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Out at Home: Challenging the United States-Japanese Player Contract Agreement Under Japanese Law

Victoria J. Siesta

OUT AT HOME: CHALLENGING THE UNITED STATES-JAPANESE PLAYER CONTRACT AGREEMENT UNDER JAPANESE LAW

INTRODUCTION

Although it is an inherently American game, thus dubbed the "American Pastime,"[1] baseball is no exception to globalization.[2] For years, Major League Baseball ("MLB") scouts have traversed South America, Latin America and the Caribbean in search of outstanding talent.[3] Moreover, players from across Asia have excelled in MLB for more than a decade.[4] Indeed, the main reason that international players come to MLB is to prove their skills in the world's premiere baseball forum.[5] In-

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1. Casey Duncan, Note, *Stealing Signs: Is Professional Baseball's United States-Japanese Player Contract Agreement Enough to Avoid Another "Baseball War"?*, 13 MINN. J. GLOBAL TRADE 87, 88 (2003).

2. 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, 289–90 (2007); Krikor Meshefejian, *The Global Reach of America's Pastime: Antitrust Implications of the US-Japanese Player Contract Agreement*, ILL. BUS. L.J., Oct. 5, 2005, http://iblsjournal.typepad.com/illinois_business_law_soc/2005/10/the_love_of_the.html.

3. On Opening Day of 2004, nearly half of all MLB players were born outside of the United States, and players from thirty-three foreign countries currently play for either MLB teams or their minor league affiliates. MLB's globalization is largely due to the efforts of Major League Baseball International, the global arm of MLB, which was organized in 1989 to "focus[] on the worldwide growth of baseball" and has offices in Beijing, New York, London, Sydney and Tokyo. The Official Site of Major League Baseball: International, http://mlb.mlb.com/mlb/international/index.jsp?feature=mlbi (last visited Apr. 14, 2008).

4. In 1995, Pitcher Hideo Nomo became the first Japanese player since the signing of the 1967 United States-Japanese Working Agreement to play in MLB. Ichiro Suzuki followed Nomo in 2000, becoming the first Japanese player to utilize the current Posting System. ROBERT WHITING, THE MEANING OF ICHIRO: THE NEW WAVE FROM JAPAN AND THE TRANSFORMATION OF OUR NATIONAL PASTIME 97 (2004) [hereinafter WHITING, MEANING OF ICHIRO]. Currently, the New York Yankees' roster includes pitcher Chien-Ming Wang of Taiwan, and the Seattle Mariners' roster includes pitcher Cha Seung Baek of South Korea. The Official Site of The New York Yankees: Team: Active Roster, http://newyork.yankees.mlb.com/team/player.jsp?player_id=425426 (last visited Apr. 14, 2008); The Official Site of The Seattle Mariners: Team: Active Roster, http://seattle.mariners.mlb.com/team/player.jsp?player_id=430657 (last visited Apr. 14, 2008).

5. Gould, *supra* note 2, at 293–94; *see* Andrew F. Braver, Note, *Baseball or Besoburo: The Implications of Antitrust Law on Baseball in America and Japan*, 16 N.Y.L. SCH. J. INT'L & COMP. L. 421, 446 (1996) (identifying the quality of baseball in the United States as superior to that of Japan). Hideki Matsui, former Japanese player and current outfielder for the New York Yankees, explained that many Japanese players come to MLB to "help Japanese baseball enhance its reputation" and that their success is "proof

ternational players are not selected in MLB's amateur draft, but are signed at a young age by MLB clubs and begin their careers in the minor league system.[6] For Japanese players, however, the process is unique.[7] While under contract in Japan, a player must be posted by his team and then bid on by interested MLB teams.[8] The result is a highly restrictive system which unjustly limits the posted player's mobility and market value.[9]

Most theories suggest that the United States-Japanese Player Contract Agreement ("Posting Agreement"),[10] used for Japanese player transfers to MLB, violates U.S. antitrust laws as codified in the Sherman Act.[11] Others posit that posting falls under the National Labor Relations Act[12] as a mandatory subject of collective bargaining.[13] However, the Posting Agreement's limitations on player mobility stem from the Nippon Professional Baseball ("NPB") league's desire to keep Japanese players in Japan.[14] Furthermore, the Posting Agreement would be largely unnecessary if NPB's free agency system was less restrictive.[15] Thus, the resolution to this problem rests not in the laws of the United States, but rather

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that the level of Japanese baseball is high." Japan Today—Matsui Weighs in on Turmoil Facing Japanese Baseball, http://www.japantoday.com/jp/shukan/243 [hereinafter Matsui Interview] (last visited Apr. 14, 2008). Masanori Murakami, a former NPB and MLB player, stated that MLB "is the best league" and analogized a Japanese player's desire to come to MLB to that of "a musician going to Carengie Hall." Jim Caple, *Dice-K 2.0*, http://sports.espn.go.com/espn/eticket/story?page=darvish [hereinafter Caple, *Dice-K*] (last visited May 21, 2008).

6. Posting of Michael McCann to Sports Law Blog, http://sports-law.blogspot.com/2006_11_01_archive.html (Nov. 27, 2006, 6:10pm).

7. *Id.*

8. United States-Japanese Player Contract Agreement, paras. 5–7, Dec. 15, 2000, *available at* http://jpbpa.net/convention/2001_e.pdf [hereinafter Posting Agreement] (last visited Apr. 14, 2008).

9. *See* discussion *infra* Part II.B.

10. Posting Agreement, *supra* note 8.

11. Sherman Act, 15 U.S.C.A. §§ 1–7 (2007); *e.g.,* Gould, *supra* note 2, at 294–95 (noting possible antitrust violations).

12. National Labor Relations Act, 29 U.S.C.A. §§ 151–169 (2007); *e.g.*, Gould, *supra* note 2, at 306 (noting possible labor law violations); Elliot Z. Stein, Note, *Coming to America: Protecting Japanese Baseball Players Who Want to Play in the Major Leagues*, 13 CARDOZO J. INT'L & COMP. L. 261, 267 (2005).

13. Gould, *supra* note 2, at 287; Stein *supra* note 12, at 267. Another theory examines the effect of contract enforcement on the Posting System. Duncan, *supra* note 1, at 87–88.

14. "The posting system was obviously designed to benefit the Japanese team owners; it allowed them to . . . control the flow of players to the U.S." WHITING, MEANING OF ICHIRO, *supra* note 4, at 146.

15. Duncan, *supra* note 1, at 97; Matsui Interview, *supra* note 5.

in those of Japan.[16] In addition, Japanese players cannot successfully challenge the limitations of the posting system[17] under the laws of the United States, therefore they must do so under either Japanese antimonopoly or labor laws.[18]

The purpose of this Note is to examine the Posting Agreement with respect to Japanese antimonopoly and labor laws and to ascertain whether the process violates the provisions of either body of law. Part I explains the history of baseball in both the United States and Japan, including the development of their respective players' unions. Part II sets forth the tensions underscoring baseball relations between the United States and Japan and discusses how they led to the implementation of the current posting system. Part III examines antitrust and labor issues with regards to U.S. laws and explains why a comparable analysis under Japanese laws is proper. Part IV uses Japanese antimonopoly and labor laws to analyze the Posting Agreement, and Part V proposes player-friendly modifications to the current system.

I. THE HISTORY OF BASEBALL IN THE UNITED STATES AND JAPAN

A. Major League Baseball in the United States

Although some controversy exists as to the true origins of baseball, the Mills Commission published a report in 1907 concluding that Abner Doubleday invented the game in Cooperstown, New York, in 1839.[19]

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16. In both cases, U.S. courts recognize exemptions that render such arguments ineffective in securing additional player rights for the Japanese players. Gould, *supra* note 2, at 285 (referencing the judicially-created baseball exemption from U.S. antitrust law); *id.* at 297 (referencing both the statutory and non-statutory labor exemptions from U.S. antitrust law). Furthermore, Japanese players lack standing as MLB players to bring an action under either law. *See* discussion *infra* Part III.

17. The process defined in the Posting Agreement is commonly referred to as the posting system, or posting. Geoffrey R. Smull, *International Player Trades and Japan's Anti-Monopoly Law: A Look at the Continued Viability of the United States-Japan Player Contract Agreement*, ASIA L. NEWS (Am. B. Ass'n, Wash., D.C.), Spring 2005, at 1, *available at* http://www.abanet.org/intlaw/committees/africa_eurasia/asia_pacific/spring05newsletter.pdf.

18. *Id.* at 5 (discussing possible labor and antimonopoly law violations in Japan); Braver, *supra* note 5, at 453–54 (discussing ripeness of posting system for challenge in Japanese courts under antimonopoly law).

19. The Mills Commission was a panel organized in 1905 by Albert G. Spalding, former pitcher and sporting goods entrepreneur, to end the speculation surrounding the origins of modern-day baseball. The report was published on December 30, 1907, and the panel consisted of former National League presidents Col. A.G. Mills, Nicholas E. Young, and the Hon. Morgan G. Bulkeley; the Hon. Arthur P. Gorman, a U.S. Senator and former president of National Baseball Club of Washington; George Wright and

The original National League ("NL") formed in 1876 and the American League ("AL") began operating in 1900.[20] MLB formed in 1903 when both leagues merged.[21] In an effort to prevent players from jumping to rival baseball leagues, the AL and NL placed renewal clauses in their standard player contracts.[22] Players signed one-year contracts giving individual teams the option to unilaterally renew those contracts at the end of the season for which they were signed.[23] The clause was generally applied to the entire contract, therefore perpetually binding the player until his team declined the option.[24] Although MLB was reluctant to grant free agency to its players, the result was inevitable as baseball players, like so many other employees in the United States, unionized.[25] The Major League Baseball Players Association ("MLBPA") formed in 1954 and initially protested the inadequacies of MLB's pension fund,[26] but later lobbied for collective bargaining and alleged antitrust violations pertaining to the reserve clause.[27] Through MLBPA's efforts as well as legislation[28] and various lawsuits,[29] free agency was established.[30] When

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Alfred J. Reach, who were former players and prominent businessmen; and Amateur Athletic Union president, James E. Sullivan. National Baseball Hall of Fame and Museum: History, http://web.baseballhalloffame.org/museum/history.jsp (last visited May 13, 2008).

