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INTERNATIONAL SPORTS LAW PERSPECTIVE

LABOR IN NIPPON PROFESSIONAL BASEBALL AND THE FUTURE OF PLAYER TRANSFERS TO MAJOR LEAGUE BASEBALL

KEIJI KAWAI & MATT NICHOL*

I. INTRODUCTION

Since the 1990s, the global search for talent by Major League Baseball (MLB) teams has resulted in a prominent number of professional Japanese players transferring to major league teams. Sparking the movement of Japanese players from Nippon Professional Baseball (NPB) to MLB was the transfer of Nomo Hideo in 1995, the first Japanese major league player since Murakami Masanori played for the San Francisco Giants in 1964 and 1965. The phenomenal major league success of NPB stars like Nomo, Ichirō Suzuki,¹ and Matsui Hideki has fuelled demand in MLB for Japanese players, leading to the high profile recruitments of players like Matsuzaka Daisuke, Darvish Yu, and most recently, Tanaka Masahiro. Over the years since Nomo's debut for the Los Angeles Dodgers, the gradual erosion of legal, cultural, and normative barriers that prevented Japanese players from embarking on a MLB career have seen numerous NPB players and some amateurs move to MLB clubs,² resulting in a major

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1. In contrast to Japanese custom and practice in professional baseball, the registered MLB (and NPB) name of Suzuki is Ichirō, and he is commonly known as Ichirō in Japan and the United States.

2. The informal rule is that a Japanese amateur not selected in the draft can sign with a MLB club. However, industrial league player Tazawa Junichi created controversy in 2008 when he was nominated for the draft and then requested not to be drafted. He then signed a contract with the Boston Red Sox and the NPB clubs informally agreed to prohibit such players from playing in the NPB after playing in

league career being viewed in Japan as an acceptable pathway for NPB players.³

Governing the movement of NPB players to MLB teams is the United States-Japanese Player Contract Agreement, an agreement first entered into by NPB and MLB in 1967,⁴ then amended in 2000⁵ and again in 2013.⁶ A binding agreement on all clubs in both leagues, the United States–Japanese Player Contract Agreement governs the movement of players between the two leagues and since 2000 has established the “posting” system, the rules and procedures for the transfer of reserved NPB players to MLB. The posting system attracted much attention in 2006 in the United States and Japan when pitcher Matsuzaka Daisuke transferred from the Saitama Seibu Lions to the Boston Red Sox for a fee of \$51.1 million and signed a six-year contract for \$52 million.⁷ The hyperbole was repeated in 2011, when Darvish Yu⁸ moved to the Texas Rangers on a \$60 million contract for six years and his team, the Nippon Ham Fighters received a \$51.7 million transfer fee.⁹ These two mega deals set the winds of change in motion.

Various factors contributed to the unsuccessful transfer of a number of posted players, but the catalyst for change was the size of the transfer fees for Matsuzaka and Darvish, leading many small market MLB teams to challenge the posting system based on the grounds of equity and transparency. As will be discussed in this Article, this unrest led to MLB notifying NPB of its intent to

MLB—a two-year ban for industrial and college players and a three-year prohibition for high school players. Takahiro Horikawa, *Dorahuto Kaikaku Kyuumu Genkin Jyuyo de Yokohama/Hanshin Owner Jinin [Urgent Reform of the Draft Needed After Owners of Yokohama and Hanshin Resign Due to Cash Payments to Recruit Players]*, ASAHI SHIMBUN (Osaka), Oct. 23, 2004, at 21.

3. See generally Keiji Kawai & Matt Nichol, *The Transfer of Japanese Baseball Players to Major League Baseball: Have Japanese Ball Players Been Internationalised?*, in INTERNATIONALISING JAPAN AS DISCOURSE AND PRACTICE 180, 187–89 (Jeremy Breaden, Stacey Steele & Carolyn Stevens eds., 2014).

4. UNITED STATES–JAPANESE PLAYER CONTRACT AGREEMENT (1967) [hereinafter 1967 AGREEMENT].

5. UNITED STATES–JAPANESE PLAYER CONTRACT AGREEMENT (2000) [hereinafter 2000 POSTING AGREEMENT]. The use of the terms “post”, “posted” or “posting” in this article does not refer to the system of posted workers that operates in the European Union. Council Directive 96/71, 1996 (EC).

6. AGREEMENT BETWEEN THE OFFICE OF THE COMMISSIONER OF BASEBALL AND THE OFFICE OF THE COMMISSIONER OF NIPPON PROFESSIONAL BASEBALL (2013) [hereinafter 2013 POSTING AGREEMENT].

7. Scott R. Rosner & William T. Conroy, *The Impact of the Flat World on Player Transfers in Major League Baseball*, 12 U. PA. J. BUS. L. 79, 86 (2009).

8. Darvish has a Japanese mother and an Iranian father. Jeff Passan, *Iconic Ace Darvish Pushes Japan's Boundaries*, YAHOO SPORTS, (Mar. 24, 2008), <http://sports.yahoo.com/news/iconic-ace-darvish-pushes-japans-062000885--mlb.html>.

9. David Waldstein, *Bidding for Japanese Players is a Denigrated Risk*, N.Y. TIMES (Dec. 13, 2011), <http://www.nytimes.com/2011/12/14/sports/baseball/darvish-is-up-for-bidding-and-system-in-japan-draws-criticism.html>.

reform the posting system in late 2012. The Posting Agreement was entered into on December 16, 2013.¹⁰ Lurking in the background of the negotiations was the pending posting of another pitching phenomenon, Tanaka Masahiro. NPB's 2013 season saw the history books rewritten numerous times¹¹ when Tanaka accomplished the rare feat of recording twenty-four consecutive wins, a perfect regular season,¹² and in doing so created a frenzy of interest among MLB teams. The ink on the Posting Agreement 2013 had barely dried when the twenty-five-year-old Tanaka signed a seven-year contract for US\$155 million with the New York Yankees,¹³ making him the fifth highest paid pitcher in major league history.¹⁴ Not everyone was happy; Tanaka's club, the Tohoku Rakuten Golden Eagles, received a transfer fee of \$20 million, the maximum allowed under the new Posting Agreement,¹⁵ but far less than the \$75 million transfer fee expected under the old protocols.¹⁶

In light of the formal expiry of the 2013 Posting Agreement in December 2016,¹⁷ an important question is whether the new posting system will actually improve the effectiveness of the transfer of reserved NPB players. Will the new

10. *MLB, NPB Reach Agreement on Posting System*, MLB (Dec. 16, 2013), http://mlb.mlb.com/news/article/mlb/mlb-npb-reach-agreement-on-posting-system?ymd=20131216&content_id=66013956&vkey=news_mlb [hereinafter *MLB, NPB Reach Agreement*].

11. The Tohoku Rakuten Golden Eagles won their first Japan Series Championship and Curacao native Wladimir Balentien hit sixty home runs to break the single season home record of fifty-five home runs, shared by Oh Sadaharu, Alex Cabrera, and Tuffy Rhodes. Jason Coskrey, *Tanaka, Balentien Earn MVP Honors*, JAPAN TIMES (Nov. 26, 2013), <http://www.japan-times.co.jp/sports/2013/11/26/baseball/tanaka-balentien-earn-mvp-honors/#.U1s91jlpvJw>.

12. Combining wins at the end of the 2012 season and during the 2013 postseason, Tanaka won thirty consecutive games, a record that ended with a loss in game six of the Japan Series.

13. Associated Press, *Masahiro Tanaka 'Relieved' About Deal*, ESPN, http://espn.go.com/new-york/mlb/story/_/id/10337617/japanese-pitcher-masahiro-tanaka-relieved-new-york-yankees-deal-completed (last updated Jan. 23, 2014).

14. The top four contracts for MLB pitchers at the time were Clayton Kershaw's \$215 million contract with the Los Angeles Dodgers, Justin Verlander's \$180 million contract with the Detroit Tigers, Felix Hernandez's \$175 million contract with the Seattle Mariners, and CC Sabathia's \$161 million contract with the New York Yankees. Erik Matuszewski, *Yankees Give Tanaka Fifth Richest Pitcher Deal in MLB History*, BLOOMBERG BUS. (Jan. 22, 2014), <http://www.bloomberg.com/news/2014-01-22/yankees-tanaka-agree-to-155-million-contract-fox-sports-says.html>.

15. See *MLB, NPB Reach Agreement*, *supra* note 10.

16. Some MLB executives estimated Tanaka's transfer fee under the old system to reach as high as \$100 million. Jeff Passan, *Japanese Ace Masahiro Tanaka Will Make Historic Money but Questions Abound*, YAHOO SPORTS (Nov. 1, 2013), <http://sports.yahoo.com/news/japanese-ace-masahiro-tanaka-will-make-historic-money-but-questions-abound-171014762.html>.

17. If either league fails to provide notice of their intention to terminate or modify the agreement six months prior to December 16, 2016, the 2013 Posting Agreement continues to operate on a year-to-year basis. *MLB, NPB Reach Agreement*, *supra* note 10.

system create greater equity among MLB clubs in recruiting Japanese professional players? Will Japanese players have greater labor mobility? A broader question is whether the transfer of Japanese players to the major leagues is evidence of the need for a global player transfer system to facilitate the movement of what is becoming an increasingly global labor market. This Article aims to examine these questions and provide a framework to shape the dialogue on the future of the transfer system for Japanese players to MLB clubs.

This Article will begin by providing an overview of the general structure of labor regulation in NPB, allowing Part III to analyse the key features of the posting system, its operation, and the new posting system. Next, Part IV will review the status of the NPB's labor regulation under Japanese labor law and competition law. The Article will conclude by proposing reforms to the posting system and exploring whether baseball needs a global player transfer system.

II. THE REGULATION OF LABOR IN NIPPON PROFESSIONAL BASEBALL

The labor system in NPB¹⁸ utilises many of the mechanisms in MLB used to control labor, for example, the player draft, the “reserve” system, and “free agency.”¹⁹ However, the NPB's labor system operates differently from MLB's system on a number of different levels, shaped by several structural features of the NPB. This Article will now analyse the basic labor structure of the NPB, the key methods of regulation and regulatory actors in the NPB's internal system of labor regulation.

A. *The Structure of Labor in Nippon Professional Baseball*

The NPB was Japan's first professional baseball league and formed as a single league with seven teams in 1936. Originally the *Nippon Shokugyō Yakyū Renmei* or the Nippon Professional Baseball Association, the league quickly changed its name several times and, in 1950, expanded to twelve teams and a two-league format, the Pacific League and the Central League,²⁰ a format that

18. The clubs in the Pacific League are the Tohoku Rakuten Golden Eagles, the Saitama Seibu Lions, the Chiba Lotte Marines, the Fukuoka Softbank Hawks, the Orix Buffaloes, and the Hokkaido Nippon-Ham Fighters. The Central League clubs are the Yomiuri Giants, the Hanshin Tigers, the Toyo Hiroshima Carp, the Chunichi Dragons, the Yokohama DeNA Bay Stars, and the Tokyo Yakult Swallows.

19. First recognised in baseball in MLB salary arbitration in 1975, free agency permits a player to choose his employer after completing a specified number of years of playing service. Jonathon B. Goldberg, *Player Mobility in Professional Sports: From the Reserve System to Free Agency*, 15 SPORTS L. J. 21, 43–44 (2008). The NPB introduced “free agency” in 1993. NPB, NIPPON PUROFESSHONARU YAKYŪ KYOYAKU [JAPANESE PROFESSIONAL BASEBALL BASIC AGREEMENT], Ch. 22, art. 196–207 (1993) [hereinafter 1993 NPB BASIC AGREEMENT].

20. The league was the *Nippon Shokugyō Yakyū Renmei* or Nippon Baseball Association in 1939,

continues today.²¹ Like the National League in MLB, the Central League has the higher status and prestige of the two leagues in NPB. The regular season begins in late March and consists of 144 games, followed by the post-season from October to November. The top three teams from each league compete in a two-stage Climax Series. The first stage is a series between the second and third place teams, and the winner proceeds to the final stage against the league's first place team. The seven-game Japan Series is between the winners of each Climax Series. The regular and post seasons are sandwiched between winter, autumn, and spring training camps, resulting in NPB players working every month of the year except January.

Like MLB and other professional sports, internal regulation dominates the regulation of labor in NPB and is based on a system of voluntary self-regulation.²² NPB, club owners and management, coaches, and players all perform regulatory functions influenced by formal rules, informal rules, and normative conduct. Internal regulation extends to the playing of games, training regimes, and the internal structure of teams. An important feature of this regulatory landscape is that large Japanese corporations own a NPB club and a minor league club.²³ External regulation by the state can impact the regulation of player labor in NPB through areas like taxation law and contract law, but direct regulatory intervention by the state or the courts in the business of NPB is uncommon and will be discussed in Part IV.

All NPB clubs can reserve a maximum of seventy registered players on what is commonly called the seventy-man roster, but a club's *ichi-gun* (Division 1) team has an active roster of twenty-eight players.²⁴ The remaining rostered players are assigned to a club's minor league team called *ni-gun* (Division 2), and the twelve *ni-gun* teams play in the Eastern or Western League. Only two NPB clubs, the Fukuoka Softbank Hawks and the Toyo Hiroshima Carp, have

the Nippon *Yakyū Hōkokukai* or the Japan Baseball Society to Serve the Country in 1944, and the Nippon *Yakyū Renmei* in 1945. SAYURI GUTHRIE-SHIMIZU, *TRANSPACIFIC FIELD OF DREAMS: HOW BASEBALL LINKED THE UNITED STATES AND JAPAN IN PEACE AND WAR* 154–157, 177–180, 200, 225 (2012).

