CUBAN BASEBALL PLAYERS, THE UNLUCKY ONES: UNITED STATES-CUBAN PROFESSIONAL BASEBALL RELATIONS SHOULD BE AN INTEGRAL PART OF THE UNITED STATES-CUBA RELATIONSHIP

Rachel D. Solomon*

“I think about my family (in Cuba) every moment,” [Rene] Arocha says. “From the first day, I knew it might be a separation of many years. On one side, I was prepared to do that and on the other, I can’t help but think about them.” That is the price Arocha and other Cuban baseball players are paying to defect.1

On July 10, 1991, Rene Arocha became the first Cuban to defect from his country in order to play professional baseball in the United States.2 Since then, nearly 200 Cuban baseball players have followed his lead.3

INTRODUCTION

Stemming from Fidel Castro’s elimination of professional baseball in Cuba and the United States trade embargo4 against Cuba, current Cuban baseball players wanting to pursue a professional baseball career are left with no choice but to defect from their home, with a slim chance of ever returning.

Fidel Castro prides himself on the international successes of *Equipo Cuba*,5 the Cuban National baseball team. *Equipo Cuba* dominated the international baseball world from

---

* J.D. Candidate 2011, Hofstra University School of Law. I would like to thank the entire staff of the JOURNAL OF INTERNATIONAL BUSINESS & LAW, especially Stephen Colianni and Omer Shahid, for their assistance and guidance in preparing this note for publication. Special thanks to my advisors, Professor Amy Stein, Professor James Hickey, and Professor Kevin McElroy, for their incredibly insightful suggestions and encouragement. I would also like to express my sincerest gratitude to my family—my parents, Richard and Susan Solomon, and my brothers, Benjamin, Joshua, and Zachary Solomon—for their love and support. I would like to thank Avi Binstock for all of his love, encouragement, and understanding throughout this time consuming process. Finally I would like to dedicate this note to the Atlanta Braves, who spurred my love of baseball and inspired this note.

1 Kevin Baxter & Fernando Dominguez, Baseball Si, Cuba No; Castro’s Island May be a Gold Mine for Major League Talent, But Under His Regime, We May Never Know to What Extent, SPORTING NEWS, Mar. 21, 1994, at 12.


4 An embargo is a non-tariff based barrier on trade. See RICHARD SCHAFFER ET AL., INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT 290 (7th ed. 2009).

5 "*Equipo Cuba*" means the Cuban National Team. MILTON H. JAMAIL, FULL COUNT: INSIDE CUBAN BASEBALL 1 (2000).
1987-1997, when the team remained undefeated with a winning streak of 150 games. Fidel Castro, as Cuban President, and adamant baseball fan, considers the reduction of talent from Cuba to Major League Baseball (“MLB”) as a source of international embarrassment.

More than 200 Cubans have defected in order to play professional baseball, however only thirty-six have played Major League Baseball (“MLB”) thus far. Since Rene Arocha’s defection in 1991, only four players have participated in the All-Star game while just five have received awards for their accomplishments. In Cuba, Castro’s regime “fashions national heroes out of its star ballplayers.” Cuban players who defect, on the other hand, are given the label *traidores al béisbol*, or “baseball traitors,” by the government. Despite these characterizations, Cubans prefer to play in the MLB, mainly because of the large contracts, the size of which varies depending on the sophistication of the team. While small market teams are willing to pay more for Cuban prospects, the large market teams “prefer to spend

---

6 See id. at 45.
10 Cuban player awards: Jose Contreras—American League Most Valuable Player (“MVP”); Livan Hernandez—National League Championship Series MVP, Major League World Series MVP, and Silver Slugger award; Orlando “El Duque” Hernandez—American League Championship Series MVP; Rey Ordonez—3 Gold Gloves for shortstop; and Alexi Ramirez—Silver Slugger. See Baseball Encyclopedia, supra note 9.
11 Frankel, supra note 2, at 391.
12 Id. at 402. The Cuban government “acts as if the departed players no longer exist, never mentioning them again in the state-controlled press. In official record books, baseball defectors have asterisks by their name; the explanation reads, *abandonó el país*, or ‘left the country.’” Id. This is similar to how Americans feel about steroid users in professional sports. For instance, “the ball Barry Bonds hit for his record-breaking 756th home run [was] branded with an asterisk and sent to the Baseball Hall of Fame.” Designer to Brand Asterisk on Ball; Hall of Fame to Accept It, ESPN.COM, Sept. 26, 2007, http://sports.espn.go.com/mlb/news/story?id=3036756 (stating that “[f]ashion designer Marc Ecko, who bought the ball in an online auction, set up a Web site for fans to vote on the ball’s fate, and . . . announced the decision to brand it won out over the other options — sending it to [the Hall of Fame at] Cooperstown unblemished or launching it into space.”). However, Barry Bonds and others used a substance to enhance their level of play whereas Cuban defectors merely escaped for the opportunity to play baseball at the professional level.
13 See Frankel, supra note 2, at 399.
14 See Mark Kurlansky, Cuba’s Major-League Catchet, WALL ST. J., Apr. 10, 2010, at W9, available at http://online.wsj.com/article/SB10001424052702303720604575170171909416204.html (asking “why is everyone in baseball talking about [Aroldis Chapman]? Why were half the ball clubs in the major leagues interested in him, and why did the Cincinnati Reds pay $30 million for him?”Explaining that it, “at least in part, is because he is Cuban—so not only does he come from a fabled baseball tradition, but he is also a defector, which is a popular political story.”); Tim Brown, Glut of Cuban Defectors Seek MLB Jobs, YAHOO!SPORTS.COM, http://sports.yahoo.com/mlb/news?slug=ti-cubandefectors030310 (Mar. 2, 2010) [hereinafter Brown, Glut of Defectors].
CUBAN BASEBALL PLAYERS

their money on known commodities.”15 For example, in 2010 the Cincinnati Reds signed Cuban pitching sensation Aroldis Chapman to a five-year $30-million contract, whereas the Boston Red Sox signed Jose Iglesias, a Cuban shortstop, to a four-year, $8.2 million contract.16

For the last thirty years, the baseball community has explored the idea of implementing a worldwide draft, some claiming that it will help the defection issue.17 The main idea behind the global draft, as discussed below, is to eliminate the free agency status of all foreign players and require all amateur players, worldwide, regardless of nationality, to participate in the amateur draft.18 Global draft advocates claim that this will reduce competition between teams, thus stabilizing bonuses, as well as resolve the issue of competitive balance.19 A worldwide draft is a potential solution to the international free agency issue. However, it is unlikely to solve the problems facing Cuban baseball players until the embargo is lifted, or, at the very least, weakened.

This Note addresses the baseball player defection tension between Cuba and the United States, which began with Fidel Castro’s 1959 Cuban Revolution. It argues that Cuban baseball players should not be forced to defect to play for a Major League club. Rather, they should be treated, just like any international free agent.20 The U.S. and Cuba should use baseball to improve international relations. The United States Government and the commissioner of baseball should together remove player restrictions placed by the embargo, revoke the Kuhn Directive, and create an agreement with the Cuban amateur league permitting the international movement of Cuban baseball players from Cuba to the United States.

Part II of this Note lays out the relevant baseball history, the legal statutes of the U.S. trade embargo on Cuba, and the political landscape. Part III analyzes the potential solutions to Cuban defections that have been proposed and introduces a new solution. Finally, Part IV concludes that baseball should be an integral part of the U.S.-Cuban relationship.