20. Jon S. Greenwood, Note, *What Major League Baseball Can Learn From Its International Counterparts: Building a Model Collective Bargaining Agreement for Major League Baseball*, 29 GEO. WASH. J. INT'L L. & ECON. 259, 260 (1995).

21. MLB operated as a single league format until 1969 when it divided into the AL and NL. *Id.*

22. *See* Duncan, *supra* note 1, at 103–09 (discussing contract jumping in baseball prior to free agency and later use of one-year contracts and renewable options). Additionally, Major League Rule 4-A(a) allowed each MLB club to submit a list of up to forty players to the Commissioner's Office that they wished to "reserve" for the following season. This rule allowed teams to secure an interest in a player on the list without fear that another team would entice him to switch clubs. Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615, 622 (8th Cir. 1976). Further, Rule 3(g) explicitly prohibited negotiations with players while they were under contract with another team and justified the measure as preserving MLB's competitive balance. *Id.*

23. *Kansas City Royals Baseball*, 532 F.2d at 618.

24. *Id.* at 624.

25. Greenwood, *supra* note 20, at 272–73.

26. Gould, *supra* note 2, at 286.

27. *Id.* at 286–87. MLBPA negotiated the first collective bargaining agreement in professional baseball in 1968. Greenwood, *supra* note 20, at 272. For the current collective bargaining agreement between MLBPA and MLB, see 2007-2011 Basic Agreement, Dec. 20, 2006, *available at* http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf [hereinafter Basic Agreement] (last visited Apr. 14, 2008).

28. Curt Flood Act of 1998, 15 U.S.C. § 26b (2007).

players attain free-agent status, they enjoy the freedom of contract negotiations with any MLB team.[31] Per the collective bargaining agreement, even players yet to reach free agency may seek higher pay in salary arbitration proceedings.[32]

Today, MLB is considered the best baseball in the world[33] and operates two leagues, AL and NL, with each comprised of three divisions: East, Central, and West.[34] Each year, the divisional winners meet in the playoffs, ultimately resulting in the AL and NL champions playing the World Series to determine the MLB champion.[35] MLB's talent pool is incredibly diverse, with players haling from the United States, South America, Latin America and the Caribbean as well as Canada, Taiwan, and Japan.[36] Recently, MLB extended its global interests into China, and India is slated for MLB International developmental programs.[37] The "Ameri-

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29. *E.g.*, Flood v. Kuhn, 407 U.S. 258 (1972) (upholding the baseball exemption, but finally conceding that baseball was interstate commerce and reiterating that only Congress could remove the exemption); *Kansas City Royals Baseball*, 532 F.2d 615 (affirming arbitrator's decision that when a team exercises the renewal option in a standard player contract, the contract is renewable for only one year, not perpetually).

30. Free agency allows MLB players to negotiate with any and all MLB teams, generally resulting in a better contract, including a higher salary, for the player. *See* Greenwood, *supra* note 20, at 273–74 (discussing the effects of free market competition on player salaries). *See also* Alex Belth: Landmark Moments in Free-Agent History, Dec. 2, 2005, http://sportsillustrated.cnn.com/2005/baseball/mlb/12/02/landmark.freeagency/index.html (briefly discussing the legal battles that helped shape free agency as well as memorable signing "firsts" in MLB).

31. The current Basic Agreement provides: "Following the completion of the term of his Uniform Player's Contract, any Player with 6 or more years of Major League service who has not executed a contract for the next succeeding season shall be eligible to become a free agent." Basic Agreement, *supra* note 27, art. XX(B)(1). "Players who . . . become free agents under this Agreement shall be eligible to negotiate and contract with any [MLB] Club *without restrictions or qualifications*." *Id.* art. XX(B)(2) (emphasis added).

32. Any player's salary may go to arbitration if both the player and his current team consent to it. However, if the player has accumulated at least three years of MLB service, but less than the six years required for free agency, his salary may be submitted to arbitration without the other party's consent. In either circumstance, arbitration is "final and binding." *Id.* art. VI(F)(1).

33. Braver, *supra* note 5, at 446.

34. Greenwood, *supra* note 20, at 260–61.

35. *Id.*

36. The Official Site of Major League Baseball: International, *supra* note 3.

37. Jim Caple, *Good Showing in '08 Olympics Will Spur Interest*, Mar. 1, 2007, http://sports.espn.go.com/espn/print?id=2766716&type=story.

can Pastime" has truly become an international phenomenon, and continues to expand.[38]

B. Nippon Professional Baseball in Japan

Americans brought baseball to Japan in 1873,[39] and the sport quickly became not just a game, but a way of life.[40] Baseball grew in popularity and became an organized professional league in 1936.[41] NPB is made up of two leagues, the Central and the Pacific, and players develop in a minor league system.[42] Like its counterpart in the United States, the Japanese Professional Baseball Players Association ("JPBPA") represents NPB's players in labor and salary matters.[43] Whereas the certification of MLBPA revolutionized American baseball in the 1960s, Japan did not have an equivalent association concerned with players' rights until 1985.[44] When JPBPA first organized, there was little support for collective actions in Japan.[45] At the time, JPBPA had a minimal effect on the game in Japan, as it only mustered support for minor changes to NPB.[46] In stark contrast to MLBPA, JPBPA evinced an unwillingness to strike in

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38. *See* Jeff Passan, *Revenue Stream of Consciousness*, Dec. 16, 2006, http://sports.yahoo.com/mlb/news?slug=jp-international121806&prov=yhoo&type=lgns (discussing MLB's international expansion and revenues).

39. Stein, *supra* note 11, at 267; WHITING, MEANING OF ICHIRO, *supra* note 4, at 52–53. During the Meiji Reformation, the Japanese solicited help from various countries in establishing an army, a navy, and a solid infrastructure. American professors who were in Japan to help establish this infrastructure were the first to introduce baseball to the Japanese. *Id.*

40. In 1886, the First Higher School of Tokyo established a baseball team and infused it with disciplines typically taught in Japanese martial arts. *Id.* at 53. Even today, when Japanese players practice, they focus more on their "inner self" than on skills and frequently push themselves towards mental limitations rather than physical ones. *Id.* at 52.

41. Organized in 1936, the Japan Occupational Baseball League was the first professional league in Japan. In 1939, it became the Japanese Baseball League and was renamed Nippon Professional Baseball in 1950 after reorganization. *See* WHITING, MEANING OF ICHIRO, *supra* note 4, at 148–49 (discussing establishment of Japanese professional baseball); Rising Sun Baseball: A Nippon Baseball League Primer, http://risingsunbaseball.com/ (last visited May 13, 2008).

42. NPB teams each have one minor league, or farm, team. Greenwood, *supra* note 20, at 261 (stating that each NPB team has one minor league club).

43. Stein, *supra* note 11, at 269; Smull, *supra* note 17, at 2.

44. Braver, *supra* note 5, at 451.

45. Members of the union showed little support for its initiatives after formation and, following comments by one owner, an entire team of players withdrew from the bargaining unit. The team eventually rejoined the players' association. Braver, *supra* note 5, at 451–52.

46. JPBPA negotiated a raise in the minimum league salary as well as pensions in 1988. Greenwood, *supra* note 20, at 278–79.

order to obtain better conditions, higher pay, or even a free agency system.[47]

Although Japanese baseball is considered inferior to MLB,[48] its players are brought up in the "besoburo"[49] way of life[50] and nonetheless become national heroes in NPB.[51] Japanese players aim to prove the adequacy of NPB baseball in the U.S. market, but they are also lured by the prospect of less restrictive free agency.[52] Additionally, corruption and harsh training conditions in NPB make MLB an attractive option.[53] Although there is documented history of players switching leagues,[54] most players "choosing" to leave MLB for Japan are at the end of their careers and have been released by their MLB teams.[55] The "desire" of MLB players

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47. Following unionization, one JPBPA representative assured the Japanese public that NPB players would not strike, stating that the Japanese players "would not act like Americans." Braver, *supra* note 5, at 452.

48. Paul White, *Japan Frets Over Talent Exodus to North America*, USA TODAY, Mar. 28, 2007, http://www.usatoday.com/sports/baseball/2007-03-28-japan-effect_N.htm. Americans are historically reluctant to accept Japanese baseball as exhibiting quality equivalent to that of MLB. Some, including current and former MLB managers, think of Japanese baseball as a "second-rate, Ping Pong type of game." WHITING, MEANING OF ICHIRO, *supra* note 4, at 25. One reason for this belief is that Japanese players tend to be smaller in both stature and physical composition than MLB players. This was minimally acceptable for pitchers but not for position players like Ichiro Suzuki, an outfielder, who checked-in at a mere five feet, nine inches 156 pounds prior to entering MLB. *Id.*

49. "Besoburo" is the Japanese word for baseball. WHITING, MEANING OF ICHIRO, *supra* note 4, at 53.

50. "Japan has imbued [besoboru] with its own philosophy: a Zen samurai emphasis on discipline, spirit and selflessness." Robert Whiting, *Batting Out of Their League*, TIME MAG., Apr. 30, 2001, at 24, *available at* http://www.time.com/time/asia/features/japan_view/baseball.html [hereinafter Whiting, *Batting Out of Their League*].

51. *See* Duncan, *supra* note 1, at 91 (indicating playing success of Ichiro Suzuki, Hideki Matsui, and Tsuyoshi Shinjo).

52. Matsui Interview, *supra* note 5.

53. When Japanese players are drafted by NPB, they nominate their preferred teams, which induces teams to secretly pay players to make specific choices. *See id.* Additionally, observers note that Japanese pre-season training camps are more like military academies in their strict rules and demanding workouts, which are usually all-day affairs in freezing conditions. Whiting, *Batting Out of Their League*, *supra* note 50.

54. Eight Japanese players have left NPB via the posting system: Ichiro Suzuki, Kazuhisa Ishii, Akinori Otsuka, Norihiro Nakamura, Shinji Mori, Daisuke Matsuzaka, Akinori Iwamura, and Kei Igawa. Posting System, http://www.baseball-reference.com/bullpen/Posting_System (last visited Apr. 14, 2008). Other players, such as Houston Astros' second baseman Kazuo Matsui, have come to MLB via free agency following the completion of their NPB contracts. Stein, *supra* note 11, at 261–62.

