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Baseball and Globalization: The Game Played and Heard and Watched ’Round the World (With Apologies to Soccer and Bobby Thomson*)

WILLIAM B. GOULD IV**

INTRODUCTION: BASEBALL AS A GLOBAL GAME

The twenty-first century will witness an acceleration in the globalization of America’s pastime and an extended reach of baseball beyond North American shores to foreign fans and players. Not only has the game long been played and appreciated in the Caribbean, particularly in Cuba (which defeated the United States in the 1996 Olympics, split a two-game set with the Baltimore Orioles in 1999, and lost to the United States in 2000), but it has also been played in Venezuela, Mexico, and Japan. Now baseball has taken root in Korea and Australia and even in such unlikely places as Italy. It no longer is fanciful to speak of the possibility of a true World Series—one not simply between teams in the United States and Canada, or even between North

* The reference is to Bobby Thomson’s pennant winning home run or “shot heard round the world” in the third and deciding playoff game between the victorious New York Giants and the Brooklyn Dodgers in 1951.


The author wishes to thank Paul Edenfield, Stanford Law School 2002, for valuable research assistance rendered.


3. See Frederick C. Klein, On the Game: The Italians’ Spicy Brand of Baseball, WALL ST. J., Sept. 21, 2000, at A8. Less improbable countries are involved. See Henri E. Cauvin, Baseball Gets Serious in a New South Africa, N.Y. TIMES, June 27, 2000 at A25, A28, where it may be assumed that baseball was passed on through the U.S. military in World War II.
America and Japan—but a true global tournament, like the World Cup, played every four years.

The globalization of baseball is now evident on the playing fields in the United States. Players continue to hail from the traditional areas of recruitment, such as the Dominican Republic, Puerto Rico, Venezuela, and Cuba; but many players from Mexico, Australia, Japan, and Korea also play Major League Baseball (MLB). Even such countries as Spain, Belgium, the Philippines, Singapore, Vietnam, Great Britain, Brazil, Nicaragua, and the Virgin Islands have placed players in MLB. The Boston Red Sox have been recruiting enough Korean pitchers to prompt a journalist to speak of a Korean Pipeline. A perceived dearth of qualified players in North America, an


5. See Murray Chass, *Scouts Search Globe for Talent*, N.Y. TIMES, Apr. 8, 1998, at C3. Professor Andrew Zimbalist has noted the talent compression fueled by Jackie Robinson in 1947, the black and Latin players who came in his wake, and the reversal of that phenomenon through "decompression" of talent that has facilitated an environment in which:

today McGwires, Sosas, Rodriguezs, Martinezs and Wells can more easily excel. Equally important, when the better players can more reliably out perform the others, it becomes easier to buy a winning team. It is one thing for the Yankees to generate $176 million in local revenue while the Expos generate $12 million. If Steinbrenner/Cashman spend their budget on under-performing, over-priced players, then the Yankees will squander their revenue advantage. Yet, the more individual players consistently stand out, the more difficult it is for inept management to squander a revenue advantage.

attempt to diminish escalating draft and free agency salary expenses through Latin American player recruitment, Japanese free-agency, the demise of the Cold War with its impact upon both Cuba’s defectors and the relaxation of conscription in Korea, and the scramble abroad for new consumer markets and recruits have accelerated the globalization of baseball. In 2000, the number of foreign-born players on MLB rosters was 312 (forty-four of whom were counted by MLB as foreign-born, even though they were born in Puerto Rico), constituting 26 percent of all players.

This process began in 1953 with the first east-to-west franchise relocations and the arrival of Henry Aaron in Milwaukee with the Braves, a club that had moved from Boston the previous winter. The more celebrated and excoriated movements of the New York Giants and the Brooklyn Dodgers to San Francisco and Los Angeles, respectively, set the stage for the expansion of baseball franchises that occurred in the 1960s. This expansion, along with the simultaneous growth in the popularity of other sports, has made competent

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7. James C. McKinley, Jr., Cuban Players Defect, but Often With a Cost, N.Y. TIMES, April 25, 1999, § 1, at 3; Cf Murray Chass, Cubans Freed From Pact After Dodgers Break Rule, N.Y. TIMES, June 29, 1999, at C30.
8. Indeed, the Korean players have attempted—apparently without success—to establish their own union in Korea. Thomas St. John, Korean Players Start Union, Lose Their Jobs, BASEBALL AMERICA, Feb. 21-Mar. 5, 2000, at 5.
9. See ZIMBALIST TESTIMONY supra note 5, at 7, which takes note of:
the emergence of new franchise owners who also own international communications networks or are attempting to build regional sports channels. These owners value their ballplayers not only by the value they produce on the field, but that they produce for their networks. When Rupert Murdock signed 33-year-old Kevin Brown to a seven-year deal worth an average $15 million annually, he was thinking about the News Corp's emerging influence via satellite television in the huge Asian market.
baseball personnel more difficult to find. The salary escalation caused by free
agency and salary arbitration in the last quarter of the twentieth century led
MLB team owners to search for new revenue sources, particularly from
television broadcasting rights in the United States and other countries where
large numbers of foreign athletes are recruited by MLB:

For nearly a decade now, baseball’s central office has been
trying to build overseas markets by promoting foreign-born
major leaguers to their home countries. The result has been
an intense but narrow interest in American baseball in the 19
countries with players currently on big-league rosters. . . .
In Japan, for example, TV carried every single Cardinals and
Cubs game during the last two months of the season—while
continuing to show all games pitched by Hideki Irabu of the
Yankees, Hideo Nomo of the Mets, and other Japanese
hurlers. Dentsu Inc., MLB’s main broadcast licensee in
Japan, is betting that all that game coverage whetted the
national appetite for American baseball. In mid-October
[1998], Dentsu signed a five-year contract extension with
MLB under which the annual rights fee it pays will double.13

In addition to international television broadcasts of MLB, baseball
interactions between the United States and other countries have become more
frequent and prominent. In 1999, the Baltimore Orioles split a two-game set
with the Cuban national team—with the Baltimore victory in Havana coming
in a very close game that could have gone either way.14 Subsequently, Peter
Angelos, the Baltimore Orioles owner who spearheaded the contact between
Cuba and the Orioles, announced his intention to bring baseball to Greece.15

James C. McKinley, Jr., with Mireya Navarro, Fans in Cuba Walking Tall Despite Loss, N.Y. TIMES, Mar.
29, 1999, at A1; Murray Chass, Cubans Match Big Leaguers Pitch for Pitch, But Lose in 11, N.Y. TIMES,
Mar. 29, 1999, at D1; Mireya Navarro, Old Enmities Puncture Baseball Détente in Cuba, N.Y. TIMES, Mar.
28, 1999, § 1 at 6; Tim Wendel, A Chance for Cubans to See Major Leaguers, N.Y. TIMES, Mar. 14, 1999,
§ 8, at 2; Tina Rosenberg, Beating the Yanquis at Their Game: How the Politics of Beisbol Serve the
Revolution, N.Y. TIMES, Jan. 11, 1999, at A1. For discussion of Cuban defectors to the U.S., see Murray
Chass, Cuban Players Scorn Those Who Defected, N.Y. TIMES, Mar. 29, 1999, at D5; James C. McKinley,
Jr., Cuban Players Defect, but Often With a Cost, supra note 7.
15. See Angelos Trying to Bring Baseball to Greece, N.Y. TIMES, Sept. 8, 1999, at A27; Theodora
An opening day game in 1999 was played in Monterrey, Mexico, where baseball has long flourished. The globalization of baseball continued in 2000, when the Chicago Cubs and the New York Mets opened the MLB season in Tokyo, and the United States triumphed over perennially talented Cuba in the Sydney Olympics.

The globalization of MLB has created complexity and diversity that present numerous issues. In this Article, I will discuss how labor-management relations in MLB has created U.S. antitrust and labor law controversies that are inseparable from the domestic and global growth of MLB. The expanding search overseas for more MLB revenues and players will continue to raise U.S. antitrust and labor law issues. The outcomes of these cases will grow increasingly important to a national pastime now played and watched around the world.

