

NOTE

A MAJOR SMUGGLE STRUGGLE: IT'S TIME FOR MAJOR LEAGUE BASEBALL TO STEP UP TO THE PLATE AND ALLEVIATE ITS CUBAN SMUGGLING PROBLEM

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I. INTRODUCTION

Baseball is commonly known as America's greatest pastime and is one of Cuba's proudest cultural pillars. Unsurprisingly, the sport was once a major area of partnership for the two countries, prior to the Castro era.¹ Indeed, there is a great opportunity for baseball (and other sports) to play a significant role in diplomatic relations around the world² – particularly between the United States and Cuba given the sport's past successes. Considering its long history, baseball diplomacy could “help break the ice” between the two nations separated by decades of hostility,³ particularly since Cuba has demonstrated a willingness to participate.⁴

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¹ Rachel D. Solomon, Note, *Cuban Baseball Players, The Unlucky Ones: United States-Cuban Professional Baseball Relations Should Be an Integral Part of the United States-Cuba Relationship*, 10 *J. OF INT'L & BUS. L.* 153, 156 (2011), available at http://law.hofstra.edu/pdf/academics/journals/jibl/jibl_issues_v10n01_cuban_baseball_players.pdf.

² According to Susan Pittman, who works with the bureau of educational and cultural affairs, “Sports diplomacy is a powerful force for reaching individuals in every corner of the globe. Sports transcend borders, increase dialogue, and expose foreign participants to American culture. . . We can start conversations and build lasting connections that inspire and inform our government-to-government relationships.” Pittman mentions ping pong diplomacy, which fostered U.S.-Chinese relations in the 1970s, U.S.-U.S.S.R. track-and-field competitions during the 1970s, and even Dennis Rodman's self-initiated correspondence with North Korea's Un family. Daniel Stone, *Does Sports Diplomacy Work?*, *NAT'L GEOGRAPHIC* (Sept. 11, 2013, 8:11 PM), <http://news.nationalgeographic.com/news/2013/09/130912-north-korea-diplomacy-kim-jong-un-basketball-rodman/>.

³ “. . .[b]aseball is perhaps the greatest cultural touchstone between the countries — and a natural venue for what could be the start of radical change.” Jon Paul Morosi, *How Restored Diplomacy Between USA-Cuba Will Change MLB*, *FOX SPORTS* (Dec. 17, 2014, 6:48 PM), <http://www.foxsports.com/mlb/story/us-cuba-relations-shift-affects-baseball-121714>; *Beisbol Diplomacy: Declassified Documents from 1975 Reveal Secret U.S.-Cuban Negotiations for Exhibition Games*, *THE NAT'L SECURITY ARCHIVE* (2013), <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB12/nsaebb12.htm>.

⁴ Cuban leader Raul Castro recently allowed some of Cuba's baseball players to sign contracts with teams in Japan and Mexico, facilitating relationship building worldwide. (Though, it should be noted, this allowance is not ideal, as it requires Cuban players to give a large cut of their contracted salaries to the Cuban

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For the past five decades, however, utilizing baseball as a diplomatic tool has not really been a possibility. When Fidel Castro took control over Cuba in the 1950s, ushering in an era of communist dictatorship, the United States responded with the institution of what would become a comprehensive trade embargo against the small island nation. Among many other elements, the embargo included an absolute prohibition against the scouting and drafting of Cuban baseball players by the MLB.⁵ This prohibition was a travesty for gifted Cuban baseball players who dreamed to escape the confines of communist Cuba and sign million-dollar contracts with the MLB. But for some hell-bent players, if there's a will, there's a way. With the help of black market agents and professional human smugglers, handfuls of Cuban baseball stars have figured out ways around the embargo⁶ – but not without major risks and costs.⁷

Since the initiation of the embargo in the 1962,⁸ (which many

government.) Mike Axisa, *Major Changes to Cuban Policy May Impact Market for Baseball Players*, CBS SPORTS (Sept. 27, 2013, 11:18 AM), <http://www.cbssports.com/mlb/eye-on-baseball/23874488/major-changes-to-cuban-policy-may-impact-market-for-baseball-players>

⁵ Dara Lind, *Major League Baseball's Human Trafficking Problem*, VOX MEDIA (Sept. 15, 2014, 11:00 AM), <http://www.vox.com/2014/9/15/6147663/baseball-players-trafficking-cuba-puig-cartels-smuggling>.

⁶ See *infra* Section I.

⁷ Ira Boudway, *Major League Baseball Might Miss a Closed-Off Cuba*, BLOOMBERG (Dec. 23, 2014), <http://www.bloomberg.com/bw/articles/2014-12-23/major-league-baseball-might-miss-a-closed-off-cuba>.

Yoenis Céspedes spent two days marooned on a tiny island without water before signing for four years and \$36 million with the Oakland Athletics in 2012. The same year, Yasiel Puig hiked “through crocodile-infested mangrove swamps” and was held captive near Cancun in Mexico before signing for seven years and \$42 million with the Los Angeles Dodgers. José Abreu entrusted his life to a twin motor boat in the open ocean before signing a six-year, \$68 million deal with the Chicago White Sox this year. All have since played in All-Star games.

⁸ Proclamation No. 3447 - Embargo on All Trade with Cuba, 27 Fed. Reg. 1085 (Feb. 3, 1962), available at <http://cuba-embargo.procon.org/sourcefiles/Proclamation-3447.pdf>. President Kennedy was able to do so under the authority of earlier legislation: 1917 Trading With the Enemy Act (“TWEA”), which enabled the President “to enforce the embargoes upon foreign countries irrespective of a wartime emergency,” but in 1933 was extended to also apply also to non-wartime. Solomon, *supra* note 1; Ryan Schur, *The Effect of Major League Baseball on United States Cuba Relations*, (2014), available at <http://ryanschurlaw.com/wp-content/uploads/2012/10/THE-EFFECT-OF-MAJOR-LEAGUE-BASEBALL-ON-UNITED-STATES-CUBA-RELATIONS.pdf>.

commentators believed would extend in full far beyond 2014),⁹ there have been two ways for Cuban ballplayers to join the MLB. The first method was to gain citizenship in a third country such as the Dominican Republic, Haiti, or Costa Rica, by which a player would *technically* be avoiding the embargo's restrictions.¹⁰ From that third country, the Cuban player would obtain approval from the Department of Treasury's Office of Foreign Assets Control (OFAC),¹¹ gain free agency status as a foreign player, and begin negotiating contracts with the MLB as a citizen of that third country. If he was talented enough, he could contract, legally, for millions.¹²

The second option for Cuban baseball players to join the MLB was to come straight to the United States and become an American citizen pursuant to the Wet-Foot Dry-Foot policy, a policy under which Cubans are immediately eligible as asylum-seekers to stay in the United States if they touch U.S. soil.¹³ At that point, as an American citizen, the Cuban defector would be able to legally join the MLB. However, a player who becomes an American citizen would be drafted as any other American citizen; instead of negotiating as a free agent like other foreign players, he would be submitted to the same annual draft that all American players are

⁹ Matthew Frankel, *Major League Problems: Baseball's Broken System of Cuban Defection*, 25 B.C. THIRD WORLD L.J. 383, 424 (2005), available at <http://lawdigitalcommons.bc.edu/twlj/vol25/iss2/4>.

¹⁰ Lind, *supra* note 5.

¹¹ Jesse Sanchez, *Shift in US-Cuba Relations May Affect MLB*, MLB.COM (Dec. 17, 2014), available at <http://m.MLB.com/news/article/104325146/shift-in-united-states-cuban-relations-may-affect-major-league-baseball> ("Because of the embargo, any Cuban defector who wants to do business with an American company must first establish residency outside Cuba and the U.S., a process that can take several months, depending on the country. Cuban players must also petition for free agency from the MLB and be unblocked by the Office of Foreign Assets Control (OFAC) before they can enter into a contract with a Major League club."); Ben Badler, *MLB, Not OFAC, Is Why Yoan Moncada Can't Sign*, BASEBALL AMERICA (Jan. 27, 2015), <http://www.baseballamerica.com/international/MLB—yoan-moncada-cant-sign/> ("Cuban nationals must be regarded as "unblocked" by the Department of the Treasury's Office of Foreign Assets Control (OFAC) before they can work for a U.S. company.").

¹² Lind, *supra* note 5.

¹³ *Id.* "[The] [W]et-foot, dry-foot" policy [is a policy] under which Cubans are eligible to stay in the United States if they touch U.S. soil. Those intercepted at sea are returned to Cuba. Nick Miroff, *Fear of Immigration Policy Change Triggers new Wave of Cuban Migrants*, WASH. POST (Jan. 27, 2015), available at http://www.washingtonpost.com/world/the_americas/fears-of-immigration-policy-change-triggers-new-wave-of-cuban-migrants/2015/01/27/8d6ca65c-a0e5-11e4-91fc-7dff95a14458_story.html.

submitted to, which would result in a drastic difference in contracted dollars,¹⁴ for reasons related to the MLB's drafting procedures, (elaborated upon in this note).

Pursuing the first method of joining the MLB, – obtaining third country citizenship and becoming a free agent – is an incredibly complex and risky business. MLB-bent Cuban players have had no real choice but to defect¹⁵ from Cuba with the assistance of practiced human smugglers,¹⁶ which involves embarking on horrifying getaway journeys towards third countries and eventually on to the United States.¹⁷ The human smuggling ringleaders who assist Cuban defectors¹⁸ have familiarized themselves with the legal loopholes;¹⁹ they have set up intricate smuggling processes by which they transplant Cuban ballplayers from Cuba to third countries and then to the United States – and they charge millions of dollars *per* player to do so.²⁰

Despite the high price tag on each of these smuggling journeys, comfort and safety are not priorities. Trips often end up filled with peril and near-death experiences,²¹ like the well-documented and highly publicized journey of Yasiel Puig in 2012.²² Even when a player makes it all the way to the MLB, his smugglers and his past will likely haunt him and continue to threaten him on United States soil.²³ Successfully defected players may also then look to have their

¹⁴ Lind, *supra* note 5.

¹⁵ Matthew N. Greller, Note, *Give Me Your Tired, Your Poor, Your Fastball Pitchers Yearning for Strike Three: How Baseball Diplomacy Can Revitalize Major League Baseball and United States-Cuba Relations*, 14. AM U. INT'L L. REV. 1647, 1661-66 (1999) (noting that a combination of U.S. immigration policies and MLB rules force players to defect if they want to play in the MLB).

¹⁶ Jeff Passan, *10 Degrees: Cuban Trafficking Grows into MLB's Ugly Secret*, YAHOO SPORTS (Apr. 20, 2014, 11:47 PM), <http://sports.yahoo.com/news/10-degrees—cuban-trafficking-grows-into-MLB-s-ugly-secret-034704407.html>

¹⁷ Lind, *supra* note 5.

¹⁸ Frankel, *supra* note 9.