16 See Brown, Glut of Defectors, supra note 14; see also infra notes 279-81 and accompanying text.
17 See infra Section III(B).
19 See Daniel Hauptman, Note, The Need for a Worldwide Draft to Level the Playing Field and Strike Out the National Origin Discrimination in Major League Baseball, 30 LOY. L.A. ENT. L. REV. 263, 274 (2010). Hauptman avidly supports the use of a worldwide draft, explaining that it would “equaliz[e] the entry rules for U.S. and international players,” as well as “address the significant competitive issue of large-market teams outbidding others for top foreign talent.” Id. See also Gary Klein, Global Draft is a Foreign Notion Still, L.A. TIMES, June 3, 2003, at B6 (stating that members of the baseball community, such as owners, endorse the implementation of a worldwide draft because they would like “to stop paying multimillion-dollar bonuses to domestic draftees and foreign free agents. Most also believe that a global draft would level the playing field between smaller-market teams and big-budget franchises such as the . . . New York Yankees . . . who have invested heavily in international scouting and have reaped the benefits.”); Alan Schwarz, Pressure Building for Draft of Players from Outside U.S., N.Y. TIMES, July 13, 2008, at SP4; Barry M. Bloom, Report: Cubs Fined for Draft Violations, MLB.COM, July 21, 2008, http://mlb.mlb.com/news/article.jsp?ymd=20080721&content_id=3169284&vkey=news_mlb&fext=.jsp&c_id=mlb.
20 The embargo impacts Cuban baseball players in that “no ‘payment or transfer’ (in baseball terms, a signing bonus) may be made to any Cuban national athlete to secure his services, thus rendering an already draft ineligible player as also ineligible to be an international free agent.” Rick J. Lopez, Comment, Signing Bonus Skimming and a Premature Call for a Global Draft in Major League Baseball, 41 AZZ. SR. L.J. 349, 358 (2009); see also 31 C.F.R. § 515.309(a).
THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

CUBAN PROFESSIONAL BASEBALL PLAYERS IN THE UNITED STATES

History Pre-Embargo

Prior to the establishment of the present Cuban government, baseball was a common interest for the United States and Cuba, helping to bind the two countries together. Similar to its American counterpart, “Cuban baseball has always been tightly intertwined with history, politics, and social change.”21 The game of baseball began during the 1840s in New York City,22 and soon spread to Cuba, with organized Cuban leagues dating back to 1878.23 At this time, “baseball became a cultural bridge between Cuba and the United States, with ballplayers constantly in transit from one country to the other.”24 Since there were no restrictions, from the 1870s until the Cuban Revolution in 1959, Cuban baseball stars often traveled to the U.S. to play professional baseball25 and several Major League teams participated in exhibition games or Cuba’s spring training program.26 Americans frequently played for Cuban teams and top Cuban players played in the MLB.27 Cuba’s winter league rosters often contained several major league players.28 From 1947 until 1959, Cuba provided the Major Leagues with the leading source of Latin-American baseball talent.29 The Cuba-U.S. baseball relationship was so intertwined that several Cubans envisioned a future that included a Cuban MLB franchise.30 However, the Cuban Revolution of 1959 brought this harmonious relationship to an abrupt stop.31

The Embargo’s Restrictions on the Freedom of Cuban Baseball Players

Cuba implemented a widespread sports reform program in 1961, which eliminated professional baseball and instead emphasized socialist values.32 The government adopted a Soviet model of physical culture, which stressed “mass participation in sports and the development of champions.”33 The following year Cuba introduced a replacement for the professional baseball system.34 This new Cuban League was centered on a socialist paradigm of

21 Frankel, supra note 2, at 388.
22 See id. at 387.
24 Frankel, supra note 2, at 388.
25 See id.
26 See Baird, supra note 23, at 166; Frankel, supra note 2, at 389.
27 See Baird, supra note 23, at 166; Frankel, supra note 2, at 389.
28 See Baird, supra note 23, at 166; Frankel, supra note 2, at 389.
29 See Jamail, supra note 5, at 20 (explaining that Cuban players like Orestes “Minnie” Miñoso, Tony Oliva, and Tony Pérez, were a crucial part of professional baseball in the U.S.); Frankel, supra note 2, at 389.
30 See Baird, supra note 23, at 166.
31 See id.; Frankel, supra note 2, at 389.
32 See Baird, supra note 23, at 166; Frankel, supra note 2, at 389-90. President Castro believed that “selling baseball players . . . was a crude manifestation of the worst elements of capitalism, akin to slavery, and he referred to professional baseball as la pelota esclava. For Fidel, the first Serie Nacional in 1961-1962 was el triunfo de la pelota libre sobre la pelota esclava (the triumph of free baseball over slave baseball).” Jamail, supra note 5, at 29.
33 Baird, supra note 23, at 167.
34 See id. at 168.
CUBAN BASEBALL PLAYERS

amateur sports motivated by national ideals rather than money.\(^35\) Here, the state provides each player with their salary, an amount comparable to the earnings of the majority of the labor force.\(^36\) In 2005, the monthly government salary of Cuban baseball players ranged from approximately 250 to 350 pesos ($10 to $15 per month).\(^37\) Ultimately, the low salary stemming from Cuba’s lack of a professional baseball league akin to the MLB led players, such as Rene Arocha,\(^38\) to defect.

Baseball players were not the only Cubans fleeing to America to escape Castro’s regime during this time. Many Cubans fled Cuba for the United States to find an improved life and experience the “American dream.”\(^39\) In response to this rising tide of defection, the federal government enacted harsh immigration constraints governing Cuban immigrants and imposed strict criminal sanctions on Americans caught smuggling Cubans into the U.S.\(^40\) The Helms-Burton Act\(^41\) has especially impacted Cuban defectors and MLB.\(^42\) This Act requires the U.S. government to enforce the Cuban Assets Control Regulations (“CACR”),\(^43\) which bans MLB clubs from performing any business in Cuba, including scouting or signing players.\(^44\) Thus, if Cuban nationals desire to play for an MLB team, they must flee Cuba, defect, and surrender their Cuban citizenship,\(^45\) with the possibility of never returning home.\(^46\)

35 See id. Cuban officials hold a negative view of professional sports: “Since the revolution, Cuban officials have characterized professional sports in the United States as a ‘capitalist perversion of athletics.’ [Fidel] Castro himself has likened professional sports to slavery and sought to remake Cuban baseball reflecting the values of the revolution.” Id. at 167 (internal citations omitted). The league is divided into sixteen teams, each corresponding to a different Cuban province, except for Havana City, which has two teams. See id. at 168. The teams do not relocate and, on the whole, the players remain with their team. See id. The province where the player originates determines the team for which he will play. See id. The idea behind the regional structure is that the players have a sense of pride for their town; this intensifies rivalries, interest, and the degree of play, which in turn replaces professional salaries as the motivation behind championship-caliber play. See id at 167-68.

36 See id. at 169.

37 See id.

38 See supra notes 1-2 and accompanying text.


40 See infra Section II(B)(2)(ii).

41 See infra notes 162-165 and accompanying text.

42 See Frankel, supra note 2, at 393.

43 See infra notes 154-156 and accompanying text.

44 22 U.S.C. § 6032(c); see Frankel, supra note 2, at 393.

45 See Frankel, supra note 2, at 394.

46 See Kurlansky, supra note 14.
Major League Baseball’s eligibility rules

The Major League Baseball Rules describe the eligibility requirements for MLB teams to acquire players: Rule 3 explains how to sign a player and Rule 4 illustrates the First-Year Player Draft. Rule 3(a)(1)(A)-(B), in pertinent part, provides:

(a) ELIGIBILITY TO SIGN PROFESSIONAL BASEBALL CONTRACTS.

(1) General Rules. Subject to the High School, College, Junior College and American Legion Rules listed in this Rule 3(a), a Major or Minor League Club may contract with a player under the conditions and restrictions set forth in this Rule 3 . . . . For purposes of this Rule 3, the term “United States” shall mean the 50 States of the United States of America, the District of Columbia, Puerto Rico, and any other Commonwealth, Territory or Possession of the United States of America.

(A) A player who has not previously contracted with a Major or Minor League Club, and who is a resident of the United States or Canada, may be signed to a contract only after having been eligible for selection in the Rule 4 draft. A player shall be considered a “resident of the United States” if the player enrolls in a United States high school or college or establishes a legal residence in the United States on the date of the player’s contract or within one year prior to that date.

(B) A player who has not previously contracted with a Major or Minor League Club, who is not a resident of the United States or Canada, and who is not subject to the High School, College or American Legion Rules, may be signed to a contract if the player:

(i) is at least 17 years old at the time of signing, or

(ii) is 16 at the time of signing, but will attain age 17 prior to either the end of the effective season for which the player has signed or September 1 of such effective season, whichever is later.

For teams to acquire players, MLB separates them into two groups: (1) legal residents of the United States, Canada, and Puerto Rico and (2) any other player. Rule 3(a)(1)(A), which applies to the first group, requires the players to participate in the Rule 4

---


48 See MLB Rules Book, supra note 47, at R. 4; see also Frankel, supra note 2, at 395 n. 99; Schneider, supra note 47, at 480-81.