I. THE MLB ANTITRUST EXEMPTION AND THE ROAD TO THE CURT FLOOD CASE: FROM FEDERAL BASEBALL TO TOOLSON

Any analysis of the globalization of baseball must include the free agency challenge of Curt Flood, the legendary center-fielder for the St. Louis Cardinals. I followed the hard fought World Series of 1967 and 1968. I watched the former because my team, the Boston Red Sox, played the Cardinals. I watched the latter because I resided in Detroit, where the hometown Tigers were able to do what the Red Sox could not—triumph over...
the Cardinals in the seventh game. Flood, because of injuries that affected his throwing arm, threw underhand to the infield in the 1968 Series. This unique method exemplified Flood's tenacity to persevere when the odds were against him. The baseball world will not soon forget his determination.

A. The Federal Baseball Case

The Curt Flood story began four decades before the 1967 and 1968 World Series with a 1922 opinion written by U.S. Supreme Court Justice Oliver Wendell Holmes in Federal Baseball Club of Baltimore, Inc. v. National League of Prof'l Baseball Clubs.¹⁹ The issue in Federal Baseball was whether the business of baseball was interstate commerce that fell under the Sherman Antitrust Act of 1890 (Sherman Act) and its treble damages remedy.²⁰ The Sherman Act prohibits conspiracies in restraint of trade, boycotts, monopolies, and other anti-competitive practices.

Noting that it was common knowledge that baseball was the preeminent American sport, Justice Holmes said, "The business is giving exhibitions of base ball, which are purely state affairs."²¹ The Court then concluded that the inducement of free persons to cross state lines and the payment to them for services rendered were "not enough to change the character of the business."²² Justice Holmes stated: "That to which it is incident, the exhibition [of baseball], although made for money would not be called trade or commerce in the commonly accepted use of those words. As it is put by defendant, personal effort, not related to production, is a not a subject of commerce."²³ The holding in Federal Baseball meant that the MLB business organization and player contracts restricting player mobility were exempt from U.S. antitrust law. MLB players could not, therefore, attack the reserve clause through antitrust law.²⁴

²¹ Federal Baseball, 259 U.S. at 208.
²² Id. at 209.
²³ Id.
B. The Gardella Case

Federal Baseball was not challenged until after World War II, when several players left MLB to play professional baseball in Mexico. Among these players were the Cardinal ace Max Lanier (the father of Hal Lanier who managed Houston), and others such as Micky Owen (who dropped the third strike for the Dodgers in the 1941 World Series when Tommy Henrich was at bat), Sal "the Barber" Maglie (the hard-throwing master of the brush-back pitch), and New York Giants utility outfielder, the light-hitting Danny Gardella. These players were barred from playing in MLB when they returned from Mexico; Gardella went to court to challenge the precedent of Federal Baseball.

Judge Chase, for the U.S. Second Circuit Court of Appeals, was of the view that Federal Baseball had not been overruled expressly or implicitly by the Supreme Court. Accordingly, because "the sale of these radio and television broadcast rights [do not differ] in some material way from the sale of the exclusive right to send 'play-by-play' descriptions of the games interstate over telegraph wires [which was an issue in Federal Baseball]," the Supreme Court's decision in Federal Baseball remained the controlling precedent. In Gardella v. Chandler, Judge Chase favored the baseball exemption from U.S. antitrust law, even with respect to MLB media broadcasts. As Judge Chase stated:

In each instance by what is called the sale of rights the appellees made it possible for others to transmit information interstate. The playing of baseball games then created the subject matter concerning which information was sent by symbols carried by telegraph wires and translated into words just as such play now creates the subject matter concerning which information is sent through the air by impulses which are transformed either into words or pictures. So far as I can perceive, the difference in the method of transmission is without significance. These appellees do not themselves broadcast anything, nor do they do anything more by way of

25. 172 F.2d 402 (2d Cir. 1949).
production of what is broadcast than was shown to have been done in the former case to "produce" what was described. Since the sellers of the rights to broadcast through the air do only what the sellers of the rights to send descriptions over telegraph wires did in the former case I can find no sound basis on the case for distinguishing that case from this. It seems to me to have decided the precise question here presented and that it controls our decision.26

Judges Hand and Frank were, however, of a different opinion. Judge Hand, noting his skepticism about any implied overruling of Federal Baseball, nonetheless voted to remand the case to the trial court because the complaint averred "enough to present an issue upon a trial."27 Judge Hand explained:

When the case goes back to trial—assuming that it does so upon our opinions—it will be necessary, as I view it, to determine whether all the interstate activities of the defendants—those which were thought insufficient before, in conjunction with broadcasting and television—together form a large enough part of the business to impress upon it an interstate character.... [Antitrust laws].... certainly forbid all restraints of trade which were unlawful at common-law, and one of the oldest and best established of these is a contract which unreasonably forbids any one to practice his calling. I do not think that at this stage of the action we should pass upon the 'reserve clause'; and therefore I do not join in my brother Frank's present disposition of it, although I do not mean that I dissent from him.28

In a more ambitious and far-reaching opinion, Judge Frank questioned the underpinnings of Federal Baseball, noting that no one "can treat as frivolous the argument that the Supreme Court's recent decisions have completely destroyed [its] vitality."29 Calling the decision an "impotent zombie," Judge

26. Id.
27. Id. at 408.
28. Id.
29. Id. Illustrative of this case law was the Court's holding defining commerce in NLRB v. Jones and Laughlin, 301 U.S. 1 (1937). The NLRB itself was to follow suit in American League of Prof'l Baseball
Frank stated that the MLB monopoly, which affected "ball-players like the plaintiff," possessed characteristics shockingly repugnant to the moral principles that, at least since the War Between the States, have been basic in America, as shown by the Thirteenth Amendment to the Constitution condemning ‘involuntary servitude,’ and by subsequent congressional enactments on that subject. For the ‘reserve clause[...]' results in something resembling peonage of the baseball player.30

Noting that only the Supreme Court could reverse Federal Baseball, Judge Frank nonetheless found it easily distinguishable from the Gardella case. The principal difference was the use of radio and television as opposed to telegraph, which provided:

mere accounts of the games as told by others, while here [in Gardella] we have the very substantially different fact of instant and direct interstate transmission, via television, of the games as they are being played, so that audiences in other states have the experience of being virtually present at these games.31

Finally, Judge Frank discounted the claim by organized baseball that it would be unable to exist without the reserve clause. He concluded that no court could predict the accuracy of such a claim and that illegality could not be condoned. Judge Frank said: "[N]o court should strive ingeniously to legalize a private (even if benevolent) dictatorship."32

In the wake of the Gardella remand, baseball settled the matter quickly; those who had been banned because of their Mexican League transgressions

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30. Gardella, 172 F.2d at 409.
31. Id. at 412.
32. Id. at 415.
were immediately returned to the game in the summer of 1949. It was thought that the handwriting was on the wall and that the reserve clause could not withstand an antitrust challenge. That was why MLB settled the case and allowed the players to return.

C. The Toolson Case

Only four years after Gardella, the Supreme Court's surprising per curiam opinion in Toolson v. New York Yankees reaffirmed Federal Baseball. Toolson, a minor league player in the Yankee farm system, refused to accept reassignment from Newark in AAA to Binghamton in A ball. The Yankees put Toolson on the ineligible list, and he complained in his litigation that he was thus barred from playing professional baseball. The Supreme Court stated that Congress had left the Federal Baseball precedent undisturbed and had allowed the business to develop for thirty years outside antitrust legislation. Without any "re-examination of the underlying issues," a seven-member majority of the Court threw the ball back to Congress by noting that any "evils" should be addressed through legislation.