¹⁹ *Id.*

²⁰ *Id.*

²¹ See Boudway, *supra* note 7.

²² Scott Eden, *No One Walks Off the Island*, ESPN THE MAGAZINE (Apr. 14, 2014), http://espn.go.com/espn/feature/story/_/id/10781144/no-one-walks-island-los-angeles-dodgers-yasiel-puig-journey-cuba.

²³ *Id.* “Even after players have arrived in the U.S., the peril sometimes doesn't end. At least three players have alerted MLB or MLBPA officials about threats from their smugglers who demanded money, according to league and union sources.” Scott Eden, *Federal Investigations Into Cuban Smuggling, Major League Baseball Slow*, ESPN (Aug. 7, 2015 1:08 PM), http://espn.go.com/espn/otl/story/_/id/13383092/homeland-security-fbi-agents-look-major-league-baseball-cuban-player-smuggling-slowed.

families smuggled into the United States after them, further perpetuating not only their own personal perils but also an international smuggling problem.²⁴

While diplomatically terminating the embargo in its entirety would theoretically end the injunction against trading with Cuba and allow for the scouting and drafting of baseball players directly out of Cuba, that theory has not yet proven true and is not likely to prove true in the near future.²⁵ Scouting and drafting players out of Cuba is likely to remain prohibited despite President Obama's recent executive actions with regard to the embargo, at least for the near future,²⁶ given that a President cannot end a trade embargo all on his own but instead needs congress' approval.²⁷ Considering that Republicans (who have traditionally supported the embargo) currently control our congress – (a congress that, in general, remains

²⁴ Frankel, *supra* note 9.

²⁵ Ben Badler, *OFAC Sends Letters To Cuban Players, MLB Tells Teams Don't Sign Them*, *BASEBALL AMERICA* (Jan. 30, 2015), <http://www.baseballamerica.com/international/ofac-sends-letters-cuban-players/> (“[In January 2015], the commissioner’s office sent another memo to teams explaining that their policy for now remains the same, and to hold off on signing Cuban players until they figure out how to proceed. In the memo, the MLB instructs teams, in bold font: “do not enter into agreements with Cuban players until you receive further notice from the Commissioner’s Office.”) *See* Ben Badler, *How Will MLB Handle Big Changes With Cuba?*, *BASEBALL AMERICA* (Dec. 18, 2014), <http://www.baseballamerica.com/international/ofac-sends-letters-cuban-players/> (“Making every Cuban player suddenly a free agent would be a nightmare. . . There won’t be an immediate change in baseball because there are still laws to change and steps to work out. . .”); Badler, *supra* note 11 (“MLB issued the following statement. . . : “MLB is confident with the current plan we have in place regarding signing foreign born players. . . .”); Sanchez, *supra* note 11 (“Major League Baseball is closely monitoring the White House’s announcement regarding Cuban-American relations. While there are not sufficient details to make a realistic evaluation, we will continue to track this significant issue, and we will keep our Clubs informed if this different direction may impact the manner in which they conduct business on issues related to Cuba.”); *See* Boudway, *supra* note 7 (“If you had a much wider swath of Cuban talent coming in, you would have some great players, but the success rate would be nowhere like this because you wouldn’t be just dealing with the cream of the crop.”).

²⁶ *See* Badler, *supra* note 11 (“Major league teams want the ability to scoop up as much talent as they can, but the commissioner’s office will want order to the process. Making every Cuban player suddenly a free agent would be a nightmare. . . There won’t be an immediate change in baseball because there are still laws to change and steps to work out. . . .”)

²⁷ Jeremy Diamond, *U.S.-Cuba relations: 10 Questions on the Embargo, Embassies and Cigars*, CNN (last updated July 1, 2015, 2:33 PM), <http://www.cnn.com/2014/12/17/politics/cuban-embargo-questions-answers/>; Daniel Renwick, *U.S.-Cuban Relations*, COUNCIL ON FOREIGN RELATIONS (last updated Aug. 4, 2015), <http://www.cfr.org/cuba/us-cuba-relations/p11113>.

unpredictably split on the issue of the embargo²⁸) – President Obama’s policy changes don’t guarantee the complete termination of the embargo and the unimpeded “trade” of athletes. Even if the embargo were to be completely terminated, the Castro Administration would also have to cooperate.²⁹

The questions explored by this note include: How is the MLB affected by the embargo? What does the current Cuban ballplayer smuggling situation look like, and how has the MLB contributed to its perpetuation? What can be done to alleviate the smuggling problem? Is the U.S. government independently responsible for the problem, and is it the only party that has an obligation or capability to do something about it? If so, will our Republican congress approve of President Obama’s recent actions and statements? Should the MLB, a supranational organization that capitalizes on Cuban baseball talent, have a responsibility to address the human rights impact of its own policies, actions, and non-actions? Legally speaking, *must* they?

In Part I, this note examines the history of United States-Cuban relations and the circumstances surrounding the embargo, and discusses the resulting Cuban baseball player smuggling situation. In Part II, this note explains how terminating the embargo would seemingly be an ideal solution to the smuggling problem, but that the impact of the embargo is likely to permeate United States-Cuban relations for the foreseeable future, including those involving baseball, regardless of any immediate diplomatic decisions.

In Part III, this note details the MLB’s culpability in the whole scheme - how they have turned a blind eye to the situation by contracting with desperate, defecting Cuban players and by, at times, even making it harder for Cubans to sign with the MLB than our government would require.³⁰ Part III further explains how the MLB’s current drafting policies, special rules for Cuban players, and failure to initiate any sort of campaign for change arguably violate their potential obligations under certain domestic laws as well as various

²⁸ *Id.*

²⁹ See Travis Waldron, *The MLB’s Cuba Problem*, THINK PROGRESS (Dec. 18, 2014, 10:31 PM), <http://thinkprogress.org/sports/2014/12/18/3604720/cuba-embargo-obama-normalized-relations-major-league-baseball/>. See *Infra* note **Error! Bookmark not defined.**

³⁰ See *infra* note **Error! Bookmark not defined.** Up until February 4, 2015, the MLB required Cubans to take an extra step beyond what the United States government required from a Cuban national wishing to do business with the United States.

international human rights laws. In Part IV, this note considers why the MLB has yet to act on this issue, and suggests possible approaches the MLB can and should take towards alleviating the smuggling issue, particularly with the recent easing of the embargo.

Part V concludes that whether or not the MLB is unambiguously obligated by international human rights law and/or domestic law to do anything to alleviate the Cuban ballplayer smuggling issue, the MLB should be persuaded by its corporate social conscience,³¹ and use its significant power as a multinational corporation³² to proactively seek to mitigate the Cuban player smuggling issue.

I. HISTORY OF THE EMBARGO & ITS RELATION TO THE MLB

A. The Circumstances Leading Up to the Embargo & Post-Embargo United State-Cuban Relations

The embargo against Cuba was the United States' response to an increasingly hostile political situation between the two nations. In 1959, Fidel Castro overthrew United States-backed President Batista and introduced communism and tyranny to Cuba,³³ ruling the nation with an iron fist.³⁴ In 1959 and 1960, Castro seized what would amount today to anywhere between \$6.4 and \$20.6 billion in American assets, which was the largest uncompensated taking of American property by a foreign government in United States history.³⁵ In 1961, President Kennedy authorized the Bay of Pigs invasion, during which United States-trained and backed Cuban exiles invaded the Bay of Pigs in Cuba in hopes to overthrow the Castro regime. However, Cuban forces defeated the exiles, and, soon thereafter, invited the Soviet Union to store nuclear missiles within their borders.³⁶ Having a Soviet ally so close to shore was a huge red flag for the United States.³⁷

In early 1962, President Kennedy reacted with the enactment of

³¹ *Id.*

³² Wasch, Adam G., *Children Left Behind: The Effect of Major League Baseball on Education in the Dominican Republic*, 11 TEX. REV. ENT. & SPORTS L. 99, 119-122 (2009), available at <http://ssrn.com/abstract=1571479>.

³³ *Should the United States Maintain Its Embargo against Cuba?* PROCON.ORG (Dec. 11, 2013, 5:33 PM) <http://cuba-embargo.procon.org/>.

³⁴ Solomon *supra* note 1, at 168.

³⁵ *Should the United States Maintain Its Embargo against Cuba?*, *supra* note 33.

³⁶ *Id.*

³⁷ *Id.* Solomon *supra* note 1, at 171.

Proclamation 3447: the complete embargo of all trade between the United States and Cuba.³⁸ In October 1962, the two countries were at frightening odds with one another during the Cuban Missile Crisis, tiptoeing the line of mutually assured destruction.³⁹ Though the Cuban Missile Crisis ended in negotiations by which the Soviets removed their missiles from Cuba, extremely tense relations understandably remained.⁴⁰

As a result of the enduring tension, in 1963 the United States prohibited travel to Cuba and issued the Cuban Assets Control Regulations, comprehensively outlawing financial transactions with Cuba and the purchasing of any merchandise of Cuban origin, with very few exceptions.⁴¹ Though in the 1977 President Carter authorized secret talks with Cuba to ease tensions with the United States, Castro did not oblige. In 1980, he authorized the Mariel Boatlift, in which 125,000 Cubans, including approximately 2,500 prisoners and mentally ill people, were sent to Florida in order to, among other venal goals, embarrass the United States, who accepted the 125,000 refugees.⁴²

Finally, the United States passed the Cuban Democracy Act in 1992 and the Cuban Liberty and Democratic Solidarity Act (also known as the Helms-Burton Act) in 1996 after Cuba indefensibly drowned two unarmed United States civilian aircrafts, killing four Americans.⁴³ These two legislative acts greatly strengthened the embargo and also encouraged foreign sanctions against the island nation. The goal was to choke off communism and basically force transition to a democratic government.⁴⁴ To achieve these goals, President Clinton maintained a dual-track system by which the U.S.

³⁸ Proclamation No. 3447 – Embargo on All Trade with Cuba, 27 Fed. Reg. 1085 (Feb. 3, 1962), available at <http://cuba-embargo.procon.org/sourcefiles/Proclamation-3447.pdf>. President Kennedy was able to do so under the authority of earlier legislation: 1917 Trading With the Enemy Act (“TWEA”), which enabled the President “to enforce the embargoes upon foreign countries irrespective of a wartime emergency,” but in 1933 was extended to also apply also to non-wartime. Solomon *supra* note 1.; Schur, *supra* note 8.

³⁹ Schur, *supra* note 8, at 7.

⁴⁰ *Should the United States Maintain Its Embargo against Cuba?*, *supra* note 33.

⁴¹ *Id.*

⁴² Aileen S. Yoo, *The Mariel Boatlift*, WASH. POST, http://www.washingtonpost.com/wp-srv/inatl/longterm/cuba/mariel_port.htm (last updated Dec. 1998).

⁴³ Schur, *supra* note 8, at 11.