55. WHITING, MEANING OF ICHIRO, *supra* note 4, at 73 (characterizing NPB as "a lucrative market for aging major leaguers"); Whiting, *Batting Out of Their League*, *supra*

to switch leagues notwithstanding, NPB imposes a limit of three foreign players per team.[56]

II. THE UNITED STATES-JAPAN BASEBALL RELATIONSHIP

A. History Between MLB and NPB

Prior to World War II, the United States and Japan had a working relationship that allowed MLB players to travel to Japan.[57] The United States sent envoys on barnstorming tours where they demonstrated the superiority of U.S. baseball and fostered amicable international relations.[58] This congenial relationship, however, was often marred by nationalist sentiments, as demonstrated by the case of Eiji Sawamura.[59] After compiling an impressive pitching performance against MLB opposition, Sawamura downplayed the pitching skill required to strike out the biggest names in U.S. baseball.[60] He reduced the matter to three words: "I hate America."[61] Assuming Sawamura's pitching prowess translated to MLB success,[62] it would be difficult to find a forgiving and embracing populace in

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note 50 ("American players have been part of the Japanese baseball equation for years but only in the form of minor leaguers, benchwarmers and aging stars.").

56. NPB takes great pride in its Japanese players' skills and the league's overall level of play and therefore limits the amount of direct American influence in the sport. In 1999, one NPB team manager publicly stated a desire to have an all-Japanese team. Whiting, *Batting Out of Their League*, *supra* note 50. Similarly, Yu Darvish, a half-Iranian and half-Japanese pitcher, was only pursued during NPB's amateur player draft by one team because his background did not fit within Japan's "very homogenous society." Caple, *Dice-K*, *supra* note 5.

57. Braver, *supra* note 5, at 445.

58. *Id.*

59. Tom Singer, *Matsuzaka Posting System's Latest Gem*, Nov. 14, 2006, http://mlb.mlb.com/content/printer_friendly/bos/y2006/m11/d14/c1740635.jsp.

60. In 1935, at the age of seventeen, Sawamura pitched against a U.S. team during a barnstorming tour and struck out four consecutive batters representing the biggest names in U.S. baseball at that time: Charlie Gehringer, Babe Ruth, Lou Gehrig, and Jimmie Foxx. *Id.*

61. Following the strikeouts, Sawamura was quoted as saying, "My problem is I hate America, and I cannot make myself like Americans." *Id.*

62. Many consider Japanese baseball to be inferior to the MLB product; the sentiment was much stronger prior to the recent era which has seen the successful transition of players such as Nomo, Ichiro, and Hideki Matsui. *See* Jim Albright, Why Haven't we Had More Japanese Players in the Majors; http://baseballguru.com/jalbright/analysis jalbright15.html [hereinafter Albright, More Japanese Players] (last visited Apr. 14, 2008) (discussing quality of Japanese baseball players and teams from the early twentieth century through the 1960s).

the United States to cheer for him following such a statement.[63] Unsurprisingly, player exchanges did not occur between the two leagues until three decades later.[64]

During the 1960s, Japanese teams sent their players to train in MLB's minor league system.[65] Masanori Murakami came to America in 1964 as part of a training expedition to the San Francisco Giants.[66] Prior to his arrival in San Francisco, his NPB club, the Nankai Hawks, agreed to an option clause granting the Giants the right to purchase Murakami's contract if he played with the parent club.[67] The Giants exercised this right after Murakami was called-up from the minor leagues, but the Hawks vehemently opposed it and pressured Murakami to return to Japan.[68] Following this announcement, MLB and NPB tensions escalated and both sides threatened lawsuits.[69] Eventually, the leagues reached a compromise and Murakami played in San Francisco for one year, and was then allowed to return to Japan without further challenge.[70] Following this incident, both sides signed the Working Agreement of 1967, mandating that each league respect the other's reserve system.[71] This agreement essentially created a "de facto ban" and nearly thirty years passed before another Japanese player emerged in MLB.[72]

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63. During the Tokyo Giants' United States tour in 1935, the Pittsburgh Pirates tried unsuccessfully to recruit Sawamura to play in MLB. Sawamura declined the offer, citing haughty women, bad rice, and an inability to speak English as a few of his reasons for not wanting to live in America. WHITING, MEANING OF ICHIRO, *supra* note 4, at 72.

64. Attitudes towards the United States slowly improved following the end of the U.S. occupation of Japan after World War II. Even so, "support networks" for Japanese players attempting to make the move did not exist at this time and it was therefore more difficult for a Japanese player to adapt to his new surroundings. Albright, More Japanese Players, *supra* note 62.

65. WHITING, MEANING OF ICHIRO, *supra* note 4, at 73–74.

66. Like other minor leaguers, Murakami and other Japanese players spent time playing in the minors to gain experience, but could be called up to the parent club. *Id.* at 73–74.

67. *Id.*

68. The Hawks went so far as to tell Murakami that if he chose to remain in the United States, he might never be able to return to NPB. *Id.* at 75–76.

69. *Id.* at 76–78. MLB alleged that Nankei's refusal to let Murakami play in MLB was a breach of their working agreement. Additionally, when San Francisco exercised its right to Murakami, he signed a standard player contract and became part of MLB. Therefore, he also became part of the reserve system under which he was perpetually bound to the Giants until (and if) they unilaterally decided not to renew his contract. *Id.*

70. *Id.* at 79–80.

71. *Id.* at 84.

72. *Id.* at 118.

Don Nomura, a Japanese agent, decided that 1995 was the optimal time for a Japanese superstar to enter MLB.[73] The image of MLB in the minds of its fans was tarnished due to the labor strike of 1994,[74] and Nomura knew of an unexploited loophole in the de facto baseball ban.[75] He contacted Hideo Nomo, a dominant Japanese pitcher, and explained his simple, yet undetected loophole.[76] Nomo could retire from Japanese baseball, forcing his NPB team to release him from his contract and allowing him to join MLB as a free agent.[77] Amid outrage from both Japanese fans and the league,[78] Nomo retired from NPB and moved to MLB's Los Angeles Dodgers.[79] After winning Rookie of the Year Honors in 1995,[80] Nomo was no longer considered a traitor, but rather a national star in his homeland and a testament to competitive Japanese baseball.[81]

The next NPB star to move to MLB was Hideki Irabu in 1997, when the San Diego Padres negotiated for his rights from the Chiba Lotte Marines.[82] Irabu, however, did not want to leave Japan and refused to play in San Diego, despite Chiba Lotte's repeated warnings that he did not have a choice.[83] The Padres, frustrated with Irabu's unwillingness to play in San Diego, finally transferred his rights to the New York Yankees.[84] Although MLBPA was against this move, MLB Commissioner Bud Selig allowed the transfer, but later prohibited any future purchase of

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73. *Id.* at 102–03.

74. The MLBPA and MLB ownership were unable to reach an agreement preventing a labor stoppage in 1994. Greenwood, *supra* note 20, at 273–74. While players were seeking more money, MLB ownership sought unilateral implementation of a salary cap to contain player salaries. *Id.* Because of the strike, the World Series was cancelled for the first time since championship play began. *Id.* at 260–61. In the hearts and minds of American fans, the game had lost its appeal. *See* Matsui Interview, *supra* note 5 (stating that following the strike, MLB "faced a significant decline in fans").

75. WHITING, MEANING OF ICHIRO, *supra* note 4, at 103.

76. *Id.* at 102–04.

77. *Id.*

78. The Japanese media publicly assaulted Nomo, referring to him as both a "traitor" and a "troublemaker." Stein, *supra* note 11, at 270–71.

79. WHITING, MEANING OF ICHIRO, *supra* note 4, at 107.

80. *Id.* at 112.

81. Whiting, *Batting Out of Their League*, *supra* note 50.

82. San Diego had a working agreement with Chiba Lotte, including "exclusive rights" to Irabu. Richard Sandomir, *Baseball: Irabu's Legacy is a High-Stakes Auction*, INT'L HERALD TRIB., Dec. 6, 2006, at 20.

83. Both Irabu and his agent opposed his going to the United States and likened the process by which San Diego obtained his rights to "indentured servitude." *Id.*

84. Irabu asserted that if he had to play in MLB, he would only do so for the Yankees. *Id.*

player contracts.[85] Then in 1998, Nomura used the Nomo loophole again to bring Alfonso Soriano to the New York Yankees,[86] prompting MLB and NPB to discuss a mutually agreeable protocol for Japanese player transfers to MLB.[87]

B. The Posting System

MLB and NPB signed the Posting Agreement on July 10, 2000, and established the posting system.[88] Posting allows Japanese players who have not yet attained the minimum eight years of service which triggers true free agency in NPB to come to MLB.[89] It also provides compensation to the posted player's NPB team for the loss of an elite athlete.[90] The "Initial Termination Date" of the Posting Agreement was December, 15, 2002, but it remains operative on a yearly basis so long as neither league notifies the other of its intention to terminate the agreement.[91]

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85. Chief Operating Officer of MLBPA Gene Orza referred to the working agreement between San Diego and Chiba Lotte as "trafficking in human flesh" and opposed it because it deprived Irabu of his freedom. *Id.* Although MLBPA was unsuccessful in its attempt to invalidate the working agreement, MLB later prohibited any agreement that assigned "exclusive rights" of players to any MLB team. *Id.*

86. Although not a Japanese native, Soriano was under contract with an NPB team and wanted to play in MLB. Following Nomo through the narrow loophole in the Japanese-American ban, Soriano eventually landed in New York and played second base for the Yankees. Even though Soriano was a "foreign player" by Japanese standards, he was still under contract with NPB and his "retirement" occurred at age twenty-one, enraging NPB officials. Additionally, NPB claimed that it had closed the loophole prior to Soriano leaving the league, which angered MLB officials as it signaled NPB's unilaterally amending the working agreement. WHITING, MEANING OF ICHIRO, *supra* note 4, at 141–45.

87. MLB and NPB began negotiating for a player transfer system in 1998 and officially entered into the Posting Agreement on July 10, 2000. Duncan, *supra* note 1, at 100–01.