The Supreme Court compounded its folly by restricting Federal Baseball and Toolson to baseball and not extending their principles to other forms of entertainment like boxing, the theater, or professional football, which, said the Supreme Court, possessed a "volume of interstate business involved [which] places it within the provisions of the [Sherman Antitrust Act]." Justice Frankfurter, dissenting, said, "I have yet to hear of any consideration that led this Court to hold that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws that is not equally applicable to football." Justice Harlan, in a separate dissenting opinion, concurred with Justice Brennan by rejecting the view that professional baseball was sui generis and stated that the

34. Id. at 363-64.
35. Justice Burton wrote a dissenting opinion challenging Federal Baseball, in which Justice Reed concurred. Id. at 357.
37. Id. at 452.
38. Id. at 455 (citation omitted).
Court had made "untenable distinctions between baseball and other professional sports." 39

II. The Curt Flood Case and Its Aftermath

A. The Curt Flood Case

*Federal Baseball*, *Gardella*, and *Toolson* set the stage for the case brought by St. Louis center-fielder Curt Flood. The year following the two memorable World Series of 1967 and 1968, Flood was traded to the Philadelphia Phillies; he refused to accept the transaction. Flood made a request for free agency, which the Commissioner of MLB denied. Flood then challenged the reserve clause in federal court, and the case ended up before the U.S. Supreme Court in 1972. In a controversial opinion thought to have trivialized the issue, Justice Blackmun provided a list of almost ninety names of memorable players and quoted "Casey at the Bat" and "Tinker to Evers to Chance" in a footnote. Noting that *Federal Baseball* and now *Toolson* were an "anomaly" and "aberration," Justice Blackmun stated that the Court would not reverse those decisions when Congress by its "positive inaction" had refused to do so itself. The remedy, said the Court, was congressional and not judicial. 40

Significantly, Justice Blackmun stated that the Supreme Court's conclusion made it unnecessary to reach the "additional" argument "that the reserve system is a mandatory subject of collective bargaining and that federal labor policy therefor exempts the reserve system from the operation of federal antitrust laws." 41 The focus upon the labor issue and the so-called nonstatutory labor exemption to the antitrust laws that emerged in this past century 42 are the true legacy of the *Flood* litigation and will remain with us so long as there is

39. *Id.* at 456.
41. *Id.* at 285.
collective bargaining in baseball.

The most influential opinion in *Flood* turns out to have been the dissenting opinion written by Justice Marshall in which Justice Brennan joined. Justice Marshall's opinion stated that reversal of *Federal Baseball* and *Toolson*, which he advocated, would not mean that Curt Flood would prevail. "Lurking in the background is a hurdle of recent vintage" that the ex-Cardinal outfielder would still have to overcome, said Justice Marshall. This was the advent of the Major League Baseball Players Association (MLBPA), formed in 1966 as the collective bargaining representative for Major League players. It was also the advent of the collective bargaining agreements negotiated by the MLBPA with MLB team owners. The Marshall opinion stated that there was a "surface appeal" to the argument that the *Flood* remedy was to be found in filing a charge with the National Labor Relations Board. But, Justice Marshall noted, "this argument is premised on the notion that management and labor have agreed to accept the reserve clause," an idea which was at variance with the record in *Flood*.43

Flood himself had maintained that the MLBPA was newly formed and did not have "time to modify or eradicate" the reserve clause system that was "thrust upon the players."44 Accordingly, Justice Marshall would have remanded the case so that the federal district court could examine the labor exemption implications that might arise from the collective bargaining agreement and thus the question of whether the MLB owners' reliance upon the reserve clause rendered their conduct immune from antitrust law. Thus, the *Flood* holding, notwithstanding the fact that it represented yet another defeat for baseball players who sought modification or elimination of the reserve clause, had enormous implications for labor-management relations in MLB. These implications became clear in connection with the activities of the MLBPA itself and its collective bargaining posture after *Flood*.

**B. The Aftermath of Flood**

In 1973, the MLBPA negotiated new clauses in the collective bargaining agreement that solved some of the important problems caused by the reserve clause, which included the players' inability to have genuine contract negotiations. The MLB team owners felt compelled to bargain seriously and

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43. 407 U.S. at 295.
44. Id.
ultimately agreed on such issues because they had maintained in *Flood* that collective bargaining, not antitrust, was the remedy for problems created by the reserve clause. Thus, in the first place, the new collective bargaining agreement provided for a system of salary arbitration through which a third-party neutral arbitrator would resolve differences between the players and owners about new salaries, and would select the "final offer" of one of the parties. In the public sector, where strikes by organized labor were not tolerated, this kind of final offer arbitration had grown in popularity because it was seen as a substitute for collective action prohibited by law. Because the arbitrator could not compromise and was required to select one party's final offer, the parties were not encouraged to be rigid in their position in the hope that the arbitrator would be more likely to compromise in their direction if their position remained unmodified. Quite the contrary was true. Because the arbitrator was required to select one party's position, the parties were encouraged to act in a moderate and responsible manner so that the arbitrator would be more likely to select their position. This tendency brought the parties together and made it possible for them to resolve their differences voluntarily more often than not without outside assistance. Salary arbitration became an important feature of the collective bargaining agreement because of *Flood* and has remained so for more than a quarter century.45

Another new provision in the 1973 collective bargaining agreement also resulted from *Flood*. This provision was the so-called "ten and five" rule, which has remained a part of the collective bargaining agreement since 1973. Flood played for the Cardinals for more than a decade, but the Cardinals traded him to the Philadelphia Phillies over his objection. This triggered Flood's antitrust litigation against the reserve clause. After *Flood*, the 1973 collective bargaining agreement provided that players who had ten years of service or seniority in MLB and five years with a particular club could not be traded without their consent.46 The so-called "ten and five" rule allowed Ron Santo, the third baseman for the Chicago Cubs, to veto a trade to the California


46. "The contract of a player with ten or more years of Major League service, the last five of which have been with one Club, shall not be assignable to another Major League Club without the Player's written consent." Article XIX, Basic Agreement between The American League of Professional Baseball Clubs and The National League of Professional Baseball Clubs and Major League Baseball Players Association 1997-2000, Jan. 1, 1997 [hereinafter 1997 BASIC AGREEMENT] (on file with author).
Santo, acknowledging that Flood had paved the way for him, was able to enter into a two-year contract with the Chicago White Sox with a considerable salary boost. Other players agreed to trades with salary increases. The provision, which would have allowed Curt Flood himself to reject a trade to the Philadelphia Phillies, has been an important part of the collective bargaining agreement for more than a quarter century.

Flood, however, had another, more formidable consequence. The players, through pitchers Andy Messersmith of the Los Angeles Dodgers and Dave McNally of the Montreal Expos, launched a more ambitious attack. They targeted the MLB team owners' assertion that players were bound to one club for life through the reserve clause system litigated in Toolson and Flood. The MLBPA convinced arbitrator Peter Seitz in 1975 that once a player completed his option year subsequent to his specified term of years in his employment contract, the player was a free agent and could bargain with other teams. Seitz's award was confirmed by the Eighth Circuit Court of Appeals. Suddenly the reserve clause was a nullity, and baseball was confronted with a new dimension in labor-management relations.

In 1976, a collective bargaining agreement was negotiated that permitted free agency after six years. During a series of strikes and lockouts in 1981, 1985, 1990, and 1994-1995, the owners unsuccessfully sought to reverse or minimize the effect of free agency contract provisions. There has been no turning back. In 1981 and 1995, the National Labor Relations Board (NLRB) intervened in two of the bigger disputes, the second of which occurred during my chairmanship of the NLRB.

In 1981, Judge Werker rejected the NLRB's argument that the owners had claimed an inability to pay and had refused to provide relevant financial data to the MLBPA under a statutory duty to bargain. The NLRB, which sought an injunction under § 10(j) of the National Labor Relations Act (NLRA),

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

The Board shall have power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.
could not compel MLB to provide the MLBPA with financial records that would show why the owners were unable to pay under the existing free agent system. The federal district court characterized the MLBPA's request as a bargaining tactic rather than as a good faith inquiry about the basis for the owners' position, concluding that the resolution of the compensation dispute was best left to negotiations. Though the court advocated that the parties "play ball," the strike persisted for more than fifty days in the summer of 1981.