⁴⁴ *Id.*

was to isolate the Cuban government while simultaneously aiding the Cuban people,⁴⁵ (as harming the Cuba civilian population was never the intended goal). Clinton's approach was promising, though the relative progress came to a screeching halt when President George W. Bush took office.⁴⁶

Since taking office in 2008 and up through December 2014, the Obama Administration had introduced positive, though non-inclusive, change.⁴⁷ It lifted restrictions on family travel and remittances and other purposeful travel and remittances, moved to reengage Cuba on several bilateral issues,⁴⁸ and continued to call for the release of United States government subcontractor Alan Gross, who was detained by Cuban officials in 2009 and sentenced in 2011 to 15 years in Cuban prison.⁴⁹ Any further change was difficult to imagine in the face of such polarized views on relations with Cuba, especially among Cuban-Americans.⁵⁰ But to the surprise of many Americans, in December 2014 after months of secret talks with the Castro Administration, President Obama announced his intention to open communications with Cuba and to pursue normalized relations with them. The two nations simultaneously executed a prisoner swap, which included the return of Alan Gross to U.S. soil after spending five years in a Cuban prison and on July 20, 2015, diplomatic ties between the two nations were officially restored, marked by the re-opening of their embassies in each other's countries.⁵¹ These actions are big steps towards the termination of the embargo – though nothing can be predicted with any certainty given that a president needs congress' approval to end an embargo,

⁴⁵ Solomon, *supra* note 1, at 171-172.

⁴⁶ *Id.* at 173 (“Rather than proceed with Clinton’s progress, Bush essentially moved backwards in the development of relations with Cuba. For one, his administration stressed greater implementation of economic restrictions and intensified sanctions on humanitarian gift packages, travel, and remittances. In addition, President Bush increased constraints on Cuban American visiting family in Cuba and conditions for payment of U.S. agricultural exports to Cuba. . .he added limitations to Clinton’s improvements.”)

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ MARK P. SULLIVAN, CONG. RESEARCH SERV., R41617, CUBA: ISSUES FOR THE 112TH CONGRESS (2012), available at <http://fas.org/sgp/crs/row/R41617.pdf>.

⁵⁰ *Should the United States Maintain Its Embargo against Cuba?*, *supra* note 33.

⁵¹ Associated Press, *Timeline of key dates in US relations with Cuba*, U.S. NEWS & WORLD REP. (July 20, 2015, 12:16 AM), <http://www.usnews.com/news/politics/articles/2015/07/20/timeline-of-key-dates-in-us-relations-with-cuba>.

and our current congress is Republican-controlled.

In terms of Cuban leadership, in 2013, Cuban leader Raul Castro eased travel restrictions for Cubans, increasing freedom of movement and extending the duration a Cuban may stay out of the country, while retaining his or her social benefits back home.⁵² However, in effect, nothing has really changed for Cubans wishing to travel because the Cuban government still requires travelers to have a passport, a nation identity card, and a destination country visa (if required by their destination country),⁵³ and the passport office is permitted to deny passports to people for various, arbitrary reasons, including for reasons of national defense, security,⁵⁴ and “preserving skilled workforce.”⁵⁵ (One could easily envision a Cuban baseball player applying for a passport and being denied for the simple reason that Cuba wants to keep its talent to itself.) It is also prohibitively expensive for Cubans to acquire the requisite documents and a plane ticket out of the country.⁵⁶

The tremendous turbulence of the past six decades as well as impassioned commentary emanating from both ends of the political spectrum have resulted in the prevailing perpetuation of tense foreign relations that many argue should be no more than a distant memory. Despite President Obama’s announcements in December 2014, United States-Cuban relations remain delicate in the shadow of their shared dark past, and many questions regarding the direction of President Obama’s announcement and the future of United States-Cuban relations remain unanswered.

⁵² “Under the new policy, Cubans will need only a passport, national identity card, and, if required by the country they are visiting, a visa from their destination. The new travel measures also extend the period of time Cubans can spend overseas, from the current 11 months to 24. Husna Haq, *Cuba Lifts Travel Restrictions*, BBC (Jan. 16, 2013), <http://www.bbc.com/travel/blog/20130116-cuba-lifts-travel-restrictions>.

⁵³ *Id.*

⁵⁴ “[N]ot everyone will be free to travel under [Castro’s] new [travel] policy. [Travel] [r]estrictions will remain on many doctors, members of the military and athletes, which Cuba attributes to reasons of national defen[s]e and security.” *Id.*

⁵⁵ “The new emigration law sets out nine cases in which the authorities can deny applicants a passport, including ‘preserving skilled workforce,’ and ‘in the public interest. This latter formulation in particular is dangerously open to interpretation. . . . This condition is particularly arbitrary. . . . [T]here won’t be any big changes. . . . [T]he new travel reform is simply ‘the same dog with a different collar, as an old Cuban saying has it.’” Wulf Wilde, *Cuba’s New Travel Rules Still Restrictive*, DEUTSCHE WELLE (Jan. 14, 2013), <http://www.dw.de/cubas-new-travel-rules-still-restrictive/a-16519708>.

⁵⁶ *Id.*

B. How Does the Embargo Affect the MLB?

In order to understand the thrust of this note, it is important to understand the details of how Cuban baseball players have been able to join the MLB in the face of the embargo. Indeed, over 250 Cuban baseball players have joined the MLB over the past few decades,⁵⁷ negotiating hundreds of millions of dollars in contracts.⁵⁸ For example, in the past year, the Arizona Diamondbacks signed Cuban player Yasmany Tomas to a six-year contract worth \$68.5 million, and the Boston Red Sox signed Cuban player Rusney Castillo to a seven-year contract worth \$72.5 million.⁵⁹

Due to the embargo (and still today in late 2015), Cuban players like Tomas and Castillo can join an MLB team in one of two ways. The first option is to immigrate directly to the United States, obtain immediate citizenship pursuant to the United States' "Wet-Foot, Dry-Foot" immigration policy,⁶⁰ and get drafted by an MLB team in the annual amateur draft (the same draft all American players are subject to). When a player is drafted in the amateur draft, he is required to either accept the single offer made to him and commit himself to that team, or reject the offer and wait until the next year's draft for a different offer.⁶¹ Since the offer is take-it-or-leave-it, offers tend to be on the lower end for the majority of players.⁶²

The other, more financially tantalizing option for Cuban ballplayers is to become international free agents as citizens of a third country. International free agents (players from outside the United States, Puerto Rico, and Canada⁶³) are free to negotiate with MLB teams as they please; they may receive offers from teams at any time during the year, and they do not have to wait a whole year for a second offer if they are unsatisfied with the first.⁶⁴ For promising players, this set-up initiates a bidding war among interested teams, and, unsurprisingly, talented free agents are likely

⁵⁷ Ben Jacobs, *Is Major League Baseball Ready for Cuban players?* THE DAILY BEAST (Dec. 19, 2014, 5:45 AM), <http://www.thedailybeast.com/articles/2014/12/19/is-major-league-baseball-ready-for-cuba-s-players.html>.

⁵⁸ *Id.* Frankel, *supra* note 9, at 394.

⁵⁹ Jacobs, *supra* note 57.

⁶⁰ *See* Miroff, *supra* note 13.

⁶¹ *Id.* Frankel, *supra* note 9, at 394.

⁶² *Id.*

⁶³ *Id.*, at 396.

⁶⁴ Lind, *supra* note 5.

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to receive much higher offers overall – typically in the millions.⁶⁵

However, though Cubans are foreign players, they are treated differently than other international players, such as players from the Dominican Republic, Japan, or South Korea. For the past five decades (prior to December 2014), the United States has been forbidden from conducting *any* trade with Cuba, which meant that Cuban players needed to acquire third-country citizenship before talking contracts with the MLB. Through this arrangement, the United States would not technically be trading with Cuba when it began such negotiations.⁶⁶

Though the trade embargo was dramatically relaxed in December 2014, various questions remain, including the MLB's ability to contract directly with Cuban players.⁶⁷ Therefore, Cubans must, at least for the foreseeable future, continue with their smuggling journeys if they want to play in the Big Leagues. Popular defection destinations for Cuban players include the Dominican Republic, Mexico, and Haiti.⁶⁸ Given the fact that MLB policy has not changed, these migration patterns are likely to continue into the near future.

Castro's restrictions on Cuban travel outside of Cuba, particularly for Cuban athletes, are the reason that Cubans must endure dangerous defection journeys." The reason Cubans must endure a dangerous defection journey is because of Castro's persistent restrictions on Cuban travel outside of Cuba, particularly for Cuban athletes. In fact, most citizens may not even book a plane ticket out of the country.⁶⁹ Desperate and dead-set on joining the MLB, Cuban players have submitted themselves to a shady system of professional human smuggling.⁷⁰ Those in charge of the smuggling network have "developed a highly specialized expertise, encompassing marine navigation, boat handling, bribery, forgery, money laundering, the immigration policies of multiple nations, and the ins and outs of the MLB's collective bargaining agreement."⁷¹

⁶⁵ Frankel, *supra* note 9, at 396.

⁶⁶ *Id.*, at 394.

⁶⁷ *See supra* note 25.

⁶⁸ Eden, *supra* note 22.

⁶⁹ Schur, *supra* note 8, at 21.

⁷⁰ *Id.*

⁷¹ Eden, *supra* note 22. The most recent story was of Yasiel Puig's frightening journey of defection, broken by ESPN The Magazine earlier this year, summarized by its surtitle: "[In 2012], Yasiel Puig [current MLB star] fled Cuba in the hands of black-market smugglers. This is the story of how the cost of the defection journey - in money and human lives - shadows him still."

Professional smugglers transport their clients from Cuba to a third country and then to the United States – assuming all goes according to plan.⁷²

So has been the set-up for the past couple of decades. In 1991, Rene Arocha became the first baseball player to defect from Cuba and join the MLB; however, since then, about two hundred more Cuban baseball players have done the same⁷³ – and still many more have tried and fell short.⁷⁴ By signing players from Cuba – and at such provocative contract numbers – the MLB is facilitating this dangerous route, and is quite aware of what it is doing. The MLB has simply chosen to turn a blind eye.⁷⁵

II. WHY THE IMPACT OF THE EMBARGO IS HERE TO STAY

The trade embargo has endured nearly fifty-five years and varied political opinions. By virtue of its longevity and the continuing passion on both ends of the political spectrum, even if the trade embargo were completely terminated, it would take a long time for its impacts to fade, including the impact it has on baseball.

A. Arguments For Terminating the Embargo

Many people believe that terminating the embargo is important not only because it is an outdated relic of the Cold War Era, but also because it is hurting the economy of the United States. The United States Chamber of Commerce issued a statement declaring Cuba as a prime example of a failed and self-harming unilateral economic sanction on the part of the United States. In doing so the Chamber of Commerce cited a Texas A&M University study reporting that “easing restrictions on agricultural exports and lifting the travel ban [to Cuba] could result in up to \$365 million in additional sales of U.S. goods and create 6,000 new jobs in the United States.”⁷⁶ The

⁷² *Id.*

⁷³ Solomon, *supra* note 1, at 153; Jacobs, *supra* note 57.