50 See id.
CUBAN BASEBALL PLAYERS

amateur draft. Non-U.S. citizens, however, lack this requirement and may enter into an employment contract with a team as a free agent, provided they abide by the criteria in Rule 3(a)(1)(B). Free agency is more appealing than the draft because players may choose between any team who offers them a contract. Generally, free agency has a tendency to generate larger contracts, because the player is likely to choose the highest bidder.

Cubans are subjected to more complex MLB rules than other baseball players for several reasons. For one, Cubans are forced to defect from Cuba to play professional baseball, which involves leaving the country as well as renouncing their Cuban citizenship. In 1977, MLB Commissioner Bowie Kuhn instituted the Major League’s rules concerning Cuban players in the “Kuhn Directive.” The Directive, updated in 1991, prohibits “the discussion or negotiation with anyone in Cuba regarding the signing of any player in Cuba.” In other words, it bars team representatives, such as scouts, from speaking with any Cuban player while they are in Cuba. However, if a scout sees a Cuban ballplayer outside of Cuba, there are no restrictions. Thus, while team representatives may not recruit or negotiate with the ballplayers in Cuba, they may do so in another country. Because MLB teams are only allowed to sign players who are residents of a country other than Cuba, this policy coerces Cubans who

51 See MLB Rules Book, supra note 47, at R. 3(a)(1)(A)- (B); Cwiertny, supra note 18, at 414 n.242; Schneider, supra note 47, at 480. A resident of the United States, Canada, or Puerto Rico may only sign a contract with a team once he has participated in the amateur draft. See Schneider, supra note 47, at 480. However, if every team in the draft passes over him, then he is permitted to sign as a free agent. See id.
52 See MLB Rules Book, supra note 47, at R. 3(a)(1)(B); Schneider, supra note 47, at 480. This system is more or less logical: The amateur draft ensures an equitable distribution of the universally-known talent. Would-be draftees, primarily high school and college athletes, are well-known to all franchises. A draft in which teams take turns reserving the right to sign known prospects helps ensure competitive balance among the teams and prevents wealthier teams from cornering the top talent.

Players from foreign nations are not as visible. Different franchises have varying talent scouting strength in different nations. Some teams conduct thorough talent searches the world over, while other teams concentrate their international efforts in particular countries. Still others largely ignore the foreign talent pool. Accordingly, international players, be they highly visible stars in a foreign professional league or obscure kids from the far corners of the Earth, enjoy free agency to sign a contract with any of [MLB’s] franchises that would have them.

Memorandum of Points and Authorities in Support of Plaintiff’s Motions for Temporary Restraining Order and Preliminary Injunction at 4, Viera v. Major League Baseball Enterprises, No. 8:01-CV-1037-T-27MAP (M.D. Fla. 2001) (internal citations omitted) [hereinafter Memorandum for the Plaintiff].
53 See Cwiertny, supra note 18, at 413-14; Frankel, supra note 2, at 396.
54 See Schneider, supra note 47, at 480.
55 See Greller, supra note 7, at 1661-66; Cwiertny, supra note 18, at 411-16; Schneider, supra note 47, at 479-86; see also Walter T. Champion & Danyahel Norris, Why Not Row to the Bahamas Instead of Miami?: The Conundrum That Awaits Cuban Elite Baseball Players Who Seek Asylum and the Economic Nirvana of Free Agency, 9 VA. SPORTS & ENT. L.J. 219, 224 (2010).
56 See Baxter & Dominguez, supra note 1, at 12; see also Frankel, supra note 2, at 397; Greller, supra note 7, at 1665; Schneider, supra note 47, at 480.
57 Baxter & Dominguez, supra note 1, at 12; see also Frankel, supra note 2, at 397; Greller, supra note 7, at 1664-65; Schneider, supra note 47, at 480.
58 See Schneider, supra note 47, at 480; Champion & Norris, supra note 55, at 222.
59 See Schneider, supra note 47, at 480; Champion & Norris, supra note 55, at 222.

159
want to play baseball to leave their home and establish residency elsewhere. Consequently, Cubans are treated differently than any other athlete.

In addition, if a Cuban player defects directly to the U.S. to obtain political asylum, MLB considers him a member of the Rule 3(a)(1)(A) group, which requires that he enter the June 1 amateur draft. Although Cubans would seemingly fall under the second category of foreign players, this is not the case; Cubans may not come to the U.S. and sign a free agency contract like other international players. Therefore, through a “loophole” discovered by Joe Cubas, MLB essentially encourages Cubans who defect to establish residency in another country and become a free agent, or be subject to the amateur draft. Lastly, Cubans also differ from Rule 3(a)(1)(A) players in another respect: if they enter the annual draft and each team passes over them, then they are unable to attain free agency.

Defection options

As previously stated, Cubans have two options if they want to play professional baseball, both of which require an initial abandonment of their homeland. They can either defect directly to the U.S. to enter the amateur draft (essentially acquiring “legal resident” status), or they can follow Joe Cubas’ route to international free agency and take advantage of the “loophole.”

60 See Frankel, supra note 2, at 397; Greller, supra note 7, at 1665; Schneider, supra note 47, at 480; Baxter & Dominguez, supra note 1, at 12.

61 Cuba is not necessarily the only country whose citizens have to defect to participate in professional sports in the United States:

There is at least one other country from which athletes must defect in order to compete in [United States] professional sports: North Korea. Michael Ri . . . dreams of playing in the National Basketball Association. His dreams are on hold because the Clinton administration will not allow him to come to the United States to play unless he defects, something he is unwilling to do.

Jamail, supra note 5, at 165 n. 7 (citing Barbara Smith, “Hoops Player Waits on Diplomatic Jump Ball,” USA Today, 1 April 1998)).

62 See Cwiertny, supra note 18, at 413-14; Frankel, supra note 2, at 398; Baxter & Dominguez, supra note 1.

63 See Memorandum for the Plaintiff, supra note 52, at 4.

64 See infra notes 71-78 and accompanying text. The “loophole,” as explained later, encourages Cuban players to defect to a country other than the United States because they can sign a free agency contract instead of entering the amateur draft. See Jason S. Weiss, Note, The Changing Face of Baseball: In an Age of Globalization, Is Baseball Still as American as Apple Pie and Chevrolet?, 8 U. MIAMI INT’L & COMP. L. REV. 123, 140 (1999-2000); Champion & Norris, supra note 55, at 225. The primary goal of all professional baseball players, especially Cubans, is to sign a large contract. See Champion & Norris, supra note 55, at 222. A free agency contract is superior because it allows for bidding wars, which usually result in more lucrative contracts, whereas only one team has the rights to a player’s contract if they enter the Rule 3 amateur draft. See id. at 225; Frankel, supra note 2, at 396.

65 See Memorandum for the Plaintiff, supra note 52, at 4; Cwiertny, supra note 18, at 414. Interestingly, American-born players are unable to avoid the draft by establishing residency in another country. See Memorandum for the Plaintiff, supra note 52, at 5.

66 See Memorandum for the Plaintiff, supra note 52, at 5.

67 See Cwiertny, supra note 18, at 412-16; Frankel, supra note 2, at 397-400; Lopez, supra note 20, at 360; Schneider, supra note 47, at 480-85; Greller, supra note 7, at 1666-79; Weiss, supra note 64, at 136-41.
CUBAN BASEBALL PLAYERS

Prior to December 1995, defection was a relatively uncommon occurrence. Thus, when Rene Arocha defected in 1991, MLB hastily chose to hold a special lottery open to any team who wished to sign him instead of subjecting him to the amateur draft, like his successors. In 1995, Joe Cubas, a Cuban-American agent, discovered a loophole in the MLB rules for Cuban defectors to avoid the amateur draft: if a Cuban ballplayer goes to a country other than the United States and establishes legal residency, then he can enter the league as any other international player and become a free agent. For example, Andy Morales defected to Florida in the summer of 2000. Since Cubans are granted residency under the Cuban Adjustment Act (“CAA”), Morales would have been forced to enter the MLB through the amateur draft. However, in that case, one team would receive sole negotiating rights with Morales, diminishing his control over receiving a rewarding contract. If Morales relocates to another country, he is considered a free agent, enabling him to negotiate with any team. This is currently how most Cubans join MLB teams.

Defection is not a simple task; it entails abandoning one’s family, friends, as well as one’s country. Although no form of defection is simple, seemingly the easiest way to defect is to follow Rene Arocha’s escape plan; he walked away from the Cuban National Team while on an international tournament in the U.S. However, this option is not available to the majority of Cuban baseball players.