In Spring 1995, the NLRB obtained an injunction under § 10(j) of the NLRA against a unilateral change prior to impasse by MLB team owners to free agency and salary arbitration provisions in the collective bargaining agreement. The injunction persuaded the players to return to the field and the owners to accept them, and it led to the negotiation of a comprehensive collective bargaining agreement that provided for continued free agency and salary arbitration. In a relatively unnoticed provision of the agreement, the owners promised to lobby Congress to change the applicability of U.S. antitrust law and partially reverse Flood.

III. THE CURT FLOOD ACT

A. The Partial Reversal of Flood by Brown and the Curt Flood Act

The new collective bargaining agreement was negotiated in November 1996, and the legislation the MLB owners promised to promote in that agreement was enacted in the Curt Flood Act of 1998. The willingness of the

53. Article XXVIII, 1997 Basic Agreement, supra note 41:

The Clubs and the Association will jointly request and cooperate in lobbying the Congress to pass a law that will clarify that Major League Baseball Players are covered under the same antitrust laws (i.e., that Major League Baseball Players will have the same rights under the antitrust laws as do other professional athletes, e.g., football and basketball players), along with a provision that makes it clear that the passage of that bill does not change the application of antitrust laws in any other context or with respect to any other person or entity. If such a law is not enacted by December 31, 1998 (the end of the next Congress), then this Agreement shall terminate on December 31, 2000 (unless the Association exercises its option to extend this Agreement as set forth in Article XXVII).

owners to support the players and this legislation must be understood in light of Brown v. Pro Football and the U.S. Supreme Court’s analysis of the labor exemption that was not considered by a majority of the Court in Flood.

Brown had emerged from the entirely different scenario of antitrust law and the labor exemptions that evolved from football, basketball, hockey, and boxing. The National Football League Players Association (NFLPA) attacked the so-called Rozelle Rule, which was nearly as rigid as the old baseball reserve clause even though the rule provided some flexibility in awarding free agency to players by compensating the team that lost them. When the NFL team owners were confronted with an antitrust attack against the Rozelle Rule, they claimed that collective bargaining had incorporated the rule, thus immunizing the rule from antitrust suits. The NFL team owners’ argument appeared to be inspired by Justice Marshall’s analysis of the labor exemption in Flood which viewed the issue as an open one, even where the parties had not fashioned a bargain, in the traditional sense of the word, relating to player mobility through the collective negotiation process.

But the Eighth Circuit Court of Appeals, in the first of a series of rulings that affected all major sports except baseball, held that the mere reference to the free agent process in a negotiated collective bargaining agreement was not sufficient to satisfy the labor exemption and thus provide immunity. The Court of Appeals said that three considerations constituted a prerequisite for triggering the exemption and the antitrust immunity that flowed from it: (1) that the parties address a mandatory subject of bargaining, (2) that the bargaining be bona fide and at arm’s length, and (3) that the subject matter be incorporated into the collective bargaining agreement. This approach to the labor exemption provided the players with an antitrust wedge to obtain effective recognition, status, and a collective bargaining agreement that addressed the free agency system.

Two immediate problems presented themselves, however. First, the players viewed the football agreement as having squandered the benefits of the

57. See Mackey, 543 F.2d at 606.
labor exemption. Second, some owners were profoundly dissatisfied with what they had negotiated. For example, basketball owners in the 1980s pressed their players to make changes that would rescue the National Basketball Association (NBA) from its beleaguered financial state. All this led people to wonder what would happen to the labor exemption when the parties attempted to resolve their differences over free agency a second time. More precisely, when would the labor exemption terminate if the bargaining process was long and difficult and failed to produce an agreement which resolved the parties' differences?

The players argued that the exemption was only available when the collective bargaining agreement was in effect and that once the agreement expired, antitrust law came into effect. This would give the players a great advantage. In a 1981 law review article co-authored by Professor Robert Berry and myself, we wrote that the players' approach was inconsistent with federal labor policy, which provided for open, autonomous bargaining without government intervention on behalf of the weaker party or the party that needed the most concessions. The federal courts eventually agreed with this view. But the next question was when, if at all, the labor exemption would terminate subsequent to expiration of the collective bargaining agreement. I say "if at all" because the owners maintained that under a labor law system, the players could not have it both ways. That is to say, if organized, the players could use the economic pressure available to them under the NLRA. According to the owners, antitrust law was properly invoked only if the players were nonunion, in which case the labor exemption providing for immunity would not be available to employers.

The difficulty with the owners' position from the players' perspective was that the right to strike under the NLRA was an unappealing option, particularly in light of an employer's right to use permanent replacements, and temporary


replacements, even during a lockout. Each passing year has more clearly exposed the inadequacy of labor law remedies in sports disputes between labor and management. Also, even if one assumes that baseball players are not as easily replaced as their football brethren in either a strike or lockout, baseball owners appear to have seriously planned temporary replacements in Spring 1995 no matter how hideous that result would have been for the game and society.

Yet, the puzzle here is where to fashion the appropriate accommodation in the interplay between labor and antitrust law if the expiration of the collective bargaining agreement was not the appropriate demarcation line. Both are properly involved. This is the conundrum for baseball now that Flood has been partially reversed and Brown v. Pro Football, holding that labor law generally trumps antitrust law, is in its place by virtue of the Curt Flood Act of 1998.63

Some of the early cases suggested that a union would have to cease its existence or be the victim of either defunctness or decertification for antitrust to be applicable. The difficulty with this approach was that it invited game-playing by the players, which was in fact what happened a number of times in football and threatened in basketball. The NFLPA, for instance, temporarily ceased to exist and emerged only after its antitrust actions were settled. Indeed, the NFL team owners insisted that the union reemerge, otherwise they could not have the labor exemption and consequent immunity from antitrust.65

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65. Ironically, the NFL has agreed not to challenge this tactic in the next set of negotiations. The parties agreed that players are not to file antitrust actions until impasse or six months after the contract expiration date, whichever is later.

The parties agree that, after the expiration of the express term of this Agreement, in the event that at that time or any time thereafter a majority of players indicate that they wish to end the collective bargaining status of the NFLPA on or after expiration of this Agreement, the NFL and its Clubs and their respective heirs, executors,
In one of the great ironies of modern labor law, owners of arena football teams first threatened to close the league if the players persisted with their antitrust action, then suggested that the league could reopen only in the event that the players would join a union. This situation was the antithesis of the normal labor law scenario where employers threaten workers with job losses or plant closings in the event that the workers form a union.

Meanwhile, some thought, as did Judge Wald in her articulate and well-reasoned dissenting opinion in Brown, that an impasse in collective bargaining was the demarcation line. That is to say, if the parties have bargained to impasse, then the labor exemption is not available because they have exhausted the collective bargaining process. But employers, who are normally accused by unions of maneuvering towards impasse so that they can institute their own conditions of employment as they are allowed to do under federal labor law, maintained that this would simply encourage unions to maneuver for impasse so they could sue under antitrust law. Moreover, the owners argued, the ability to sue upon impasse was itself inconsistent with federal labor policy inasmuch as it deprived the owners of their ability to put their own position into effect unilaterally by giving the union an additional lever.

Yet, aside from the uncertainty frequently involved in determining when the parties are in fact at impasse, I believed that the appropriate and intermediate approach was to deprive the employer of its labor exemption within a reasonable period of time after impasse. This approach, under which federal labor policy would give employers the power to effect their position unilaterally, was arguably as vague and uncertain as impasse. While uncertainty often is a defect, in this situation the uncertainty would deprive the union of its ability to wait for the labor exemption to be terminated, because otherwise the union risked facing an unsympathetic judge and jury in antitrust

administrators, representatives, agents, successors and assigns waive any rights they may have to assert any antitrust labor exemption defense based upon any claim that the termination by the NFLPA of its status as a collective bargaining representative is or would be a sham, pretext, ineffective, requires additional steps, or has not in fact occurred.