88. *Id.* Although the agreement was signed in July 2000, it was not effective until December 15, 2000. Posting Agreement, *supra* note 8, para. 17.

89. Tim Kurkjian, *Posting Process Needs to be Altered*, Dec. 15, 2006, http://sports.espn.go.com/mlb/columns/story?columnist=kurkjian_tim&id=2697354; *see* Posting Agreement, *supra* note 8, para 4 (requiring MLB teams to inquire with the NPB commissioner regarding players currently under contract in Japan).

90. Posting Agreement, *supra* note 8, para. 9. This provision was included to address NPB's concerns over the dilution of the league because of players leaving for MLB. Stein, *supra* note 11, at 272.

91. The original agreement "terminated" on December 15, 2002 (the "Initial Termination Date"), unless the Commissioner of either league notified the other "(180) days prior to the Initial Termination Date . . . of his intention to modify or terminate" the agreement. When neither side did so, the agreement became effective from year-to-year and remains so until either Commissioner gives notice otherwise "(180) days prior to any anniversary of the Initial Termination Date." Posting Agreement, *supra* note 8, para. 17.

Pursuant to the Posting Agreement, an MLB team may inquire as to an NPB player's status between November 1 and March 1 of any given year.[92] If the player's NPB team agrees to posting,[93] it notifies the NPB Commissioner's office who then notifies the MLB Commissioner's office.[94] The MLB Commissioner then informs all MLB teams and within four days of notification interested teams must submit a sealed bid to the MLB Commissioner.[95] At the conclusion of the bidding period, the MLB Commissioner notifies NPB of the highest bid without disclosing the name of the bidding team.[96] The NPB team then has an additional four days to either accept or reject the bid.[97] If accepted, the MLB team is disclosed and has thirty days to negotiate a contract with the posted player.[98] If successful, the player joins his new MLB team and the bid price is passed on as a transfer fee to his NPB team within five days.[99] However, if the negotiations fail, the player returns to Japan until the posting period of the following year and no money changes hands.[100] Teams are expected to negotiate in good faith and the MLB Commissioner oversees the process.[101]

The Posting Agreement satisfies MLB's interest in obtaining the best talent in the world and assuages NPB's fear that it is becoming nothing more than a farm team for MLB.[102] One integral group, however, is left

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92. *Id.* para. 9. An NPB team may also decide to post a player without prior MLB inquiry. *Id.* para. 8.

93. *Id.* para. 5.

94. *Id.* para. 9.

95. *Id.*

96. "At the conclusion of the bidding period, the U.S. Commissioner shall determine the highest bidder . . . [and] then shall notify the Japanese Commissioner of the *amount* of the bid submitted by the successful bidder." *Id.* para. 10 (emphasis added).

97. *Id.* Teams decide whether to accept or reject the MLB team's bid because they are the ones that will eventually get that money if the negotiations are successful, not the player. *Id.* paras. 9, 11.

98. *Id.* para. 11.

99. *Id.*

100. *Id.* para. 12. Some criticize this provision in the Posting Agreement because there is a real possibility that some teams may submit high bids, fully aware that they will not be able to sign the player within the thirty-day window, simply to block another team from doing so for at least another year. Gould, *supra* note 2, at 294.

101. The MLB Commissioner has "the authority to oversee the bidding procedures . . . to ensure that they [have] not been undermined in any manner." Furthermore, the MLB Commissioner has the power to revoke a team's exclusive rights, or to declare any contract between a Japanese player and the winning bidder void if he "deems [that the contract] was the result of conduct that was inconsistent with [the] Agreement or otherwise not in the best interests of professional baseball." Posting Agreement, *supra* note 8, para. 13.

102. Whiting, *Batting Out of Their League*, *supra* note 50.

out: the Japanese players.[103] Under the posting system, players have minimal involvement and their only decision is whether to accept the MLB team's offer.[104] Because only one MLB team may negotiate with the player, his market value, and thus his final contract value, is kept artificially low.[105] In addition, NPB teams generally post players because the prospect of extraordinary bid prices is attractive to their financially despondent organizations.[106] The notion of exorbitant bids somewhat counters an original selling point of the posting system, which was that blind bidding ensured that large-market teams would not be the only organizations capable of landing celebrated Japanese players.[107] The stark, unfair nature of the system as it relates to NPB players' rights was not thrust into the forefront until the 2006 off-season.[108]

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103. MLB teams usually end up with great players who make an immediate impact on their respective teams, while the NPB teams collect the multi-million dollar transfer fees, leaving the Japanese players with a chance to play in the United States for less money than they would be worth on the free agent market. Kurkjian, *supra* note 89.

104. The Posting Agreement specifically prohibits MLB teams from contacting Japanese players under contract with NPB without MLB's Commissioner asking permission of the NPB Commissioner. Posting Agreement, *supra* note 8, para. 4. Additionally, MLB must still seek NPB's approval and follow the posting rules. *Id*. para. 5. The player is only personally involved in the negotiation of his contract with a team that has "sole, exclusive, and non-assignable" rights to him. *Id.* para. 11.

105. Under posting, the player's "purchase price" is a combination of both the bid amount and the resulting contract terms. Since only one team may negotiate with him, the player has diminished leverage and is denied his "maximum earning potential." Kurkjian, *supra* note 89.

106. *Id.* At the time of writing, there was much speculation about when, or if, NPB's biggest young star, Yu Darvish, would be posted. Bobby Valentine, former MLB manager and current manager of the Chiba Lotte Marines, speculated that Darvish's possible move to MLB will depend on whether his team, the Nippon Ham Fighters, "[are] in a state where they need a lot of money." Caple, *Dice-K*, *supra* note 5.

107. Small-market teams favored blind bidding because they felt that it leveled the playing field for them against large-market clubs. Kurkjian, *supra* note 89. The Tampa Bay Devil Rays are the only small-market team to successfully bid and negotiate a contract with any NPB player. In 2005, the Devil Rays signed a two-year, $1.3 million contract with Shinji Mori, formerly of the Seibu Lions. Most recently, during the 2006 off-season, the Devil Rays signed a three-year, $7.7 million contract with third baseman Akinori Iwamura, formerly of the Yakult Swallows. Tampa Bay paid a total of $5.5 million in transfer fees to the NPB teams for both players. Posting System, *supra* note 54. Daisuke Matsuzaka's posting in 2006 seemingly thwarted this reasoning. Kurkjian, *supra* note 89.

108. *See* Kurkjian, *supra* note 89 (discussing how the posting process deprived Daisuke Matsuzaka and his agent, Scott Boras, of leverage in the negotiating of Matsuzaka's contract with the Boston Red Sox).

C. Daisuke Matsuzaka

In 2000, the Seattle Mariners bid roughly $13 million for Ichiro Suzuki, and later signed him to a three-year contract worth $12 million.[109] The amount of money bid for Ichiro has not been questioned because he was expected to be a star, and his skills have successfully transferred to MLB.[110] Following Ichiro's signing, the posting system experienced modest success until 2006, when it was criticized for encouraging high bidding and unfair practices.[111] In November 2006, the Boston Red Sox submitted a sealed bid to the MLB Commissioner's office of $51.1 million for the negotiating rights to Daisuke Matsuzaka.[112] The Red Sox later signed a six-year, $52 million contract with the Japanese pitcher.[113] Prior to this astronomical bid, MLBPA opposed the posting system,[114] but did not challenge it and most MLB team executives kept their personal opinions about the system to themselves.[115] Following the bid, however, sports writers and team executives openly stated that MLB had to change the system.[116] One unidentified executive went so far as to refer to the posting system as "silly" and even "stupid."[117]

MLB free agents rely on competition among at least two teams in negotiating the best possible contract.[118] Here, NPB players are explicitly deprived of that right in that they may only negotiate with one MLB

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109. WHITING, MEANING OF ICHIRO, *supra* note 4, at 22–24.

110. Kurkjian, *supra* note 89. Others, like Hideki Irabu, were unable to translate their NPB success into MLB stardom. Many see Irabu as one of the Yankees' worst investments. Sandomir, *supra* note 81.

111. Sandomir, *supra* note 81; Gould, *supra* note 2, at 294.

112. Kurkjian, *supra* note 89.

113. The contract includes a $2 million signing bonus and provides for a base salary of $6 million in 2007, $8 million in 2008–2010, and $10 million in 2011 and 2012. Beginning in 2009, Matsuzaka's contract contains escalators for his performance in both Cy Young Award and Most Valuable Player voting. He also has a no-trade provision and various other benefits. Matsuzaka Contract Details, http://www.boston.com/sports/baseball/redsox/articles/2006/12/15/matsuzaka_contract_details/ (last visited Apr. 14, 2008).

114. Gene Orza, then counsel to MLBPA, questioned the legality of posting because it deprived the player of choice and "totally ignore[d] his rights," but later admitted that MLBPA was limited in its efforts to help the Japanese players by the fact that JPBPA would not act on behalf of its members. WHITING, MEANING OF ICHIRO, *supra* note 4, at 146–47.

115. Kurkjian, *supra* note 89.

116. *Id.*

117. *Id.* Given the trend in escalating posting prices, baseball insiders speculate that if Darvish Yu, a young and powerful pitcher, is posted within the next few years that he will garner up to a $75 million bid from an eager MLB team. Caple, *Dice-K*, *supra* note 5.

118. Greenwood, *supra* note 20, at 273.

team.[119] By eliminating every other MLB team from negotiations, posting keeps a player's market value artificially low.[120] It is reasonable to apply at least part of the bid price to the final contract price in ascertaining a player's market value, as both amounts together represent what he is worth to the MLB team.[121] Arguably then, Matsuzaka's value was over $100 million, while he personally realized just half of that amount and had little choice in doing so.[122] Not every Japanese player desires to become an MLB hero but, for those who do, the process is utterly anti-player.[123]

III. U.S. ANTITRUST AND LABOR LAW

A. The MLB Antitrust Exemption

In 1922, the United States Supreme Court decided the landmark case of *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.[124] Plaintiff, an organized professional baseball league, alleged that MLB's AL and NL purchased other Federal League clubs and "induc[ed] all those clubs . . . to leave [that] League" in violation of the Sherman Act.[125] While the trial court found for the plaintiffs, the Court of Appeals reversed, finding that the business of baseball did not fall within the scope of the Sherman Act, and the Supreme Court affirmed.[126] In the decision, Justice Oliver Wendell Holmes, Jr., concluded that the business of baseball was of "giving exhibitions of baseball, which [is] purely [a] state affair[]," thus rejecting plaintiff's claim that MLB's practices violated federal antitrust laws.[127] Furthermore, Justice

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119. Kurkjian, *supra* note 89.