⁷⁴ “You also don’t hear about the [defectors] who are left behind when their smugglers decide they’re not worth anything to them. They may be in Haiti, and they have no papers, they can’t go back to Cuba and they have no marketable skills. They’re literally left with the clothes on their back.” Jorge L. Ortiz, *Activist Used Simple Method to Help Cubans Defect*, USA TODAY (Feb. 5, 2015, 10:43 PM), <http://www.usatoday.com/story/sports/MLB/2015/02/05/cuban-smuggler-activist-baseball-vladimir-gutierrez-dainer-moreira/22954077/>.

⁷⁵ “The teams are plenty culpable, too, engaging in baseball’s version of the don’t-ask, don’t-tell policy.” Passan, *supra* note 16.

⁷⁶ *Oppose Unilateral Economic Sanctions*, U.S. CHAMBER OF COMMERCE.

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U.S. government devotes hundreds of millions of dollars and the efforts of ten different governmental agencies to administering the embargo *each year*. The historical costs to the United States are estimated to be between \$1.2 to \$3.6 billion.⁷⁷ On top of all that, the embargo “create[d] a vacuum (of economic opportunity) that is quickly filled by companies from Asia, Europe, or elsewhere in the Americas.”⁷⁸

Additional reasons for ending the embargo include reports that it has not harmed its intended target of the Cuban government but instead has harmed Cuban citizens in a multitude of ways. The American Association for World Health issued a report indicating that the embargo “has dramatically harmed the health and nutrition of large numbers of ordinary Cuban citizens. As documented by [our] report, it is our expert medical opinion that the United States embargo has caused a significant rise in suffering-and even deaths-in Cuba.”⁷⁹ The embargo also prevented the Cuban people from joining the digital age, as the United States restricted Cuba from using its technologies.⁸⁰

Furthermore, proponents of ending the embargo argue that the United States should rethink its policies regarding Cuba for the sake of its international relations with countries around the world, since most countries disagree with the embargo.⁸¹ In fact, the United Nations has voted nearly unanimously against the embargo for 22 straight years (188 in favor and 2 against, (those 2 being the U.S. and Israel)).⁸² The Cuban government has positioned itself for a post-embargo era, claiming it would “welcome renewed diplomatic

(May 19, 2015, 1:00 PM) <https://www.uschamber.com/issue-brief/oppose-unilateral-economic-sanctions>.

⁷⁷ Daniel Hanson, Dayne Batten & Harrison Ealey, *It's Time for the U.S. to End Its Senseless Embargo of Cuba*, FORBES (Jan. 16, 2013, 8:36 A.M.), <http://www.forbes.com/sites/realspin/2013/01/16/its-time-for-the-u-s-to-end-its-senseless-embargo-of-cuba/>.

⁷⁸ Chamber of Commerce, *supra* note 76.

⁷⁹ *The Impact of the U.S. Embargo on Health and Nutrition in Cuba*, AM. ASSOC'N FOR WORLD HEALTH (Apr. 14, 2014), <http://www.medicc.org/resources/documents/embargo/The%20impact%20of%20the%20U.S.%20Embargo%20on%20Health%20&%20Nutrition%20in%20Cuba.pdf>.

⁸⁰ *Should the United States Maintain Its Embargo against Cuba?*, *supra* note 33.

⁸¹ *General Assembly Demands End to Cuba Blockade for Twenty-Second Year as Speakers Voice Concern over Impact on Third Countries*, UNITED NATIONS (Oct. 29, 2013), available at <http://www.un.org/press/en/2013/ga11445.doc.htm>.

⁸² *Id.*

relations with the United States and would not set preconditions.”⁸³ In fact, since Fidel Castro abdicated power to his brother Raul in 2008, the government has made impressive strides towards change, introducing substantial economic reform and lifting restrictions on property use, travel, farming, municipal governance, electronics access, and more.⁸⁴ Though Cuba is far from finished in terms of achieving fairness for its citizens, it is difficult to say that it is not moving in the right direction.

Lastly, many argue that the United States should be looking to its own citizens for feedback.⁸⁵ According to a 2012 opinion poll, most Americans want improved diplomatic ties and open travel and trade policies with Cuba.⁸⁶ Additionally, in 2011, a survey of Cuban-

⁸³ The Editorial Board, *Obama Should End the Embargo on Cuba*, N.Y. TIMES (Oct. 11, 2014), available at http://www.nytimes.com/2014/10/12/opinion/sunday/end-the-us-embargo-on-cuba.html?_r=1.

⁸⁴ Hanson, *supra* note 77.

⁸⁵ *Should the United States Maintain Its Embargo against Cuba?*, *supra* note 33.

⁸⁶ *Id.*

People in the United States are ready to change their country's interaction with Cuba, a new Angus Reid Public Opinion poll has found. In the online survey of a representative national sample of 1,008 American adults, three-in-five respondents (62%) agree with the U.S. re-establishing diplomatic relations with Cuba, while one-in-four (23%) disagree. Majorities of Independents (67%), Democrats (64%) and Republicans (56%) agree with re-instituting to bilateral ties. In March 2009, U.S. President Barack Obama eased travel restrictions to Cuba, and allowed U.S. citizens to travel to the island for religious and cultural reasons. Most Americans (57%) believe it is time to lift the travel ban that prevents most Americans from visiting the island. Half of Americans (51%) would lift the trade embargo with Cuba that has been in place since the 1960s, while three-in-ten (29%) disagree. Most Democrats (53%) and Independents (55%) support ending the embargo, but Republicans are not as convinced (46%). The notion of supporting non-governmental groups in Cuba in order to foster protests against the current regime did not resonate with Americans. Across the country, only 35 per cent of respondents endorse this course of action. Two-thirds of Hispanics (67%) support re-establishing diplomatic relations with Cuba, and their views on the travel ban and the trade embargo mirror those of the entire sample of Americans.

Latin American Working Group Education Fund, *Growing Number of Americans Favor Engagement with Cuba*, ANGUS REID PUBLIC OPINION (Feb. 2012), available at http://www.angusreidglobal.com/wp-content/uploads/2012/02/2012.02.06_Cuba_USA.pdf.

Americans (those who arguably understand the situation at closest range) indicated that 80% believed the embargo hasn't worked at all or even very well.⁸⁷

As described in this Note, the Obama Administration has heard these arguments loud and clear and has responded to them by taking action towards profound change with regard to the United States policies toward Cuba.⁸⁸ Although President Obama's executive actions are indeed big steps toward the complete lifting of the embargo, no accurate forecasts can yet be made. A president needs congress' approval to end an embargo, and our current congress is Republican-controlled and split on the issue of the embargo,⁸⁹ making any predictions speculative at best.

B. Arguments For Maintaining the Embargo

Despite the abundant support for ending the embargo, many people remain committed to it. Supporters of the embargo offer arguments including that "[ending the embargo]. . . would be bad business, strengthen an oppressive [Cuban] government, and abandon American values."⁹⁰ They also point out that the embargo has led to at least some positive results.⁹¹

Supporters of the embargo claim that the embargo has indeed achieved a number of its goals: it has restricted the flow of funds to Cuban government hands (money that would certainly be used for the wrong purposes), it reduced the size of Cuba's military, and it once drained Soviet pockets in their support of a new Cuban ally.⁹² Additionally, the United States government has been able to aid the Cuban people via the President Clinton-initiated dual track system,

⁸⁷ *Should the United States Maintain Its Embargo against Cuba?*, *supra* note 33.

⁸⁸ *See* Diamond, *supra* note 27.

⁸⁹ *Id.*

⁹⁰ Jorge Benitez, *Lining a Dictator's Pockets*, US NEWS (Feb. 27, 2014, 5:00 P.M.), available at <http://www.usnews.com/opinion/blogs/world-report/2014/02/27/lifting-the-us-embargo-on-castros-cuba-would-be-a-mistake>.

Many Republican presidential candidates have slammed [President Obama's easing of the embargo]. Former Florida Gov. Jeb Bush said this year the ban should actually be strengthened, not lifted. And Sen. Marco Rubio, whose parents fled Cuba after Fidel Castro's takeover, has called the embargo "the last tool we have remaining to ensure that democracy returns to Cuba one day.

See Diamond, *supra* note 27.

⁹¹ *See* Diamond, *supra* note 27.

⁹² *Should the US End Its Cuba Embargo?* SCHOLASTIC (last updated 2015), available at <http://www.scholastic.com/teachers/article/should-us-end-its-cuba-embargo>.

by which the U.S. government does what it can to isolate the Cuban government while simultaneously providing support to Cuban citizens.⁹³ Between the years of 2001 and 2011, Congress had appropriated almost \$200 million in funding for Cuba's democracy efforts.⁹⁴

Another argument in support of the embargo is that lifting the embargo before Cuba meets the conditions originally required would send the wrong message to Cuban leadership, giving credibility to a regime that once promised democratic elections but imposed communist rule instead.⁹⁵ Prematurely ending the embargo would also send a message to the international community that the United States can be "waited out"⁹⁶—that behavior such as gunning down civilian aircrafts unprompted and seizing billions of dollars in American assets is tolerable as long as you wait 50 years for it to all just be forgotten.⁹⁷

According to United States law and the original goals of the embargo, Cuba must legalize all political activity, release all political prisoners, commit to free and fair elections in the transition to representative democracy, grant freedom to the press, respect internationally recognized human rights, and allow labor unions.⁹⁸ Supporters of the embargo maintained that since Cuba has not met these conditions, the embargo should remain in full force. Lifting the embargo before Cuba meets these conditions might even embolden Cuba to fall back on its relative progress and join forces with other anti-American neighbors.⁹⁹ Of particular concern is the fact that it is uncertain who will succeed Raul Castro in ruling the country, rendering it unwise to make any drastic political moves such as ending a nearly 55-year embargo before Cuba's future becomes more

⁹³ "Since 1996, the United States has provided assistance—through the U.S. Agency for International Development (USAID), the State Department, and the National Endowment for Democracy (NED)—to increase the flow of information on democracy, human rights, and free enterprise to Cuba. USAID's Cuba program has supported a variety of U.S.-based non-governmental organizations with the goals of promoting a rapid, peaceful transition to democracy, helping develop civil society, and building solidarity with Cuba's human rights activists." Sullivan, *supra* note 49, at 57.

⁹⁴ *Id.*

⁹⁵ *Should the US End Its Cuba Embargo?* *supra* note 92.