NFL COLLECTIVE BARGAINING AGREEMENT 1993-2003, Art. LVII, § 3(b) (as amended June 6, 1996).


70. See Charles D. Bonanno Linen Service, Inc. v. NLRB, 454 U.S. 404 (1982) (noting that impasse is "only a temporary deadlock or hiatus in negotiations . . . " id. at 412.).
litigation years later.

But Brown arguably has taken the law of non-statutory labor exemption much further and established a demarcation line that requires union decertification as a prerequisite to owner antitrust liability, although the U.S. Supreme Court was careful to say that the precise line should be left to the NLRB’s judgement. If Brown is deemed to have gone this far, then future litigants will fight over whether the union’s decertification is a sham and whether it can be shown that the union engaged in a decertification strategy to deceive adjudicators and gain leverage through elimination of the labor exemption. This kind of judicial or NLRB inquiry may be focused on whether the union is seen to be passing out decertification or authorization cards and what its conduct has been in the past and what its stance is at the bargaining table. The owners will complain loudly and maintain that the labor exemption should always be available in the absence of either a very strong showing of nonexistence of the union or a nonunion environment such as that which existed in arena football in the first instance.

None of these approaches is entirely satisfactory. The reasonable period of time subsequent to the impasse finding seems to be the best of all approaches and one that might arguably still be compatible with Brown if the NLRB has the courage to demonstrate its expertise in future litigation. Now Brown will govern bargaining relations between the MLBPA and the MLB team owners by virtue of the Curt Flood Act, which reversed Flood and made antitrust law, to the limited extent possible under Brown, applicable to baseball. If we avoid another strike or lockout in 2001 or 2002—and hopefully we will since the game is currently awash in money, though plagued with competitive balance problems—there would be litigation about how deceased in fact the union or collective bargaining is if the union chooses to take this avenue so as to circumvent the nonstatutory labor exemption and

invoke antitrust law.

The Curt Flood Act is designed to provide antitrust coverage for "major league baseball players" in a manner compatible with Brown. This "clause appears to assure the owners and commissioner of Major League Baseball that all other aspects of the business of baseball will remain free from antitrust challenge."75

B. Future Problems with Brown and the Curt Flood Act

Brown and the Curt Flood Act will inevitably be interpreted against the backdrop of future problems. One such problem will involve complaints by minor league players. When compared to the minor league plaintiffs in Toolson, minor league players today enjoy greater freedom to play for clubs other than those to which they have been assigned pursuant to the MLB draft.76 Nonetheless, minor league players may not like their assignment and protest through antitrust litigation. The exclusive focus of the Curt Flood Act on the Major Leagues and the emphasis on retaining antitrust immunity for the minor league system appears to leave Toolson intact, notwithstanding that the plaintiff in that case complained that he was barred from playing in MLB and the minor leagues. The difficulty is that virtually any minor league player’s


76. Major League Rules, Annual Selection of Players (a):

MEETINGS. A selection meeting hall shall be held each year at such time and place as the Commissioner shall designate and shall be known as the Rule 5 Selection Meeting. At the Rule 5 Selection Meeting, Major League Clubs may claim the contracts of players who are on Minor League Reserve Lists (filed pursuant to Rule 2) and who are subject to selection as set forth in this Rule 5. If any Major League or Minor League Club shall fail to file Minor League Reserve Lists in accordance with Major League Rule 2, its players on Minor League Reserve Lists shall be subject to selection under this Rule 5 without any restrictions. The Commissioner shall decide all procedural questions that may arise during the Rule 5 Selection Meeting.

Subsequent provisions of Rule 5 set forth the method and priority of selection, players subject to selection and consideration and payment to be provided for such players. The BLUE RIBBON PANEL, supra note 10, at 40, advocates a Rule 5 change providing that clubs with the eight worst records possess preferential drafting rights with no requirement that the player be retained on the drafting team’s roster for a specific duration.
complaint about an assignment affects his Major League status because every minor league player aspires to play in the Major Leagues. Thus, despite the effect of the Curt Flood Act upon Flood, Toolson has not been reversed and remains good law for minor league players.\textsuperscript{77} Ambiguity arises from the Major League-Minor League contracts that owners have frequently negotiated with veteran players during the past decade. Whether Toolson applies to complaints arising from such contracts would presumably be determined by analyzing the language of the individual contract.

The Curt Flood Act also influences another significant baseball development: the globalization of baseball and the attempt to establish foreign markets by recruiting qualified players from Japan, Korea, Australia, Europe, Latin America, and the Caribbean. In the next part of this Article, I examine how U.S. antitrust and labor law exemptions affect the globalization of baseball markets for players.

IV. PLAYER MOVEMENT ACROSS NATIONAL BOUNDARIES

Although most of the current MLB conflicts are over the movement of foreign players into the United States, earlier disputes arose when American baseball and basketball players competed abroad. In baseball, for example, the first disputes occurred when prominent American players accepted offers to play in the newly formed Mexican League after World War II.\textsuperscript{78} Basketball faced a similar dispute when Brian Shaw signed a contract with the Boston Celtics in which he promised to cancel his commitment to play for an Italian basketball club the following year. An arbitrator agreed with the Celtics that Shaw’s promise was enforceable.\textsuperscript{79} The Celtics also had a problem with Yugoslav player Dino Radja, but unlike in the case of Shaw, could not persuade a federal district court that Radja was free of his European obligations.


\textsuperscript{78} See Part I, supra, and the related discussion of the Gardella case.

\textsuperscript{79} Boston Celtics, LP v. Brian Shaw, 908 F.2d 1041 (1st Cir. 1990). See Winnipeg Rugby Club v. Freeman, 140 F. Supp. 365 (N.D. Ohio 1995), where the court enjoined players from playing with the Cleveland Browns of the NFL in breach of contracts with a Canadian Football League (CFL) team on the ground that the players were more valuable to the CFL team because of the relatively inferior play in that league. This reasoning could be applicable to Japanese, Korean, Australian, Cuban or other Latin players who are sued for breaching their contracts when they come to the United States. Cf. Mid-South Grizzlies v. NFL, 720 F.2d 772 (3rd Cir. 1983).
obligations. The refusal of USA Basketball to issue unconditional letters of clearance to American players seeking to play in Europe during the 1998-1999 NBA lockout as European teams require under Federation Internationale de Basketball (FIBA) regulations raised similar problems.

The effect of Shaw and Radja, and the European cases arising out of the lockout litigation and the dynamics driving baseball towards the recruitment of foreign players caused some clubs to institutionalize relationships with teams in foreign countries through "working agreements." The first of these to receive attention in the United States was a relationship between the San Diego Padres and the Chiba Lotte Marines in Japan. Murray Chass described the arrangement:

The San Diego Padres have a new working agreement with a Japanese team that they believe is a significant step in the globalization of baseball. Others, George Steinbrenner [owner of the New York Yankees] for one, are not so sure about the part of the deal that gives the Padres exclusive negotiating rights to one of Japan's best pitchers.

The MLBPA threatened legal and arbitral action if the Padres did not trade Hideki Irabu's negotiating rights to the team of his choice. The MLB Players Relation Committee questioned the authority of the MLBPA to file a grievance on Irabu's behalf. The Committee maintained that the MLBPA could not properly represent a Japanese player who was not already part of the bargaining unit. Several earlier rulings by the courts and arbitrators arguably supported the idea that the MLBPA could act on behalf of applicant players as well as incumbent players.