21. See NPB, <http://www.npb.or.jp/eng/> (last visited May 11, 2015).

22. Other forms of regulation include enforced self-regulation and co-regulation. IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 101–128 (1992).

23. Corporate owners of NPB clubs can be divided into traditional Japanese corporations like Yomiuri, Chunichi, and Hanshin, and new technology-based companies like Rakuten, Softbank, and DeNA. This divide represents a shift from owners who were involved in newspapers and media, department stores, rail, and manufacturing.

24. NPB, *NIPPON PUROFESSHONARU YAKYŪ KYOYAKU (JAPANESE PROFESSIONAL BASEBALL BASIC AGREEMENT)* art. 81(2) (2013) [hereinafter 2013 NPB BASIC AGREEMENT].

formal *san-gun* teams (Division 3), a team that clubs otherwise operate unofficially for development purposes. In addition to the seventy-man roster, all clubs maintain a roster of *ikusei* (development) players and these players can be transferred to the seventy-man roster.²⁵ There is no limit on the number of foreign players permitted on a seventy-man roster but only four foreign players can be on an *ichi-gun* roster.²⁶ The average salary of a player on a NPB twenty-five-man roster is \$500,000, considerably lower than the average salary of \$3 million for a player on a MLB twenty-five-man roster. However, the average salary of a *ni-gun* player is \$218,000, which greatly exceeds the average \$67,000 salary of Class AAA players²⁷ and the in-season entry-level wages of minor league players of \$1,110 per month.²⁸

B. Contracting Practices in the Nippon Professional Baseball League

Clubs in the NPB acquire entry-level labor by using selections in a player draft for first-year players in a system that closely resembles the MLB amateur draft. A peculiarity of the NPB draft is that more than one team can select a player in a given round, and in such circumstances, a lottery is used to determine the drafting club.²⁹ All players selected in the draft who agree to a contract with their drafting club must sign a Uniform Player Contract (UPC).³⁰ Like uniform contracts in MLB, NPB UPCs permit limited negotiation, and draftees can only negotiate the amount of the signing bonus.³¹ A small number of a club's top players sign lucrative multi-year contracts; but, the majority of players annually sign a contract for a term of one-year, and a player's salary can fluctuate from

25. NPB, NIPPON PURO YAKYŪ IKUSEI SENSYU NI KANSURU KİYAKU [THE RULE ON PROFESSIONAL BASEBALL DEVELOPMENT PLAYERS] art. 1 (2006, revised 2013).

26. The restriction on foreigners on the active roster permits a maximum of three pitchers and one position player or vice versa. 2013 NPB BASIC AGREEMENT, *supra* note 26, art. 82(2). For an overview of foreign player limits in NPB, the Korean Professional Baseball League and the Chinese Professional Baseball League, see generally, Naoki Chiba, *Pacific Professional Baseball Leagues and Migratory Patterns and Trends: 1995-1999*, 28 J. SPORT & SOC. ISSUES 193 (2004).

27. GLENN M. WONG & KEIJI KAWAI, SUPŌTSU BIJINESU NO HO TO BUNKA: AMERIKA TO NIHON [SPORTS BUSINESS LAW AND CULTURE: THE U.S. AND JAPAN] 349 (2012). From 2014, the minimum minor league salary for a player with at least one day of service on an active roster, or who has signed two or more MLB contracts, is \$81,500. 2012–2016 BASIC AGREEMENT art. VI, sec. A(3). [hereinafter 2012 MLB BASIC AGREEMENT]. The minimum minor league wage for players signing their first MLB contract is \$40,750. *Id.*

28. Garret R. Broshuis, *Touching Baseball's Untouchables: The Effects of Collective Bargaining on Minor League Baseball Players*, 4 HARV. J. SPORTS & ENT. L. 51, 63 (2013).

29. NPB, SHINJIN SENSU SENTAKU KAIGI YAKYŪ [RULE OF THE NPB DRAFT], art. 9 (2006) [hereinafter RULE OF NPB DRAFT].

30. NPB, TOUTSU KEIYAKUSHO [UNIFORM PLAYER CONTRACT] (2011) [hereinafter NPB UPC].

31. NPB, NIPPON PUROFESSHONARU YAKYŪ KYOYAKU [JAPANESE PROFESSIONAL BASEBALL BASIC AGREEMENT] art. 45, 47 (2011) [hereinafter 2011 NPB BASIC AGREEMENT].

year to year based on performance or if a club reduces its total payroll. All NPB UPCs include a reserve clause that gives the NPB club control over a player's labor as a professional baseball player in Japan for a minimum of seven years.³² Clubs lose their reserve rights by assigning their reserve rights to another NPB club through a trade, or to a MLB club through the posting system. Alternatively, NPB's contract system allows players who are unconditionally released through a process called *senryokugai* to sign with any club as a *jiyū keiyaku sensyu* (free agent).³³

C. Free Agency in Nippon Professional Baseball

The introduction of free agency in NPB in 1993 was not the product of lobbying by the Japanese Professional Baseball Players Association (JPBPA), but by the league's most powerful club, the Yomiuri Giants, who wanted to use free agency to acquire the best players from other NPB clubs. Unlike the minor league baseball system in the United States, no system of free agency exists for players in the NPB's minor league system, as free agent qualification is based on *ichi-gun* team service.³⁴ In 1993, free agency required ten years of playing service,³⁵ and the JPBPA renegotiated qualification to nine years of service in 1997. But the ten years of service was retained for players drafted through the *gyaku-shimei* system or "reverse-designation" draft pick system.³⁶ In 2003, the reverse-designation system was abolished and all players qualified for free agency after nine years of service.³⁷ Depending on the classification of a player under the Basic Agreement, clubs that lose a free agent to a NPB team may be entitled to compensation.³⁸

32. *Id.* art. 66–74; NPB UPC, *supra* note 30, at cl. 31.

33. 2013 NPB BASIC AGREEMENT, *supra* note 24, art. 58.

34. Service is calculated by the number of days on an *ichi-gun* roster: seven years of service is calculated as 1,015 days and eight years of service is 1,160 days. NPB, FURIEJENTO KİYAKU [RULE OF FREE AGENT] art. 2 (2009) [hereinafter RULE OF FREE AGENT].

35. 1993 NPB BASIC AGREEMENT, *supra* note 19, art. 196–207.

36. This system allowed college and industrial league players to negotiate to be selected by their preferred club during the first two rounds of the NPB draft. *Giants Grab Olympian Early in Amateur Draft*, JAPAN TIMES (Nov. 18, 2000) <http://www.japantimes.co.jp/sports/2000/11/18/baseball/giants-grab-olympian-early-in-amateur-draft/#.UoU9-DlpvJx>. Clubs that utilized the reverse-designation system were permitted to negotiate directly and freely with up to two non-high school players in the draft. Such clubs forfeited their first and second high school draft selections.

37. NPB, NIPPON PUROFESSHONARU YAKYŪ KYŌYAKU [JAPANESE PROFESSIONAL BASEBALL BASIC AGREEMENT] art. 197 (2004) [hereinafter 2004 NPB BASIC AGREEMENT].

38. Compensation for the loss of domestic free agents is based on a player's rank in club salary for the player's last season. Compensation can be money or a player, but clubs are permitted to protect twenty-eight players from compensation. *Id.* art. 10.

The introduction of a dual system of domestic and international free agency in 2008 represents a reform to NPB's labor system. Collective bargaining caused the JBPBA and the NPB to agree to introduce a dual system of domestic and international free agency. International free agent qualification remained at nine years of service,³⁹ but reduced the qualification period for domestic free agency became dependent on when and from where a player was drafted. Players drafted before 2006, or from high school after 2007, require eight years of service to qualify as a domestic free agent, while players drafted after 2007, or from college or industrial teams, only require seven years of service.⁴⁰

D. The Operation of the Free Agent Market in Nippon Professional Baseball

Despite the formal right to become a free agent, there is no robust free agent market in NPB. A key factor contributing to this situation is that most players who qualify for domestic and international free agency do not elect to become a free agent. For example, only twenty-nine players in the NPB used free agency to change clubs between 1993 and 2012.⁴¹ Practice within individual clubs reinforces the league trend. During this period at the Hanshin Tigers, twenty-five players exercised their right to become a free agent but only eight players changed clubs: five transferred to other NPB clubs and three to MLB clubs.⁴² These numbers indicate that in Japan, a free agent's right to negotiate with other clubs is frequently counterbalanced by the ability of the player's club to match or exceed offers received by the player from the market, and the fact

"A rank" players were in a team's top three players for salary and compensation is either money (80 per cent of the player's last salary) or money (50 per cent of player's salary) and one unprotected player.

"B rank" players were in a team's top four to ten salary earners and compensation is either money (60 per cent of the player's last salary) or money (40 per cent of player's salary) and one unprotected player.

"C rank" players are all other players and teams receive no compensation for these players.

Id.

39. RULE OF FREE AGENT, *supra* note 34, art. 2(2).

40. *Id.* art. 2(1).

41. *Seibu FA Ryūshutsu Iya, kishi ni 3 Nen Keiyaku Teiji* [Seibu Oppose Player Talent Drain: Offer Kishi a 3-year Contract], NIKKAN SPORTS (Tōkyō) (Nov. 30, 2013), <http://www.nikkansports.com/baseball/news/p-bb-tp0-20131130-1224995.html>.

42. *Hanshin, Kore Made No FA Sengen de 25 Ninchuu 8 Nin Ryūshutsu* [At Hanshin, 8 of 25 Players Who Declared Free Agency Moved to Another Team], SANSPO (Tōkyō) (Nov. 13, 2013), <http://www.sanspo.com/baseball/news/20131113/tig13111305020010-n1.html>.

that the first year salary of a free agent who transfers to a new club cannot exceed the salary paid by his current club.⁴³ Then, there are the clubs who refuse to participate in the free agent market, like the Toyo Hiroshima Carp, who have never signed a NPB free agent.⁴⁴ From the perspective of clubs like the Carp, the loss of a player as compensation for acquiring a free agent can be a deterrent in acquiring domestic free agents.

The structure of free agency also limits the free agent market in NPB. Naturally, the length of service to qualify for free agency will make it difficult for many players to even qualify for free agency. Nakazato Minoru and J. Mark Ramseyer noted that research conducted by the JPBPA found that most players did not qualify as a free agent under the nine years of service requirement. In fact, nine years of service took the average NPB player eleven and a half years to complete, and eligible free agents took anywhere between ten and seventeen years to qualify.⁴⁵ Making qualification even more difficult is the absence of a minor league free agent system as *ni-gun* service is excluded from the calculation of free agency. Another relevant factor related to the structure of free agency is a player who changes NPB club as a domestic free agent must complete an additional four years of service to become an international free agent,⁴⁶ an important consideration for players with aspirations of pursuing an MLB career.

Cultural factors like loyalty, groupism, and deference to the team influence a Japanese player's decision to change team, shaping the operation of free agency and even the posting system. An important cultural factor shaping relationships among *taikukai* (sports-minded people) is *ongaeshi*, the duty to repay one's obligations.⁴⁷ Traditionally, this concept was important in the context of professional baseball as it influenced player relationships between *senpai* (seniors) and *kohai* (juniors), playing a central role in when a player could change clubs. However, since the turn of the twenty-first century, as clubhouse rela-

43. This salary restriction only applies to the first year of a contract signed by a domestic free agent and there is no limit on salary beyond the free agent player's first year at his new club. RULE OF FREE AGENT, *supra* note 34, art. 7.

44. Hiroshima, *FA Senshu Kakutoku Zero Demo Ninki No Himitsu* [Hiroshima Has a Secret to Be Popular, Even Though They Have Acquired Zero Free Agents], DAILY SPORTS ONLINE (Kinki) (Oct. 15, 2013), <http://www.daily.co.jp/baseball/carp/2013/10/15/0006422106.shtml>.

45. Minoru Nakazato & J. Mark Ramseyer, *Bidding for Ballplayers: A Research Note*, 26 J. JAPANESE L. 85, 94 (2008).

46. RULE OF FREE AGENT, *supra* note 34, at art. 5.

47. Keiji Kawai, *Posting Seido no Houteki Kenshou* [A Legal Study of the Posting System: Does the NPB Standard Player Contract Have Binding Power to Restrict a Japanese Player's Transfer to Overseas Leagues?], 60 DOSHISHA L. REV. 1081, 1110 (2008). *Ongaeshi* is particularly important for *taikukai* (sports-minded people) or *bukatsu* (club activities).

tionships are no longer defined by human relations but by contract-based relations, the past fifteen years have seen a decline in the role of *ongaeshi* in Japanese professional baseball.