⁹⁶ *Should the United States Maintain Its Embargo against Cuba?*, *supra* note 33.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

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in-focus.¹⁰⁰ Even if Raul were to step down by 2018 as he has stated he will, some remain unconvinced that the Castro regime will be over so long as either Castro brother retains any form of leadership role.¹⁰¹

Given that the embargo, though newly eased and vulnerable, is still formally in effect, MLB recruitment and signing of Cuban baseball stars will likely remain the same for the foreseeable future. Cuban ballplayers will continue to place themselves in the greedy, perilous hands of professional smugglers until the embargo is either completely overturned or an exception to the embargo for the free trade of athletes is realized.¹⁰²

III. THE MLB'S LEGAL OBLIGATIONS WITH REGARD TO CUBAN BALLPLAYER SMUGGLING

When considering changes in foreign relations policy, people naturally focus on what *governments* should or should not do. The President should pass executive orders; congress should appropriate funds; agencies should be created to tackle pressing issues; diplomats should negotiate, et cetera. Indeed, the United States government holds the key and the final say regarding foreign relations, and

¹⁰⁰ *Id.*

¹⁰¹ “. . .there will still be no real change for the Cuban people so long as the Castro brothers remain in any form of leadership position, even behind the scenes. . .” Peter Orsi, *Raul Castro to step down: Who will run Cuba next?*, CHRISTIAN SCIENCE MONITOR (Feb. 24 2013), <http://www.csmonitor.com/World/Latest-News-Wires/2013/0224/Raul-Castro-to-step-down-Who-will-run-Cuba-next>

¹⁰² ESPN reporter and baseball expert Pedro Gomez said in one interview, “There is still not free trade, so it’s not like clubs can go down there and scout a player and sign that player. There is still that escape route. It’s a sticky situation. Players are risking their lives to get here to work. On a global scale, it makes you scratch your head.” Eden, *supra* note 23. Prior to December 2014, it might not have been reasonable to believe the United States would create a limited exception to the embargo for the free trade of athletes because of the fact that similar legislation (Baseball Diplomacy Act, H.R. 216, 110th Cong. (2008) has failed in the past. Matthew Piehl, *Double Play: How Major League Baseball Can Fix the Amateur Draft and International Player Acquisition with One Swing*, 8 WILLAMETTE SPORTS L. J. 1, 13-28, 19 (2010), available at <https://willamette.edu/wucl/resources/journals/sportslaw/documents/Fall%202010%20Piehl.pdf>. (However, perhaps the United States is heading in a more promising direction after President Obama’s announcements in December 2014.); In order for the end of the embargo or any exceptions to the embargo to alleviate the smuggling situation, Cuba would also need to cooperate and allow its athletes to leave the island. This, however, is unlikely, for reasons elaborated upon in this note. See Haq, *supra* note 52.

without action on the government's part, no significant changes can occur.¹⁰³

But perhaps the United States government is not the only party with a role to play in alleviating the issues of Cuban ballplayer smuggling. Maybe there are other actors to consider who have power to effect change, big or small. For example, how about a supranational organization that manages to contract with hundreds of Cuban nationals, transferring millions of dollars into Cuban hands per year?¹⁰⁴

The MLB has acknowledged the reality that Cubans are forced to endure frightening and illegal journeys to third countries in order to acquire free agency status – and they have indeed expressed their sympathies.¹⁰⁵ Nonetheless, the MLB continues averting its eyes. MLB officials have made statements that the human smuggling situation is “a problem for Washington” and that it is “beyond the MLB.”¹⁰⁶ According to one expert reporter, Jeff Passan, “[t]he silence from the league and the union, the two parties charged with protecting the sport's sanctity and the players' health, is deafening.”¹⁰⁷

Passan explains the gravity of the situation:

Baseball's ugliest secret is now out in the open, and it is even worse than imagined. Not only does the sport find itself in the middle of a human-trafficking¹⁰⁸ scheme in which men and women have allegedly been kidnapped, held hostage, forced to sign binding documents at gun- and knifepoint, threatened with mutilation and terrorized by those from some of the world's most murderous gangs, top officials from Major League Baseball and the players' union have shown little inclination to remedy even the smallest of problems in the

¹⁰³ See GLOBAL INITIATIVE AGAINST TRANSNATIONAL CRIME, *infra* note 166.

¹⁰⁴ Jacobs, *supra* note 57.

¹⁰⁵ Passan, *supra* note 16.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ The terms “human trafficking” and “human smuggling” are often conflated in literature, but they have different legal definitions that are important to note. The former involves forced migration of the individual being trafficked for purposes of exploitation (such as sex work or child labor), and it can occur domestically or across borders; the latter involves the free will of the party being smuggled, is carried out for varying purposes, and, by definition, occurs only across borders. U.S. Immigration & Customs Enforcement, *Human Trafficking and Smuggling*, DEP'T OF HOMELAND SECURITY (Jan. 16 2013), <http://www.ice.gov/factsheets/human-trafficking>.

web of chaos involving Cuban defectors.¹⁰⁹

He explains that decades of misguided MLB policy have “left the league in an untenable situation, surrounded by sociopolitical mines.”¹¹⁰

But does the MLB have an *obligation* to do anything? Do they have a responsibility under any international human rights law or domestic law – or any other doctrine – to stop pretending that nothing bad is happening and actually take a stand against the smuggling of Cuban players onto its fields?

A. Legal Implications: MLB’s Status as a Non-State Actor and a Multinational Corporation & Its Potential Violations of International Human Rights and Domestic Law

The MLB is a non-state actor and therefore not a party to any international treaty nor technically obligated under international human rights law.¹¹¹ It has been argued, however, that the MLB, as a multinational corporation¹¹² (“MNC”) should be treated like many other MNCs that have been subjected to strict scrutiny in terms of their objectionable practices with regard to human rights and international legal responsibilities.¹¹³ Listing Nike and the Gap as examples of MNCs who have violated human rights law and

¹⁰⁹ Passan, *supra* note 16.

¹¹⁰ *Id.*

¹¹¹ Under international law, unless the treaty was created with the express intention to bind the third party non-state actor, and unless that third party non-state actor has consented with signature, the third party non-state actor is not technically bound to the treaty’s obligations. MATH NOORTMAN & CEDRIC RYNGAERT, *NON-STATE ACTOR DYNAMICS IN INTERNATIONAL LAW: FROM LAW-TAKERS TO LAW-MAKERS* 75-77 (2010). “In the context of assessing liability to a U.S. based MNC, however, two thresholds must be reached. First, it must be determined whether there exists a claim that violates “the law of nations” (i.e., a customary international law). Second, it must be determined whether the Federal court will extend liability to a non-state, corporate actor, such as the MLB.” Wasch, *supra* note 32, at 112.

¹¹² “A multinational corporation is a centrally coordinated company that is established in more than one nation-state. A typical multinational corporation comprises a parent company in one state with subsidiaries in one or more other states.” Menno T. Kamminga, *Multinational Corporations in International Law*, OXFORD BIBLIOGRAPHIES (Jan. 12, 2014), <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0049.xml>.

¹¹³ Arturo J. Marcano, & David Fidler, *The Globalization of Baseball: Major League Baseball and the Mistreatment of Latin American Baseball Talent*, 6 IND. J. OF GLOBAL LEG. STUDIES 2, 511, 552 (1999), available at <http://www.repository.law.indiana.edu/ijgls/vol6/iss2/6>.

received heightened scrutiny in American courts, the authors of one journal article on the topic explain:

Such MNC behavior has been subjected to harsh criticism by non-governmental organizations [sic] working to promote international human rights and labor standards. We believe MLB deserves the same type of scrutiny in connection with its activities with Latino baseball prospects. . . . When MLB teams are engaged in violations of established international human rights and labor norms, we believe that critical attention should be brought to bear on MLB to correct the unseemly side of the globalization of baseball.¹¹⁴

Proponents of this argument also advance that “the globalization of baseball has made baseball a global game and has given the MLB not only global opportunities to make money but also global responsibilities that it must face if the future of baseball as a pastime and as a business is to be healthy and honorable.”¹¹⁵

The notion that the MLB, as a MNC, should be held accountable under international and human rights norms¹¹⁶ has received heightened attention due to the MLB’s alleged complicity in violating certain rights of young baseball players at MLB academies in the Dominican Republic.¹¹⁷ The MLB has been accused of violating these Dominican players’ rights to education under international law¹¹⁸ through contemptible educational provisions in Dominican MLB academies.¹¹⁹

Accusations stemming out of the Dominican Republic allege that the MLB, as a MNC, has an obligation to provide sufficient education to its academy players in line with the international right to education, and that the MLB has failed to do so.¹²⁰ With regard to

¹¹⁴ *Id.* at 513.

¹¹⁵ *Id.* at 514.

¹¹⁶ “Human rights law potentially imposes duties on non-state economic actors.” Dinah Shelton *Protecting Human Rights in a Globalized World*, 25 *BOST. COL INT’L & COMP. L.R.* 273 (2002), available at http://www.bc.edu/content/dam/files/schools/law/lawreviews/journals/bcicl/25_2/06_FMS.htm.

¹¹⁷ Ryan S. Hanlon, *School’s Out Forever: The Applicability of International Human Rights Law to Major League Baseball Academies in The Dominican Republic*, 1 *PAC. MCGEORGE GLOBAL BUS. & DEV. L.J.* 235, 243 (2014), available at <http://digitalcommons.mcgeorge.edu/globe/vol1/iss1/10>

¹¹⁸ *Id.* at 243-244.

¹¹⁹ *Id.*

¹²⁰ “As a U.S.-based multinational corporation, the MLB has a moral obligation to educate the children they employ at their academies, and their failure to do so may even amount to a violation of corporate responsibility under international law.” *Id.* at 243.

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Cuban baseball players, in condoning human smuggling by signing multimillion dollar contracts with players such as Cuban superstars Yasiel Puig, Alexei Ramirez, and Jose Abreu,¹²¹ the MLB could arguably¹²² be in violation of a myriad of international human rights laws – including the Palermo Protocols and the Universal Declaration of Rights¹²³ – and United States law as well.¹²⁴

¹²¹ Passan, *supra* note 16.

¹²² “In practice, many human rights are difficult to enforce legally, due to the absence of consensus on the application of certain rights, the lack of relevant national legislation or of bodies empowered to take legal action to enforce them.” *Enforcement of Awards for Victims of Torture and Other International Crimes*, THE REDRESS TRUST (May 2006) http://www.redress.org/downloads/publications/master_enforcement%2030%20May%202006.pdf.

