operation', *Shimbun (Morning Edition)*, 24 February 2015.

¹⁴¹ 'Hiroshima Carp Baseball Academy, a critical stage in the development of Dominican players', *Asahi Shimbun (Evening Edition)*, 6 February 2003.

¹⁴² Even though he failed in his bid to increase his salary to \$165,000, Soriano's agent, Don Nomura, strategically used arbitration to void his contract by rejecting the Carp's salary offer and transferring to the New York Yankees in MLB: Robert Whiting, *The Meaning of Ichiro: The New Wave from Japan and the Transformation of our National pastime* (Warner Books, 2004) 141-142; 'Hiroshima's Soriano's request for annual salary rejected Pro baseball' *Asahi Shimbun (Morning Edition)*, 14 April 1998.

players face salary discrimination as they receive wages lower than a Dominican player of equivalent skill recruited from an MLB club.¹⁴³

In 2021, 79 foreigners were on NPB rosters:¹⁴⁴ 46 per cent Latin Americans, 43 per cent American and eight per cent from other countries.¹⁴⁵ Latinos made up 46 per cent of foreign pitchers and 50 per cent of foreign position players. In contrast to the recruitment of young Latin American players by MLB clubs, NPB clubs recruit experienced foreign professional players and therefore the average of foreign NPB players is 30 years.¹⁴⁶ Recruitment practices vary between the NPB's two leagues. In the Central League, Latin American players compose 56 per cent of players compared to 36 per cent in the Pacific League. Differences in nationality also exist: 31 per cent of Central League Latinos are Dominican (7 per cent in the Pacific League) and 21 per cent of Latin Americans in the Pacific League are Cubans (nine per cent in the Central League).¹⁴⁷

There were similar trends in the recruitment of foreign and Latin American players in 2022.¹⁴⁸ Some differences between the two seasons were a decrease in non-Japanese players (79 to 71 players), a drop in the average age of foreign players (30.03 years to 26.1 years), a reduction in the gap in the number of Dominican players in each league (24 per cent in the Central League, 11 per cent in the Pacific League) and a similar number of Cubans in the two leagues (each league was 8.0 per cent to 8.9 per cent).¹⁴⁹ There was also a significant reduction in the number of nationalities among non-Japanese players.¹⁵⁰ Also,

¹⁴³ Yoshinori Hasegawa Interview (n 139).

¹⁴⁴ Clubs are limited to four active roster foreign players (a maximum of three pitchers or three position players) but there are no restrictions on foreigners on the 70-man or *ikusei* rosters: Nippon Professional Baseball, *Nippon Purofessionaru Yakyū Kyojaku* [Japanese Professional Baseball Agreement] 2021, article 82(2) ('Japanese Professional Baseball Agreement').

¹⁴⁵ Data on foreign players on NPB rosters in 2021 was collected by the authors from the NPB English website, MLB website and Baseball Reference ('Nichol and Kawai Data 2021').

¹⁴⁶ Only a small number of *ikusei* players are foreign and as these players possess less experienced the average age of Latin players is 22.75 years: *ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ Data on foreign players on NPB rosters in 2022 was collected by the authors from two sources: *Puroyakyū Senshu Meikan 2022* [Professional Baseball Players Directory 2022] (Mainichi Shimbun Publishing Inc); Nippon Professional Baseball, Teams - Player Information, undated <<https://npb.jp/bis/teams/>> ('Kawai and Nichol Data 2022').

¹⁴⁹ *Ibid.*

¹⁵⁰ In 2021, foreign players were predominantly from the United States and the Latin American countries of the Dominican Republic, Venezuela, Puerto Rico, Mexico, Brazil and Cuba. Other countries represented were Lithuania, Taiwan, South Africa, South Africa, Holland and Curacao. The differences in 2022 rosters included no Puerto Rican Latin Americans but instead Colombians. Also, the only non-American and Latin American players were from Taiwan: Nichol and Kawai Data 2021 (n 147), Kawai and Nichol Data 2022 (n 148).

the 2022 foreign player data encompasses salary information.¹⁵¹ Individual salaries ranged from US\$184,610 to US\$2.77 million. The average foreign player salary was similar across the two leagues: US\$985,426 in the Central League compared to US\$935,529 in the Pacific League. In the Central League, 14 players earned US\$1 million to US\$2 million (only six foreign players in the Central League). While one Central League foreigner received US\$2 million to US\$3 million, three Pacific Leagues players had salaries in this range (all Softbank players).¹⁵²