E. Regulatory actors in Nippon Professional Baseball

Internal regulatory actors dominate the regulatory landscape of the NPB and Japanese baseball in general. Internal regulatory actors include the corporate owners of clubs who act individually in regulating the labor of their team and as a collective through the institution of NPB. Players perform the role of internal regulatory actor on the field, in the clubhouse, and as a collective at the industry level through the labor union, the JPBPA. Industry-based unions like the JPBPA are uncommon in Japanese labor relations and “more than [ninety] percent of labor unions [in Japan] are organized at the enterprise level.”⁴⁸ Since 2000 player agents have been permitted to represent NPB players but are likely to be viewed by clubs as an external regulation.⁴⁹ Other external regulatory actors include MLB, the traditional external actors of the state, and the courts, which, as will be seen below, are peripheral actors in the regulation of NPB.

III. THE POSTING AGREEMENT AND TRANSFER OF PLAYERS FROM NIPPON PROFESSIONAL BASEBALL TO MAJOR LEAGUE BASEBALL

Reviewing all three United States-Japanese Player Contract Agreements is important in understanding the historical changes in the NPB's labor market,⁵⁰ its regulation, and how clubs in Japan and the United States have responded to these changes. Examining the regulatory function and operation of the 1967 and 2000 Agreements assists in understanding the aims of the 2013 Amendments and how the transfer system may evolve in the future. Part III will now analyse the transfer system in the Posting Agreement 2000, specifically focusing on the operation of the rules and procedures in the original posting system, and will conclude by examining the new posting system and its first transfer of Tanaka Masahiro.

48. MATTHEW FINKIN, ET AL., MULTINATIONAL HUMAN RESOURCE MANAGEMENT AND THE LAW: COMMON WORKPLACE PROBLEMS IN DIFFERENT LEGAL ENVIRONMENTS 64 (2013).

49. Player agents must be attorneys in Japan and can only represent one player. *See generally* JPBPA, <http://jpbpa.net/system/problem.html> (last visited May 11, 2015).

50. Note that the 1967 Agreement and Articles 1 through 3 of the 2000 Posting Agreement regulate the transfer of MLB players to NPB clubs and since the 1960s, have facilitated the movement of many from major and minor league players to NPB clubs.

A. Background to the 2000 Posting Agreement

The Nankai Hawks sent ni-gun pitcher Murakami Masanori to the United States in 1964 to train with a minor league affiliate of the San Francisco Giants. Murakami was selected to play for the Giants' major league club, triggering a clause in his contract with the Giants that resulted in the Giants trying to purchase Murakami from Nankai for \$10,000.⁵¹ As a result, both the Hawks and the Giants argued that they held the reserve rights to Murakami, and NPB and MLB resolved the matter by allowing Murakami to play for San Francisco in 1965 and 1966, then return to NPB. Consequently, NPB and MLB entered the 1967 Agreement that in effect required clubs to honour the other league's reserve system by requiring clubs interested in a reserved player from the other league to contact the player's club.⁵² Combined with Japanese cultural practices, the 1967 Agreement erected a barrier that prevented Japanese professional players from transferring to MLB clubs, and created an insular labor market that was largely isolated from foreign leagues.

The 1967 Agreement was an effective formal barrier for Japanese players transferring to MLB clubs until a weakness was exposed and exploited in 1995. In representing Nomo Hideo, player agent Nomura Don through Arn Tellem, a player agent in the United States, identified a loophole in NPB's by-laws that allowed an NPB player to voluntarily retire from the league and then continue his career in a foreign league. Nomo used Tellem's interpretation of the voluntary retirement clause to retire from the Osaka Kintetsu Buffaloes. The subsequent recruitment of Nomo by the Los Angeles Dodgers did not violate the 1967 Agreement.⁵³ Nomo's transfer resulted in a number of NPB players negotiating with their clubs to arrange transfers to MLB clubs,⁵⁴ most notably, Irabu Hideki, another Nomura client. The trade in 1996 by the Chiba Lotte Marines of Irabu to the San Diego Padres saw an infuriated Irabu threaten litigation in Japan and the United States unless he was permitted to play for his club of choice, an outcome facilitated by San Diego trading Irabu to the New York Yankees.⁵⁵

By the turn of the new century, the 1967 Agreement was out-dated and in need of urgent reform if the movement of Japanese players to major league clubs

51. ROBERT WHITING, *THE MEANING OF ICHIRO: THE NEW WAVE FROM JAPAN AND THE TRANSFORMATION OF OUR NATIONAL PASTIME* 72–75 (2004).

52. 1967 AGREEMENT, *supra* note 4, art. 1–4.

53. William Gould IV observed that the recruitment of Nomo was not coincidental in light of MLB's labor problems, culminating with the 1994–1995 labor strike and cancelled World Series. William B. Gould IV, *Bargaining, Race, and Globalization: How Baseball and Other Sports Mirror Collective Bargaining, Law, and Life*, 48 U.S.F.L. REV. 1, 14–15 (2013).

54. These players included Kashiwada Takashi, Hasegawa Shigetoshi, Ohka Tomokazu, and Alfonso Soriano, who were recruited by the Hiroshima Toyo Carp from the Dominican Republic.

55. For a general discussion on these and other transfers in the 1990s, see Whiting, *supra* note 51.

was to operate in a fair and transparent manner. In Japan, NPB clubs were concerned about the potential impact of an uncontrolled “talent drain” on the status and level of competition of the league. Similarly, many MLB clubs worried about a level playing field in recruiting Japanese players as the Irabu trade was facilitated by a “working agreement” between Lotte and San Diego. These factors and the desire of both leagues to avoid the type of litigation threatened by Irabu⁵⁶ led to the creation of the 2000 Posting Agreement, an agreement that continued to allow NPB players who were free agents or unconditionally released to transfer to an MLB club.⁵⁷ Marking a historical shift in the regulation of labor in NPB, the 2000 Posting Agreement created a new transfer mechanism for reserved players called posting⁵⁸ and will now be analysed for the remainder of Part III.

B. Procedures for Posting a Player

The posting system allows reserved NPB players to transfer to MLB before serving the nine years required to qualify as an international free agent. In effect, the posting was a blind auction system that allowed NPB clubs to retain control over their players and receive financial compensation for reserved players who transferred to the major leagues. In principle, this system provided all MLB clubs with equal access to elite players in NPB and allowed professional Japanese players to embark on a MLB career without meeting the arduous service requirements of international free agency. However, as will now be seen, these policy objectives were not achieved.

The procedures of the posting system are activated when a player requests to be posted by his club during the posting period between November 1st and March 1st of the following year.⁵⁹ If the club consents, the player’s details are then “posted” by the Commissioner of the NPB to the Commissioner of MLB, who then provides details of the posted player to all MLB clubs.⁶⁰ An MLB club wanting to recruit the player has four days to submit a monetary bid to the Commissioner of MLB⁶¹ and was commonly known as a “posting fee.” For a period of thirty days, the club with the highest bid received the “sole, exclusive, and non-assignable right to negotiate with and sign the posted Japanese Player[s].”⁶² If the player and MLB club agreed to a contract, the MLB club

56. Gould, *supra* note 53, at 25–26.

57. 2000 POSTING AGREEMENT, *supra* note 5, art. 5–6.

58. *Id.* art. 5, 8–12.

59. *Id.* art. 9.

60. *Id.* art. 8.

61. *Id.* art. 9.

62. *Id.* art. 9, 11.

was required to pay the posting fee to the player's NPB club within five days of reporting the terms of the contract to the Commissioner of MLB.⁶³ At this time the player transfers to his new MLB club. However, failure of the parties to agree to a contract terminated the major league club's negotiation rights and their obligation to pay the posting fee. In this situation, the player would return to the NPB club and seek to be posted during the next posting period,⁶⁴ or transfer as an international free agent.

C. Controlling Player Labor and the Decision to Post a Player

The transfer of Japanese players in the 1990s occurred in an uncontrolled, ad hoc manner that created a cloud of uncertainty in the NPB's labor relations with players. Therefore, a key aim of the NPB in entering the Posting Agreement was to create certainty in contractual relations and return control of labor to clubs. Granting NPB clubs the right to consent to posting a player was the tool used to achieve this aim,⁶⁵ and it eased concerns at the time in the NPB about the perceived threat of American imperialism and the prospect of the NPB becoming a de facto minor league.⁶⁶ Generally, players who receive consent are either one or two years from becoming an international free agent who have completed a minimum of seven years of service required to become a free agent.⁶⁷ William Gould IV analogises this practice to MLB clubs trading players just prior to the player becoming a free agent so as to receive compensation beyond the provisions of the collective bargaining agreement.⁶⁸ The factors discussed above that limited the free agent market also affects the number of players posted by NPB clubs as only twenty-three players have been posted and only fourteen players transferred after signing contracts.⁶⁹

No uniformity exists in the decision process of an NPB club posting a player, and the decision is ultimately influenced by the status of the club and the player. For example, Japan's most prestigious, wealthy, and influential sporting club, the Yomiuri Giants have never posted a player, nor are they likely to post

63. *Id.* art. 11.

64. *Id.* art. 12.

65. *See id.* art. 6.

66. *See* Gould, *supra* note 53, at 26. Tanaka's posting in December 2013 was added to Gould's statistics.

67. Darvish and Tanaka each completed seven years of service prior to being posted. *See* *Hokkaido Nippon-Ham Fighters, Darvish Yu*, NPB, <http://bis.npb.or.jp/eng/players/61965110.html> (last visited Feb. 15, 2015); *Tohoku Rakuten Golden Eagles, Tanaka, Masahiro*, <http://bis.npb.or.jp/eng/players/11215114.html> (last visited May 11, 2015).

68. Gould, *supra* note 53, at 25.

69. *Id.* at 26.

a player in the immediate future. Instead, Yomiuri players are required to transfer to the major leagues by completing the nine-year service requirement to become an international free agent.⁷⁰ While not adopting the hard line of Yomiuri, the Hanshin Tigers are also a powerful foundation NPB club, who have only posted one player, Igawa Kei, who transferred to the New York Yankees in 2006 for a posting fee of \$26 million.⁷¹ Hanshin was recently confronted with a similar decision and refused posting requests by star closer Fujikawa Kyuji over several years. Fujikawa was forced to transfer to the Chicago Cubs in 2013 as a thirty-two-year-old international free agent.⁷² His transfer demonstrates why players want to be posted when they are younger. Fujikawa suffered a season ending elbow injury early in the first year of his contract and required reconstructive elbow surgery.

Smaller and less prestigious NPB clubs that have low revenue bases are more likely to post star players. Substantial financial compensation is a compelling motivation for the owners of such clubs to post a player, and the corporate owner typically acquires the entire posting fee. In 2006, the Saitama Seibu Lions posted twenty-six-year-old pitcher, Matsuzaka Daisuke to the Boston Red Sox for a posting fee of \$51.1 million.⁷³ Then, in 2011, the Hokkaido Nippon Ham Fighters posted another young phenomenon, twenty-five-year-old Darvish Yu to the Texas Rangers for a posting fee of \$51.1 million.⁷⁴ Neither the Lions nor the Fighters are shackled by the conservative practices of teams like Yomiuri and the players benefitted from receiving long-term contracts, financial security and embarking on a MLB career at the peak of their athletic performance.

D. Problems Created by Posting Fees

Much of the debate on the posting system focuses on the rapid growth in the value of posting fees and the perceived “windfall” received by many NPB

70. Since 2000, the following players have transferred from Yomiuri to MLB teams as international free agents: Matsui Hideki in 2003, Uehara Koji in 2009, and Takahashi Hisanori in 2010.

71. David Brown, *Stuck: Yankees Pay Japan's Kei Igawa Big Money to Pitch in Minors*, YAHOO SPORTS (July 24, 2011), http://sports.yahoo.com/mlb/blog/big_league_stew/post/Stuck-Yankees-pay-Japan-8217-s-Kei-Igawa-big-m?urn=mlb-wp13697.

72. Carrie Muskat, *Cubs Finalize Deal, Introduce Fujikawa at Wrigley*, CUBS.COM (December 7, 2012), http://chicago.cubs.mlb.com/news/article.jsp?ymd=20121204&content_id=40523142&vkey=news_chc&c_id=chc.

73. Boston and Matsuzaka agreed to a six-year, \$52 million contract. Rosner & Conroy, *supra* note 7, at 86.

74. Texas and Darvish agreed to a six-year, \$60 million contract. Waldstein, *supra* note 9.

clubs for high profile players.⁷⁵ Such narrow debates mask many important issues that relate to the effectiveness and limitations of posting fees as a transfer mechanism. The posting system was introduced as a blind auction in 2000 and that gave all MLB clubs the same formal rights to acquire talent from Japan, allowing the market to set the value of a player's transfer. In practical terms, the decision to pay a posting fee is essentially an exercise in economic rationalism and the allocation of resources. Large market MLB clubs like the New York Yankees, the Boston Red Sox, the Texas Rangers, and the Los Angeles Dodgers possess the financial resources to pay astronomical transfer fees, a payment that along with the value of the contract of a posted (and free agent) player, is not in the calculation of a MLB club's competitive balance tax⁷⁶ or international amateur signing pool.⁷⁷ Clubs with lesser financial resources must determine whether to commit a portion of their baseball operations budget to a posting fee for a professional player with no MLB experience, or alternatively, invest the same money in cheaper labor on the international market⁷⁸ or acquire players on the MLB market.