¹²³ The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2241 UNTS 507, is one of the three “Palermo Protocols,” which were adopted by the United Nations to supplement the 2000 Convention against Transnational Organized Crime (the Palermo Convention). The Smuggling Protocol deals with international laws to protect smuggled people around the world. “The Smuggling Protocol also refers to the protection needs of smuggled persons. . . It affirms ‘the need to provide migrants with humane treatment and full protection of their rights’, includes several provisions that protect rights, and affirms that international humanitarian and human rights law, and international refugee law, apply to smuggled migrants. States Parties are required to protect the right to life, and prevent torture or cruel, inhuman, or degrading treatment or punishment. Combined with the prohibition on criminali[z]ation of migrants, this represents an important international commitment to a basic level of protection. . . [I]ts standards provide a basic floor of protection for smuggled migrants who, in common with trafficked and other irregular migrants, enjoy the protection of international human rights law by virtue of their common humanity.” International Council on Human Rights Policy, *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence*, ICHRP (2010), available at http://www.ichrp.org/files/summaries/41/122_pb_en.pdf. “The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants. . . States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.” United Nations, *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime*, U.N. (2000) http://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf. “Even states that are not a party to [The Palermo Protocols] are obligated to protect the rights of trafficked persons under provisions in the Universal Declaration of Human Rights, which comprises customary international law.” Lindsey King, *International Law and Human Trafficking*, HUMAN RIGHTS & HUMAN WELFARE (2009), 88-90, available at <https://www.du.edu/korbel/hrhw/researchdigest/trafficking/InternationalLaw.pdf>.

¹²⁴ “Investigators from the FBI and Homeland Security began looking into the trafficking of baseball players last year. According to a report by ESPN’s Outside

The problem is that MNCs including the MLB, as non-state actors, are not technically legally obligated by any international law but rather only by the domestic laws of the states in which they do business.¹²⁵ Therefore, the regulation of international corporations is quite weak, and many violations go unaddressed.¹²⁶ This international legal ambiguity is what has perpetuated issues such as the MLB's educational neglect in the Dominican Republic and possibly the Cuban situation as well. When no external organization enforces any legal sanctions against the MLB due to the fact that it is

the Lines, federal authorities interviewed Cuban players, in both the major and minor leagues, and even presented subpoenas at Major League Baseball's New York headquarters to try to learn if MLB officials had knowledge of how some of their top players happened to leave their homeland." Steve Strachley, *Homeland Security and FBI Struggle to Investigate Smuggling of Cuban Baseball Players*, ALL GOV (Aug. 15, 2015), <http://www.allgov.com/news/us-and-the-world/homeland-security-and-fbi-struggle-to-investigate-smuggling-of-cuban-baseball-players-150815?news=857195>. There could be arguments made that in condoning the smuggling of Cubans to third countries and/or the United States, the MLB is violating the Immigration and Nationalization Act, Section 274(a)(1), (2), which "provides for criminal penalties under Title 8, United States Code, Section 1324, for acts or attempts to bring unauthorized aliens to or into the United States, transport them within the United States, harbor unlawful aliens, encourage entry of illegal aliens, or conspire to commit these violations, knowingly or in reckless disregard of illegal status." U.S. Department of State, *Fact Sheet: Distinctions Between Human Smuggling and Human Trafficking 2006*, DEPT OF STATE (Jan. 1, 2006), <http://www.state.gov/m/ds/hstcenter/90434.htm>. The MLB has also been accused of violating Title VII. Some groups argue that some MLB teams, in *not* hiring Cuban baseball players/refugees, actively discriminate against Cubans, which is in violation of Title VII. Roger Clegg, general counsel for the Center for Equal Opportunity, a Washington-based policy group, has stated that the MLB's policy is discriminatory because civil rights laws prohibit teams from treating people differently based on national origin, which is exactly what the MLB does with regard to its Cuban recruits. The typical MLB response is that "[b]aseball. . . does not discriminate against Cuban players, most of whom have acquired paperwork as legal residents in other Central American countries in order to avoid the draft." But arguably that is the crux of the problem – that U.S. policy essentially forces Cuban players to attain alternate citizenship in order for them to be treated just like any non-Cuban international free agent. Tom Farrey, *Selig Plays Political Hardball on Baseball's Cuban Crisis*, ESPN (Nov. 11), <http://a.espncdn.com/MLB/s/2002/1110/1458871.html>

¹²⁵ Kamminga, *supra* note 112.

¹²⁶ "The main difficulty with multinational corporations is the accountability or governance gap caused by the absence of corporate regulation in international law. In traditional international law, multinational corporations have rights but no obligations. In practice, therefore, multinational corporations are subject only to the domestic laws of the different states in which they operate. Since states compete with each other to attract investment from multinational corporations, the regulatory framework applicable to such corporations has a tendency to weaken rather than strengthen." *Id.*

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unclear whether or not the MLB is liable, what might potentially be considered violations of various international and human rights laws unfortunately continue on unaddressed.¹²⁷

Even if the MLB, as a non-state actor, does not have an unambiguous legal obligation under international human rights law (or domestic law) to stop signing contracts with smuggled Cubans, many argue that the MLB's moral obligation requires them to act and perhaps change their policies.¹²⁸

*B. Moral Obligations Created by Corporate Social Responsibility: the
MLB's Responsibilities as a Major Corporation to Work Towards
Social Betterment*

The concept of "corporate social responsibility" is based on the idea that "business corporations have an obligation to work for social betterment" and that corporations should "respon[d] to issues beyond the narrow economic technical, and legal requirements of the firm. . .to accomplish social benefits along with the traditional economic gains which the firm seeks."¹²⁹ The power of MNCs has grown exponentially with rapid globalization, and the role of MNCs such as the MLB in the global economy puts it in a uniquely influential position in the area of human rights.¹³⁰ As a MNC, the MLB should change its ambivalent, if not contemptible conduct and policies, and should push for reform to work towards social betterment.

Opponents of this argument claim that "arguing that although Major League Baseball is not a state party to the mechanisms they should still be held to the standards of state parties. . .is [sic] a moral

¹²⁷ Wasch, *supra* note 32, at 119-121; See REDRESS, *supra* note 122.

¹²⁸ Wasch, *supra* note 32, at 114.

¹²⁹ Donna J. Wood, *Corporate Social Performance Revisited*, Vol. 16 No.4 Acad. of Mgmt. Rev., 691, 694 (Oct., 1991), <http://www.jstor.org/stable/258977>.

¹³⁰ *Id.* "Corporate Social Responsibility is an important area of study because of its ability to improve lives and bring awareness to social issues around the world. . . However, social responsibility in the professional sports industry has an even greater potential to influence lives on a local, national, and even global level. Sports possess a unique ability to unite a diverse group of individuals and the positioning of athletics in popular culture enables athletes and franchises to bring awareness to a range of social issues. As the presence of sports in today's culture continues to grow, so does its ability to deliver CSR and have a positive impact on communities across the world." RICHARD MCGOWAN & JOHN MAHON, CORPORATE SOCIAL RESPONSIBILITY IN PROFESSIONAL SPORTS: AN ANALYSIS OF THE NBA, NFL, AND MLB,(2014), *available at* http://www.academia.edu/5091556/Corporate_Social_Responsibility_in_Professional_Sports_An_Analysis_of_the_NBA_NFL_and_MLB.

argument that ignores the complications of international law and state sovereignty, rather than a feasible legal solution.”¹³¹

What these accusations against the MLB boil down to is that even if the MLB is not unequivocally accountable *legally* speaking (under United States law or international human rights law) for being complicit in a system whereby they benefit from Cuban talent but ignore the realities of the dangers to Cubans, they are certainly walking a thin line of accountability. In the end, if it is not an unambiguous legal obligation that leads the MLB to change their policies and conduct, then obligations of corporate social responsibility should be what tip them.¹³²

IV. THE MLB'S PAST INACTIONS & OPTIONS FOR THE FUTURE

A. Why Hasn't the MLB Done Anything to Address the Cuban Smuggling Issue?

In baseball parlance, when a player “struck out looking,” he has failed without even trying, (as opposed to “struck out swinging,” where, despite the failure, he at least attempted to succeed). Some might describe the MLB's failure to fix its Cuban problem with such a metaphor – that the MLB has struck out swinging. But the MLB is quick to remind those concerned with their potential culpability in the Cuban ballplayer smuggling scheme that the MLB “is simply following the labor rules set by the embargo”¹³³ – that they are not really doing anything wrong.

But some of the MLB's own policies are flawed and contribute to the Cuban problem. In addition to the MLB's years of silence on the Cuban player dilemma, the MLB's current amateur draft

¹³¹ Vanessa Marie Zimmer, *Dragging Their Devotion: The Role of International Law in Major League Baseball's Dominican Affairs*, 4 Nw. J. Int'l Hum. Rts. 418, 428 (2005), available at <http://scholarlycommons.law.northwestern.edu/njihr/vol4/iss2/6>.

¹³² Frankel, *supra* note 9, at 400.

¹³³ “The U.S. requires Cubans to establish residency in a third country before joining an American employer, while Cuba also restricts its players from signing with American teams.” Kavitha A. Davidson, *Florida Asks Baseball to Fight Human Trafficking*, BLOOMBERG (June 23, 2014, 1:56 PM), <http://www.bloombergview.com/articles/2014-06-23/florida-uses-stadium-subsidies-for-good>. “[DOI] investigators [have] reported what [they've] found to MLB executives, concerned that the MLB's own policies – [sic].—were enabling corruption, [sic]. However, [sic] MLB executives believed that the validity of a person's permanent-residency status in such cases had already been cleared by federal government agencies. . .” Eden, *supra* note 23.

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structure limits the amount of money teams can offer their *domestic* draft picks (i.e. Americans, Canadians, and Puerto Ricans), which encourages Cuban players to undergo smuggling so they can get to *third* countries and sign as *international* players, which lets them avoid the domestic draft dollar cap and remain in the game for higher offers.¹³⁴ The MLB also cannot deny that it has tacitly approved of the Cuban situation for years and has chosen to maintain a policy of shifting blame, claiming the smuggling problem is “a problem for Washington.”¹³⁵

But is it a problem for Washington to deal with *independently*? Is the MLB precluded from doing anything at all to mitigate the issue? Given that the MLB is clearly walking a fine line and that it could arguably be held accountable for various international human rights violations as well as violations of domestic law, why has it not changed its policies or somehow else pushed for change?

Some believe the MLB’s reason for refusing to change its policies used to be because the MLB wanted to keep Fidel Castro happy.¹³⁶ But since Fidel abdicated his power to his brother Raul in 2008, this is no longer a feasible argument.

One possibility is that in avoiding policy change, despite its potential complicity in the smuggling situation, the MLB is aiming to prevent its wealthiest teams from driving up signing bonus numbers. Baseball agents and lawyers for defectors say the commissioner’s office is using the embargo as an excuse to prevent the wealthiest teams from bidding on Cubans, and driving up overall the MLB salaries.¹³⁷

Another cogent argument explained by Peter C. Bjarkman, a writer on Cuban baseball, is that the MLB “do[es]n’t necessarily want an efficient system. [They] want to be able to get more and more and more. . .”¹³⁸ If the embargo is terminated and the MLB could sign Cubans freely and did so, that approach would

[O]verlook the benefits of getting players who ‘come pretty much ready packaged’ after years playing in international tournaments and the Cuban National League. . . If you had a much wider swath of Cuban talent coming in, you would have some great players. . .but the success rate would be nowhere like [it is now regarding Cuban talent] because you wouldn’t

¹³⁴ *Id.*

¹³⁵ Passan, *supra* note 16.