Each year, at the end of the Cuban League’s playoff season, the sports ministry’s government officials select the players to compete for Equipo Cuba, the Cuban national
team.81 In the summer of 1991, after pitching for Equipo Cuba at an international tournament, Arocha merely left his team and walked out of the Miami International airport.82 Initially, this was the easiest method.83 However, since Arocha’s exit, the Cuban players are often selected based on political views, instead of athletic performance.84 Since the Cuban government selects the players for the Cuban national team, they refrain from choosing players they deem to be a “flight risk.”85 Therefore, Cubans who want to defect, but cannot leave the country, are forced to resort to defecting by sea via tragically deficient means, such as a float or a makeshift boat, or professional smuggling.86

The Dangers of Defecting by Sea

Defecting by sea is extremely dangerous because players are forced to take desperate measures to avoid being interdicted in the ocean.87 Furthermore, the boats that Cubans use are frequently poorly constructed, overflowing, and unsafe.88 Despite the fact that one of the major goals of the 1995 U.S.-Cuba migration treaty is safe travel, the leniency of U.S. immigration laws encourages Cuban refugees to take the short, yet treacherous, journey to America.89

The day after Christmas in 1997, Orlando Hernandez, a Cuban commonly known by his nickname “El Duque,” and seven of his friends left Cuba for the United States in a twenty-foot sailboat.90 After four days, their ship was in such abysmal condition that they were forced to land in the Bahamas.91 While determining whether to send El Duque back to Cuba, the Bahamian government placed him in a detention center.92 During this time, the Commissioner of Baseball, Bud Selig prohibited any major league team from meeting with El Duque.93 Joe Cubas went to the Bahamas and strongly advised El Duque to seek refuge in a third country, unsure if the Bahamian government would send El Duque back to Cuba or grant

81 See Baird, supra note 23, at 169. The national team participates in several international tournaments, such as the IBA World Championships, the Intercontinental Cup, the Olympic Games, and the Pan Am Games. Id.
82 See Frankel, supra note 2, at 383.
84 See Baird, supra note 23, at 169 (explaining that “[b]ecause international play outside Cuba gives players an opportunity to defect, players with so-called political loyalty may not be selected.”).
86 See Frankel, supra note 2, at 394-95.
88 See Frankel, supra note 2, at 408-410; Pingeton, supra note 39, at 329-31.
89 See infra Section II(B)(2)(ii); Cwiertny, supra note 18, at 419 (explaining that the MLB loophole directly undermines safety and instead encourages players to leave).
90 See Cwiertny, supra note 18, at 415.
91 See id.
92 See id. After the El Duque situation, Bahamian, Dominican, and Costa Rican governments all tightened their repatriation agreements with Cuba because they wanted to avoid becoming the stomping grounds for Cubans en route to the U.S. Id. at 420.
93 See id.
**CUBAN BASEBALL PLAYERS**

him refugee status.\textsuperscript{94} Upon receiving El Duque’s permission, Cubas arranged with Costa Rican President Jose Maria Figueras for an indefinite, albeit temporary, visa for the ball player.\textsuperscript{95} El Duque’s “defection story” ended when he signed as a free agent with the Yankees for $6.6 million.\textsuperscript{96} Unfortunately, most Cubans will not be as lucky as El Duque or Yunel Escobar, another player who defected from Cuba to play baseball in the United States.

When the Cuban National team failed to add Yunel Escobar to the roster, he decided that he needed to pursue his future somewhere else.\textsuperscript{97} After gathering five fellow baseball friends, they organized their escape to America.\textsuperscript{98} On October 6, 2004, at approximately 8 p.m., they boarded an undersized boat with thirty other people.\textsuperscript{99} The weather was exceptionally stormy, with waves up to eighteen feet high.\textsuperscript{100} The tumultuous waves broke one of the motors, requiring Escobar and the other passengers to remain at sea an extra day.\textsuperscript{101} Conditions were so bad that “[e]veryone around the players vomited. If the waves didn’t make the passengers throw up, if the people around them throwing up didn’t make them throw up, the overpowering smell of gasoline did. Escobar—a proud man—admits he vomited.”\textsuperscript{102} Sharks even circled their boat.\textsuperscript{103} Although the distance between the northern coast of Cuba and Florida is only about ninety miles,\textsuperscript{104} their trip lasted two days and two and a half nights without food or water.\textsuperscript{105} On October 9, at about 1 a.m., after their laborious voyage, the boat finally arrived in Florida.\textsuperscript{106} Yunel Escobar’s story is unlike the majority of recent Cuban defectors\textsuperscript{107}: as a talented young baseball player, Escobar defected directly to the U.S., gained political asylum, and entered the amateur draft instead of utilizing the loophole.\textsuperscript{108} Moreover, he has been so successful that he is currently the starting shortstop for the Toronto Blue Jays.\textsuperscript{109}

\textsuperscript{94} See id.
\textsuperscript{95} See id. Believing that El Duque would be severely punished if the Bahamian government returned him to Cuba, the American State Department actually offered El Duque a special humanitarian visa before he went to Costa Rica. See id. at 416, 416 n. 265. However, per Cubas’ recommendation, El Duque declined the visa. See id. at 416.
\textsuperscript{96} See id. at 416.
\textsuperscript{97} See Crossman & Parajon, Story of Six Cuban Baseball Defectors, supra note 87.
\textsuperscript{98} See id.
\textsuperscript{99} See id.
\textsuperscript{100} See id. (noting that Escobar revealed that he did not think they were going to make it to their destination alive).
\textsuperscript{101} Id. Id.
\textsuperscript{102} See id.
\textsuperscript{104} See Crossman & Parajon, Story of Six Cuban Baseball Defectors, supra note 87.
\textsuperscript{105} See id.
\textsuperscript{106} The truth is that “[m]ost Cuban defectors never play a game at the major league level, and those who do reach MLB can be hampered by injuries or, for older players, age-related decline.” Frankel, supra note 2, at 407.
\textsuperscript{108} See id. The Cuban baseball culture is much different than that of professional baseball in the United States. Despite the obvious language barrier, the atmosphere is different—more professional. Cuban ballplayers, who are fortunate enough to play professional baseball after defecting, often experience a cultural shock and face a tough adjustment period. See David O’Brien, This Team Can Compete, ATLANTA J.-CONST., July 12, 2009, at
Human Smuggling

Since the first embargo in the early 1960s, many Cubans have abandoned Cuba to travel the ninety-mile stretches to the United States, utilizing any form of flotation device they could find.\textsuperscript{110} Although many reasons motivate Cubans to flee to America, the United States immigration policy, the Cuban Adjustment Act of 1966 ("CAA"), provide most with the push they need.\textsuperscript{111} The CAA grants Cubans with asylum status upon arriving on American

\textsuperscript{110} See Pingeton, supra note 39, at 329 (noting how Cubans use "makeshift boats, rafts, and even inflated tire tubes . . . to cross the treacherous Straits of Florida en route to the promised land"). See also Sawczyn, supra note 39, at 346.

\textsuperscript{111} See Sawczyn, supra note 39, at 346 n.26, citing Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 [codified as amended at 8 U.S.C. § 1255 (1999)]: That, notwithstanding the provisions of section 245(c) of the Immigration and Nationality Act [subsec. (c) of this section], the status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959 and has been physically present in the United States for at least one year, may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the
CUBAN BASEBALL PLAYERS

land.\textsuperscript{112} This policy is unique in comparison to non-Cuban immigrants because to remain in the U.S. Cubans are not obligated to prove their refugee status.\textsuperscript{113} Essentially, the United States initiated the CAA “to reward those who were courageous enough to leave the repressive regime of Fidel Castro.”\textsuperscript{114} Although several of the early refugees escaped Cuba for political reasons, after 1980 the Cuban immigrants mostly sought refugee from the dwindling economy.\textsuperscript{115} Fortunately for these Cubans, economic reasons suffice.\textsuperscript{116}

The objectives of the CAA backfired in 1980, when the Cuban government opened its border allowing approximately 125,000 Cubans to flee to the United States.\textsuperscript{117} This episode, which became known as the “Mariel Boatlift,” intensified concern about illegal immigration in the United States.\textsuperscript{118} The bulk of the “Marielitos” were peaceful and hardworking people, however approximately 10,000 to 15,000 were expelled because they were former mental patients and violent criminals.\textsuperscript{119} Subsequently, in 1984, Cuba and the United States alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence. Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 [codified as amended at 8 U.S.C. § 1255 (1999)].