Bidding in the posting system also lacked transparency and Gould described the system as "bidding in the dark." As MLB clubs submitted bids without knowing whether other MLB clubs either placed or bid or the value of their bid, there was an inherently high risk of overbidding. The player's NPB club would receive any difference in the bids of the highest and second highest bid,⁷⁹ an inefficiency in the procedure for the market setting the transfer value, and an amount that could otherwise be devoted to the player's contract negotiations. The posting fees paid for pitchers like Igawa, Matsuzaka and Darvish put the

75. For critiques of the posting system, see generally William B. Gould IV, *Globalization in Collective Bargaining, Baseball, and Matsuzaka: Labor and Antitrust Law on the Diamond*, 28 COMP. LAB. L. & POL'Y. J. 283 (2007); 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. 13 (2010); Victoria J. Siesta, *Out at Home: Challenging the United States-Japanese Player Contract Agreement Under Japanese Law*, 33 BROOK. J. INT'L L. 1069 (2008).

76. For the method of calculating the competitive balance tax, see MLB BASIC AGREEMENT 2012, *supra* note 27, art. XXIII(B).

77. Excluded players include players who have previously contracted with a major or minor league club and players over twenty-three years of age with at least five seasons of professional experience in a league recognised by the Commissioner of MLB's office. *Id.* art. 46(II)(E)(2).

78. By 2006, the average signing bonus for players from the Dominican Republic had increased from \$29,000 to \$108,000. Gould, *supra* note 54, at 18. Despite the average increase, clubs still use the "boatload" mentality of acquiring twenty Dominican players for \$5,000 per player and using the academy-training camp system to identify the best players to send to the minor leagues. *Id.* at 17-18. See also Timothy Poydenis, *The Unfair Treatment of Dominican-Born Baseball Players: How Major League Baseball Abuses the Current System and Why It Should Implement a Worldwide Draft in 2012*, 18 SPORTS L. J. 305, 317 (2011).

79. Gould, *supra* note 54, at 27.

spotlight on the issues of transparency, the rights of the player, market efficiency, and equality.

Transfer fees raise the difficult issue of what constitutes fair compensation to a NPB club for the loss of a reserved player, a person who is generally one of the team's best players. Providing insight into how to resolve this question is Nakazato and Ramseyer's 2004 empirical research on NPB salaries. Nakazato and Ramseyer examined when a Japanese player repays a club's initial investments of a signing bonus and development costs⁸⁰ and concluded that these costs are incorporated into the initial salaries of players. They found that forty percent of hitters repay a club's initial investment after their first year of *ichi-gun* service,⁸¹ a number that is likely to be higher for pitchers, particularly starting pitchers. As posted players generally have six to seven years of *ichi-gun* service, the transfer fee for a reserved NPB player needs to reflect the impact of the on-field loss of the player, not the costs of recruitment and development.

E. Normative Practice and the Operation of the Old Posting System

An important procedural feature of the posting system is that the winning bidder receives the exclusive and non-assignable negotiation rights to the Japanese player for a period of thirty days. The winning bidder cannot trade, sell, or assign the rights to another club. The MLB club's negotiation rights lapse if the parties do not agree to a contract in the thirty-day negotiation period, and the player's NPB club retains the reserve rights to the player. The posted player cannot be posted again until the next posting period.⁸² The operation of these procedures has seen normative practice negatively impact on the ability of the posting system to transfer posted players.

The posting system is predicated on the assumption that MLB clubs will bid on posted players and several posted players have had the misfortune of receiving no bids.⁸³ Even though the player has received the consent of his NPB club to play MLB, the posting procedures have prevented the players from seeking alternative methods of obtaining work in the major leagues. In the case of Sanada Hiroki, the impact of receiving no bids in 2011 had disastrous consequences for his club, the Yokohama DeNA Bay Stars, who allowed Sanada to pursue his MLB dream by releasing him from his contract. Sanada became a free agent and attended trials with MLB clubs but was unsuccessful. Instead of returning to the Bay Stars, who had relinquished their reserve rights, Sanada

80. Nakazato & Ramseyer, *supra* note 45, at 96–97.

81. *Id.* at 97.

82. 2000 POSTING AGREEMENT, *supra* note 5, art. 12.

83. Sanada Hiroki, Otsuka Akinori, Iriki Yusaku and Mitsui Koji have been posted and received no bids.

signed with the Yomiuri Giants.⁸⁴ The unconditional release of Sanada by Yokohama is uncommon and most clubs do not relinquish their reserve rights to posted players who do not transfer to a MLB club. Almost all players are required to wait until the next posting period,⁸⁵ and face the risk of again receiving no bids,⁸⁶ or transfer as an international free agent.

Normative conduct also began to effect the contract negotiations between the posted player and the winning bidder. In 2010, the Tohoku Rakuten Golden Eagles posted star pitcher Iwakuma Hisashi and the Oakland Athletics secured the negotiation rights with a winning bid of \$19.1 million, a curious outcome in light of the use of analytics and sabermetrics by General Manager, Billy Beane, made famous by the *Moneyball* book and film.⁸⁷ A contract was not concluded and Iwakuma returned to Rakuten for the 2011 season before transferring to the Seattle Mariners as an international free agent on a one-year contract for \$1.5 million.⁸⁸ Then, in 2011, the New York Yankees won the negotiation rights to posted infielder Nakajima Hiroyuki with a \$2 million bid, and once again, the parties did not agree to a contract. Nakajima returned to the Saitama Seibu Lions for one season before signing a two-year contract for \$6.5 million with the Oakland Athletics as an international free agent.⁸⁹ The bidding motivations of the Yankees were questionable, and at least odd, due to their high priced infield of All Stars at the time, evident in their refusal to guarantee Nakajima an opportunity to win a position in the starting line-up.⁹⁰ The failed posting of Iwakuma and Nakajima highlight the ineffectiveness of the posting system to transfer to MLB reserved Japanese players who receive the consent and the willingness of NPB clubs to attempt to cash in on the transfer of players in the penultimate year of a player's qualification for free agency.

E. The New Posting System Protocols

Problems in the operation of the posting system saw the JPBPA raise with

84. *Sanada ga yonenburi kyojin hukkatsu! Meiya-wo dannen [Sanada Returns to Kyojin After 4 years! Major Leagues Abandoned]*, SANSPO (Mar. 19, 2012), <http://www.sanspo.com/baseball/news/20120319/gia12031917310004-n1.html>.

85. 2000 POSTING AGREEMENT, *supra* note 5, art. 12.

86. Mitsui Koji was unsuccessfully posted twice.

87. See generally Michael Lewis, *Moneyball: The Art of Winning an Unfair Game* (2003).

88. Geoff Baker, *Mariners Sign Japanese Right-Hander Hisashi Iwakuma*, SEATTLE TIMES (Jan. 5, 2012), <http://www.seattletimes.com/sports/mariners/mariners-sign-japanese-right-hander-hisashi-iwakuma/>.

89. Josh Dubow, *A's Agree on \$6.5 Million, 2-Year Contract with Nakajima*, BIG STORY (Dec. 18, 2012), <http://bigstory.ap.org/article/agree-2-year-contract-nakajima>.

90. Rob Smaal, *Wanted: Team to Fulfill MLB Dream. Serious Replies Only*, THE ASAHI SHIMBUN (Osaka) (Jan. 31, 2012), http://ajw.asahi.com/article/behind_news/sports/AJ201201310034.

the NPB the need for revising the system in December 2010,⁹¹ and in response, NPB considered the union's request in 2011 but ultimately took no action.⁹² The formal reform process emanated from the United States when a number of disgruntled MLB clubs pressured MLB to officially raise the prospect of reforms with the NPB at the end of 2012.⁹³ Negotiations began in early 2013 and in an attempt to accelerate the process, in June 2013, MLB notified the NPB of its intention to terminate the Posting Agreement on December 15, 2013.⁹⁴ Potential areas of reform included allowing a posted player to negotiate with multiple MLB clubs, creating an open auction for a player's contract rights and capping or developing a formula for calculating a player's transfer fee.⁹⁵ In the middle of 2013, negotiations were stalled by MLB's Biogenesis drug scandal⁹⁶ and the ill health of Michael Weiner, the executive director of the Major League Baseball Players Association. Further delays were experienced in October and November when the JPBPA lobbied NPB for changes to strengthen the rights of players to negotiate with multiple MLB clubs, and Tanaka Masahiro propelled the Golden Eagles to the Japan Series Championship and the Asia Series Championship.⁹⁷

In early November 2013, negotiations saw NPB and the JPBA approve a

91. *Puro yakyū: nyūsatsuseido no kaikaku NPB ni youkyū he: rouso senshukai* [Professional Baseball: JPBPA Requested NPB to Revise the Posting System], MAINICHI SHIMBUN (Tōkyō), Dec. 3, 2010, at 19.

92. *Puro Yakyū Jikkoui: Nyūsatsuseido ha Iji no Houkou* [NPB Committee Take the Direction to Keep the Posting System], NIKKAN SPORTS (Tōkyō) (June 13, 2011), <http://www.nikkansports.com/baseball/news/f-bb-tp0-20110613-789962.html>.

93. Jeff Passan, *MLB Seeking Changes to Posting System for Players from Japan*, YAHOO SPORTS (Nov. 30, 2012), <http://sports.yahoo.com/news/mlb-seeking-changes-to-posting-system-for-players-from-japan-203422114.html>.

94. *Ma-kun Konofu Mejya-Shoumetsu? A-Rod yoha shin posting kyoutei koushou atomawashi* [Will Tanaka Lose the Chance to Transfer to MLB? The Effect of A-Rod's Issue, Makes Negotiating a New Posting System a Low Priority], SPONICHI (Tōkyō) (Aug. 8, 2013), <http://www.sponichi.co.jp/baseball/news/2013/08/08/kiji/K20130808006375430.html>. For either league to terminate the 2000 Posting Agreement, notice was required at least 180 days before December 15, 2002. 2000 POSTING AGREEMENT, *supra* note 5, art. 17.

95. *Daru ga ugokashita 'posting' seido minaoshi* [Darvish Sets in Motion Revision to the Posting System], SANSPO (Oct. 13, 2012), <http://www.sanspo.com/baseball/news/20121013/mlb12101305290000-n1.html>.

96. Ben Badler, *As Teams Scout Masahiro Tanaka, Posting System Changes Could Be Coming*, BASEBALL AM. (Aug. 21, 2013), <http://www.baseballamerica.com/majors/as-teams-scout-masahiro-tanaka-posting-system-changes-could-be-coming/>. The scandal involved the distribution of Performance Enhancing Drugs (PEDs), specifically human growth hormone, by the Biogenesis of America, to fourteen MLB players, including several high profile players.

97. *Nichibei Shinnyū Satsuseido no Hadan Bakkin Shiharaisaki ha MLB* [Penalty Fee to Be Paid to MLB for Ending Negotiations with a NPB Player Under New Posting System], NIKKAN SPORTS (Tōkyō) (Nov. 7, 2013), <http://www.nikkansports.com/baseball/mlb/news/p-bb-tp2-20131107-1214736.html>.

new agreement proposed by MLB,⁹⁸ only for MLB to withdraw the proposal before a formal agreement was concluded,⁹⁹ initiating a new round of negotiations in New York. The imminent posting of Tanaka added to the time pressures and NPB and MLB finally agreed to a new posting on December 16, 2013.¹⁰⁰ The key features of the new protocols were:

- (1) The posting period operates from November 1st until February 1st of the following year;
- (2) The negotiation period remains at thirty days;
- (3) Prior to posting a player the NPB club sets the “release” fee (formerly the posting fee) and the amount cannot be changed;
- (4) Release fees are capped at \$20 million;
- (5) Any MLB club willing to pay the release fee may negotiate a contract with the posted player; and
- (6) The term of the new Posting Agreement is three years but if neither league terminates the agreement six months prior to December 15, 2016 it continues on a yearly basis.¹⁰¹

The new protocols marked the end of the auction system and transferred the role of setting a transfer fee from the market to the player’s NPB club, representing a dramatic policy shift in the Posting Agreement as NPB clubs now determine the financial cost of losing a player. The renaming of the bid or posting fee as the “release” highlights that the transfer fee is not a value determined at auction, but a fee that releases a player from his contract and compensates the NPB club for relinquishing their reserve rights to the player. The modification of the language in the posting protocols is important for calculating the transfer fee, and in improving parity among MLB clubs in the market for reserved NPB players, particularly as fees are now capped at \$20 million.¹⁰² The new protocols represent another major policy shift in the ability of posted players to

98. *Sensyukai ga shin-nyūsatsuseido wo jyudaku [JPBPA Accepts the New Posting System]*, NIKKAN SPORTS (Tōkyō) (Nov. 14, 2013), <http://www.nikkansports.com/baseball/news/f-bb-tp0-20131114-1218160.html>.

99. Barry M. Bloom, *Impasse with Japan Puts Tanaka on Hold*, MLB.COM (Nov. 14, 2013), http://mlb.mlb.com/news/article/mlb/posting-system-impasse-between-mlb-japan-puts-masahiro-tanakas-future-on-hold?ymd=20131114&content_id=63920472&vkey=news_mlb.

100. *MLB, NPB Reach Agreement*, *supra* note 8.

101. 2013 POSTING AGREEMENT, *supra* note 6, art. 7-9, 15.