¹³⁶ See Farrey, *supra* note 124.

¹³⁷ *Id.*

¹³⁸ See Boudway, *supra* note 7.

be just dealing with the cream of the crop.¹³⁹

One might think that the MLB would be quick to change its policies to reflect the most recent embargo relaxation in order to make it easier to retain Cuban talent, or to at least be vocal and encourage the U.S. government to continue down its recent path – a path that may ultimately lead to free trade with Cuba, (which includes the “trade” of athletic talent). However, even if the MLB did immediately decide to pursue changes, change takes time and endless discussion among several different parties (i.e. the MLB and MLB Players’ Association officials, Cuban National League officials, and both the United States and Cuban governments).¹⁴⁰ As Bjarkman notes, “[t]he bottom line to all of this is, the situation between the MLB and the Cuban baseball federation is a very complicated one. It doesn’t have easy solutions, because the MLB wants control of its players, and Cuba wants control of their own players.”¹⁴¹ All involved parties will have to arrive at major compromise.¹⁴² The MLB also may move slowly because of any federal liability it may risk with regard to potential fraudulent immigration papers, given that the embargo is not completely over and won’t be for at least some time, and, thus, immigration laws for Cuban arrivals remain in place.¹⁴³

¹³⁹ *Id.*

¹⁴⁰ “While the administration’s announcement is a step toward more normalized relations between the two governments — and a necessary step toward fostering a relationship between the two baseball leagues — nothing will change quickly or immediately. . . Knowing the history of things, [sic] baseball will be one of the slowest things to change, because it is such a major institution in Cuba. . . Obama announcing in Washington that they’re going to ease the embargo, and [Raúl Castro] announcing that he wants smoother diplomatic relations to the U.S., that doesn’t mean the baseball situation changes.” *See* Waldron, *supra* note 29.

¹⁴¹ *Id.*

¹⁴² *Id.*; “[If Congress were to completely end the embargo], [i]t’s highly unlikely, however, that there would be a sudden free-for-all on Cuban talent. MLB doesn’t want that. Neither does the Cuban government. Both sides would want to establish some order to what would be an extremely complicated process for all sides to navigate, one that certainly will involve mistakes along the way, not due to incompetence but just the sheer complexity of accounting for every detail and unintended consequence that will pop up. . . There won’t be an immediate change in baseball because there are still laws to change and steps to work out. . .” *See* Badler, *supra* note 25.

¹⁴³ Up until February 4, 2015, the MLB required Cubans to take an extra step beyond what OFAC required. *MLB nixes Cuba requirement*, ESPN (Feb. 4, 2015, 9:43 AM), http://espn.go.com/MLB/story/_/id/12277232/MLB-eliminates-requirement-cuban-players-obtain-us-license-yoan-moncada-cleared-sign. “The U.S. has an embargo against Cuba, which means Cuban nationals must be regarded as “unblocked” by the Department of the Treasury’s Office of Foreign Assets

Whatever the reason for its history of inaction, the MLB needs to realize that it should not play the role of helpless bystander any longer. In describing the various problems caused by the legal loopholes pertaining to Cuban baseball players joining the MLB, one writer stated: “[i]t is clear the price is too high for these actions [(i.e. encouraging, or at least condoning, defection and the acquisition of third-country citizenship prior to signing Cubans)] to continue. . . the MLB can prevent further embarrassments in the future and regain its respect as America’s pastime. . .”¹⁴⁴

B. What Can the MLB Do?

In 2007, former MLB executive Lou Melendez told the L.A. Times that the prevalent smuggling of Cuban players would “require [MLB] to take a good, hard look at the policy.”¹⁴⁵ With regard to the MLB’s fault in the whole scheme, reporter Jeff Passan points a finger at the MLB’s “misplacement of priorities – of not spending time, energy and resources to better understand what it can do to untie the knot it cinched. . .” He adds that “[j]ust because no clear solutions exist does not excuse the sport from shoving the Cuban paradox under the carpet as it has for years.”¹⁴⁶ Passan believes that the MLB

Control (OFAC) before they can work for a U.S. company. . . Any Cuban national who presents documents showing permanent residence in a country outside of Cuba qualifies for OFAC’s “general license,” which is not a written document. As far as OFAC is concerned, that should make him unblocked, and that’s good enough for the government to allow him to sign. [Up until February 4, 2015,] [sic] MLB wo[uld]n’t let. . .any Cuban player. . .use the general license [sic]. That wasn’t always the case. It’s not clear what exactly changed, but at some point in 2012, MLB no longer allowed Cuban players to sign using the general license and instead required them to apply for the specific license, which is a written document from OFAC. That [went] beyond what the government requires from Cuban players to be able to begin their careers. . . While MLB didn’t elaborate, the league’s stance appear[ed] to be a conservative one to limit its own liability in the event that a player uses false residency papers. Under the general license, the player doesn’t have to formally submit anything to OFAC. But through the specific license, if a player uses false residency papers and OFAC were able to discover that, those who submitted false documents to the government could face federal felony charges.” See Badler, *supra* note 11.

¹⁴⁴ Scott M. Cwiertny, Note, *The Need for a Worldwide Draft: Major League Baseball and Its Relationship with the Cuban Embargo and United States Foreign Policy*, 20 LOY. L.A. ENT. L. REV. 391, 426 (2000), available at <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1404&context=elr>.

¹⁴⁵ Passan, *supra* note 16.

¹⁴⁶ *Id.* Passan also mentions, “Baseball [sic] can affect change. It’s time. Stop playing uniform police. Cut the nonsense about some loose-lipped executives. Don’t waste everyone’s time with fake problems [like players who show up with their jerseys un-tucked] when a real one exists and could lead to people losing their

and the union must:

[G]et together immediately and hatch a plan that at the very least does better than their present-day do-si-do. . . Baseball can go public with a statement it should've long ago: supporting a system that puts players in danger is not an acceptable standard, and they will do everything they can to ensure their ugly secret gets no worse.¹⁴⁷

So what are the MLB's options?

1. Option #1: Changing MLB Drafting Procedures

One idea is changing MLB drafting procedures. As it stands, Americans, Canadians, and Puerto Ricans are subjected to the amateur draft, in which players can be drafted only during the annual draft in June, and are required to either accept or reject the single offer from the single team that drafts them. Current MLB drafting policies limit the amount that teams can spend by putting an exact dollar figure on each pick in the first 10 rounds. If a team goes over the total amount allotted for rounds 1 through 10, they incur harsh penalties, including a crushing tax on the overage and the potential to lose future draft picks.¹⁴⁸ International free agents (*excluding* Cubans), as opposed to domestic players, are free to negotiate at any time with any team at any dollar amount.¹⁴⁹

Combined with United States and Cuban law, MLB drafting policies lead to various issues, not just human smuggling out of Cuba.¹⁵⁰ Some people believe it's time for a change in MLB policy, arguing that the MLB should adopt a worldwide draft in the style of the current American draft that would submit all players around the world to one single draft.¹⁵¹ In such a set-up, Cubans would not have an incentive to head to a third country instead of straight to the U.S. because no matter where they go, they would be subject to the

lives." "One former Major League Baseball executive, who spoke only on the condition of anonymity, told *Outside the Lines*, 'If I'm running a club, I don't care how the guy got to the D.R. or wherever. As long as my own people aren't involved in the smuggling, why would I care?'" Eden, *supra* at note 23.

¹⁴⁷ *Id.*

¹⁴⁸ Jason Catania, *Are New Bonus Spending Limits Ruining the MLB Draft?*, BLEACHER REPORT (June 7, 2013), <http://bleacherreport.com/articles/1665180-are-new-bonus-spending-limits-ruining-the-MLB-draft>.

¹⁴⁹ Lind, *supra* note 5.

¹⁵⁰ *Id.* For example, limiting the amount of money teams are allowed to spend in round 1-10 of the draft has caused tensions among teams and recruits, as well as a decrease in the excitement of the draft. Catania, *supra* note 148.

¹⁵¹ Solomon, *supra* note 1, at 155.

same draft as everybody else.¹⁵² Famous MLB agent Scott Boras stated, “[w]e’ve really got to review what we’re doing with our draft and our international players to really say what we do with the Cubans. Maybe it will prompt a broader discussion to revamp the entirety of the system.”¹⁵³

A worldwide draft, though good in theory, is not a realistic option for two reasons. First, the MLB has decided against adopting an international draft until *at least* 2016, which is the next time collective bargaining will take place.¹⁵⁴ Second, Cubans who wish to play baseball in America would still have to somehow get to America, which means the smuggling problem would remain only partially addressed,¹⁵⁵ since, as explained quite well by the title of Scott Eden’s infamous coverage of Yasiel Puig’s smuggling journey to America, “[n]o one walks off the island.”¹⁵⁶ Additionally, a worldwide draft would penalize international players, including Cubans, by establishing a system in which MLB teams would have no incentive to bargain.¹⁵⁷

Alternatively, the MLB could create an exception by which it allows players from Cuba who gain asylum in the United States pursuant to the Wet-Foot, Dry-foot Policy to become free agents like any other foreign players, despite their newly gained American status. However, similarly to the scenario above in which the MLB institutes a worldwide draft, Cubans would still have to find a way off Cuban soil and to the United States, meaning smugglers would still be incentivized to help them flee Cuba in the first place.¹⁵⁸ (Though at least this would cut out one entire leg of the journey, and hundreds

¹⁵² Lind, *supra* note 5.

¹⁵³ Anthony Witrado, *MLB International Signing Rules Must Be Altered with Improved US-Cuba Relations*, BLEACHER REPORT (Dec. 22, 2014), <http://bleacherreport.com/articles/2307450-MLB-international-signing-rules-must-be-altered-with-improved-us-cuba-relations>.

¹⁵⁴ Lind, *supra* note 5; Jesse Sanchez, *Baseball decides against holding international draft*, MLB (May 31, 2013), <http://m.MLB.com/news/article/49189442/major-league-baseball-decides-against-holding-international-draft>.

¹⁵⁵ Lind, *supra* note 5.

¹⁵⁶ Kavitha A. Davidson, *Baseball’s Cuban Player Crisis*, BLOOMBERG (Apr. 29, 2014, 12:12 PM) <http://www.bloombergvew.com/articles/2014-04-29/baseball-s-cuban-player-crisis>.

¹⁵⁷ Lind, *supra* note 5.

¹⁵⁸ “Even if the league got rid of the residency requirement and made an exception allowing Cuban players granted asylum in the U.S. to sign as free agents, American policy would still embolden smugglers to help players flee Cuba in the first place.” *See* Davidson, *supra* note 156.

of miles of risk.)