6 *Enforcement of contracts and jurisdiction*

Determining the relevant jurisdiction for the enforcement of player contracts is likely to continue and increase in importance as global labour mobility continues to expand and evolve. The enforcement of contracts is complex due to contract formation occurring across multiple countries in jurisdictions that consist of a myriad of rules and practices in different languages, laws and legal systems. Adding to these challenges is the absence of universal contract law.¹⁵³ An illustrative example of the regulatory complexity is the decision of the United States District Court for the Eastern District of Pennsylvania in *Lutz v Rakuten Inc*¹⁵⁴ in 2019. The Court ruled it had ‘personal jurisdiction’ under federal civil procedure law to hear cases between athletes and foreign teams if an international conglomerate owns the team and the conglomerate’s marketing is central to its business and targets citizens in an American state. The District Court determined it had jurisdiction as contract negotiations took place over a number of months between Lutz in Pennsylvania (and his agent in Los Angeles) and the Golden Eagles in Japan.¹⁵⁵

Simple disputes involving enforcement frequently require the identification of the relevant law and jurisdiction. In Soriano’s arbitration, his lawyer argued the contract needed to be countersigned by a guardian under Japanese law as he

¹⁵¹ Salaries were converted from Yen to US Dollars at an exchange rate of 135.42 yen to the dollar: Bank of Japan - Financial Markets Department, Foreign Exchange Rates, 6 July 2022 <<https://www.boj.or.jp/en/statistics/market/forex/fxdaily/index.htm/>>.

¹⁵² Kawai and Nichol Data 2022 (n 148).

¹⁵³ Kenneth A Jacobson, Noah J Goodman and Travis M Watson, ‘Leveling the Playing Field: U.S. Court Jurisdiction Over Disputes Between American Professional Athletes and Foreign Sports Teams’ (2020) 27(2) *Jeffrey S Moorad Sports Law Journal* 181, 202.

¹⁵⁴ 376 F. Supp. 3d 455 (E.D. Pa. 2019). Lutz played for Rakuten in 2014 and returned to the United States to rehabilitate a broken thumb after being hit by a pitch. The two parties agreed to a new contract for \$700,000, generous incentives and expenses. While Lutz signed the formal agreement, Rakuten failed to execute the agreement due to concerns about his injury and by the time Lutz was released in late December 2014 he was unable to sign with an NPB team and signed a \$500,000 contract with the Doosan Bears in the KBO. Lutz initiated court proceedings alleging fraud, negligent misrepresentation and promissory estoppel: Jacobson, Goodman and Watson (n 153) 197-198.

¹⁵⁵ *Lutz*, 376 F. Supp. 3d 455, 465-466, 476 (E.D. Pa. 2019).

was 17 years old at the time (capacity in Japan is 20 years). The Carp's lawyer rejected this argument and claimed the Dominican Republic as the relevant jurisdiction where Soriano had capacity according to contract law.¹⁵⁶ Capacity again surfaced as an issue in 2020 when Cuban player Oscar Colas sought release from his contract with the Fukuoka Softbank Hawks on the basis he did not understand the terms of his contract. Colas argued neither the Hawks nor the Cuban Baseball Federation explained to him that once the three-year term of his *ikusei* ("development") contract ended, the contract permitted the Hawks to exercise a five-year option. Colas' mother emphasised the disparity in bargaining positions when stating she lacked the capacity to understand the terms of the contract, did not comprehend the contractual effect of an 'option' and received no copy of the contract in Spanish or English.¹⁵⁷ In Venezuela, some MLB clubs also fail to give a player or his family a copy of the contract in Spanish or English, rendering the contract illegal and unenforceable under local law.¹⁵⁸

D Proposed Reforms to the Regulation of Global Labour Mobility in Baseball

1 Protecting international human rights

An urgent area for reform in the regulatory space of baseball is the protection of the international human rights of players. The need for fundamental change is most acute in the labour practices of MLB clubs, scouts and agents in Latin America and ending the trafficking of Cuban players. To ensure the human rights of players are respected in labour markets in Latin America and all countries, professional leagues, clubs and player associations must immediately safeguard human rights through the implementation of the provisions in the United Nations Guiding Principles on Business and Human Rights.¹⁵⁹ These principles compel States and business enterprises to meet human rights standards in international laws.

Three general principles underpin the UN Guiding Principles that need to form the basis of the human rights framework in baseball's regulatory space. Principle 1 requires States to respect, protect and fulfil fundamental human rights and freedoms via the implementation of policies, legislation and

¹⁵⁶ Whiting (n 142) 141-143.

¹⁵⁷ Jim Allen, 'Cuban 'Ohtani' Oscar Colas wants out of deal with Softbank, calls current deal invalid', *The Japan Times*, 10 June 2020 <<https://www.japantimes.co.jp/sports/2020/06/10/baseball/japanese-baseball/cuban-ohtani-oscar-colas-wants-deal-softbank-calls-current-contract-invalid/>>.