102. It should be noted that it was reported that only one NPB club, the Tohoku Rakuten Golden Eagles, voted against the introduction of the new posting system. *Shin posting wo shounin [Agreement*

strengthen their bargaining position by negotiating with multiple major league clubs. Although this right is conditional on more than one MLB club agreeing to pay the release fee, the new procedure is a step towards the JPBPA achieving their aim of posted players possessing the unconditional right of players to negotiate with multiple MLB clubs.¹⁰³

F. The First Posting Under the New Posting Protocols and Tanaka Masahiro

One day after the new posting protocols were announced, Tanaka Masahiro announced on December 17, 2013, that he had asked the Tohoku Rakuten Golden Eagles to be posted,¹⁰⁴ and after months of speculation, the Golden Eagles announced on Christmas Day 2013 that they had consented to Tanaka's request.¹⁰⁵ Unsurprisingly, the release fee was set at the maximum of \$20 million and by the middle of January 2014, Tanaka was a New York Yankee after the two parties agreed to a seven-year contract for \$155 million. The number of clubs who negotiated with or contacted Tanaka's representatives is unknown,¹⁰⁶ but the Los Angeles Dodgers, Chicago Cubs, Chicago White Sox, Arizona Diamondbacks, and Houston Astros all confirmed entering contract negotiations with the pitcher. Media reports indicated that the Dodgers and Astros offered a contract that exceeded \$100 million, the Cubs' contract offer was less than \$150 million, and the Yankees not only offered the most money but were also the only club to offer a seven-year contract.¹⁰⁷

The impact of Tanaka's probable posting on negotiations between the NPB and MLB, and his transfer to the Yankees, raises the question as to whether the new posting protocols were able to achieve their underlying policy aims. The aim of capping the release fee was to allow clubs other than large market clubs a realistic opportunity to recruit top Japanese talent. But Tanaka's transfer shows little has changed. The two clubs with the highest bids, the Dodgers and the Yankees, respectively, had the highest and second highest opening day payrolls in 2014.¹⁰⁸ The ability of small market clubs like Houston and Arizona to

on *New Posting System*], YOMIURI SHIMBUN (Tōkyō), Dec. 17, 2013, at 25.

103. Puro yakyū: nyūsatsuseido, *supra* note 91.

104. *Ma-kun Bei Iseki Kibou Tsutaeru: Ketsuron ha Mochikoshi [Tanaka Express His Desire to Transfer to MLB: The Decision Was Delayed]*, NIKKAN SPORTS (Tōkyō) (Dec. 17, 2013), <http://www.nikkansports.com/baseball/news/f-bb-tp0-20131217-1232575.html>.

105. *Rakuten Tachibana Syatyou to-ku Touhoku no Hokori wo Motte Mejya-de [Take the Pride of Tohoku to Play in MLB]*, NIKKAN SPORTS (Tōkyō) (Dec. 25, 2013), <http://www.sanspo.com/baseball/news/20131225/gol13122517220010-n1.html>.

106. Casey Close from Excel Sports Management represented Tanaka, who also represents Clayton Kershaw and New York Yankees' captain, Derek Jeter.

107. *Masahiro Tanaka 'Relieved'*, *supra* note 13.

108. The total payroll at the start of 2014 MLB season for the confirmed bidders was: Los Angeles

sign Tanaka remain affected by finances as clubs like the Yankees and the Dodgers can shift the money once allocated to a posting fee to a player's contract. Also coming into play was the duration of a club's financial commitment to a player with no major league experience. The Yankees' lucrative offer of a seven-year contract not only had an impact on smaller market clubs, but also affected high payroll clubs like the Dodgers, who were restricted in their ability to exceed the Yankees' offer by their long-term commitment to a number of high priced players. Undoubtedly Tanaka benefitted financially and in terms of job security by negotiating with multiple clubs. The loser in this transaction was Rakuten, who received a release fee of \$20 million as opposed to a posting fee in excess of \$50 million. As Tanaka did not sign with small market teams like Houston or Arizona but the Yankees, it appears that the path to transferring an elite reserved Japanese player has changed, but the outcome is unchanged.

IV. NIPPON PROFESSIONAL BASEBALL'S TRANSFER SYSTEM TO MAJOR LEAGUE BASEBALL AND JAPANESE LAW

During the eighty-year history of the NPB, no internal regulatory actor has sought to use Japanese labor law or competition law to challenge the NPB's internal labor system and seek external regulatory intervention by the Japanese courts. Disgruntled players occasionally make public threats of litigation¹⁰⁹ and players seldom use dispute resolution mechanisms like salary arbitration to resolve salary disputes.¹¹⁰ However, it remains important to determine whether the NPB's player transfer system and labor practices comply with Japanese law.

Dodgers \$241 million—ranked first, New York Yankees \$208 million—ranked second, Chicago White Sox \$89 million—ranked twentieth, Chicago Cubs \$74 million—ranked twenty-eighth, Arizona Diamondbacks \$111 million—ranked twelfth, and Houston Astros \$44 million—ranked twenty-ninth. *MLB Salaries*, USA TODAY (May 14, 2014), <http://www.usatoday.com/sports/mlb/salaries/2014/team/all/>.

109. In the 1990s, Irabu Hideki and Alfonso Soriano, a Dominican Republican born player for the Toyo Hiroshima Carp, both threatened litigation in attempting to transfer to MLB. Litigation was avoided when both players transferred to MLB clubs. WHITING, *supra* note 51, at 130–34, 141–45.

110. Since 1973, there have been seven cases of salary arbitration. These cases involved five Japanese players and two foreign players. There is no independence on the arbitration panel as the arbitrators are the President of the NPB and two arbitrators appointed by the clubs. The two successful players were Shimoyanagi Tsuyoshi in 2001 and Wakui Hideaki in 2001. David L. Snyder, *Automatic Outs: Salary Arbitration in Nippon Professional Baseball*, 20 MARQ. SPORTS L. REV. 79, 89–91 (2009). The use of salary arbitration is in direct contrast to MLB practices. *See generally*, Ed Edmonds, *A Most Interesting Part of Baseball's Monetary Structure - Salary Arbitration in Its Thirty-Fifth Year*, 20 MARQ. SPORTS L. REV. 1 (2009).

Japanese labor law is comprised of the *Labor Standards Act*,¹¹¹ the *Labor Contract Act*,¹¹² the *Labor Union Act*,¹¹³ and competition law as enshrined in the *Antimonopoly Act*.¹¹⁴ These laws will now be used to analyze the NPB's labor system, specifically, free agency and posting.

A. *Labor Law, Players and Nippon Professional Baseball*

The *Labor Standards Act*, the *Labor Contract Act*, and the *Labor Union Act* all adopt different definitions of an employee. Therefore the ability of a worker to be recognized as an employee, not an independent contractor, and activate the labor protections afforded by the laws is dependent upon the worker's status under each act. The *Labor Union Act* provides the broadest legal definition of an employee, stating that an employee is a person "who 'live[s] on their wages, salaries, or other equivalent income, regardless of the kind of occupation.'¹¹⁵ In contrast, the *Labor Standards Act* defines an employee as a person "employed at an enterprise or office . . . and receives wages. . . without regard to the kind of occupation."¹¹⁶ The *Labor Contract Act* adopts a similar definition to the *Labor Standards Act* and classifies an employee as "a person who works by being employed by an employer and to whom wages are paid."¹¹⁷ The critical difference between the *Labor Contract Act* and the *Labor Standards Act* is that the *Labor Contract Act* classifies *kajishiyounin* (domestic helpers or domestic servants) as employees.

Players in NPB are held to be employees under the *Labor Union Act* and independent contractors according to the *Labor Contract Act* and the *Labor Standards Act*,¹¹⁸ a legal position that is largely the product of two matters involving the JPBPA. In 1985 Japan's Labor Relations Commission recognized

111. Roudou Kijyun Hou [Labor Standards Act], Law No. 49 of 1947, amended by Law No. 42 of 2012 (Japan) [hereinafter Labor Standards Act].

112. Roudou Keiyaku Hou [Labor Contract Act], Law No. 128 of 2007 (Japan) [hereinafter Labor Contract Act].

113. Roudou Kumiai Hou [Labor Union Act], Law No. 174 of 1949, amended by Law No. 102 of 2005 (Japan) [hereinafter Labor Union Act].

114. Dokusen Kinshi Hou [Antimonopoly Act; Act on Prohibition of Private Monopolization and Maintenance of Fair Trade] Law No. 54 of 1947 (Japan), *translated by* Japan Fair Trade Commission, http://www.jftc.go.jp/en/legislation_gls/index.html [hereinafter Antimonopoly Act].

115. Labor Union Act, art. 3.

116. Labor Standards Act, art. 9.

117. Labor Contract Act, art. 2(1).

118. Further complicating the regulation of labor of NPB players is that other Japanese laws adopt divergent approaches in viewing players as employees or independent contractors. Players are independent contractors under the Shotoku Zei hou [Income Tax Act] Law No. 33 of 1965, amended by Law No. 63 of 2013 (Japan), but employees according to the Antimonopoly Act.

the JPBPA as a labor union by applying the *Labor Union Act*.¹¹⁹ Then, in 2004, the merger of the Osaka Kintetsu Buffaloes and the Orix Blue Wave led to the NPB attempting to consolidate the number of clubs, thereby reducing the size of the player workforce. In a rare public challenge to the authority of club owners and NPB, the JPBPA sought judicial relief and held a two-day strike, the only labor strike in NPB history. The Tōkyō High Court in the Nippon Professional Baseball League case¹²⁰ used the Labor Union Act to conclude that the NPB's attempt to consolidate the number of clubs pertained to a working condition and was therefore a mandatory subject of collective bargaining. Although the Tōkyō High Court did not explicitly state that players are employees, the decision was based on the underlying premise that players are employees, not independent contractors, fundamentally shaping the legal rights of NPB players under labor law.¹²¹

B. Mandatory Subjects of Collective Bargaining

Working conditions that form part of a labor contract or the rules of employment can only be changed if a worker and employer reach an agreement.¹²² Such changes cannot result in creating rules of employment that disadvantage the worker.¹²³ However, Japanese labor law allows employers to unilaterally change general working conditions, if the change is reasonable.¹²⁴ But if a labor union requests collective bargaining on a mandatory subject of bargaining, employers must negotiate working conditions.¹²⁵ Refusal by employers to collectively bargain without proper justification in such circumstances constitutes an

119. *Puro yakyū sensyu ga roudou kumiai kubikakugo de danketu nakahata kaityou* [*The Unionization of Professional Baseball Players Was the Result of the Firm Resolve of Union President, Even If He Could Be Fired*], ASAHI SHIMBUN (Osaka), Nov. 15, 1985, at 22.

120. Tōkyō Kōtō Saibansho [Tōkyō High Ct.] Sept. 8, 2004, 879 RŌDŌ HANREI 90 (Japan) [hereinafter Nippon Professional Baseball League Case].

121. KEIJI KAWAI, PURO SPORTS SENSYU NO HOUTEKI CHII [LEGAL STATUS OF PROFESSIONAL LEAGUE PLAYERS] 423–41 (2003).

122. Labor Contract Act, art. 8.

123. *Id.* art. 9. Changes cannot be made to any employment rules a worker and employer had agreed would not be changed. There will be no disadvantage to a worker if the employer informs the worker of the changed employment rules and the change is reasonable in light of the extent of the disadvantage to the worker, the appropriateness of the changes and other relevant circumstances to the changed employment rule. *Id.* art. 10.

124. Employers are permitted to change *shugyou kisoku* (work rule) for uniform working conditions without consent of employees on the basis the change is reasonable, otherwise the unilateral change will be declared void by a court. The Labor Standards Act regulates *shugyou kisoku* and generally gives employees the right to voice their opinion on any changes. Labor Standards Act, art. 89–92; Labor Contract Act, *supra* note 112, art. 10.

125. KAZUO SUGENO, RŌDOU HOU [LABOR LAW] 126–50 (2012).

unfair labor practice.¹²⁶ Mandatory subjects of collective bargaining include matters within an employer's control that affect the terms of an employee's employment, the "treatment of union members and the management of collective labor relations."¹²⁷ As free agent qualification is the basis for an employee's free choice and choosing one's employer, and central to the collective management of labor by clubs and NPB, it is a mandatory subject of collective bargaining. The issue of collective bargaining is particularly important in determining if the restraints in the reserve and free agent systems are enforceable restraints of trade.

C. Free Agency, Restraint of Trade and Japanese Labor Law

The enforceability of the NPB's free agent system under Japanese labor law will depend on whether the process of collective bargaining created a reasonable restraint of trade, and Japanese courts are likely to use the test from the *Foseco Japan* case.¹²⁸ This case involved whether Foseco could enforce against a former employee a post-employment agreement not to compete that was two years in duration. The Nara District Court found that the enforceability of the post-employment restraint is based on the reasonableness of the restraint in relation to the employer's interests, the employee's interests, the interests of consumers, and the interests of the public.¹²⁹

The typical approach of Japanese courts in assessing the reasonableness of a post-employment non-compete clause is to determine the reasonableness of the restraint in respect of its time limit, geographical application, the type of business it restricts and whether the employee was paid for agreeing to the restraint.¹³⁰ Importantly, Japanese courts have held that consent by an employee to enter a non-compete clause is not conclusive evidence of a restrictive covenant's enforceability. In addition to being reasonable, Japanese courts have held that the restraint must not be more restrictive than necessary, the process to create the agreement must be adequate, and consideration is required to counter-balance the effect of the restraint.¹³¹

Thus, Japanese courts are likely to review the collective bargaining process

126. Labor Union Act, art. 7(ii).

127. FINKIN, ET AL., *supra* note 48, at 84.

128. Nara Chihō Saibansho [Nara Dist. Ct.], Oct. 23, 1970, 624 HANJI 78 (Japan) [hereinafter *Foseco Japan Case*].

129. *See id.* at 82.