120. *See supra* note 114.

121. *See* Kurkjian, *supra* note 89 (discussing debate over what constitutes "purchase price" for luxury tax purposes). In essence, MLB teams have to pay twice for a player, which is "an expensive restriction." WHITING, MEANING OF ICHIRO, *supra* note 4, at 146.

122. *See supra* note 121, and accompanying text.

123. Stein, *supra* note 11, at 266.

124. 259 U.S. 200 (1922).

125. The Federal Baseball Club of Baltimore was one of eight member teams of the Federal League of Professional Base Ball Clubs, which was one of various professional baseball leagues that attempted to compete with a fairly young, yet well-established, MLB for the professional baseball market. Plaintiffs alleged that MLB was trying to monopolize the U.S. baseball market and extinguish, through prohibited business practices, any leagues that attempted to compete with them. *Id.* at 207.

126. The trial court found a conspiracy to monopolize the baseball market in violation of the Sherman Act and awarded $80,000 in treble damages for the antitrust violation. *Id.* at 208–09.

127. *Id.* at 208.

Holmes noted that while such exhibitions require players to cross state lines and are undoubtedly money-makers, "the transport is a mere incident, not the essential thing."[128] Moreover, baseball could not be designated "interstate commerce" within the scope of the Sherman Act because its product was one of "personal effort," which is not a component of commerce.[129] Thus, the Supreme Court created baseball's antitrust exemption and placed the decision to remove it squarely in the hands of Congress.[130]

In 1952 Congress issued its "Celler Report"[131] on the study of monopoly power which, following hearings on the business of baseball, concluded that "[t]he evidence adduced . . . would clearly not justify the enactment of legislation flatly condemning the reserve clause."[132] This Congressional inaction coupled with *Federal Baseball* led later courts to apply the exemption established therein to validate the reserve clause.[133]

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128. Justice Holmes stated that player transport was an incident to an "exhibition [of baseball that], although made for money would not be called trade or commerce in the commonly accepted use of those words" and "[t]hat which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place." *Id.* at 209.

129. *Id.*

130. *See* Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953) (holding that *Federal Baseball* concluded that Congress did not intend to include baseball within the scope of the Sherman Act and was effectively put on notice with the *Federal Baseball* decision that only it could amend the law through legislation specifically geared to bring baseball within the scope of antitrust laws, and yet did nothing to accomplish the task); *see also* Flood v. Kuhn, 407 U.S. 258, 285 (1972) (denying Curt Flood's request for free agency). Although the *Flood* Court concluded that "[p]rofessional baseball is a business and it is engaged in interstate commerce," it nonetheless upheld *Federal Baseball* because "what the Court said in *Federal Baseball* in 1922 and what it said in *Toolson* in 1953, we say again here in 1972: the remedy, if any is indicated, is for *congressional*, and not judicial, action." *Id.* at 282–85 (emphasis added).

131. Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615, 619 (8th Cir. 1976).

132. 1952 Report of the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary, H. R. Rep. No. 2002, 82d Cong., 2d Sess., 229 (quoted in *Flood*, 407 U.S. 258, 272–73).

133. *E.g.*, *Toolson*, 346 U.S. at 356; and *Flood*, 407 U.S. at 282–84. As early as 1902, players challenged MLB's reserve system, albeit unsuccessfully. Nap Lajoie challenged the reasonableness and equitability of the renewable provision in the standard player contract and the Supreme Court of Pennsylvania found that the contract was reasonable and the consideration adequate. The court further stated that "mutuality of remedy [does not] require[] that each party should have precisely the same remedy, either in form, effect, or extent." Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 220 (Pa. 1902). *See also* American League Baseball Club of Chicago v. Chase, 149 N.Y.S. 6, 16 (N.Y. 1914) (denying "the proposition that the business of baseball for profit is interstate trade or commerce" and finding baseball outside the scope of the Sherman Act). The *Chase* court

Indeed, it was this reasoning that prompted the Supreme Court to uphold the baseball exemption with specific regard to the reserve clause in 1972 with its decision in *Flood v. Kuhn*.[134] The exemption lasted for over seventy-five years before Congress finally removed it as it pertained to employment issues, with the Curt Flood Act of 1998 ("Flood Act").[135] There are limitations to the Flood Act's application, however, in that Congress tailored its provisions to only "major league baseball players [who] play baseball at the major league level."[136] Furthermore, section 26b(c) states that "[o]nly a *major league* baseball player has standing to sue under this section," and section 26b(c)(1) defines a major league player as "a per-

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further noted that "[b]aseball is an amusement, a sport, a game that comes clearly within the civil and the criminal law of the state, and it is not a commodity or an article of merchandise subject to the regulation of Congress on the theory that it is interstate commerce." *Id.* at 17.

134. *Flood*, 407 U.S. at 282. The Court stated that the baseball exemption was "an aberration," but that it was "loathe . . . to overturn [*Federal Baseball* and *Toolson*] judicially when Congress, by its positive inaction, ha[d] allowed those decisions to stand for so long and . . . ha[d] clearly evinced a desire not to disapprove them legislatively." *Id.* at 282–84. Curt Flood's claim nonetheless helped create free agency for all MLB players and just four years later, two MLB players challenged the system by filing a grievance with the league. Andy Messersmith of the Los Angeles Dodgers and Dave McNally of the Montreal Expos both played the 1975 MLB season under the Standard Uniform Player's Contract because neither signed a new contract following the 1974 season. Section 10(c) of the contract allowed each player's respective team to unilaterally renew their contract for another year. Following the 1975 season, both teams attempted, again, to renew the players' contracts under the same terms and Messersmith and McNally filed grievances alleging that the provision only applied to one renewal year and that they were actually free agents under contract to no team. The League, on the other hand, argued for perpetual renewability, stating that the renewal provision applied to the entire contract, *including* the renewal provision. In Messersmith's and McNally's case, the arbitrator found that the League's interpretation of the Uniform Player Contract was incorrect and that the renewal provision only allowed for a one-year renewal of all terms of the contract, excluding the renewal provision. Thus, both players were declared free agents and were free to negotiate with any team in MLB for a new player contract, despite the protests of MLB officials. *Kansas City Royals*, 532 F.2d at 617–20. Following the Messersmith and McNally grievances, the Basic Agreements between MLBPA and MLB provided that "Arbitration Panel[s] shall not have jurisdiction or authority to add to, detract from, or alter in any way the provisions of such agreements." Basic Agreement, *supra* note 27, art. XI.

135. Curt Flood Act, 15 U.S.C.A. § 26b (2007). Section 26b(a) states: "the conduct, acts, practices or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players to play baseball at the major league level are subject to the antitrust laws to the same extent . . . [as] in any other professional sports business affecting interstate commerce." *Id.* § 26b(a).

136. *Id.*

son who is a party to a major league player's contract, or is playing baseball at the major league level."[137] Therefore, not only are minor league ballplayers excluded from the Flood Act's provisions,[138] but it is impossible for Japanese players to assert that the Posting Agreement violates the Flood Act because, under the aforementioned provisions, a Japanese player can neither claim that he is a "major league baseball player" nor that he "plays baseball at the major league level."[139]

B. Labor Law and the MLBPA-MLB Collective Bargaining Agreement

Under the National Labor Relations Act ("NLRA"),[140] MLB must negotiate with MLBPA regarding topics relating to "wages, hours, and other terms and conditions of employment."[141] In *Silverman v. Major League Baseball Player Relations Committee*,[142] the Second Circuit concluded that anti-collusion, free agency and reserve issues were mandatory subjects of bargaining and that to hold otherwise "would ignore the reality of collective bargaining in sports."[143] One theory suggests that the omission of the posting system from the current collective bargaining agreement ("Basic Agreement")[144] is itself a violation because posting is

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137. *Id.* §§ 26b(c), 26b(c)(1) (emphasis added).

138. In addition to the Flood Act specifically identifying and defining "major league baseball player," section 26b(b)(1) avers that it does not "create, permit or imply a cause of action by which to challenge under the antitrust laws, or otherwise apply the antitrust laws to . . . the minor league level, any organized professional baseball amateur first-year player draft, or any reserve clause as applied to minor league players." *Id.* § 26b(b)(1).

139. *See id.* §§ 26b(c), 26b(c)(1) (defining players eligible to assert a claim under the Act). When Japanese players are posted, they are still under contract with their NPB team, hence the posting system provides the NPB team with compensation in the amount of the winning MLB team's bid. Further, these players have never played a single out in a major league game, and will not do so until, and unless, they reach an agreement to play for the winning MLB team. Therefore, they are not "major league players," but rather are still NPB players, and lack the necessary standing to sue MLB for an antitrust violation pursuant to the Flood Act. *See generally* Posting Agreement, *supra* note 8 (Posting Agreement is required for Japanese players to transfer to MLB because they are still under contract with NPB).

140. 29 U.S.C.A. §§ 151–169 (2007).

141. Employers and employee representatives are obligated to negotiate in good faith, although neither side is required to accept the other's proposal or to make concessions. *Id.*. § 158(d).

142. 67 F.3d 1054 (1995).

143. *Id*. at 1060–62. The *Silverman* court also analyzed salary arbitration and likened it to "interest arbitration," whereby employers and unions settle disputes over certain issues by sending them to an arbitrator, rather than engaging in collective bargaining. *Id*. at 1062. Nonetheless, the court found that there was "reasonable cause to believe that [salary arbitration] is a mandatory subject of bargaining." *Id*.