This issue had previously arisen in *Wood v. National Basketball Association*. Before the Second Circuit Court of Appeals, Leon Wood, "an accomplished point guard" from California State University at Fullerton, sued under the Sherman Act, arguing that the salary cap and college draft violated federal antitrust law. Noting that the teams were properly regarded as individual employers whereas the league was not, Judge Winter stated that the draft and salary cap were not "the product solely of an agreement among horizontal competitors but [rather was] embodied in a collective agreement between an employer or employers and a labor organization reached through procedures mandated by federal labor legislation." Accordingly, the court reasoned that federal labor policy precluded a player from obtaining his true market value simply because he was dissatisfied with his salary. Analogizing to collective negotiations in construction, maritime, and other industries, the court stated:

The choice of employer is governed by the rules of the hiring hall, not the preference of the individual worker. There is nothing that prevents such agreements from providing that the employee either work for the designated employer at the stipulated wage or not be referred at that time. Otherwise, a union might find it difficult to provide the requisite number of workers to employers. Such an arrangement is functionally indistinguishable from the college draft.

The court noted that "newcomers" are frequently disadvantaged in collective bargaining relationships primarily because they lack seniority. The court rejected the argument that individuals who were not current members of the bargaining unit could not be regulated by collective bargaining agreements:

Wood argues that the draft and salary cap are illegal because they affect employees outside the bargaining unit. However, that is also a commonplace consequence of collective agreements. Seniority clauses may thus prevent outsiders

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84. 809 F.2d 954 (2d Cir. 1987).
85. Id. at 956.
86. Id. at 959.
87. Id. at 960.
from bidding for particular jobs, and other provisions may regulate the allocation or subcontracting of work to other groups of workers. Indeed, the National Labor Relations Act explicitly defines "employee" in a way that includes workers outside the bargaining unit. If Wood's antitrust claim were to succeed, all of these commonplace arrangements would be subject to similar challenges, and federal labor policy would essentially collapse unless a wholly unprincipled, judge-made exception were created for professional athletes.88

Accordingly, the court brought "potential employees" and current employees within the purview of the labor exemption immunity to antitrust liability established by Wood. The Supreme Court had previously accorded protection to applicants under the NLRA, notwithstanding the fact that the statute covers only employees explicitly.89 On the other hand, the NLRB itself in Star Tribune90 held that with respect to the employer's bargaining obligations the employer was under no obligation to bargain with the union over the administration of drug tests to applicants.91 However, even though applicants were not employees, the NLRB left the door ajar as to whether, under different circumstances, their conditions of employment might be bargainable as an incident of the terms and conditions of the extant bargaining unit. Although, in Star Tribune the drug testing of applicants was too far removed from the interests of incumbent employees, for whom drug testing is a mandatory subject of bargaining,92 the NLRB nonetheless conceded that certain conditions, imposed exclusively upon applicants, might be deemed

88. Id. (citations omitted).
89. Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).
90. 295 NLRB 543 (1989).
91. The NLRB distinguished the facts of Star Tribune from those cases, such as Westinghouse Electric Corp., 239 NLRB 106 (1978), enforced as modified sub nom. Electrical Workers IUE v. NLRB, 648 F.2d 18 (D.C. Cir. 1980), and East Dayton Tool and Die Co., 239 NLRB 141 (1978), which affirmed an employer's obligation to bargain with the union over nondiscrimination policies with respect to applicants based in part on Congress' expression that antidiscrimination is an important goal of national collective bargaining policy, notwithstanding its concurrent embodiment in Title VII. The NLRB in Star Tribune too recognized the national policy goals in support of nondiscrimination and the compelling interest of unions in keeping discrimination out of the workplace. Star Tribune, 295 NLRB at 548-49. However, there the NLRB found a "significant difference" between a union's ability to address its concern over a work environment free of drug use, which might be accomplished through post-hire physical exams, and its inability to address discrimination concerns beyond the applicancy phase. Id. at 549.
mandatory subjects of bargaining, if existing employees were "vitally affected" by the applicant conditions.

Thus, the question of whether applicant conditions are bargainable turns on a case's respective facts. Nonetheless, reiterating Wood eight years later in the 1994-1995 baseball strike in Silverman v. MLB Player Relations Committee, the Second Circuit, while holding that conditions of employment, such as free agency and reserve clauses, are mandatory subjects of bargaining, suggested that the sports draft might also be considered a mandatory subject of bargaining, inasmuch as the conditions of employment imposed on new hires are intimately related to the entire league's salary structure. Judge Winter reasoned:

A mix of free agency and reserve clauses combined with other provisions is the universal method by which leagues and player unions set individual salaries in professional sports. Free agency for veteran players may thus be combined with a reserve system, as in baseball, or a rookie draft, as in basketball . . . for newer players . . . . To hold that any of these items, or others that make up the mix in a particular sport, is merely a permissive subject of bargaining would ignore the reality of collective bargaining in sports.

True, the court referred to the draft in the context of basketball where players proceed directly to the National Basketball Association—in contrast to MLB where players are almost invariably assigned to the minor leagues, which are beyond the MLBPA's jurisdiction. Nonetheless, the court characterized the word "employees" in the NLRA broadly so as to include individuals outside the bargaining unit. The court's language was not limited to basketball or situations where the party's entry into the unit was not necessarily immediate. Moreover, baseball itself has made the draft part of the collective bargaining procedure by establishing draft choices as compensation for free agent losses. Thus, all leagues and unions, in determining player salaries, must necessarily strike a delicate balance between free competition for players and the need for stability and parity of talent. The draft is a necessary component of this give-and-take inherent in the sports bargaining

93. 67 F.3d 1054 (2d Cir. 1995).
94. Id. at 1061-62.
process. Both Wood and Silverman suggest that the entry of new players from
abroad as well as any future international draft is subject matter that would
affect major league players to which Curt Flood Act of 1998 would make
antitrust law applicable, notwithstanding the apparent preservation of Toolsen.

Even more relevant were a series of rulings that arose from conflicts
between the status of baseball free agents, which is part of the collective
bargaining agreement, and the amateur draft, which is not part of the collective
bargaining agreement. In the first of these cases, the MLBPA filed a grievance
alleging that the unilateral adoption by the clubs of amendments to MLB
amateur draft rules violated the collective bargaining agreement provisions
that protected free agency and prohibited the unilateral change of subject
matter if such a change would alter a player's "benefit" under the agreement.\footnote{Major League Baseball Players Association and the twenty-eight major league clubs (Amateur
draft) (Aug. 19, 1992).}

Noting that historically bargaining sometimes involved amateur matters and
sometimes did not, the arbitrator was of the view that the parties had routinely
negotiated the promotion of players to the majors and the demotion of players
to the minors. Moreover, the arbitrator concluded that the right to challenge
changes in the amateur draft had not been waived by the MLBPA in collective
bargaining. Moreover, the arbitrator believed that the changes in the case
before him were significant because they assigned a college-bound player to
a club for five years and eliminated the pressure to sign a player upon pain of
losing him during the following year. As a practical matter, the opportunity
to improve his position in succeeding drafts was foreclosed. The question
before the arbitrator was whether the attempt by the club to promote the
signability of such players and to de-escalate costs was consistent with the
agreement. Since draft choices are provided as compensation for the signing
of free agents, the arbitrator noted that such free agents would carry a "greater
burden" in negotiations by virtue of the change. The arbitrator said: "[T]his
is not a case that only affects non-employees not yet in the bargaining unit. It
also affects bargaining unit employees because free agency and draft choices
are, as of now, inseparable. . . . [T]he connection is obvious; draft choices and
free agency co-exist in the same contractual provision."\footnote{Id. at 15-16.}

Accordingly, a unilateral change in the draft rules was inconsistent with
the benefits provided by virtue of free agency. In a second case,\footnote{Major League Baseball Players Association and the twenty-eight major league clubs (Amateur
draft) (June 10, 1993).} the rule that
a drafted player was no longer eligible to be signed by the drafting club after he had attended his first class at university was unilaterally changed to provide an immutable cut-off date of August 15 regardless of whether the player attended class. While the arbitrator did not view this change as profound and fundamental as those addressed in the 1992 decision, the arbitrator noted that the postponement of serious negotiations reflected a measure of bargaining power which would be eroded by the rule change. Here also, in the arbitrator’s view, the economic bargain was being altered. And the change was thus prohibited under the same provisions of the collective bargaining agreement.