130. Takashi Araki, *Legal Issues of Employee Loyalty in Japan*, 20 COMP. LAB. L. & POL'Y J. 267, 276 (1999).

131. Urawa Chihō Saibansho [Urawa Dist. Ct.] Jan. 27, 1997, 1618 HANJI 115, 118 (Japan) [hereinafter *Tōkyō Freight Car Case*].

in order to assess the reasonableness of the restraints imposed by the free agent system. The free agent system has been the subject of several rounds of collective bargaining since its introduction in 1993. As discussed above, collective bargaining has seen the length of service required to become a free agent reduced from ten years to nine years, and now, a dual system of domestic and international free agency operates. Players can move to another NPB club after seven or eight years of service, depending on their draft status. The current domestic system represents a significant reduction in service from the initial ten years of service and a slight reduction for the nine years of service to become an international free agent. Several rounds of collective bargaining demonstrate the willingness and *bona fide* intentions of NPB in negotiating the free agent system that, when combined with the policy of competitive balance,¹³² indicates that Japanese courts are likely to respect the autonomy of NPB's internal labor system and view free agency as a reasonable restraint. However, NPB lacks the authority to govern the transfer of players to foreign clubs. A strong argument exists that international free agency does not operate in isolation, that it is now intrinsically linked to the posting of players to major league clubs.

D. The Posting System, Restraint of Trade and Japanese Labor Law

If a Japanese court adopted the position that free agency and the posting system are interconnected and viewed the posting system as a work rule, the enforceability of the new posting system would be contingent upon the qualification period to become an international free agent. The relevant judicial test focuses on whether the process to create the work rule and its content is unenforceable on the basis that it denies an individual their freedom.¹³³ This judicial concept of reasonableness identifies if the employer unilaterally created the new work rule, or if the explicit consent of employees or their labor union was obtained. The content of the amendment is assessed based on the level of disadvantage created for employees, the ability of the amendment to protect the employer's interests, the existence of good cause to make the amendment, the process of negotiation between management and workers, and any other relevant considerations.¹³⁴ To determine if the new posting system satisfies the elements of the test of reasonableness, it is necessary to identify and apply the relevant judicial standard.

132. See Andrew Zimbalist, *Reflections on Salary Shares and Salary Caps*, 11 J. SPORTS ECON. 17 (2010).

133. Saikō Saibansho [Sup. Ct.], Feb. 28, 1997, 705 MINSHŪ 51 (Japan) (hereinafter Daishi Bank Case).

134. Tōkyō Chihō Saibansho [Tōkyō Dist. Ct.] Oct. 16, 1995, 690 RŌDŌ HANREI 75 (Japan) (hereinafter Tōkyō Legal Mind Case).

In determining the relevant judicial standard, a Japanese court is likely to use cases that apply the *Labor Standards Act* and the *Labor Contract Act*, even though these laws do not govern the labor of NPB players. The reason is that the issues raised in general labor disputes involve analogous issues to those raised by the introduction of the new posting protocols. According to the *Labor Standards Act*, work rules must be in writing for employers who continuously employ ten or more workers.¹³⁵ NPB clubs maintain a roster of a maximum of seventy players, and the posting system is contained in the 2013 Posting Agreement. Further, to change a work rule, the *Labor Contract Act* requires employees to be consulted¹³⁶ and the *Labor Standards Act* for employers to obtain the opinion of a majority of employees.¹³⁷ However, an employer is not required to obtain the consent of employees to change work rules, and courts apply the principle of good faith to determine if the alteration to the work rule was reasonable.

To prove the new posting system is a reasonable change to a work rule, NPB would need to demonstrate the new protocols are a product of good faith negotiations with the JPBPA. Publicly available information helps to assess the reasonableness of what were confidential negotiations. NPB notified the JPBPA of MLB's decision to change the posting system, and sought the approval of the union when MLB submitted the two proposed posting systems.¹³⁸ The JPBPA then sought feedback from player representatives from all twelve clubs,¹³⁹ and as discussed earlier, the JPBPA was permitted to voice its concerns regarding the old posting system. Overall, NPB players will benefit from the new posting system in that they can negotiate with multiple clubs; the cap on release fees encourages more MLB clubs to bid, and as demonstrated by the Tanaka contract, allows a player to receive a greater percentage of his market value.

These factors indicate that the changes to the posting protocols involve the amendment of a work rule that was reasonable, and the result of good faith negotiations. Therefore, there is a high probability that Japanese courts would allow NPB clubs to retain discretion over when reserved players move to foreign leagues. Alternatively, if the nine years of service were held by a Japanese court to be unreasonable, the only legal mechanism available to NPB clubs to retain reserved players wanting to embark on a MLB career would be to enter long-term contracts.

135. Labor Standards Act, art. 89.

136. Labor Contract Act, art. 10.

137. Labor Standards Act, art. 90.

138. See Nichibei shinyū, *supra* note 97.

139. *Nippon puro yakyū, sensyukai kyōu shinseido ketsuron* [JPBPA Will Conclude If They Accept the New Posting System Today], ZAKZAK (Japan) (Nov. 11, 2013), <http://www.zakzak.co.jp/sports/baseball/news/20131113/bb1131131204007-n1.htm>.

E. Nippon Professional Baseball's Transfer System and Japanese Competition Law

The historical development of competition law in Japan, as well as economics, culture, and the Japanese legal system, shape the operation and enforcement of the *Antimonopoly Act*, but are sometimes ignored in comparative analyses of the NPB transfer system.¹⁴⁰ While the general aim of the competition law system established by the Sherman Act of 1890¹⁴¹ is to promote free competition in the economy by prohibiting unreasonable restraints of trade and monopolies, competition law was introduced to the Japanese legal system during the Occupation in 1947. The *Antimonopoly Act* was part of the law reform agenda aimed at democratizing Japan and Japanese corporations,¹⁴² but during the ensuing decades of the bubble economy, Japanese consumers, businesses, and the government rarely utilised the *Antimonopoly Act*.

The dramatic bursting of the bubble economy and the resulting economic problems changed this paradigm, and the 1990s sparked a broad social and corporate legislative reform agenda that would last for nearly 20 years.¹⁴³ Part of this agenda included a shift in competition policy by the Japanese government in 1991,¹⁴⁴ resulting in greater enforcement of the *Antimonopoly Act* by the Japan Fair Trade Commission.¹⁴⁵ The general purpose of the *Antimonopoly Act* is to promote the democratic development of the economy and the interests of consumers by prohibiting private monopolization, unreasonable restraints of trade and unfair trade practices. The Act also attempts to “prevent[] excessive concentration of economic power and eliminate unreasonable restraint[s] . . . and . . . restriction[s] on business activit[y]”¹⁴⁶

Even though the Japanese courts have never been utilized to challenge the

140. Ross Appel, *Head East, Young Man (and Comparatively Older Men Who Are Likely to Languish in the Minor Leagues)*, 12 TEX. REV. ENT. & SPORTS L. 109, at 112–16 (2010); Siesta, *supra* note 78, at 1089–1091.

141. Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2012).

142. These efforts culminated in 1946 with the Japanese Constitution, NIHONKOKU KENPŌ [KENPŌ] [THE CONSTITUTION OF JAPAN] (1946), and revisions by Illinois lawyers to Japan’s corporate law, SHŌHŌ [SHŌHŌ] (Comm. C.) 1899, amended by Law No. 167, 1950 (Japan).

143. Matt Nichol, *Japanese Corporate Governance and the Market for Corporate Information Disclosure: What is the Role of Private Rights Enforcement?*, 27 AUSTL. J. CORP. L. 262, 264 (2013).

144. From 1989 to the early 1990s, the Japanese government also experienced external reform pressure from the United States government, who wanted the Antimonopoly Act enforced so that American corporations could enter Japan and help correct the trade imbalance. Mel Marquis & Tadashi Shiraiishi, *Japanese Cartel Control in Transition* 6–9 (CEU Ediciones, Working Paper No. 14, 2014).

145. General enforcement measures that are now used include cease and desist orders, fines, injunctions and awards of damages. Disputes can be heard by a panel of the Fair Trade Commission panel and can proceed to the Tōkyō High Court. See JAPAN FAIR TRADE COMMISSION, *supra* note 116.

146. Antimonopoly Act, art. 1.

legality of NPB's labor practices, players, the JBPBA, or another party could contest the legality of NPB's domestic and international transfer systems using the *Antimonopoly Act*. Article 3 of the *Antimonopoly Act* prohibits entrepreneurs from effecting private monopolization and unreasonable restraints of trade,¹⁴⁷ the functional equivalent to Section 1 of the Sherman Antitrust Act.¹⁴⁸ Japanese competition law also prohibits international agreements or contracts entered into by entrepreneurs that create an unreasonable restraint of trade.¹⁴⁹ Therefore, NPB's free agent and posting systems will be enforceable under Japanese competition law if the relevant rules contained in the 2013 NPB Basic Agreement, the Rule of Free Agency, and the 2013 Posting Agreement do not give effect to a private monopoly or an unreasonable restraint of trade.

Proving free agency and posting constitute a private monopolization under the *Antimonopoly Act* would be difficult. It can be argued that by creating international free agency and the posting system, the NPB 2013 Basic Agreement, the Rule of Free Agency, and the 2013 Posting Agreement "exclude[] or control[] the business activities of other entrepreneurs"¹⁵⁰ in relation to the employment of professional Japanese baseball players in Japan and the United States, but to breach the *Antimonopoly Act*, the restraint of competition created by these agreements must be contrary to the public interest.¹⁵¹ Herein lies the problem. The NPB and its clubs would argue that the reserve and free agent system represent standard practice in professional baseball and professional sport that protects Japan's public interest in baseball and its professional clubs by promoting competitive balance in the nation's premier professional sports league and controlling the loss of talented players to foreign leagues.

Another option under the *Antimonopoly Act* is to claim that the agreements that establish free agency and the posting systems are an unreasonable restraints of trade in that they are collusive agreements between entrepreneurs that mutually restrict their business activities in regards to the cost and availability of labor in the provision of professional baseball games.¹⁵² An unreasonable re-

147. *Id.* art. 3.

148. Sherman Antitrust Act, 15 U.S.C. § 1 (2012). This legislation formed the basis of antitrust litigation in *American League Baseball Club v. Chase*, 149 N.Y.S. 6, 16 (Sup. Ct. 1914), *Fed. Baseball Club v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922), *Toolson v. New York Yankees*, 346 U.S. 356 (1953), and *Flood v. Kuhn*, 407 U.S. 258 (1972). These cases resulted in the famous judicial exemption of MLB from antitrust laws, an exemption that was partially repealed by the Curt Flood Act of 1998, 15 U.S.C. § 27(a) (2012).

149. *Antimonopoly Act*, art. 6.

150. *Id.* art. 2(5).

151. *Id.*

152. *See id.* art. 2(6).

straint of trade must be contrary to public interest and substantially restrain competition,¹⁵³ which allows the application of the same arguments that the monopolization created by the free agent and posting systems are in the public interest. In the context of unreasonable restraints of trade, the public interest test creates a risk for the JPBPA and its members. NPB could strategically argue, or threaten to argue, that the reserve and free agent systems operate in tandem with the league's restriction on foreign players to ensure NPB retains its 'Japanese' qualities, and that Japanese players can work in Japan's premier professional sporting league. Such an argument exposes the foreign player restriction to the risk of being held invalid on the basis of unreasonably restraining the trade of foreign professional players, in turn exposing the active rosters of NPB clubs to increased levels of foreign players and fewer jobs for Japanese players.

V. THE FUTURE OF NIPPON PROFESSIONAL BASEBALL'S INTERNATIONAL PLAYER TRANSFER SYSTEM

The new posting agreement will be tested in three posting periods prior to its formal expiry on December 15, 2016. The first posting period saw the transfer of Tanaka in 2013, and greater insight into the new system will be likely obtained by the likely posting of another ace pitcher, Maeda Kenta, at the end of the 2015 season.¹⁵⁴ The JPBPA is likely to push for further reforms from late 2015, as may MLB and NPB clubs, depending on the outcome of any postings in 2015. This Article will now conclude by proposing a number of reforms that should be part of future dialogue regarding the posting system.¹⁵⁵ In addition, Part V will also analyse whether the issues raised in this Article are part of a larger regulatory issue; namely, the need for a global player transfer system in baseball.

A. *Areas of Reform for the Posting System*

The end of the term of the 2013 Posting Agreement in December 2016 will allow the expansion of potential reforms at the next round of bargaining. Major

153. *Id.*

154. Maeda, a right-handed, twenty-five-year-old starting pitcher for the Toyo Hiroshima Carp, won the Sawamura Award in 2010, equivalent to the Cy Young Award, was scouted by MLB clubs at the 2013 World Baseball Classic, and has publicly stated his intention to play in the major leagues. Dayn Perry, *Kenta Maeda: The Next Big NPB Export Now That Tanaka Has Signed?*, CBS SPORTS (Jan. 23, 2014), <http://www.cbssports.com/mlb/eye-on-baseball/24418251/kenta-maeda-the-next-big-nbp-export-now-that-tanaka-has-signed>.