\textsuperscript{112} See Sawczyn, supra note 39, at 346.


The term “refugee” means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such person’s nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term ‘refugee’ does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.


\textsuperscript{114} Paul J. Greene, \textit{Boats, Baseballs, and What a Repeal of the Cuban Refugee Adjustment Act Might Mean for Both}, 27 ENT. & SPORTS LAW. 4, 4 (Summer 2009). The implementation of the CAA stemmed from two foreign policy goals aimed at dealing with Fidel: “(a) to destabilize Castro’s government by draining it of vital human resources (such as physicians, teachers, and technicians); and (b) to discredit the regime through encouraging the flight of thousands from a ‘Communist’ to a ‘free’ country.” Sawczyn, supra note 39, at 347 (quoting \textsc{Felix Roberto Masud-Piloto, With Open Arms} 1 (1988)).

\textsuperscript{115} See Sawczyn, supra note 39, at 347.

\textsuperscript{116} See Pingeton, supra note 39, at 332.

\textsuperscript{117} Brown, supra note 104, at 275.

\textsuperscript{118} See Pingeton, supra note 39, at 330; see also Brown, supra note 104, at 275 n. 9. It became known as the Mariel Boatlift because “[b]etween April and September 1980, 124,776 Cuban migrants were rescued at sea and brought to the United States.” \textit{Id}.

\textsuperscript{119} See Pingeton, supra note 39, at 330.

165
came to an agreement that any individual who was ineligible to stay in the U.S. would be sent back to Cuba. 120

Ten years later, Fidel subdued rallying mobs precipitated by electrical blackouts and island-wide food shortages by once again permitting unrestricted sea departures. 121 However, the 30,000 Cubans who were rescued from the sea in 1994 were taken to Guantanamo Bay, instead of straight to the United States. 122 From this, stemmed the “Wet Foot, Dry Foot” rule 123: because of Cuban refugees’ unique condition they are allowed to stay in the United States if they actually touch United States soil, whereas if they are intercepted at sea, they are repatriated to Cuba. 124 As a result, the United States and Cuba instituted joint migration agreements in 1994 and 1995 to promote safe, organized, and legal immigration. 125 Additionally, the United States promised “to provide no less than 20,000 visas annually for legal immigration of Cubans to the United States.” 126

Nonetheless, many Cubans continue to emigrate illegally. 127 Since 1994, most alternative methods of escape have proven to be ineffective, triggering Cubans dependence on professional smugglers from the United States. 128 Human or immigrant smuggling is “a con-

120 See id. (explaining that at the time of the agreement an estimated 2700 Cubans were returned who either confessed to executing serious crimes in the United States or Cuba, or who suffered from acute mental disorders).
121 See Brown, supra note 104, at 275-76; Pingeton, supra note 33, at 330.
122 See Brown, supra note 104, at 276; Pingeton, supra note 33, at 330.
123 While the majority of U.S.-Cuba immigration policy is viewed as irrational, critics find the “Wet Foot, Dry Foot” rule to be especially ridiculous. For example, Paul J. Greene, an attorney who concentrates on immigration issues related to professional athletes, criticized this policy in his article, Boats, Baseballs, and What a Repeal of the Cuban Refugee Adjustment Act Might Mean for Both:

The act allows a unique path to U.S. citizenship as it gives any Cuban who sets foot on U.S. soil the chance to bypass the route all other immigrants must take to become legal permanent residents. For example, a Cuban boxer can defect after a fight in Mexico City, take the bus to the American border, cross into the United States without a valid visa, and become a green card holder. A Mexican boxer who makes the same trip would be subject to immigration detention and deportation for crossing into the United States illegally. The same is true for a citizen of any other country except Cuba. Greene, supra note 114, at 4. In addition, Matt Crossman, a writer for Sporting News, described the policy in an article he wrote about Baseball defectors, while adding his own comical “stab”:

The U.S. government generally follows a “wet foot, dry foot” policy—an unofficial title for an unofficial policy that a Border Patrol official borrowed from a Dr. Seuss book. If a boat of defecting Cubans is intercepted at sea, those aboard are sent back to Cuba. . . . If a boat makes it to land, the people on board are allowed into the country. After a year and a day, they are eligible to become permanent legal residents.


124 See Frankel, supra note 2, at 394-95; Sawczyn, supra note 39, at 348-49; Crossman & Parajon, Story of Six Cuban Baseball Defectors, supra note 87.
125 See Joint Statement on the Normalization of Migration, Building on the Agreement of Sept. 9, 1944, U.S.-Cuba, May 2, 1995, 35 I.L.M. 327; Brown, supra note 104, at 276 (stating that “[t]hese accords stipulate, inter alia, that Cuban migrants interdicted at sea will be returned to Cuba and will receive instruction on legal means of immigration, and oblige Cuba to refrain from any action against returned migrants for attempting to immigrate illegally.”).
126 Brown, supra note 104, at 276.
127 See id. at 276-77.
128 Id. at 278-79. Before 1994, homemade rafts were the most prevalent vehicles of migration. Id. at 278. However, after the horde of immigrants in 1980 and 1994, the United States Coast Guards established a system allowing them to extradite the majority of the rafters to Cuba. Id.
CUBAN BASEBALL PLAYERS

Tractable agreement in which one person (the smuggler) agrees to take, guide, or transport another person (the smuggled human) across a national border illegally.”

Immigrant smuggling is the superior form of escape for several reasons. For one, smugglers have access to boats with “speed and maneuverability” that can outdistance law enforcement vessels. Secondly, the smuggler captains have the knowledge and skill to steer alongside the coast of Cuba as well as Florida, and receive ample compensation for evading law enforcement. Lastly, a professional smuggler has access to the “necessary logistical coordination of the covert transit through an underground network collecting advance payment or financing or expensive fees from relatives in both Cuba and the United States.” However, safety is not a main concern:

In [November] 2001, thirty Cuban men, women, and children each reportedly secured payment in excess of $10,000 to smugglers in Florida for covert transit to the United States. They crowded onto a hired stranger’s speedboat on the north coast of Cuba for the 100-mile crossing under the cover of darkness. When the vessel failed to arrive in South Florida the following day, the United States Coast Guard was notified. The Coast Guard’s search discovered a capsized vessel believed to be that driven by the hired smuggler, but no survivors or bodies were found. This event is typical of many unsuccessful human smuggling trips in the Straits of Florida, as smuggling has flourished in this corridor since 1998.

While some have faced trials for smuggling Cubans, no one had been convicted until MLB agent Gustavo “Gus” Dominguez in April 2007. Despite a letter expressing Dominguez’s “strong character and high moral principles,” written by Hall of Famer Sandy Koufax, Dominguez was given the mandatory minimum sentence of five years in prison for funding two smuggling trips to Florida.

---

129 Edward J. Schauer and Elizabeth M. Wheaton, Sex Trafficking Into the United States: A Literature Review, 31 CRIMINAL JUSTICE REVIEW 146, 148 (2006). Although human smuggling and human trafficking are often mistaken for each other in the media, “[h]uman smuggling differs from trafficking in that smuggling suggests consent of the parties, whereas trafficking includes deception, fraud, coercion, force, or exploitation of the trafficked human by the trafficker.” Id.

130 See Brown, supra note 104, at 279.

131 See id.

132 Id. at 279.

133 Id. at 280 (explaining that the coordinators main concern is to maximize profit which entails delivering as many people without alerting the authorities and therefore the boats are often crowded and unsafe).


135 Brown, supra note 104, at 279; see also United States v. Zayas-Morales, 685 F.2d 1272 (11th Cir. 1982) (“dismissing indictments charging defendants with transporting illegal aliens during the Mariel Boatlift”).

136 See Jay Weaver & Cammy Clark, Federal Court: Player-Smuggling Case, MIAMI HERALD, July 10, 2007, at B.

137 Id.

138 Id.
The U.S. Trade Embargo on Cuba

On January 1, 1959, Fidel Castro seized control of the Cuban government and the previously amicable U.S. relationship came to an abrupt halt. Shortly thereafter Fidel Castro became Cuba’s prime minister, marking his first assumption of administrative responsibilities for the new government. U.S.-Cuban relations severely declined in the early 1960s, when Fidel “began to build a repressive communist dictatorship and moved his country toward close relations with the Soviet Union.” Since January 1, 1959, until his resignation in 2006, Fidel Castro ruled the island of Cuba with an iron hand.