Finally, in the well-known *J.D. Drew* case, involving the prominent St. Louis Cardinal outfielder prior to the negotiation of his first Major League professional contract, the arbitrator considered the draft rules as they related to players who signed with new independent leagues unaffiliated with MLB. The question was whether such a player under contract to one of the new unaffiliated leagues, such as the Northern League and the Western League which emerged in the 1990s, would be subject to a new draft or could be a free agent. Again, the unilateral change in the rules to bring unaffiliated clubs within the requirement that an unsigned player be in a succeeding draft was condemned as inconsistent with the agreement:

> In the fierce competition which typifies high-stakes negotiations surrounding premium players, whether in the draft or in free agency, unilateral elimination of even a perceived bargaining edge in the Rules for a drafted player would devalue related free agency, a disruption of the [contractual] linkage of draft and free agency which the parties last reconfirmed in their Basic Agreement effective January 1, 1997....

Thus, all of the arbitral decisions provided protections against unilateral changes in the collective bargaining agreement for applicants who were potential MLB employees, but who were outside the MLBPA bargaining unit. It is these very same concerns about potential arbitral holdings relating to the foreign players that—as well as potential antitrust liability—induced MLB to...

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98. Major League Baseball Players Association and the thirty major league clubs (May 18, 1998).
99. *Id.* at 27.
support the proposition that a trade could send Hideki Irabu to the team of his choosing, the New York Yankees.

In the wake of the Irabu matter, baseball has negotiated agreements with commissioner's offices of baseball in Japan and Korea. These agreements do not include the MLBPA as a party to them, and thus make the applicability of the nonstatutory labor exemption arguably problematic, but they appear to have the tacit approval of the union because they eliminate the authority of clubs to make working agreements with baseball teams abroad which provide exclusive or preferential rights to foreign players. Rather than the free agency framework through which the Cuban and some other Latin American players have bargained with individual teams, the arrangements with Japan and Korea have provided for the direct involvement of the national commissioner's office.

The United States-Japanese player contract agreement applies to the recruitment of MLB and Japanese players by MLB and Japanese baseball. (For a number of years Japanese clubs have contracted with two foreigners to play on each individual club.) The agreement states that if any Japanese baseball club wishes to contact and engage a baseball player "professional or amateur, who is playing or has played baseball in the United States or Canada and/or is under contract with a club that is a member of the National or American league," the Japanese team shall request the Japanese Commissioner of Baseball to determine the status and availability of the MLB player by communicating with the MLB Commissioner's Office. If a MLB player is sought by a Japanese club, they are not to contact or negotiate with the player unless approval is given through the MLB Commissioner. The Japanese club cannot contact the MLB player unless approval to do so is given by the MLB club through the MLB Commissioner. Approval is needed only when the MLB player is on the list of "Reserved, Military, Voluntarily Retired, Restricted, Disqualified, Suspended, or Ineligible." If approval is not needed, then the Japanese club may immediately contact and negotiate with the MLB player. If approval is required, the MLB Commissioner is to transmit to the Japanese commissioner the approval or disapproval of the club.

If a MLB club wishes to engage a Japanese player who has "played baseball in Japan and/or is under contract with a Japanese club," the club must request that the MLB Commissioner determine the status and availability of the Japanese player in the same manner that the status and availability of the MLB player is determined. If no approval is needed, the club may
immediately contact the Japanese player. If approval is needed, that contact can be initiated only when the club has provided approval. Similar provisions are provided in the Korean agreement, which was entered into in 1996 and is now being renegotiated.

Thus, the Irabu matter has created a new set of procedures applicable to the United States. With regard to those players for whom approval is required, the MLB Commissioner posts the Japanese player's availability by notifying "all U.S. Major League Clubs of the Japanese club to make the player available." Requests for Japanese club postings are made from November 1 to March 1. Within four business days of the posting all interested MLB clubs are required to submit a bid to the MLB Commissioner "composed of monetary consideration only, to be paid to the Japanese Club as consideration for the Japanese Club relinquishing its rights to the player in the event that the U.S. Club reaches an agreement with the Japanese player." The MLB Commissioner determines the "highest bidder" and that determination is "conclusive and binding on all parties." The Japanese commissioner must then determine whether the bid is acceptable to the Japanese club. If it is not acceptable, then no contact may be had with the player until the next window period. If the highest bid is acceptable, the MLB Commissioner is to award the "sole, exclusive and non-assignable right to negotiate with and sign the Japanese player." If the MLB team cannot come to terms with the player within thirty days from the date that the MLB Commissioner indicates that the bid is acceptable to the Japanese club, the obligation to compensate lapses as do the negotiation rights of the club, and no contact may be had with the player until the following window period.

No bidding procedures were provided in the Korean agreement and in both the Japanese and Korean agreements, working agreements of the kind that the San Diego Padres had with Irabu are now prohibited insofar as they give to the MLB club the "exclusive or preferential rights to contract with players." Similar rules have been established for MLB dealing with baseball clubs located in Italy.100

Why did Commissioner Selig enter into these agreements? In the first place, as more Japanese players are recruited, there will always be eighteen MLB clubs which are displeased by virtue of any exclusive or preferential working agreements. This is because there are thirty MLB teams, and only

twelve Japanese teams. Thus, access for all MLB clubs to Japanese players became an important principle.

Second, the approval mechanisms were included so that Japanese sensibilities about MLB baseball imperialism would not be ignored. The Japanese do not want to see their own professional league become a farm system for MLB and to see their best teams raided for top talent. And the same holds true for other nations that may fear talent depletion because of an MLB international draft. Thus, the Japanese and other countries also have an interest in restraining and regulating future Irabu disputes.

But there are problems with the Japanese agreement. The nonassignability of the rights obtained by the highest bidder is presumably designed to avoid another Irabu situation where the Yankees were waiting in the wings to receive Irabu’s assigned negotiating rights. But teams like the Yankees will still benefit from the new mechanism because they are most likely to be the highest bidder. This is particularly true given the fact that only monetary compensation may be provided. (It is unclear why a trade between the two countries cannot be arranged unless the Commissioners thought that an agreement could not be negotiated with the players.)

Though insider preferences are discouraged or prohibited by virtue of the new limitations upon team-to-team working agreements, the fact of the matter is the clubs are more likely to get their players through Japanese teams with whom they have working agreements. The recent acquisition of 2000 Rookie of the Year relief pitcher Kazuhiro Sazaki by the Seattle Mariners (owned by the Japanese chairman of Nintendo), which has a working arrangement with the Orix Blue Wave of Kobe, is a good illustration.

After the highest bidder wins, the negotiating rights lapse if no agreement is reached with the player within thirty days. Some teams may want to keep the player off the market and to provide the highest bid, knowing that their bargaining stance makes a contract with the player impossible since no dispute resolution mechanism such as arbitration is contained in the agreement. It is unclear how this and other potential abuses by teams can be adjudicated.

Finally, most players who have come from Japan thus far have not come under the bidding mechanism. Most of them have been veteran free agents


102. But the bidding mechanism appears to be gaining in its use, perhaps affecting players who are about to be eligible for free agency when the leverage of the Japanese team may be enhanced, because the player is contractually obliged to play in Japan. See Murray Chass, *Majors are Scrambling for Japanese
like Seattle's Sazaki—the Japanese have a more lengthy ten-year requirement for free agency under their rules—or amateurs. The latter group creates some of the same problems that have afflicted the relationship of MLB with Latin America, such as the signing of underage and relatively immature players. For instance, the San Diego Padres have recently signed an eighteen-year old pitcher from Japan prior to his graduation from high school. While this is not comparable to some of the abuses found in Latin America, it does give cause for concern.04

The next step in the process may be the negotiation of provisions in the MLB collective bargaining agreement which will make it possible for a new MLB-Japan agreement to provide for trades as well as compensation. Moreover, a draft system, promulgated or negotiated internationally, which provides for the allocation of players to teams rather than the bidding procedures would be a better arrangement from the owners' perspective. This has been proposed by the Blue Ribbon Panel, an idea triggered by the high-salary bonuses provided to foreign free agents, the impact that this has had on American amateur demands, and the inability of small-market teams to compete for such talent.