155. The formal end date of the current Posting Agreement is important in light of the fact that, at this time, a new group of elite pitchers will be approaching posting eligibility, including Kikuchi Yusei, Ōtani Shohei (signed as a pitcher and outfielder), and Fujinami Shintaro.

structural changes or a new transfer framework are unlikely, but two major issues need to become part of the debate on the future of the international transfer of Japanese players. Both the 2000 and 2013 versions of the Posting Agreement have narrowly focused on the transfer of established *ichi-gun* players, who represent a small percentage of the workforce in the NPB. A major policy shift in the Posting Agreement would be to expand the posting system to include players who are unable to secure a regular position on the active roster and are career *ni-gun* players.¹⁵⁶ The cost for MLB clubs to acquire such players would be low. For NPB clubs, lower valued but loyal players with significant *ni-gun* service would be given the opportunity to extend their career in the larger labor market of the minor and major leagues.

Another area for major reform is the transfer of amateur Japanese players to MLB clubs. Even though the Japan High School Baseball Federation and the Japan Amateur Baseball Association (JABA) are directly responsible for the recruitment of amateurs by all professional clubs,¹⁵⁷ recent events demonstrate the need for a formal protocol to replace the existing informal “gentlemen’s agreement.”¹⁵⁸ The hysterical reaction in NPB by the Boston Red Sox breaching this agreement and recruiting industrial league player Tazawa Junichi in 2008¹⁵⁹ was repeated by the failed attempts of MLB clubs to recruit two of Japanese baseball’s best high school pitching prospects, Kikuchi Yusei in 2009¹⁶⁰ and Ōtani Shōei in 2012.¹⁶¹ The steady stream of problematic amateur transfers

156. Many of these players would not be prepared to take a large pay cut to play in the minor leagues, nor deal with the challenges of speaking English and a new culture. But the opportunity to play in the major leagues would appeal to a number of players with limited opportunities to play *ichi-gun*.

157. See generally JAPAN HIGH SCHOOL BASEBALL FEDERATION, KOUTO UGAKKOU YAKYUUBUIN NO PURO YAKYUUDAN TONO KANKEI NI TUITENO KITEI [REGULATION ON RELATIONSHIP BETWEEN HIGH SCHOOL BASEBALL PLAYERS AND PROFESSIONAL BASEBALL TEAMS] (1968, amended 2005); JAPAN STUDENT BASEBALL ASSOCIATION, NIHON GAKUSEI YAKYUU KENSHOU (ZENMEN KAITEI) [JAPAN STUDENT BASEBALL CHARTER] (2010).

158. The informal agreement between MLB and the NPB prevents MLB clubs from recruiting top amateur Japanese talent considered to be NPB prospects. If prospects are not selected in the NPB draft, they may sign with a MLB club. Shirō Yamaguchi & Shiori Tabuchi, *Niti? Bei? Ōtani Doko He 25 Niti Puro Yakū Dorahuto Kaigi* [Where is Ōtani Going, Japan or US? Draft Will Be Held on Oct. 25], THE ASAHI SHIMBUN (Osaka), Oct. 4, 2012, at 18. This agreement excludes players like Tazawa who requested not to be drafted after nominating for the draft. Ōtani nominated for the draft then stated he wanted to pursue a MLB career but did not state that he did not want to be drafted, and after being drafted by the Tohoku Rakuten Golden Eagles, changed his mind once again and signed with the Golden Eagles.

159. Kawai & Nichol, *supra* note 3, at 187–89.

160. Stuart Biggs, *Japan Teen’s 94-mph Fastball May Spur U.S. Migration*, BLOOMBERG (Aug. 20, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a.X6E.DD0.XI>.

161. Ryōji Yoshimura, *Hanamakihigasikou Ōtani Tousyu ‘Wakai Utikara Ikitai’ Mejya- Chousen Wo Hyoumei* [Ōtani’s Desire: I Want to Go to MLB When I Am Still Young], THE ASAHI SHIBUN

continued in 2013 when the Los Angeles Dodgers signed industrial league pitcher Numata Takumi to a minor league contract, violating the JABA's rules and procedures,¹⁶² and resulting in Numata receiving a life ban from playing in the industrial leagues. In addition, the JABA requested the NPB to contact MLB and request that major league clubs follow JABA rules in recruiting industrial league players.¹⁶³

The focus of reforms in future posting system negotiations will be on the form of current posting protocols. The calculation of transfer fees for posted players will continue to be a major issue and will be analysed in detail below. The JPBPA is likely to push the NPB to expand the right of posted players to negotiate with multiple MLB clubs, an important right for players that do not attract the attention of players like Tanaka or Darvish, and a right that is currently contingent on more than one club agreeing to pay the release fee. Another normative problem not addressed by the 2013 reforms involves posted players who attract no bids or do not agree to a contract with a MLB club. We propose that in both circumstances such players obtain the consent of their club to become a designated free agent for a restricted period, for example thirty days, during which time the player could negotiate with all MLB clubs. In the event the player does not enter a contract with a major league club, he would return to his NPB club. The release fee for these transfers would be a percentage of the value of the player's final contract in the NPB, reflecting the NPB's valuation of the player. A designated free agent system would create an incentive for clubs who agree to pay the release fee to negotiate a contract with the player, and could be complimented by penalizing such clubs if a posted player does not enter a contract. Potential penalties include prohibition from participating in future posting periods or monetary fines that could be distributed between the player, his NPB club, and MLB clubs not involved in contract negotiations. Even though the ability of multiple teams to negotiate with a posted player in effect negates the ability of a MLB club to block a Japanese player from transferring to a rival club, these reforms would allay any lingering doubts about the

(Osaka), Oct. 22, 2012, at 14; Keiko Tomishige, *Netemo Sametemo: Ayamaranakute Ii* [All the Time: You Don't Have to Apologize], MAINICHI SHIMBUN EVENING PAPER (Tōkyō), Dec. 13, 2012, at 2.

162. Prior to signing a professional contract, industrial league players must be removed from the JABA registry of players so that players do not simultaneously possess amateur and professional status. This did not occur and neither the Dodgers nor Numata obtained permission from his club, the Edion Aiko-dai Ob Blitz, to contact each other. As a registered player, Numata was required to contract exclusively with his industrial league club for a period of three years (two years for college players). JABA, TOUROKU KITEI [RULE OF REGISTRATION] (1991, amended 2009), art. 15.

163. *Numata Mondai: Genbatsu Wo Motte Saihatsu Boushi Wo Hakaru* [Numata Problem: Preventive Step Taken With Severe Punishment], NIKKAN SPORTS (Tōkyō) (Sept. 26, 2013), <http://www.nikkansports.com/baseball/news/f-bb-tp3-20130926-1195463.html>.

motivations of MLB clubs.¹⁶⁴

B. The Posting System and the Calculation of the Transfer Fee

Prior to examining methods of calculating the release fee, it is necessary to identify the factors relevant to calculating a transfer fee. Player transfers typically involve two losses that can be assigned a dollar value—the effect of the loss on the performance of the team and the cost of developing the player. Soccer’s global player transfer system¹⁶⁵ incorporates both financial costs, and the impact on the team of losing a contracted player requires the payment by the new club to the player’s previous club of a “solidarity contribution,” financial compensation that is calculated as percentage of the player’s new contract.¹⁶⁶ Soccer’s transfer system also requires a player’s new club to pay “training compensation” to the player’s previous clubs when the player signs his first professional contract and on all other professional transfers until the player is twenty-three years old.¹⁶⁷ The restriction on the payment of the training compensation reflects Nakazato and Ramseyer’s research on the repayment of development costs by NPB, and the fact that established professional players generally require a minimal amount of training compared to less experienced players. Therefore, the release fee of posted players should not include training compensation as most posted players have completed a minimum of seven years of *ichigun* service and are at least twenty-five years old.

The aim of calculating the transfer fee in the new posting system needs to be on accurately valuing the on-field loss of the player, an important consideration in light of the NPB club now setting the release fee. Over the years a number of methods to calculate the posting system’s transfer fee have been proposed. Stephen R. Rosner and William T. Conroy identified a number of these proposals, including: a flat fee paid by MLB to the NPB for Japanese players participating in the MLB draft; a per-player fee that is negotiated by the two leagues and based on the selection of Japanese players in an international draft; a uniform per player fee; and a uniform player fee with uniform fee classes

164. See Gould, *supra* note 53, at 27.

165. See generally FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION, REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS (2003) [hereinafter FIFA REGULATIONS]. See generally Stratis Camatsos, *European Sports, the Transfer System and Competition Law: Will They Ever Find a Competitive Balance?*, 12 SPORTS LAW. J. 155 (2005).

166. The amount of the transfer fee is five percent of the player’s new contract and is distributed on a pro rata basis to the player’s teams when aged between twelve and twenty-three years. See FIFA REGULATIONS, *supra* note 165, art. 1.

167. *Id.* art. 20. Training costs are based on the costs the new club would have incurred if they trained the player. *Id.* art. 4–5.

based on a player's skill and experience.¹⁶⁸ However, these proposals involve NPB clubs losing control of reserved players and lower transfer fees than produced by either of the posting systems and are unlikely to receive support from the NPB or its clubs.

Our proposal for calculating the release fee involves adapting the principle of the solidarity contribution and Rosner and Conroy's percentage transfer system¹⁶⁹ to calculate a release fee that recognizes NPB's reserve system and general labor practices. The basis of the release fee would be the Japanese player's new MLB contract and the NPB club's compensation scaled according to the number of years required by a player to qualify as an international free agent. For example, the scale could be set at 400 percent of the salary one year before qualification, 600 percent for two years, 800 percent for three years, and so on. Using the player's MLB contract and the number of years remaining until international free agency to calculate is advantageous in that it includes the perspective of the NPB and MLB club, would promote consistency in setting release fees, and intersects with NPB's concept of fair compensation. An alternative method of calculation is setting the transfer fee at fixed percentages of a contract. One option is to rank the player's final salary at his Japanese club, a system that is used to calculate compensation in NPB's domestic free agent system.¹⁷⁰ Another option is to calculate the transfer fee as a fixed percentage of the player's MLB contract, or set a scale of percentages based on salary ranges.

C. Professional Baseball's Global Labor Market

The movement of professional Japanese players to the major leagues is part of a broader global movement of baseball players, a trend driven by MLB's policy of globalisation¹⁷¹ through the international expansion of MLB's talent

168. Rosner & Conroy, *supra* note 7, at 119–127.

169. *See id.* at 125–26.

170. RULE OF FREE AGENT, *supra* note 34, art. 10. This system determines free agency compensation based on:

“A rank” players were in a team's top three players for salary and compensation is either money (80 percent of the player's last salary) or money (50 percent of player's salary) and one unprotected player.

“B rank” players were in a team's top four to ten salary earners and compensation is either money (60 percent of the player's last salary) or money (40 percent of player's salary) and one unprotected player.

“C rank” players are all other players and teams receive no compensation for these players.

171. Major League Baseball International was established to implement this policy. *See generally*

pool and revenues.¹⁷² Highlighting the globalisation of baseball's workforce is the diversity of major and minor league teams. By 2012, twenty-eight percent of major league players and forty-six percent of minor league players were born outside the United States.¹⁷³ Aiding the globalisation of the baseball workforce are MLB's initiatives, which include the establishment of the World Baseball Classic¹⁷⁴ (WBC) foreign countries hosting the MLB season opening series,¹⁷⁵ the establishment and financial support of foreign baseball academies,¹⁷⁶ formal agreements with foreign leagues to govern player transfers,¹⁷⁷ and the creation of the Australian Baseball League, a new winter league.¹⁷⁸ In addition to NPB and MLB's network of major and minor leagues, the global labor market of professional baseball players now includes professionals from the Mexican Pacific League, Dominican Winter League, Venezuelan Winter League, Korean Baseball Organisation (KBO) Chinese Professional Baseball League (Taiwan), Chinese Baseball League, Asia Winter League, and Australian Baseball League.

The recruitment activities of many players in baseball's global labor market have led to problems in the activities of clubs in foreign countries, as evidenced by the Tazawa transfer and a similar event in 2012 that saw the Baltimore Orioles banned from scouting amateurs in South Korea.¹⁷⁹ However, the race

Major League Baseball International, MLB, http://mlb.mlb.com/mlb/international/mlbi_index.jsp (last visited May 11, 2015).

172. William B. Gould IV, *Baseball and Globalization: The Game Played and Heard and Watched 'Round the World (with Apologies to Soccer and Bobby Thomson)*, 8 *IND. J. GLOBAL LEGAL STUD.* 85, 86–88 (2000); Gould, *supra* note 55, at 15; Alan Klein, *Globalizing Sport: Assessing the World Baseball Classic*, 9 *SOCCER & SOC'Y* 158, 159 (2008).