144. Basic Agreement, *supra* note 27.

a mandatory topic for collective bargaining, rather than a permissive one.[145] However, the problem with Japanese players alleging that the Posting Agreement is a violation of the Basic Agreement is two-fold. First, these players are not contemplated within the definition of "player" found in the Basic Agreement.[146] Second, posting is neither covered by the Basic Agreement nor is it a mandatory subject of bargaining.[147]

The Basic Agreement applies to "Major League Players, and individuals who may become Major League Players during the term of [the] Agreement, with regard to all terms and conditions of employment."[148] Under this definition, Japanese players seem to fall within the purview of the Basic Agreement[149] and could, therefore, argue that the Posting Agreement falls within this rubric such that it is a "mandatory subject of bargaining."[150] Although the Basic Agreement encompasses employment issues relating to "individuals who may become Major League Players,"[151] Japanese players do not fall under that determination. The only players included in this category are those that are drafted by MLB teams and who begin playing in the parent clubs' minor league farm systems.[152] Thus, posting cannot be considered a mandatory subject of the MLBPA-MLB bargaining relationship.

Additionally, the Basic Agreement states that players "shall be entitled to negotiate in accordance with the *provisions set forth in this Agreement*."[153] Posting is not specifically covered in the Basic Agreement, nor is it implied by its provisions.[154] The article dealing with "International Play"[155] only pertains to "any game or series of games played by a Club or Clubs" outside the continental borders of MLB, or in which a foreign

145. Gould, *supra* note 2, at 306–07; Stein, *supra* note 11, at 287–89.

146. *See* Basic Agreement, *supra* note 27, art. II (defining "player").

147. There is no section that either directly or indirectly refers to Japanese, or any foreign players for that matter, within the Basic Agreement, nor does it make any mention of the posting system. The only references to player signings are found within the Articles pertaining to Salaries, the Assignment of Player Contracts, and the Reserve System, none of which encompass posting. *Id.* arts. VI, XIX, XX, respectively; *see also* Gould, *supra* note 2, at 300 (citing the 2006 Basic Agreement, which is largely the same as the current Basic Agreement).

148. Basic Agreement, *supra* note 27, art. II.

149. *See id.* (referencing "players who *may become*" MLB players) (emphasis added).

150. Stein, *supra* note 11, at 285–87.

151. Basic Agreement, *supra* note 27, art. II.

152. Sections of the Basic Agreement refer to Minor League Players and MLB player assignments to the minor league clubs, as well as the allocation of draft picks to member clubs losing ranked players to the free agency system. *Id.* arts. XIX, XX.

153. *Id.* art. II (emphasis added).

154. Gould, *supra* note 2, at 300.

155. Basic Agreement, *supra* note 27, art. XV(J).

club is a participant.[156] The article also refers to "Joint Cooperation" among MLB clubs regarding international activities, but again there is no mention of international player acquisitions or the rights afforded to such players.[157] Rather, the provision attaches only to international competition and league-wide contracts.[158]

Japanese players could only oppose posting as a violation of the Basic Agreement if MLBPA decides to bring them within its definition.[159] MLBPA, however, has no incentive to include Japanese players as members of its bargaining unit.[160] Japanese players are under contract with other teams, in another league and have their own representation in the JPBPA.[161] If Japanese players want their playing conditions changed in NPB, *their* union approaches *their* teams and *their* respective league; they do not seek help from MLBPA.[162] The Basic Agreement does not reference posting and, since Japanese players are both under contract in NPB and members of JPBPA, they do not fall within the meaning of "Major League Player" and may not challenge posting as such.[163]

IV. JAPANESE ANTIMONOPOLY AND LABOR LAW

A. Japanese Antimonopoly Law

Japan did not adopt antitrust laws similar to the Sherman Act until the conclusion of World War II,[164] when it enacted the Act Concerning Pro-

156. The Article specifically relates to games played "outside the United States and Canada; or within or without the United States and Canada against a foreign club or clubs." The continental borders of MLB, as used above, pertain to the United States and Canada as there are currently no MLB clubs attributed to any cities or countries outside of the two aforementioned North American countries. *Id.*

157. *Id.* art. XV(J)(4).

158. The provision "includ[es] but [is] not limited to, international play, international events for which Player participation is sought by or on behalf of a Club or Clubs (such as clinics or skill competitions), [and] international competition among nations." In addition to international competition on the field of play, the provision provides for "the exploitation of international rights, such as media and sponsorship contracts." *Id.*

159. *But cf.* Stein, *supra* note 11, at 287–88 (recognizing that the Basic Agreement does not cover the Posting Agreement, but stating that this omission is itself a violation of MLB's obligation to address mandatory subjects of collective bargaining).

160. *Id.* at 290–91.

161. Smull, *supra* note 17, at 2.

162. *Id.*

163. This is further evidenced, both that Japanese players are not covered by MLBPA and the lack of incentive to include them, by the fact that MLBPA offered to help JPBPA contest the validity of the Posting Agreement, either in the United States or Japan, and JPBPA refused the offer. WHITING, MEANING OF ICHIRO, *supra* note 4, at 147.

164. BASIC JAPANESE LAWS 393 (Hiroshi Oda ed., 1997).

hibition of Private Monopolization and Maintenance of Fair Trade ("Antimonopoly Act").[165] The Antimonopoly Act was drafted during the postwar occupation and, therefore, resembles the Sherman Act in many ways.[166] Both the Sherman Act and the Antimonopoly Act are primarily concerned with prohibiting illegal restraints of trade, unfair business practices, and monopolization.[167] For the purposes of this Note, the most striking difference between Japanese and U.S. antitrust law is that Japan does not have a baseball exemption.[168] This fact alone makes the Japanese legal system a more attractive vehicle for challenging the Posting Agreement.[169] The baseball exemption notwithstanding, U.S. jurisprudence finds certain sports' business practices violative of antitrust legislation as either unfair trade practices or illegal restraints of trade.[170] It

165. Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade, Law No. 54, (1947) (Jp.) [hereinafter Antimonopoly Act], *translated at* http://www.jftc.go.jp/e-page/legislation/ama/ama.pdf (last visited Apr. 14, 2008).

166. Following World War II, occupational forces in Japan assisted the Japanese government in the drafting and adoption of the Antimonopoly Act, the premise of which was largely against common economic practice in Japan at the time. Braver, *supra* note 5, at 436. Prior to World War II, the Japanese government routinely interfered in the affairs of private businesses and there was little in the way of wealth distribution, as most power was concentrated in a few companies. *Id.* The Antimonopoly Act was modeled after the Sherman Act and the Clayton Act, but was stricter. Enforcement of the Antimonopoly Act was lax, primarily because of Japan's traditional allowance of cartels. Only after amendments to the act in 1974 was the law strengthened and cartel fines increased. Even then, however, the United States criticized Japan's relaxed implementation, which led to further amendments throughout the 1990s. ODA, *supra* note 164, at 393. Much of the resistance to enforcement of the Antimonopoly Act stemmed from Japan's contempt of the occupational forces because they represented both defeat and the imposition of Western laws and ideals. *Id.* at 439–40.

167. Sherman Act, 15 U.S.C.A. §§ 1–7 (2007); Antimonopoly Act §1.

168. Smull, *supra* note 17, at 3 (stating that Japanese antimonopoly law does not recognize a baseball exemption); *see* discussion *supra* Part III (referencing the baseball exemption).

169. Smull, *supra* note 17, at 3.

170. Flood v. Kuhn, 407 U.S. 258 (1972) (holding that the reserve system was a violation, but the exemption was entitled to stare decisis, and the Court left removal of the exemption to Congress); Smith v. Pro Football, Inc., 593 F.2d 1173, 1189 (D.C. Cir. 1978) (holding that the NFL's rookie player draft was a violation of § 1 of the Sherman Act because it had "severe anticompetitive effects and no demonstrated procompetitive virtues" and was therefore an unreasonable restraint of trade); Mackey v. NFL, 543 F.2d 606, 623 (8th Cir. 1976) (stating that NFL's "Rozelle Rule," which required compensation for a team losing a player to another NFL team via free agency, was an unreasonable restraint of trade because it promoted a highly restrictive system of free agency in which player mobility was deterred rather than encouraged).

follows, therefore, that these violations are the proper context under which to analyze the posting system with regards to Japanese law.[171]

The Antimonopoly Act defines an unfair trade practice as "[a]ny act . . . which tends to impede fair competition" within the scope of activities generally classified as unfair and designated an unfair trade practice by the Japanese Fair Trade Commission.[172] Of the six activities set forth in section 2, the current posting system fits squarely within both "[d]ealing with another party on such conditions as will unjustly restrict the business activities of the said party"[173] and "[d]ealing with another party by unjust use of one's bargaining position."[174] Furthermore, because the amount of the winning bid goes to the posted player's NPB team, thereby depriving the player of his full market potential, the posting system could arguably be considered "[d]ealing at unjust prices."[175]

By its nature, the posting system is an unjust restriction on NPB players' business activities.[176] Initiating the process for a possible transfer to MLB relies not on the player's approval, but ultimately on that of his NPB team.[177] Further, once the highest bid is determined, the winning team is awarded the "sole, exclusive, and non-assignable right to negotiate with and sign" the player.[178] Moreover, if the NPB club does not accept the bid, or if the MLB team fails to sign the player, "another request

171. *See* Smull, *supra* note 17, at 5; and Braver, *supra* note 5, at 453–54 (both noting the availability of Japanese antitrust claims).

172. Antimonopoly Act § 2(9). Japan's Fair Trade Commission is an independent five-person agency charged with enforcing the Antimonopoly Act, and is largely based on the U.S. Federal Trade Commission. Braver, *supra* note 5, at 438.

173. Antimonopoly Act § 2(9)(iv).

174. *Id.* § 2(9)(v).

175. *Id.* § 2(9)(ii); Smull, *supra* note 17, at 2.

176. *See* discussion *supra* Part II.B (detailing inequities of posting system); *see* Antimonopoly Act § 2(9)(iv) (prohibiting practices that unjustly restrict the another party's business activities).

177. Posting Agreement, *supra* note 8, paras. 5, 6. Additionally, the Japanese club may make one of its players available for posting without any inquiry on the part of an MLB team. *Id.* paras. 7, 8. Either way, the player's prerogative in the matter is never mentioned in any paragraph relating to the initial inquiry.