The Cuban Government’s goals for the revolution were to implement land reform, develop the economy, obtain new international allies, and establish socialism as the new political authority. They adopted the first Agrarian Reform Law in May of 1959, which involved confiscation by the Cuban government of all agricultural land over 165 acres, in order to divide the large property holdings for allocation amongst the poor. To lessen United States economic influence and presence, Cuba enacted Law No. 851, confiscating all United States-owned businesses. In response to the Cuban government’s nationalization of

---


140 See Country Study, supra note 139, at 64. Initially, the only official position that Fidel undertook was commander of the armed forces, which only lasted a few weeks. See id. See also BBC On This Day, 1959: Castro Sworn in as Cuban PM, BBC News, http://news.bbc.co.uk/onthisday/hi/dates/stories/february/16/newsid_2544000/2544431.stm (last visited Jan. 30, 2010).

141 Mark P. Sullivan, Cuba: Issues for the 111th Congress 15 (Cong. Research Serv., CRS Report for Congress, Order Code R40193, Mar. 25, 2010). In April 1961, Fidel declared that the “Cuban Revolution” was socialist, and then in December 1961 he publicly adopted Marxism-Leninism. Id. at 5. Almost immediately before Castro’s declaration of socialism, in April 1961, the U.S. instigated the Bay of Pigs catastrophe to attempt to oust the Castro government. See Jamail, supra note 5, at 9. See also Brian Latell, After Fidel: The Inside Story of Castro’s Regime and Cuba’s Next Leader 69 (2005). The Marxism-Leninism theory:

The substance of the Marxist doctrine was the idea that private ownership of the means of production is the origin of social inequality and class struggle. Thus such ownership had to be abolished. [T]he root of all social evil is class antagonism; social classes can, and must, be suppressed by prohibiting the private appropriation of productive forces by and putting them at the disposal of the collectivity which will exploit them in the common interest. . . . [T]he new society. . . will have neither state nor law. . . . Man will once again be free. When the Marxist party—also known as the Bolshevist party—succeeded in gaining power in Russia, Lenin, the leader of the party, played such an important role that the theory became known as Marxism-Leninism.


142 See Sullivan, supra note 141, at 5.


144 See Country Study, supra note 139, at 65.

145 See id.; Jamison, supra note 143, at 892.

CUBAN BASEBALL PLAYERS

all American commercial property and business in Cuba, the development of a relationship with the Soviet bloc, and the assistance to various anti-American organizations during the Cold War, the Eisenhower administration placed the first limitation on Cuban exports between the years of 1960-61, which essentially barred all trade and travel between the two states.147

The United States’ embargo against Cuba stems from the 1917 Trading With the Enemy Act ("TWEA"),148 which bans transfers of property between United States citizens and enemy nations, unless authorized by the President.149 Currently, the TWEA maintains that during wartime, the President may:

investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transaction involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States.150

However, in 1933 the TWEA was extended to include circumstances of “existing national emergency.”151 The authority in the amended portion, Section 5(b), is “intended to be exercised in peacetime to enable the President to engage in extensive regulation of international economic transactions when a national emergency so required.”152 In other words, the President retains the power to enforce embargoes upon foreign countries, irrespective of a wartime emergency.153

The TWEA’s embargo was codified in 1963 with the implementation of the Cuban Assets Control Regulations ("CACR"),154 which prohibits “transactions incident to travel to, from, and within Cuba” and “payment or transfer” to Cuban nationals.155 Although Congress

147 See WILLIAM RATLIFF & ROGER FONTAINE, A STRATEGIC FLIP-FLOP IN THE CARIBBEAN: LIFT THE EMBARGO ON CUBA 9 (2000); Frankel, supra note 2, at 390; Greller, supra note 7, at 1685.
152 Cornet Stores v. Morton, 632 F.2d 96, 97 (9th Cir. 1980) (referring to Act of Mar. 9, 1933, ch. 1, § 2, 48 Stat. 1).
153 Cwiertny, supra note 18, at 396 (citing United States v. Fernandez-Pertierra, 523 F. Supp. 1135, 1137 (S.D. Fla. 1981)).
154 Cuban Assets Control Regulations, 31 C.F.R. §§ 515.101-901 (2009); see Cwiertny, supra note 18, at 396.
155 31 C.F.R. §§ 515.305, 515.309(a), 515.415(a)(1); see Frankel, supra note 2, at 393. The CACR has a substantial impact on baseball:

[T]his means no U.S. baseball organization is allowed to engage in any transactions with Cuba unless it requests a specific license. No club may enter into contractual relations with Cuban or Cuban nationals. And if a Cuban ballplayer signed a multimillion-dollar contract with a U.S. team, he would be prohibited from sending money home to Cuba without a Treasury Department License.

Jamail, supra note 5, at 129.
THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

revised the embargo in 1977 to only pertain to times of war, it simultaneously enacted legislation that includes renewable one-year options, which authorizes the President to enforce the Cuban embargo in times of peace.156

Insisting on a regime change in Cuba, the United States passed the Cuban Democracy Act (“CDA”) of 1992157 and the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (also called the Helms-Burton Act),158 which together strengthened the existing embargo sanctions.159 The CDA broadened the ban on conducting business in Cuba to U.S.-owned or controlled businesses located overseas.160 Despite this expansion, it also aspired to bring humanitarian assistance to the Cuban people.161 Due to considerable amounts of foreign investments in Cuba, the United States subsequently enacted the newest, most restrictive embargo, the Helms-Burton Act.162 This codified the Cuban embargo, including all limitations under the CACR.163 The Helms-Burton Act aims to globalize the current U.S. trade embargo over Cuba by discouraging third-party countries and their nationals from dealing or investing in Cuba while also granting a cause of action in U.S. federal courts to U.S. citizens whose property was taken against subsequent purchasers.164 Furthermore, the purpose of the Helms-Burton Act is “to seek international sanctions against the Castro government in Cuba, to plan for support of a transition government leading to a democratically elected government in Cuba, and for other purposes.”165 These restrictions largely contribute to the current issues facing Cuban nationals who want to play major league baseball.

156 See Trading With the Enemy Act, § 101(b), 91 Stat. at 1625 (codified at 50 U.S.C. app. § 5 note (2009)); see also Cwiertny, supra note 18, at 397 (2000); Lopez, supra note 20, at 358.


159 See Sullivan, supra, note 141, at 16; Sheryl L. Lutjens, Cuba and the Security Frame, 33 LATIN AMERICAN PERSPECTIVES 3, 7 (2006); O’Brien, supra note 149, at 146.

160 See CDA, supra note 157, at § 1706; see also Cwiertny, supra note 18, at 398.

161 See O’Brien, supra note 149, at 146 (CDA “sought to bring humanitarian aid to Cuba through food donations [CDA § 1705(b)], provision of medical supplies [CDA § 1705(c)], and the introduction of a postal infrastructure [CDA 1705(f)].”).

162 See Frankel, supra note 2, at 394; Digna B. French, Economic Sanctions Imposed by the United States Against Cuba: The Thirty-Nine Year Old Embargo Culminating with the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 7 U. MIAMI INT’L & COMP. L. REV. 1, 12 (1998-99). Prior to implementation of the Helms-Burton Act, on February 24, 1996, four pilots from Brothers to the Rescue (a humanitarian group made up of Cuban exiles) flew over Cuba in order to drop political pamphlets. See COUNTRY STUDY, supra note 139, at lix; Catherine M. Clendinning, Comment, The Great North American Trade-Off: Legislation Shaping Trade Policies Between Cuba and the United States, 14 L. & BUS. REV. AM. 139, 142-43 (2008). After they strayed from the path that they previously agreed on with the Cubans, a Cuban military aircraft shot down the jets, killing them. Id. Seemingly in retaliation, the Senate approved the Helms-Burton legislation on March 5 and President Clinton hastily signed it into law on March 12 (despite fervent, articulated criticism by Russia, Canada, the EU, and the Caribbean Community). See COUNTRY STUDY, supra note 139, at lix.