2. Option #2: Strategically Supporting Legislation

In 2014, Florida passed a law that requires its MLB teams (the Miami Marlins and Tampa Bay Rays) to allow Cuban defectors who came straight to the United States to be drafted through free agency like any other international player, in order to qualify for certain tax benefits.¹⁵⁹ This puts Floridian MLB teams in a tough predicament, because following the Florida state law in order to receive the tax benefit will mean violating the federal embargo, but adhering to the embargo means losing out on certain tax benefits.¹⁶⁰

Fortunately for the federal government, the teams are not likely too tempted by the proposed state law; the tax break is only up to \$3 million, which, comparatively, is not much for sports franchises in the long run.¹⁶¹ And truth be told, it's unlikely that the two Florida teams alone are going to be able to pressure the league to change its policies across the board.¹⁶²

Ignoring the quandary this Florida law presents to Florida's MLB teams, it also presents a great opportunity for the MLB as an organization to finally go up to bat against the Cuban smuggling situation. Despite the fact that the MLB may only have so much power with regard to United States-Cuban relations, the League should be held accountable for maintaining their "don't ask, don't tell" status quo, and do something to change. As MLB teams continue to look the other way, the Florida law aims to "combat the complacency by enlisting local [Florida] teams, [sic] to pressure the league into reporting any knowledge of [smuggling] to the Florida attorney general."¹⁶³

In response to a request for commentary on the new law, a spokesman from the MLB Commissioner's office provided the following statement:

¹⁵⁹ Tim Elfrink, *New Florida Law Tries To Prevent MLB's Cuban Stars From Falling Prey to Human Smugglers*, MIAMI NEW TIMES (Jun. 23 2014, 9:10 AM), http://blogs.miaminewtimes.com/riptide/2014/06/new_florida_law_tries_to_prevent_MLBs_cuban_stars_from_falling_into_human_smugglers_hands.php; Wendy Thurm, *Trafficking in Cuban Ballplayers: A Look at Florida's New Law*, FAN GRAPHS (June 25 2014), <http://www.fangraphs.com/blogs/trafficking-cuban-ballplayers-florida-legislature-governor/>

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Lind, *supra* note 5.

¹⁶³ See Davidson, *supra* note 156.

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MLB is extremely concerned about the role of human traffickers in assisting Cuban baseball players to leave the country. . . [W]e will meet with the Players Association to determine whether changes can be made to our international signing rules to reduce or eliminate the reliance of Cuban players on criminal organizations when leaving Cuba. We also intend to speak to the U.S. State Department about actions that the U.S. government can take to reduce or eliminate the trafficking of Cuban baseball players. We hope that the legislators in Florida will do the same.¹⁶⁴

Though this statement is headed in the right direction, it was duplicitous. The MLB padded it with the following gratuitous sentiment:

While the sponsors of the bill in Florida blame MLB policies for the role of human smugglers, they do not provide any support for their premise that Cuban players must rely on traffickers to defect to countries other than the U.S. such as Mexico or the Dominican Republic, but would not need the assistance of traffickers to reach U.S. soil. However, we will meet with the Players Association. . .¹⁶⁵

3. *Option #3: Initiating Immediate Discussions with Cuba's Baseball Leaders*

Realistically, there may not be much the MLB can do without further changes between the United States and Cuban governments,¹⁶⁶ since United States-Cuban diplomatic relations are what allow the underground smuggling market to exist.¹⁶⁷ Only time will tell whether our congress will be supportive of President Obama's executive actions, and whether the embargo will be entirely eliminated. However, now that the embargo is officially fading, the MLB should proactively engage in direct talks with Cuban baseball leaders to figure out how to proceed in the future with regard to

¹⁶⁴ Kathleen McGrory, *House wants to tie sports franchise subsidies to change in MLB's Cuban player policy*, MIAMI NEW TIMES (Apr. 25 2014, 5:28 PM), <http://www.tampabay.com/sports/baseball/rays/house-wants-to-tie-sports-franchise-subsidies-to-change-in-MLBs-cuban/2176957>.

¹⁶⁵ *Id.*

¹⁶⁶ "In the absence of major policy changes, though, the *lancheros* [(i.e. the professional smugglers)] will continue to ply their trade in Cuba, searching for the next six- or seven-figure athlete." *Cuban Baseball Players: A Home Run for Migrant Smugglers*, GLOBAL INITIATIVE AGAINST TRANSNATIONAL CRIME (2014), <http://www.globalinitiative.net/cuba-baseball/>.

¹⁶⁷ *See* Waldron, *supra* note 29.

sharing players.

The reason the MLB must be proactive in its negotiations with Cuba about how they would handle an end or an athletic exception to the embargo is because Cuban leadership may be unforthcoming to change. Cuba may not be as ready and willing to let their players sign with the MLB as they were letting them sign with Japan and Mexico.¹⁶⁸ Local baseball talent is one of Cuba's most prideful assets, and giving up their players to the MLB – particularly with Cuba's tumultuous history with the U.S. and particularly when Cuba has already lost many of its top players to the MLB – may not sound too appealing to them.¹⁶⁹

But there *is* one thing that might make the idea of exporting its players to the United States easier to swallow: money.¹⁷⁰ In its arrangements with Japan and Mexico, the Cuban government takes a percentage of the salaries earned by its exported players; but that money “pales in comparison” to what they could potentially make if they were able to essentially sell their star players directly to MLB teams.¹⁷¹ The MLB can use this bargaining chip to engage Cuban baseball officials in realistic discussions about how the two countries and their baseball organizations would handle diplomatic changes.

Even before the question of the embargo is settled, the MLB should relentlessly attempt to engage Cuba in talks about possible

¹⁶⁸ “Cuba may be reticent to change. Cuba is in a unique baseball situation. Unlike other Latin American countries, it has its own strong domestic league, and unlike Japan, it is supplied exclusively with domestic talent. As a result, the Cuban league is a point of pride for the Cuban people and a supplier for the island's national team, an even bigger source of Cuban pride on the international sporting stage.” *Id.*

¹⁶⁹ “What's not going to happen is the common wisdom that they're simply going to open up this huge market to MLB.” Jorge Ortiz, *Can agreement with USA fix defects in Cuban baseball?*, USA TODAY (Feb. 4, 2015, 11:15 PM), <http://www.usatoday.com/story/sports/MLB/2015/02/04/cuba-MLB-defections-caribbean-series/22897737/>.

¹⁷⁰ See Waldron, *supra* note 29. “While details hinge on the US State Department's conversations with their Cuban counterparts, it's conceivable that Cuban players will be permitted to leave the island legally and play in the MLB. Perhaps an arrangement can be reached whereby MLB teams would owe a “posting fee” to the state-owned Cuban league in return for signing a player, similar to the MLB's current practices with Japanese and Korean leagues.” See Morosi, *supra* note 3. “[The Cuban] government would salivate over the prospect of tax revenue from MLB contracts so large they can be measured in percentage points of Cuba's GDP.” D.R., *A Looming Brawn Drain*, THE ECONOMIST (Dec 18, 2014, 11:07 PM), <http://www.economist.com/blogs/gametheory/2014/12/baseball-cuba>.

¹⁷¹ See Waldron, *supra* note 29.

future arrangements so that when and if further diplomatic changes ever permit the “trade” of Cuban athletes, MLB and Cuban baseball leaders will be ready to adapt. Preparing to be able to act as soon as is legally possible would not only benefit MLB teams, the Cuban economy, and the players themselves, but it would also eventually rid the process of human smugglers.¹⁷²

V. CONCLUSION

In sum, the United States-Cuban trade embargo has resulted in the dangerous smuggling of Cuban baseball players to join the MLB. The recent easing of the embargo is not likely to change anything any time soon, particularly with regard to the MLB’s ability to freely sign Cuban players, and the smuggling of Cuban players will continue to jeopardize the lives of hundreds of Cubans. The defecting ballplayers themselves are put in danger, and so are their families and friends back in Cuba¹⁷³ – and it is important to remember that “[f]or every [successful Cuban defector who reaches the MLB and signs for millions], there are 10 guys who are lucky if they make \$1 million. . . [and there are many] guys who don’t make it [at all].”¹⁷⁴

The MLB is arguably in violation of various domestic and international human rights laws. The MLB’s status as a gigantic MNC places it in a unique position to be able to push for reform in the area of Cuban baseball player smuggling,¹⁷⁵ though perhaps it does not explicitly require them to do so or hold them accountable for failing to do so.¹⁷⁶

Although as of December 2014 the embargo has been weakened and its future put into question, the smuggling of Cuban baseball players to join the MLB will remain a significant problem for the foreseeable future. Though the United States government will have the strongest impact, they may not be the only actor responsible for acting to alleviate this issue. Obligated by international human rights law or not, the MLB should be persuaded by its moral¹⁷⁷ corporate social conscience,¹⁷⁸ and use its significant power as a MNC¹⁷⁹ to

¹⁷² “If there was a more normalized way for Cubans to come to the United States, this could potentially cut [smugglers] out of the market.” *Id.*

¹⁷³ Eden, *supra* note 22.

¹⁷⁴ See Ortiz, *supra* note 74.

¹⁷⁵ Wasch, *supra* note 32, at 119-122.

¹⁷⁶ *Id.*

¹⁷⁷ Frankel, *supra* note 9, at 400.

¹⁷⁸ *Id.*

proactively seek to assuage the Cuban player smuggling issue by doing any of the following: implementing a worldwide draft; allowing Cuban players who come straight to the United States and gain citizenship pursuant to the Wet-Foot, Dry-Foot policy to sign as any non-Cuban foreign player; strategically supporting legislation like Florida's recent tax-break law;¹⁸⁰ and/or, perhaps most importantly, by preparing for a potentially terminated embargo or an athletic exception to the embargo by immediately initiating discussions with Cuba's government and baseball officials so that a cooperative system is in place for when the embargo against the trade of athletes is no longer in their way.

¹⁷⁹ Wasch, *supra* note 32, at 114.

¹⁸⁰ Sports Business Daily, *Selig Writes Letter To MLB Fans, Will Support Legislation*, SPORTS BUSINESS DAILY (May. 17, 2005), <http://www.sportsbusinessdaily.com/Daily/Issues/2005/05/Issue-163/Leagues-Governing-Bodies/Selig-Writes-Letter-To-MLB-Fans-Will-Support-Legislation.aspx?hl=Football&sc=0>; Agency France Presse, *Arizona Anti-Gay Bill Vetoed After NFL, MLB, And NBA Put Pressure On State*, BUSINESS INSIDER (Feb. 27, 2014, 6:32 AM), <http://www.businessinsider.com/arizona-anti-gay-bill-vetoed-after-nfl-mlb-and-nba-put-pressure-on-state-2014-2?IR=T>; Farrey, *supra* note 124 (““We’re going to examine our legal options,” he said. “We’re certainly going to demand that the (Bush) administration, the Department of Justice and any other relevant agencies take action”), (serving as examples of ways the MLB has supported legislation in the past, some with significant impact).