178. *Id.* para. 11. Buttressing this part of the problem is the fact that the MLB team that submits the winning bid does little more than quote a number. The bid price does not change hands unless the MLB team successfully negotiates a contract with the player and, in the event that no agreement is reached, there is no penalty on the team; the entire bid is then off the table and neither the player nor the NPB team sees any money. Once again, the Japanese player is subjected to this process and has no say in where he goes or with whom he may negotiate, further proving the "anti-player" nature of the posting system. Rehan Waheed, *The Posting System in Major League Baseball*, J. OF BUS. L. SOC'Y, Nov. 2, 2006, http://iblsjournal.typepad.com/illinois_business_law_soc/2006/11/the_posting_sys.html.

for posting with respect to that Japanese player shall be *prohibited* until the following November 1."[179] The only time the posted player is personally involved in this process is when he negotiates with the winning MLB team.[180] Thus, posting unjustly restricts a player's freedom of choice and his ability to "shop" his talents to an array of MLB teams and may, therefore, be a violation of the Antimonopoly Act.[181]

Additionally, the posting system may be actionable as an "undue use of one's bargaining position."[182] Here, NPB and MLB each have superior bargaining positions to the Japanese players.[183] While both organizations have power over the player, it is ultimately the NPB team that can unduly control the process since they must approve a player's posting before further action is taken.[184] This skewed power is also visible where the NPB team has the sole right to reject the winning MLB bid, thereby ensuring that no team will have the opportunity to negotiate with the player until at least the following November.[185] MLB has superior bargaining power because by awarding "sole, exclusive, and non-assignable" rights to the player, only one team "competes" for his services and his contract value is kept artificially low.[186] Essentially, the player has no bargaining power and if he does not acquiesce to the bidding team's final offer, or if his NPB team does not approve both the initial posting and the bid amount, he must return to Japan for at least another year.[187]

Alternatively, if either of the preceding analyses is insufficient to establish a violation, the combination of the two may be viewed as "[d]ealing at unjust prices."[188] It is difficult to grasp the concept of a six-year contract worth $52 million[189] as "unjust," until the terms of Daisuke Matsuzaka's player contract are compared with the $51.1 million windfall for his former NPB team, the Seibu Lions.[190] In total, the Boston Red

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179. Posting Agreement, *supra* note 8, paras. 11, 12 (emphasis added).

180. *Id.*

181. Smull, *supra* note 17, at 5; Meshefejian, *supra* note 2.

182. Antimonopoly Act, Law No. 54, § 2(9)(v) (1947) (Jp.).

183. Smull, *supra* note 17, at 5.

184. Posting Agreement, *supra* note 8, paras. 6–8.

185. *Id.* para. 11.

186. *Id.* Thus restricting the number of teams involved in negotiations to one. Smull, *supra* note 17, at 5; *see* discussion *supra* Part II.C.

187. Posting Agreement, *supra* note 8, para. 12.

188. Antimonopoly Act, Law No. 54, § 2(9)(ii) (1947) (Jp.).

189. Matsuzaka Contract Details, *supra* note 113.

190. Boston bid $51.1 million for the rights to negotiate with Matsuzaka, all of which was transferred to the Seibu Lions upon Matsuzaka's agreement to Boston's contract offer. Kurkjian, *supra* note 89; *see* Posting Agreement, *supra* note 8, para. 11 (detailing the procedure and timeframe for transfer of the bid amount to the NPB club).

Sox spent roughly $100 million to acquire Matsuzaka,[191] and arguably his talent alone commanded such a price tag.[192] Furthermore, Matsuzaka has to earn his money over the course of the next five seasons[193] while Seibu received their transfer fee once the contract was signed.[194] Therefore, Matsuzaka received an "unjust price" for his services as his contract reflects only one-half of his potential value.[195]

One other possible violation of Japanese antitrust laws is that posting is established by an international agreement, and section 6 of the Antimonopoly Act prohibits parties from signing "an international agreement or international contract which contains such matters as constitute an unreasonable restraint of trade or unfair business practices."[196] As established above, Japanese players have colorable claims against posting under either provision. Further, the Antimonopoly Act provides for private causes of action by "person[s] whose interests are infringed or likely to be infringed" by the illegal conduct.[197] Thus, if either the JPBPA or any individual posted player can show an undue restraint of trade or an unfair business practice associated with the Posting Agreement, they can bring a suit in Japan for either monetary damages or injunctive relief.[198] Furthermore, enforcement of the Antimonopoly Act favors the idea that any international agreement in violation of section 6 is unenforceable and

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191. Even before negotiations took place, Boston's total package for Matsuzaka was expected to be between $80 and $100 million. Barry M. Bloom, *Red Sox Win Matsuzaka Bid*, MLB.com, Nov. 15, 2006, http://mlb.mlb.com/content/printer_friendly/mlb/y2006/m11/d13/c1739983.jsp.

192. In an interview following MLB's announcement regarding the Red Sox's winning bid, Omar Minaya, General Manager of the New York Mets, said, "You've got to pay a pitcher like Matsuzaka when he's already proven himself in the Olympics and in Japan and the [World Baseball] Classic. A lot of people respect this pitcher." *Id.* (alteration in original).

193. At the time of writing, Matsuzaka had completed one full season with the Red Sox, a campaign that brought the World Series trophy back to Boston for the second time in the past four years. Nick Cafardo, *Well-earned Recognition*, BOSTON GLOBE, Nov. 4, 2007, at E19.

194. Paragraph 11 states that, "the U.S. Major League Club shall pay the Japanese Club the amount of its successful bid within five (5) business days of the confirmation of terms." Posting Agreement, *supra* note 8, para. 11. It is also worth noting that Seibu agreed to post Matsuzaka following his Most Valuable Player performance in the 2006 World Baseball Classic in part due to the team's financial troubles. Kurkjian, *supra* note 89. The team even marketed Matsuzaka throughout the posting process as "a national treasure." Singer, *supra* note 59.

195. *See supra* notes 121 and 122, and accompanying text.

196. Antimonopoly Act, Law No. 54, § 6 (1947) (Jp.); *see* Smull, *supra* note 17, at 4 (explaining the possibility of a section 6 claim for JPBPA).

197. Antimonopoly Act § 24.

198. *Id.* §§ 24–26; Smull, *supra* note 17, at 4.

entirely null and void.[199] According to JPBPA, however, it is near futile to bring a lawsuit in the Japanese legal system because "trials last forever [in Japan]."[200] MLBPA even offered to assist its Japanese counterpart in pursuing the action, in either the United States or Japan, but the offer was rejected.[201] Thus, the Posting Agreement remains effective and will continue to limit Japanese players' mobility and earning potential until action is taken to invalidate it.[202]

B. Japanese Labor Law

In Japan, unions meeting certain criteria[203] are permitted to negotiate towards collective bargaining agreements with employers and are not liable for concerted activity, such as strikes.[204] Since formation in 1985, JPBPA has been a far weaker version of MLBPA,[205] and remains reluctant to strike because of "traditional Japanese cultural views of collective harmony, company loyalty, and a tendency to promote the benefit of the group over the individual."[206] Nonetheless, JPBPA has successfully em-

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199. Smull, *supra* note 17, at 4.

200. Whiting, *Batting Out of Their League*, *supra* note 50.

201. Toru Matsubara, an official with JPBPA responded to MLBPA by saying that court proceedings in either country would be too lengthy and, therefore, that "the problem can't be helped." WHITING, MEANING OF ICHIRO, *supra* note 4, at 147.

202. *Id.* at 146–47.

203. Article 28 of Japan's Constitution guarantees the right of collective action, which "inherited many of the effects of the guarantee of the dispute right in advanced capitalist countries." KAZUO SUGENO, JAPANESE LABOR LAW 539–40, (Leo Kanowitz, trans.) (1992). To come within the purview of the Labor Union Act, a Japanese union must have "formed voluntarily . . . for the main purposes of maintaining and improving working conditions and raising the economic status of the workers." Labor Union Act, Act No.174, art. 2(1) (1949) (Jp.), *translated at* http://www.cas.go.jp/jp/seisaku/hourei/data/lua.pdf (last visited Apr. 14, 2008). In addition, labor unions must be financially independent of their employer. *Id.* art. (2)(1)(ii).

204. Labor Union Act, arts. 1(1), 6; SUGENO, *supra* note 203, at 539–40 (discussing collective action by unions, including "dispute acts" such as strikes and boycotts). Furthermore, if an employer refuses to "bargain collectively with representatives of the workers employed by the employer without justifiable reasons," it is considered an unfair labor practice. Labor Union Act, art. 7(ii). Justifiable collective actions are exempt from criminal liability. *Id.* art. 2. Also, employers cannot claim damages arising from strikes or other "acts of dispute." *Id.* art. 8. Dispute acts are typically defined as those which "impair an employer's normal operation of its business conducted in the course of a labor dispute" and include strikes and picketing. SUGENO, *supra* note 203, at 544. Justifiable dispute acts must be "aimed at achieving an object of collective bargaining." *Id.* at 550.

205. Stein, *supra* note 11, at 269.

206. Duncan, *supra* note 1, at 93. For a general discussion of the evolution of Japanese cultural opinions towards labor, see ANTHONY WOODIWISS, LAW, LABOUR AND SOCIETY IN JAPAN: FROM REPRESSION TO RELUCTANT RECOGNITION (1992).

ployed both the collective bargaining and concerted activity mechanisms to effect changes within NPB.[207] Therefore, JPBPA could feasibly utilize either of these rights to achieve player-friendly changes to the posting system.[208]

Pursuant to Japanese labor law, JPBPA has a right to bargain collectively with NPB regarding payment and working terms and conditions.[209] Also, if JPBPA is established in its constitution as a democratic organization affording equal treatment to all of its members, it may claim administrative relief from unfair labor practices.[210] The union may demand collective negotiations regarding posting because it directly affects both players' salaries and working terms and conditions, and it is within NPB's power to change the system.[211] Furthermore, although posting affects the aforementioned player interests, JPBPA was neither consulted during the drafting of the Posting Agreement, nor did the union ratify it.[212] If JPBPA demands collective bargaining and NPB refuses to negotiate, it would constitute an unfair labor practice within the purview of

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207. In 1993, NPB instituted its first free agency system. NPB's system was fashioned after MLB's system, but remains a more restricted version of the free agent market. Braver, *supra* note 5, at 453. Some suggest that this Americanization was the product of former MLB stars playing in Japan and making more money than the native Japanese players and bringing their "pro-union" attitude with them. *Id.* at 446–48.