163 See Sullivan, supra note 141, at 16.

164 See French, supra note 162, at 7.

165 Helms-Burton Act, supra note 158. The Helms-Burton Act consists of four major parts:

(1) it imposes sanctions against persons or companies from third countries who do business with Cuba (under a “trading in stolen goods” argument) and establishes the financing of the U.S.-organized “opposition”; (2) it continues the blockade until all nationalized properties have been returned and seeks to regulate the process of the overthrow of the Cuban Revolution (including stipulating specific people who are not to
CUBAN BASEBALL PLAYERS

A Change in the Political Landscape Presents New Opportunities for Baseball

The change in the political landscape presents a unique opportunity for a new arrangement for Cuban baseball players to participate in Major League Baseball.

American relations with Cuba before the Obama administration

The embargo against Cuba was warranted when it was first introduced in 1960: “[t]he United States wanted to expedite change in the Cuban form of government while protecting its own national security because Cuban-Soviet relations were growing apace with the development of world communism.” However, the end of the Cold War eliminated these initial concerns. The situation has drastically changed since the enactment of this outdated embargo but, unfortunately, the Cuban people are still forced to deal with the consequences.

Several critics argue that the conclusion of the Cold War should have precipitated the removal of the embargo. Instead, the U.S. foreign policy toward Cuba transformed with the new goals of “bringing democracy” to the island. President Bill Clinton and President George W. Bush both focused on a status quo approach to “maintain the U.S. dual-
track policy of isolating the Cuban government while providing support to the Cuban people.”

President Bill Clinton’s Dual-Track System

President Clinton’s term followed the dual-track policy. Representing the first track, the beginning of the administration was characterized by increased pressure, through the Cuban Democracy Act and the Helms-Burton Act, in an attempt to abruptly wipe out the Cuban Revolution. However, when that path failed, he proceeded with track two: Clinton lessened the restrictions imposed by the trade embargo in order to “ease the plight of the Cuban people and help them prepare for a democratic future.” For example, Clinton enabled United States residents to aid Cubans more effectively; they could: (1) send more money ($1,200 a year) to individual families and non-governmental groups; (2) sell food and medicines to organizations unaffiliated with the government, e.g., religious groups; (3) schedule direct flights to Cuban cities, excluding Havana; (4) create a mail service directly to Cuba; and (5) partake in people-to-people contacts through exchanges between academics, scientists, and athletes.

Clinton explained that his administration strategically devised these measures to help the Cuban citizens without providing support to Castro’s government. He felt very strongly about promoting this policy of “people-to-people exchange.” For example, in 1999, Clinton enabled the Baltimore Orioles to compete against the Cuban National Team in two exhibition games, one in Havana and the other in Baltimore, with a provision that the profits be given to Cuban charities rather than Castro’s government. Through the implementation of his new policies, Clinton concluded his term by setting the stage to improve the forty-year hostility between these two nations.

---

170 Sullivan, supra note 141, at 17.
171 See generally Mariño, supra note 168.
172 See id. at 48.
173 See id. at 52-54; Greller, supra note 7, at 1650 n. 5
174 Statement on United States Policy Toward Cuba, 35 WEEKLY COMP. PRES. DOC. 7, 7 (Jan. 5, 1999) [hereinafter Statement on U.S. Policy].
175 Initially, Clinton only allowed Cuban Americans to send remittances to their immediate families in Cuba. However, he later expanded on this, permitting any U.S. resident to transit money to Cubans. See id.
176 See id; Greller, supra note 7, at 1650 n. 5; Weiss, supra note 64, at 155.
177 See Statement on U.S. Policy, supra note 174, at 7. Clinton stated: “They are consistent with our policy of keeping pressure on the regime for democratic change—through the embargo and vigorous diplomatic initiatives—while finding ways to reach out to the Cuban people through humanitarian efforts and help in developing civil society.” Id. at 7-8. In addition, he proclaimed: “They demonstrate the United States’ compassion for the Cuban people, our strong interest in building bonds between the citizens of our nations, and our determination to provide the people of Cuba with hope in their struggle against a system that for four decades has denied them even basic human rights.” Id. at 7.
178 See Lutjens, supra note 159, at 7 (contrasting Clinton’s strict legislation that called for a change in the Castro regime, such as the CDA and Helms-Burton Act, with his “Cuba policy [that] was characterized, too, by the post-cold war context, by his conceding of authority over sanctions regulations to Congress, and by his faith in people-to-people exchange as the means to bring change to Cuba.”).
CUBAN BASEBALL PLAYERS

President George W. Bush’s Stricter Dual-Track System

By the time President Clinton left office, U.S.-Cuba relations were, seemingly, headed in the right direction, towards a weakening of the embargo. However, this setting did not last long. Although President Bush maintained the dual-track U.S. policy system, his approach to relations between the two nations was entirely different than his predecessor. President Bush zealously sought enforcement of the long-standing embargo against Cuba and, consequently, the Cuban people. In 2006, Bush’s administration attempted to preclude Cuba from participating in the World Baseball Classic ("WBC"). When Bush thought that Cuba might partake in the WBC, he placed a political barrier on "the Caribbean dictatorship’s participation, only to be countered by an equally savvy political move from Castro." Fidel promised to donate all of the proceeds from the WBC to the victims of Hurricane Katrina. Although Bush eventually allowed Cuba to participate in the games and the WBC ensued without any problems, his actions stood as a reminder to anyone who happened to forget about the longstanding hostility between the two nations.

Rather than proceed with Clinton’s progress, Bush essentially moved backwards in the development of relations with Cuba. For one, his administration stressed greater implementation of economic restrictions and intensified sanctions on humanitarian gift packages, travel, and remittances. In addition, President Bush increased constraints on Cuban Americans visiting family in Cuba and conditions for payment of U.S. agricultural exports to Cuba. Although Bush did not completely abolish Clinton’s reductions of sanctions, he added limitations on Clinton’s improvements instead. For example, Clinton permitted American travel to Cuba intended for any educational activity, while Bush required this travel to be directly associated with a structured educational program. Due to these new restrictions, if President Obama plans to improve the tension, he should revert back to U.S.-Cuba relations prior to President Bush’s term.

Current political landscape: New administrations moving toward easing restrictions

Currently, U.S. President Barack Obama and Cuban President Raul Castro are working to improve United States-Cuba relations. Given their stances on the embargo, the respective leaders are more likely to establish a solution to the restrictive, dangerous, and ineffective embargo than their predecessors. The Obama administration has already initiated its process of reform. In September 2009, the Treasury Department executed the Omnibus Ap-

---

180 See Sullivan, supra note 141, at 18.
181 O’Brien, supra note 149, at 136.
183 O’Brien, supra note 149, at 136-37.
184 See id.
185 See id. at 137.
186 See Sullivan, supra note 141, at 18.
187 See id.
188 See id.
189 See Adam Jadhav, Thaw Seems Near for U.S., Cuba, St. Louis Post-Dispatch, Apr. 12, 2009.
THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

appropriations Act of 2009 along with other presidential policy directives, which authorized the easing of restraints on travel, remittances, gifts, and agricultural exports to Cuba. Outside of legislation and executive action, in June 2009, the United States and Cuba took a large step toward lifting the embargo when they decided to revive the semi-annual migration talks; talks that the U.S. suspended in 2004. Further, the American and Cuban governments are considering establishing a direct postal service between the countries. Finally, in June 2009, the United States and Cuba took a large step toward lifting the embargo when they decided to revive the semi-annual migration talks; talks that the U.S. suspended in 2004. Further, the American and Cuban governments are considering establishing a direct postal service between the countries.