¹⁵⁸ Vargas (n 94) 28.

¹⁵⁹ United Nations Human Rights Commission, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, 2011.

regulations to prevent third parties violating human rights. Immediate development of these regulatory tools is required in the Dominican Republic, Venezuela and Cuba. Principle 2 requires businesses to avoid infringing upon human rights and address adverse impacts on human rights by complying with all applicable laws and respecting fundamental international human rights¹⁶⁰ through formulating appropriate policy commitments and performing human rights due diligence.¹⁶¹ A starting point in baseball to meet the Principles is to nationally embed core human rights and ethical standards in league constitutions, by-laws, policies and codes of conduct. Human rights due diligence must become a key area of regulating global labour mobility. MLB and NPB could use their power as influential regulatory actors to establish human rights due diligence in their own regimes and then require other professional leagues in Latin American and Asia to follow. Principle 3 mandates the provision of effective remedies when human rights are breached.¹⁶² The recruitment of Latin Americans by MLB and NPB clubs demonstrates the difficulties facing players in accessing any type of legal remedies, a product of the power imbalance between players and clubs that is exacerbated by MLB's political and economic influence related to the numerous jobs in the academy system.¹⁶³ It is essential that human rights violations face independent review by an external regulatory actor.

2 *Creating a global player transfer regime*

Hindering the global movement of baseball players and the access of clubs to labour is a fragmented international transfer system that develops in an ad hoc manner and that is dominated by the MLB regime. In this regulatory paradigm, most aspects of amateur recruitment are unregulated and the constant expansion of global labour mobility into amateur baseball necessitates a regime that extends beyond the rules of local amateur sports governing organisations. Establishing a global player transfer system in baseball to govern professional and amateur players would create transparent protocols that cover the international transfer of all players. This framework would protect the human rights of players and alleviate many of the exploitative labour practices in Latin America. Potential areas of regulation for a global player transfer system include minimum age requirements, contract length, minimum wages, signing bonuses, transfer rules and transfer fees.

¹⁶⁰ Ibid Principles 11-13.

¹⁶¹ Ibid Principles 16-17.

¹⁶² Ibid Principle 25.

¹⁶³ In Latin America MLB clubs pay \$1 billion in salaries per year to Latin American staff, annually invest \$100 million in Dominican and Venezuelan academies who employ thousands of locals and 2,000 to 3,000 *buscone* work in the Dominican Republic: Tiedeman (n 116) 272.

A number of rules and practices governing professional transfers that are uncontroversial but effective in facilitating labour mobility could be quickly implemented. Setting the minimum age of signing a professional contract to 18 years not only aligns international amateur recruitment practices with professional leagues who have a draft but better protects a child's human right to education under international law by encouraging players to complete high school. Clear rules on the rights of amateur players entering professional ranks would be of particular assistance to Japanese and South Korean amateurs in deciding whether to commence their careers locally or in the MLB system. Online registration systems¹⁶⁴ expedite labour mobility as foreign leagues are notified when a player is released or available to play in a winter league. The cost and efficiency of global transfers would be improved if transfers are effective when a player's approved clearance letter¹⁶⁵ or international transfer certificate¹⁶⁶ is lodged in the online registration system. Clear rules establishing grounds for rejecting a transfer¹⁶⁷ create greater certainty for clubs and players. Registration could incorporate 'transfer windows' that require the transfer and release of players in designated periods¹⁶⁸ and would benefit MLB and MiLB players who face the prospect of termination of employment at any time. Posting fees in the Posting Agreement 2017 create a fair method for calculating transfer fees and is capable of being the universal method for setting transfer fees in baseball.

3 *National team representation*

The inability of players to play for their country when called up to national team duties is a regulatory failure that has wide-ranging repercussions on stakeholders and is in stark contrast to fully globalised sports like soccer.¹⁶⁹ Protecting a player's right to represent their country helps ensure that international tournaments are played at the highest standard with the best players. This, in turn, generates greater commercial interest and sponsorship opportunities. It also ensures leagues and countries that invest in players who are recruited to foreign leagues are not unfairly disadvantaged. In the world of baseball, players from countries such as Cuba, the Dominican Republic, Japan, South Korea, Taiwan, China and Australia all aspire to play in international tournaments due to the prestige and importance of national team representation. Status as an Olympic sport and qualification for the Olympics also determines the level of government funding a sport receives in some countries. The results of international tournaments (including juniors and

¹⁶⁴ See eg, ice hockey: International Ice Hockey Federation (n 3) article 3.1.