208. Smull, *supra* note 17, at 5.

209. Labor Union Act, arts. 1, 6.

210. Article 5(1) of the Labor Union Act states that any labor union meeting Article 5(2) constitutional requirements and complying with the Article 2 definition of a labor union may utilize administrative procedures and be awarded remedies pursuant to the provisions of the Act. *Id.* art. 5(1); SUGENO, *supra* note 203, at 423–31 (explaining qualifications of labor unions as a prerequisite for taking action pursuant to the Labor Union Act). If a union alleges unfair labor practices in violation of Article 7 of the Labor Union Act against the employer, the union may file, within one year of the act's commission, a motion with the Labor Relations Commission, which will then investigate the matter and determine whether it should proceed to a hearing. Labor Union Act, art. 27. If the matter goes to hearing, the Labor Relations Commission may award the relief sought by the movant or it may dismiss the motion. *Id.* art. 27-12(1).

211. Although there is no provision in the Labor Union Act that specifically addresses topics for collective bargaining, it is generally accepted that any issue which relates to employee interests for which the employer has the "discretion to respond" is appropriate. SUGENO, *supra* note 203, at 485–86. With regards to posting, NPB exerts power over the player both before he is posted and after MLB teams bid for his negotiating rights and therefore have the discretion to respond to player inquiries as well as the overall agreement with MLB. *See supra* Part IV.A (discussing NPB's superior bargaining power to that of its players).

212. WHITING, MEANING OF ICHIRO, *supra* note 4, at 147.

the Labor Union Act.[213] JPBPA could then submit the issue to the Labor Relations Commission or they could initiate a strike.[214]

At present, the posting system is a sensitive issue in Japan, with JPBPA likening the process to "human trafficking."[215] Since 1985, JPBPA has only gone on strike once, but the attempt was successful.[216] Given that posting directly relates to players' rights, it is reasonable to expect that JPBPA would be successful in at least making the process more player-friendly through either collective bargaining or concerted activity.[217] Thus, the issue is ripe for action by JPBPA without fear of criminal or civil liability.[218] If they remain hesitant to strike, JPBPA can either file a complaint seeking administrative relief with a district labor relations commission,[219] or they may file suit in the court system for

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213. In order for NPB to refuse collective bargaining, the league would have to provide a legitimate reason to do so. Labor Union Act, art. 7.

214. Employees may file motions with the Labor Relations Commission alleging unfair labor practices against an employer and requesting that the Commission investigate the matter. If the Commission finds sufficient bases for pursuing the matter, it will initiate a hearing to further explore the allegations. *Id.* art. 27(1). The Labor Relations Commission includes members representing employers, workers, and the public interest. *Id.* art. 19(1). The Commission has authority to investigate alleged unfair labor practices and to resolve labor disputes. *Id.* art. 20.

215. Smull, *supra* note 17, at 2.

216. In 2004, the JPBPA protested the possible merger of two NPB teams because it threatened both the stability of the dual-league format and the jobs of players and team personnel. JPBPA and NPB ownership signed an agreement, ending the action after two days and preventing a second strike, which provided that the merger would proceed as planned, but that NPB would initiate the process of finding corporate ownership for a new team to enter the league the following year in 2005. Additionally, the agreement abandoned the traditional exorbitant league entry fees charged to new corporate ownership while establishing an expansion draft-type system to ensure the new team's competiveness. *Id.*

217. Both public opinion and that of the legislature currently favors collective action by JPBPA. *Id.* at 3. Unions in Japan may decide to strike prior to reaching impasse in collective bargaining, but it is generally recognized that to strike over a term currently in negotiations is improper. Failure to give notice of a possible strike to an employer prior to the action is not dispositive of the legality of the concerted activity, but the propriety of such action is assessed based on whether it amounted to an intentional paralysis of the employer's operations. SUGENO, *supra* note 203, at 553–54.

218. As previously discussed, labor unions meeting statutory criteria may participate in administrative procedures and demand relief from unfair labor practices. *See supra* note 210 and accompanying text. In addition, such qualified unions may exercise their statutory right to engage in collective action while enjoying exemption from both criminal and civil liability. SUGENO, *supra* note 203, at 424. Furthermore, if JPBPA does strike over the posting system and it is deemed a "justifiable act," NPB would not be permitted to claim damages against the union for the disruption. Labor Union Act, art. 8.

219. Labor Union Act, art. 27.

monetary damages.[220] Once again, JPBPA must initiate the reform process, but is reluctant to do so both because of cultural barriers and the daunting length of Japanese trials.[221]

V. PROPOSAL FOR MODIFICATIONS TO THE POSTING SYSTEM

In the absence of JPBPA action invalidating the Posting Agreement, there are modifications that can make the system more amenable to Japanese players' rights.[222] First, the bidding process, which takes place entirely in the United States among MLB teams, can be altered so that sole negotiating rights to the posted players are not awarded to the highest bidder.[223] Instead, the rights to negotiate with the player could be given to multiple teams thereby creating a pseudo-market in which the player may "shop" his talents to the club offering the best overall package, including term of contract, compensation, and location.[224] If more teams are allowed to negotiate, the player can extract more value for his talents and is assured the opportunity to bargain for an amount closer to his market potential, rather than a low offer which he must accept if he does not wish to remain in Japan.[225]

Alternatively, the Posting Agreement can require MLB teams to pay NPB teams a percentage of the total package negotiated with the player, rather than having them place a bid beforehand.[226] This amount would be a percentage of the total package, but would not come out of the player's salary; it would be a separate payment to the NPB team, but would serve a similar purpose and be transferred comparably to the current bid

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220. SUGENO, *supra* note 203, at 627. If JPBPA seeks relief from the Labor Relations Commission, it will not be entitled to "consolation money" or "compensation for abstract losses," but if it seeks relief solely from the court system, they can only obtain remuneration for past wages and will not be able to affect the employer-employee relationship in the future. *Id.* at 691–92.

221. WHITING, MEANING OF ICHIRO, *supra* note 4, at 147.

222. *See* discussion *supra* Part II.B–C.

223. *Contra* Posting Agreement, *supra* note 8, para. 11 (stating that only the highest bidder gets negotiating rights to the posted player).

224. This system would resemble free agency in that teams would actually compete to sign the player, therefore encouraging better offers. *See* Greenwood, *supra* note 20, at 273 (stating that escalation of players' salaries is due to free market competition encouraged by free agency); Basic Agreement, *supra* note 27, art. XX(B)(2) (setting forth procedures for negotiating and signing free-agent contracts).

225. *See* Gould, *supra* note 2, at 292 (referencing the potential for higher salary through free agency); *see id.* at 294 (referencing potential for MLB teams to bid high while knowing they cannot sign the player); Posting Agreement, *supra* note 8, para.12 (stating that players return to Japan for another year if negotiations are unsuccessful).

226. *Contra* Posting Agreement, *supra* note 8, para. 11 (providing for bidding process which occurs prior to a player's posting).

price.[227] Since this alteration is analogous to the system in the Basic Agreement whereby MLB teams losing free agents to other teams are compensated with draft picks, it would encourage competitive negotiations with Japanese players.[228] Interested teams could submit skeletal contracts outlining some terms and conditions which they are prepared to offer, and then let the player choose the teams with whom he wants to negotiate based on his own criteria.[229] This pro-cess would afford the player a pro-active role in deciding where he will eventually play. Not only would he be given a chance to make an informed decision, but he would also have the leverage enjoyed by free agents to extract maximum value.[230]

CONCLUSION

The Posting Agreement is the product of decades of U.S.-Japanese baseball tensions resulting from NPB's animosity towards players desiring to prove their skills in MLB. The strictures placed on player mobility and bargaining power are the embodiment of NPB's desire to keep Japanese players in Japan, and to not become a farm system for MLB. Opponents to the system have suggested that its unfair labor practices violate both antitrust and labor law. However, for a Japanese player hoping to challenge the posting system in the United States, the baseball exemption from antitrust law and the lack of protection from MLBPA are near-insurmountable hurdles.

By instituting the proposed changes, MLB can still access Japanese talent while ensuring that NPB remains a competitive professional league and receives compensation for posted players. Furthermore, players will acquire bargaining power and freedom of choice, both of which the current Posting Agreement denies them. Nonetheless, the only way to truly combat this problem is for JPBPA to demand a better free agency system and collective negotiations specifically geared towards remedying the unfair labor practices that are encourgaed by posting. They can also accomplish this task by invalidating the Posting Agreement under Japan's

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227. *See id.* (stating that in the event of successful contract negotiations, bid price goes to NPB team).

228. *See* Basic Agreement, *supra* note 27, art. XX(B)(4) (setting forth team compensation for loss of free agents).

229. Not only does this create a market for the player, but it re-establishes his freedom of choice. *See* WHITING, MEANING OF ICHIRO, *supra* note 4, at 146 (quoting MLBPA officials as questioning the legality of posting for depriving players of choice and rights).

230. *See* Kurkjian, *supra* note 89 (discussing how the posting process deprived Daisuke Matsuzaka and his agent, Scott Boras, of leverage the negotiation of Matsuzaka's contract with the Boston Red Sox).

antimonopoly law. MLB cannot unilaterally fix a problem arising from NPB's feudalistic and out-dated policies, and they "can[no]t force the Japanese players to stand up for their interests."[231] If Japanese players will not assert their rights, the Posting Agreement will remain intact and will continue to restrict their mobility and market value indefinitely.

Victoria J. Siesta[*]

231. WHITING, MEANING OF ICHIRO, *supra* note 4, at 147.

* A.B., Princeton University (2001); J.D., Brooklyn Law School (expected 2009); Managing Editor of the *Brooklyn Journal of International Law* (2008–2009). I would like to thank my family, especially my parents, Michael and Marian, my sister, Christina, and my grandfather, Vincent J. Siesta, Sr., for their unwavering love and support. Thank you also to the 2007–2008 Executive Board and staff of the *Brooklyn Journal of International Law* for their help in preparing this Note for publication. All errors and omissions are my own.