Any effort to establish an international amateur draft system will trigger antitrust litigation pursuant to the Curt Flood Act.06 The regulation of applicant procedures may not fall within the labor exemption given U.S. Supreme Court and NLRB holdings that they do not share a community of interest with employees under the NLRA.07 However, as noted, drug testing for new applicants has been found "vitally related to" the terms and conditions

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104. See Sports Digest, SAN FRAN. CHRON., Jan. 12, 2000, at E6 ("Nobuaki Yoshida, an 18-year-old Japanese left-hander, agreed to a minor-league contract with the San Diego Padres and will report to extended spring training in April following his graduation from high school.").

105. BLUE RIBBON PANEL, supra note 10, at 41.


of active employees and thus constitutes a mandatory subject of bargaining.

Were the international draft not deemed to be vitally related to terms and conditions of employment of existing unit members, and thus to fall outside the ambit of mandatory bargaining, MLB might face a similar quandary to that which Major League Soccer (MLS) presently faces in the United States. MLS seeks to avert antitrust regulations which might impact its ability to foster international agreements over the drafting of foreign players. If the MLS draft is subject to antitrust, the league might incur the disfavor of the international soccer tribunal which, fearing the rapid emigration of its European stars to lucrative U.S. positions undeterred by any restrictions, insists that, as a condition of U.S. participation in such banner events as the World Cup, teams be limited in the number of non-native players it may employ. If MLB is faced with this same prospect, hopes of future cooperative arrangements and international competition, especially with nations concerned with the United States stripping them of their most talented players, might be dashed. On the other hand, if foreign baseball leagues are enhanced and attract American players, antimonopoly attacks on American restraints of trade triggered by foreigners who want to play in the United States, may encounter more difficulty in the courts.

The Curt Flood Act brings baseball within the parameters of Brown v. Pro Football, which provides a labor exemption if there is a collective bargaining agreement or relationship. But what if the MLB owners attempt to establish some kind of allocation without bargaining with the players? Indeed, what is the status of the current Japanese and Korean agreements, notwithstanding their lack of exclusivity, under antitrust law given the fact that there is no collective bargaining agreement addressing this issue or bargaining with the union which preceded the agreement?

It is possible that Brown could provide a shield against antitrust action given the fact that the subject matter involves the bargaining process itself, and the MLBPA was presumably advised, notified, and given an opportunity to participate. On the other hand, the fact that this approach was formulated independently of bargaining could take it beyond the labor exemption if in fact

111. However, this view is inconsistent with Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976) and its progeny.
it could be determined that there was no recourse for the union other than antitrust action.

Suppose that the owners bargain concessions from the players which attempt to oust the MLBPA from their amateur draft role recognized in the arbitration awards by eliminating draft choices as free agent compensation. This provision, after all, was attractive to the owners because they thought (mistakenly it would appear) that it would deter the signing of free agents. Professor Zimbalist has suggested that "...[s]ince the system of free agent compensation was originally sought by the owners as a way both to lower demand for free agency and support greater balance on the field, it is possible that the owners could now seek to remove the compensation rules. Without such rules, in turn, draft procedures may no longer be a mandatory subject."112

But, in the first place, as the amateur draft arbitrations have held, contract resolutions are not dispositive of the statutory issue relating to whatever players are "vitally affected" by amateur draft rules and even whether the labor exemption is available.113 Second, the owners might have difficulty in the antitrust arena without the non-statutory labor exception and would, therefore, not have an incentive to erode the amateur draft free agency connection recognized in arbitration.

And, third, the unions are unlikely to eliminate the connection between free agency and amateur draft rules or agree to an international draft without concessions. Moreover, Professor Zimbalist has proposed that the players negotiate the right of amateurs to bargain with two teams and that the owners obtain as a quid pro quo permanent signing rights. If this were to happen, the owners might be again contractually constrained from instituting unilateral changes in amateur draft rules without the free agency–amateur draft connection in the absence of a broad union waiver.114 And, if the union negotiated a broad waiver, which leaves foreign players unprotected, the MLBPA might then become enmeshed in litigation about its failure to meet its duty of fair representation.115

112. ZIMBALIST TESTIMONY, supra note 5, at 16.
CONCLUSION

The Hideki Irabu dispute in which Irabu (since traded to the Montreal Expos) insisted on playing for the New York Yankees rather than the team with which his club in Japan had an exclusive arrangement (the San Diego Padres) dramatized the connections between the globalization of baseball and U.S. antitrust and labor laws. Out of this fracas came a U.S.-Japanese agreement negotiated between the MLB and Japanese Commissioner offices. A similar agreement has been negotiated with the South Koreans and probably one will be negotiated with the Australians. To summarize broadly, the Japan agreement establishes a procedure whereby the future Japanese players, for whom approval is necessary, must bargain with the MLB team that is the "highest bidder" for his transfer of services from the Japanese team.

But the fact that an MLB team is the highest bidder to a Japanese club does not necessarily mean that it will be the highest bidder for the player or that they will be able to negotiate an agreement. The player may want to go to a lower-bidding club that has a more congenial environment, such as Seattle or San Francisco where the Japanese-American population is substantial. This was what made both Japanese outfielder superstar Ichiro Suzuki and Sazaki such perfect fits with the Seattle Mariners. Future Gardella antitrust actions under the Curt Flood Act will be filed by players who object to their assignment to the highest bidder and these issues must be resolved either in antitrust litigation or arbitration.

These problems may also argue for a comprehensive bargained international draft. But, the prerequisite will be a negotiated international labor market, like that contained in the U.S.-Japanese agreement, where foreign country organizations will not perceive themselves to be threatened by American baseball imperialism.

Again, the Curt Flood Act only pertains to MLB. Does the Curt Flood Act only make antitrust applicable to established labor-management relationships rather than to players outside the bargaining unit? Certainly the history of antitrust litigation prior to the Curt Flood Act and specifically Gardella as well as Toolson (the latter involving a minor league player) as well as the baseball amateur draft arbitration indicate that MLB activity is to be defined broadly. That would portend litigation by foreign players who seek to follow their calling in the United States in this new era of globalization rather than in their own countries. And finally, there is the labor exemption of which Justice
Marshall wrote in *Flood*. Again, the MLBPA has not signed the MLB-Japanese agreement or its Korean counterpart. Is the labor exemption therefore unavailable to MLB owners as they defend against antitrust actions filed by dissatisfied Japanese, Korean, and Australian players? And even if it is available as a product of the collective bargaining relationship under the court's ruling in *Brown*, a fundamental question is whether the subject matter is appropriate to the nonstatutory labor exemption and to antitrust prohibitions. Here the very same nexus to conditions of major league players which brings this subject within antitrust scope argues for qualifying arrangements with foreign institutions regarding player mobility as part of the labor exemption—if, that is, they can be viewed as part of the labor management relations under *Brown*.

The movement of players into the United States from other countries inevitably portends internationalization, the playing of games abroad and ultimately a genuine World Series or World Cup. Baseball may no longer be the national pastime in this twenty-first century but much more than that.

Curt Flood lost his litigation in 1972, but the holding of *Flood* led directly to both salary arbitration and free agency in baseball. And that in turn, albeit within the limitations of the Supreme Court's 1996 holding in *Brown*, has fostered the growth of the applicability of antitrust law to baseball owners. MLB players and owners—in the United States and abroad—are about to become even more familiar with the legacy of Curt Flood, the sterling St. Louis center-fielder who began a process that has transformed the landscape of baseball forever.

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