¹⁶⁵ International Basketball Federation (n 3) article 57.

¹⁶⁶ FIFA RSTP 2021 (n 3) article 9.

¹⁶⁷ See eg, International Ice Hockey Federation (n 3) article 3.5.

¹⁶⁸ See eg, long and short transfer windows in soccer: FIFA RSTP 2021 (n 3) article 6.

¹⁶⁹ Ibid Annexe 1.

women's) determine rankings that shape eligibility and qualification process for the WBC, the Premier 12 and the Tokyo Olympics. However, MLB uses its regulatory power to influence the composition and outcomes of international tournaments as its clubs frequently prevent foreign players on an MLB 40-player roster and some Minor Leaguers from participating in international events. National team call-ups can affect the way players move overseas and the global development of baseball. It is important that the proposed global player transfer system guarantee players the right to represent their country in order to effectively and fairly balance the interests of stakeholders in all countries, notably national federations, leagues, clubs and players.

4 *Independent dispute resolution*

The absence of independent dispute resolution in the regulation of global labour mobility undermines the effectiveness of player transfer regimes and heightens the risk of exploitative labour practices and human rights violations. Relevant professional leagues typically internally resolve transfer disputes through negotiation and thereby inhibit parties receiving substantive and procedural fairness. Transfer disputes can encompass contractual capacity, contracting processes, a club's refusal to post a player, excessive player agent fees, player signing bonus and human rights violations. There is scope inside the regulatory space of baseball to add an internal or external independent global dispute resolution mechanism.

An internal option is to add expand the WBSC's functions to include dispute resolution. The Fédération Internationale de Football Association adopted this option when it created the Dispute Resolution Chamber.¹⁷⁰ The performance of dispute resolution by an actor inside baseball's regulatory space is more likely to obtain the support of baseball's regulatory actors than the external option. Generally absent from the world of baseball is the Court of Arbitration for Sport ('CAS')¹⁷¹ which like the other key global sports law regulators of the IOC and the World Anti-Doping Authority, sits outside baseball's regulatory sphere. But arbitration may receive some support as it occupies a prominent place in the MLB regime¹⁷² and is present in NPB.¹⁷³ The CAS may be appealing to some regulatory actors as its decisions are not reviewable by state courts and it is criticised for failing to follow precedent, not

¹⁷⁰ Ibid article 1.

¹⁷¹ Ibid article S12.

¹⁷² Arbitration has been an integral part of MLB's labour regimes since its implementation in the first Major League collective bargaining agreement in 1968 and led to the recognition of free agency by arbitrator Peter Seitz in 1975: *National and American League of Professional Baseball Clubs v MLBPA*, 66 Labor Arbitration Report (BNA) 101 (1976) (Seitz, Arb).

¹⁷³ Articles 94-96 of the Japanese Professional Baseball Agreement permit salary arbitration but since 1973 there has only been seven arbitration hearings: Nichol (n 6) 84.

conforming with public policies on the role of judges and diverging from established law.¹⁷⁴

5 *The need for an independent global regulator*

The continual globalisation of baseball and the failure to protect human rights of players in Latin America necessitates an independent global regulator to govern global labour mobility. Amplifying the situation are the cultural, linguistic and legal complexities in player movements between the United States and numerous countries in Asia and Latin America. The impact of normative factors on the evolution of global mobility in multiple regimes requires the regular review of rules, processes and practices by an independent regulator with no vested interest in the commercial and financial outcomes of transfers. An independent global regulator is also better equipped to monitor human rights compliance in a diverse number of countries and to promote the global interests of baseball. The WBSC's narrow regulatory focus can be easily expanded through constitutional changes and resourcing.

2 CONCLUSION

Baseball's continual globalisation into the 21st century created a cluttered regulatory space in the governance of labour mobility that is largely controlled by MLB as the sport's de facto global regulator. While NPB has long been the dominant actor in Asia, *buscone* are a relatively new and influential regulatory actor in Latin America. Recent decades have seen the forces of globalisation compel professional and amateur regimes in multiple countries to regularly interact, thereby accelerating the evolution of the rules and protocols that regulate global labour mobility. Despite the advancement in baseball's global labour regime, there is no independent global regulator, global player transfer system for professionals and amateurs or independent dispute resolution mechanism. These regulatory failures not only impede the global mobility of baseball players but exploitative labour practices and human rights violations are common in several Latin American countries. Baseball's regulatory space critically needs an independent regulator and global transfer regime that protect the international human rights of all players and promote the interests of baseball and all stakeholders.

¹⁷⁴ Stephen F Ross, *Advanced Introduction to Global Sports Law* (Edward Elgar, 2021) 123-124.