173. *Percentage of Foreign Players Rises*, ESPN, http://espn.go.com/mlb/story/_/id/7779279/percentage-foreign-major-league-baseball-players-rises (last updated Apr. 5, 2012). Players in the major and minor leagues are now recruited from countries including the Dominican Republic, Venezuela, Puerto Rico, Colombia, Cuba, Mexico, Panama, Nicaragua, Aruba, Canada, Japan, South Korea, Taiwan, Italy, Germany, Curacao, New Zealand, and Australia.

174. The World Baseball Classic Inc. is a joint venture equally owned by MLB and the MLBPA.

175. MLB has had its season opening series in Mexico, Puerto Rico, Japan, and Australia.

176. MLB operates development academies in Latin America, Australia, Italy, and China. *Major League Baseball Australia Academy*, BASEBALL AUSTRAL., <http://www.baseball.com.au/Professional/Pathways-to-Pro-Ball/MLB-Australia-Academy> (last visited May 11, 2015).

177. These agreements are with the Mexican League, Korean Professional Baseball League, NPB, and Chinese Professional Baseball League. 2012 MLB BASIC AGREEMENT, *supra* note 27, art. 46, sec. I(E)(1–2).

178. The Australian Baseball League is a joint venture; seventy-five percent is owned by MLB and twenty-five percent by the Australian Baseball Federation. Ryan P. Morrison, *What's Next for the Australian Baseball League?*, BEYOND THE BOX SCORE (Jan. 31, 2014), <http://www.beyondtheboxscore.com/2014/1/31/5358328/mlb-australia-dodgers-diamondbacks-abl>.

179. The Orioles signed high school pitching prospect Kim Seong-min prior to entering his final year of high school, violating the Korean Baseball Association's rules that prevent any professional clubs from contacting players before their final year of school. The Orioles were banned from attending all amateur high school and college games in South Korea. Seong-min was banned from playing or

among MLB clubs to find cheap international talent has seen recruitment practices in many Latin American countries push the boundaries of ethical and responsible conduct. The practices of major league clubs in the Dominican Republic have attracted much criticism and can involve the recruitment of players as young as sixteen years of age for a few thousand dollars and signing bonuses that can be grossly disproportionate to players of similar talent in the United States. In addition, money from signing bonuses is sometimes skimmed by player agents (*buscone*) and club representatives. Dominican players then enter local academies operated by MLB and its clubs and a small number are selected to play in the minor leagues. Criminal activity does occur, and there have been cases of identity theft and fraudulent paperwork proving age.¹⁸⁰ Then, there are legal, political, and ethical issues related to the defection of Cuban players.¹⁸¹

D. Governing Professional Baseball's Global Labor Market

Amid the gradual growth of baseball's global presence operates a decentred system of regulation that has contributed to the problems experienced in Latin America, Japan, South Korea, and other parts of the world. Inside this regulatory paradigm exists a fragmented global player transfer system that consists of a mix of formal and informal arrangements, agreements between professional leagues, agreements between professional clubs from different countries, and agreements between professional leagues and national baseball federations. This fragmented system is largely the result of the absence of an independent global regulator, a regulatory gap filled by a number of regulatory actors who perform narrow elements of the regulatory functions of a global regulator.

The peak international body in baseball is the International Baseball Federation (IBF), who is primarily responsible for organizing international competitions and promoting grassroots baseball, not governing the movement of players to professional clubs. Baseball's omission from the Olympics led to the recent creation in 2012 of the World Baseball Softball Confederation (WSBC), a lobby

coaching in high school or college and has not been signed by any KBO or MLB clubs. *Local Baseball Governing Body Bans Baltimore's Scouts After Controversial Signing*, YONHAP NEWS (Seoul) (Feb. 9, 2012), <http://english.yonhapnews.co.kr/culturesports/2012/02/09/93/0702000000AEN20120209006100315F.HTML>.

180. Gould, *supra* note 53, at 18–19.

181. The extraordinary risk taken by Cuban players to play major-league baseball was demonstrated by Los Angeles Dodgers' outfielder, Yasuiei Puig. It has been confirmed that Puig and three other people were smuggled out of Cuba by a Mexican drug cartel, employed by a Miami businessman, who refused to pay the agreed fee. The cartel never received their money, and they have since threatened Puig's life. The Miami businessman is also seeking money for Puig's arrival in the United States. For the full story of Puig's journey to the Dodgers, see Jesse Katz, *Escape from Cuba: Yasuiei Puig's Untold Journey to the Dodgers*, L.A. MAG. (Apr. 14, 2014), <http://www.lamag.com/features/2014/04/13/escape-from-cuba-yasuiel-puigs-untold-journey-to-the-dodgers/page/1>.

group representing baseball and softball in their effort to be reinstated to the Olympic program.¹⁸² Meanwhile, the World Baseball Classic Inc. and its steering committee operate baseball's premier international event, the World Baseball Classic or WBC, an event that every four years sees professional players from all of the world's professional leagues competing for their country. Since the first WBC in 2006, the ownership of this competition by MLB has brought to the surface many of tensions created by the absence of a global regulator and MLB's dominant presence as a global regulator. Gould identified a number of transparency issues, including host venues for qualifying rounds and finals, appointment of umpires, and pitch limit rules.¹⁸³ Many of the early governance issues emanated from NPB and KBO fears of American imperialism, and the lack of fairness and democratic representation in the management of the tournaments. These concerns were partly addressed by NPB and KBO gaining positions on the steering committees for the 2009 and 2013 tournaments.¹⁸⁴ Other issues in Japan have included revenue distribution¹⁸⁵ and the absence of Japanese major league players on Team Japan at the 2013 WBC.¹⁸⁶

E. Major League Baseball as a Global Regulator in Labor

The global regulation of baseball labor is dominated by MLB and its regulatory activities now extend beyond private agreements with other professional

182. In September 2013, the joint bid by baseball and softball was one of three finalists vying for reinstatement. But the WSBC was unsuccessful in their efforts to have baseball reinstated for the Tōkyō Olympics in 2020 and wrestling was instead reinstated. Joey Nowak, *Baseball Will Not Be Reinstated for 2020 Olympics*, MLB.COM (Sept. 8, 2013), http://mlb.mlb.com/news/article.jsp?ymd=20130908&content_id=59954638&vkey=news_mlb&c_id=mlb.

183. Gould, *supra* note 53, at 35–36.

184. After the 2006 WBC, the NPB and KBO utilized their political power to gain representation on the WBC Steering Committee for the 2009 and 2013 tournaments. See *2013 World Baseball Classic Field Expands to 28 Teams*, INT'L BASEBALL FED'N (June 1, 2011), <http://www.ibaf.org/en/news/2011/06/01/2013-world-baseball-classic-field-expands-to-28-te/7c72c2b7-5ea7-4c51-9c79-25ecc4b05123>.

185. The distribution of revenue caused issues due to Japan's significant contribution to revenues through sponsorship, gate receipts, and television rights. The NPB and JPBPA were involved in protracted disputes with MLB prior to the 2013 WBC. Associated Press, *Japan Agrees to Play in 2013 WBC*, ESPN (Sept. 4, 2012), http://espn.go.com/mlb/story/_/id/8335634/japan-commits-2013-world-baseball-classic. It was reported that for the 2013 WBC, forty-seven percent of profits were distributed among teams as prize money. The remaining fifty-three percent of profits were distributed among members of the steering committee: MLB seventeen and one-half percent, MLBPA seventeen and one-half percent, NPB seven percent, KBO five percent, and the IBAF five percent. FURŪCHI YOSHIKI, MAJOR LEAGUE NO WBC SEKAI SENRYAKU [MAJOR LEAGUE'S WBC WORLD STRATEGY] 34 (2009).

186. Transparency and a fair, level playing field at the WBC is influenced by MLB clubs, who determine the availability of a nation's major and minor league players, a practice that is in contrast to soccer's system of national representation. See FIFA REGULATIONS, *supra* note 165, art. 1.

leagues to encompass the recruitment of international amateurs.¹⁸⁷ The 2012 Basic Agreement required the establishment of the International Talent Committee (ITC) to explore the introduction of an international amateur draft, and in the interim, implemented a taxation system for recruiting international amateurs.¹⁸⁸ Established in December 2011, the primary objective of the ITC is to examine the acquisition and development of international players by proposing rules for regulating the recruitment of international professional players and how to implement an international amateur draft.¹⁸⁹ Reflective of many of the issues discussed above, matters to be investigated by the ITC include the appropriate minimum age for international amateurs signing professional contracts, the inclusion of international amateurs in international draft or the MLB amateur draft, safeguards for signing bonuses paid to international amateurs, representation of international amateurs, the effect of local law in countries where international players are recruited and whether protocols with professional leagues like the Mexican League and NPB require amendments to facilitate an international draft.¹⁹⁰

The emphasis of the current MLB Basic Agreement on an international amateur draft and a taxation system are evidence of the direction MLB intends to steer the regulation of baseball's global labor market. Resistance by MLB clubs to an international draft saw the failure to meet the deadline required to commence the international draft,¹⁹¹ an outcome connected to the investment by clubs in in foreign academies¹⁹² and the strategic advantages created for clubs with sophisticated international scouting systems. Even though the international draft was delayed until the next collective bargaining period, another model of regulation began in July 2013 when MLB formally commenced regulating the recruitment of international amateurs through its signing bonus-taxation system. The new system created three new regulatory mechanisms. First, there is now an international signing period from July 2nd to June 15th of the following year.¹⁹³ Second, MLB clubs are allocated a signing bonus pool for

187. International players are residents of any country or territory, other than the United States, Canada, and Puerto Rico. 2012 MLB BASIC AGREEMENT, *supra* note 27, att. 46, sec. II(E)(1).

188. 2012 MLB BASIC AGREEMENT, *supra* note 27, att. 46, sec. I–II. The failure to implement an international draft by 2014 resulted in the introduction of the taxation system and was described by Gould as a type of “poison pill.” Gould, *supra* note 53, at 19.

189. 2012 MLB BASIC AGREEMENT, *supra* note 78, att. 46, sec. I(A).

190. *Id.* att. 46(I)(D).

191. *Id.* art. 46, sec. II(E). In May 2013, MLB announced that an international draft would not be introduced in 2014, as no agreement with the MLBPA had been reached. Jay Jaffe, *No International Draft for 2014, or Anytime Soon*, SPORTS ILLUSTRATED (May 31, 2013), <http://mlb.si.com/2013/05/31/mlb-international-draft-2014/>.

192. Gould, *supra* note 53, at 30.

193. 2012 MLB BASIC AGREEMENT, *supra* note 27, art. 46, sec. II(B).

each signing period.¹⁹⁴ Third, teams that exceed their allocated pool are taxed on the amount they exceed their pool and also face future restrictions on the value of signing bonuses for international players.¹⁹⁵

F. Is There a Need for a Global Player Transfer System in Baseball?

The gradual movement of baseball to a global sport has created a burgeoning global market for baseball labor of amateur recruits and professional players. Transfers from the NPB to MLB over the past two decades highlight the difficulties encountered by professional leagues administering privately negotiated transfer rules. Even greater challenges exist in the regulation of recruiting amateur players in regions like Latin America. Currently, the dual regulatory systems for amateur and professional players represent an embryonic model of regulation, devoid of a clear and transparent set of rules, and an independent regulator, two essential requirements for the operation of an effective global system. The growth in the number of people seeking work as professional players will continue to grow in response to the global promotion and development of baseball. A global framework of transfer rules and procedures is needed to support a global labor market.

The starting point for creating a basic global player transfer system is setting clear time periods for the recruitment and release of players in professional leagues. Such a system would allow players time to seek work in the same league, or in a foreign league, and could incorporate a notice system to make foreign leagues aware of released players. The details of players released during a season could also be included in a notice system. Another regulatory mechanism required in a global labor market is a formal dispute resolution mechanism, particularly important for players at risk of unscrupulous practices by agents and clubs, and disputes arising from players transferring between leagues. A global transfer framework could also set out the availability of professional players for national representation. These proposals are moderate and would not lead to the substantial reduction in power by MLB or the NPB, but would allow the smoother international transfer of players and establish a foundation to introduce a global system of rules and procedures. However, the problems associated to MLB's ownership of the WBC highlights the need for transparency and fairness in the world of global baseball. The absence of an independent regulator will continue to inhibit the birth of a global player transfer system.

194. The base signing pool for the 2012–2013 signing period was \$2.9 million but subsequent signing periods are based on the reverse order of winning percentage from the previous season and calculated by assigning four bonus values to each club and adding \$400,000 to the aggregate sum. *Id.* art. 46, sec. II(A).

195. *Id.* art. 46, sec. II(C).

VI. CONCLUSION

The one certainty of the future transfer of Japanese players from the NPB to MLB is that the Japanese professional system will continue to produce elite young pitchers who create a recruiting frenzy among MLB clubs, a frenzy fuelled by the search for the next Darvish or Tanaka. The new posting system will face its next test with the pending posting of Maeda, an important transfer, that in addition to the posting of Tanaka, will shape negotiations between the JPBPA, the NPB, and MLB in the lead up to the expiry of the current Posting Agreement in December 2016. The pending negotiations need to see the reform agenda expand to include problems caused by normative practice, and the ability of the posting system to create career opportunities for all players, not just a small percentage of elite players. The Posting Agreement should not be viewed as part of a bilateral relationship between two wealthy professional leagues, but as part of a global labor system that requires regulation by a global regulatory system.