In the ensuing stalemate, several analysts had varying opinions on the outcome of possible diplomacy between the United States and Cuba. On one hand, some predicted Raul Castro would be receptive to providing the Cuban people with additional economic freedoms. On the other hand, some felt that Raul would follow in his brother’s footsteps and that it is unlikely for the United States to expect Cuba to impose democratic reforms. For

---

193 See Sullivan, supra note 141, at 25, 28; U.S. GAO, supra note 192, at 9-11 (detailing the changes in each policy); Rob Biertempfel, MLB Clubs Await Thaw in Relations with Cuba, PITTSBURGH TRIB. REV., Apr. 29, 2009. To initiate President Obama’s plan of seeking “a new beginning with Cuba,” he amended part of the CACR. Id. For example, in September of 2009, the regulation of “Remittances to nationals of Cuba” was amended. See U.S. GAO, supra note 192, at 9, 10. The older version stated:
(a) Periodic $300 family household remittances authorized. Persons subject to the jurisdiction of the United States who are 18 years of age or older are authorized to make remittances to nationals of Cuba who are members of the remitter’s immediate family, provided that:
(1) The remitter’s total remittances do not exceed $300 per recipient household in any consecutive 3-month period, regardless of the number of members of the remitter’s immediate family comprising that household; (2) The remittances are not made from a blocked source. . .
31 C.F.R. § 515.570 (2008). The amended regulations: (1) “[a]uthorized remittances to close relatives, provided no remittances are authorized to prohibited Cuban government officials or Cuban Communist Party officials;” (2) “[r]emoved limitations on the amount and frequency of remittances”; and (3) “[a]uthorized family travelers to Cuba to carry up to $3,000 in remittances.” U.S. GAO, supra note 192, at 10; see 31. C.F.R. § 515.570 (2009) (amended by 74 FR 46006).
194 Sullivan, supra note 141, at 23. The first set of talks was on July 14, 2009. The next stage were planned to occur in Havana in December 2009, but were postponed until February 2010. Id.; Migration Talks with Cuba Put Off to February, WASH. POST, Dec. 4, 2009, at A17.
195 See Sullivan, supra note 141, at 23 (the State Department announced the billboard’s removal in late July 2009).
196 See Cuba and the United States: Resistant to Sticks and Carrots, 950 ECONOMIST, Nov. 21, 2009 [hereinafter Resistant to Sticks and Carrots]; Marc Lacey, In Cuba, Hopeful Tenor Toward Obama Is Ebbing, N.Y. TIMES, Dec. 31, 2009, at A6 (explaining how Raul Castro and the Cuban people’s initial enthusiasm about President Obama has declined; “The Obama honeymoon is over.”).
197 See Jadhav, supra note 189.
198 See Biertempfel, supra note 193.
CUBAN BASEBALL PLAYERS

example, one critic explained that although the “economic reforms are greatly improving the weathered county, Raul is not taking the measures necessary to ensure their continued success, including reestablishing trade with the United States and encouraging foreign investment.”199 The discourse was accompanied by a mixed reply from Cuba’s government:

Days after President Raul Castro said he was willing to negotiate, his older brother, Fidel Castro, said Cuba will not give in to American demands. Change will be a slow process, for both sides. “Just because the USA decides it will normalize relations, that does not negate what 51 years of the Cuban Revolution and anti-American sentiments have solidified into a society,” [Rene] Gayo [the Pittsburgh Pirates’ director of Latin American scouting] said. Distrust of America is prevalent throughout Cuban government. According to Gayo, the sentiment runs especially deep at the country’s National Institute of Sports. “The Communist Party will not go away because the USA wants to get access to what Cuba has to offer,” Gayo said. “It will take time for the Cubans to infiltrate (American baseball), volume-wise, to the extent that the Dominicans and Venezuelans have.”200

Despite the opinions on Raul’s reluctance to embrace an easing or lifting of the embargo, his economic progress and willingness to abandon certain socialist mechanics are a symbol of the possibilities for direct diplomacy with the United States. Since taking office, Raul has significantly improved Cuba’s economy, in spite of suffering a gigantic setback caused by Hurricanes Ike and Gustav’s destruction.201 In addition, he has assisted the agricultural sector,202 rebuilt Cuba’s infrastructure, and encouraged spending.203

Raul’s policy reforms symbolize a shift away from Fidel’s aggressive socialist rule.204 Prior to January 2009, the government was responsible for constructing homes.205 In

199 Jamison, supra note 143, at 891.
200 Biertempfel, supra note 193.
201 See Jamison, supra note 143, at 899.
202 The farmers are very happy with the changes Raul has made thus far. The problem with state-run distribution of agricultural goods is that farmers lack motivation for additional self-development. See Jamison, supra note 143, at 900. Thus, Raul increased the price that the state will compensate farmers, doubling and sometimes tripling it, to promote further expansion. See id. In addition, farmers now retain the authority to purchase essential supplies, which were formerly dispensed by the government’s regulatory system, in order to maintain their crops and prevent uncultivated land stemming from scarcity in the rationed stock. See id. Lastly, he returned the unused government-owned land to the people, instituting Law Decree 259, which granted private owners and cooperatives segments of the vacant farmland. See id. Raul’s new land policies transferred the majority of farmland ownership from the government to the citizens. See id. (explaining how “the balance in ownership of farmlands virtually inverted itself. Farmers now control eighty-five percent of the total farm acreage, while prior to Raul taking office the state maintained ownership of eighty percent.”). This action defies one of the principles of socialism. See Bulkina, supra note 141, at 601 (noting the essence of the Marxist doctrine: “the idea that private ownership of the means of production is the origin of social inequality and class struggle. Thus such ownership had to be abolished.”).
203 See Jamison, supra note 143, at 899-903.
205 See Jamison, supra note 143, at 901; Govan, supra note 204.
THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

response to Cuba’s housing shortage emergency.206 Raul revoked the ban, permitting Cuban residents to build their own homes, and he announced that several new housing reforms are expected.207 Furthermore, Raul admitted to inadequacies in Cuba’s education system stemming from the majority of teachers seeking other, better paying jobs.208 Therefore, he introduced incentives to attract retired teachers to return to the classrooms.209 In the spring of 2008, President Raul Castro initiated reforms to improve the economy by pushing the Cuban people to increase their spending.210 Other policies, which became effective in April of 2008, included removal of the long-standing ban against buying electronic goods211 and conclusion of the “tourism apartheid,” in which only tourists, not Cuban citizens, were allowed access to car rentals and hotel stays.212

As expected, many are still critical of President Raul Castro, claiming that his development is too slow and trivial.213 However, even though these adjustments may appear to be fairly small, “they are gradually leading to the decentralization of the government, something Cuba has not experienced in half a decade.”214 If Raul Castro continues down this path, progressively granting the people more freedoms, the U.S. will have no choice but to continue easing restrictions on the embargo.

Recently, Cuban officials have gradually become more critical of President Obama’s administration.215 For example, in December, the Cuban Foreign Minister criticized President Obama, calling him an “imperialistic, warmongering Cuba hater.”216 Cuban officials have also complained about the U.S. including Cuba on the Transportation Security administration’s new list of countries that require enhanced security screening procedures.217 While these happenings are certainly disheartening to those in favor of lifting the embargo, “[t]here was and still is potential for the Obama administration to change relations with Cuba.”218

President Obama has slowly initiated the changes he promised during his presidential campaign. He pledged to remove constraints on family travel to Cuba and on Cuban Americans sending remittances to Cuba, which he fulfilled.219 However, Obama continues to uphold the embargo as a source of power, a bargaining chip, to induce change.220 He has also declared: “if the Cuban government takes significant steps toward democracy, beginning with

206 For three years prior to lifting the ban, the Cuban government failed to execute its annual goal of constructing 100,000 new homes. See Govan, supra note 204. The issue intensified further when three hurricanes razed more than half a million houses. See id.
207 See Jamison, supra note 143, at 901.
208 See id. at 902 (stating that Cuba is ranked fifty-first in the world).
209 See id. ( contrasting Fidel’s policy almost a decade ago, which attempted to employ high school graduates as temporary teachers).
210 See id.
211 See id. (including computers, mobile phones, microwave ovens, and car alarms).
212 See id.
213 See id. at 903.
214 Id.
215 See Sullivan, supra note 141, at 23; Resistant to Sticks and Carrots, supra note 196.
216 Lacey, supra note 196; see also Sullivan, supra note 141, at 23.
218 Lacey, supra note 196 (quoting Wayne S. Smith, a former American diplomat in Havana).
219 See Sullivan, supra note 141, at 22; Spain Predicts Thaw in US and EU Relations with Cuba, VOICE OF AMERICA NEWS, July 21, 2010 [hereinafter Spain Predicts Thaw].
220 See Sullivan, supra note 141, at 22.
CUBAN BASEBALL PLAYERS

the freeing of all political prisoners, then the United States would take steps to normalize relations and ease the embargo.”

Although the freeing of all political prisoners may seem implausible, it is much more rational than requiring Cuba to become a democratic state as a prerequisite of weakening the embargo.

On July 14, 2010, President Raul Castro “took his first major step away from decades of hardline policy,” when he announced Cuba’s plan to free 52 political prisoners who were arrested in 2003. Under the deal that Raul and Cardinal Jaime Ortega of the Roman Catholic Church discussed, “five of the prisoners were to be released ‘within days,’ . . . and the rest within months, bringing the number of political prisoners in Cuba—once numbering in the tens of thousands—to fewer than 150, the lowest in the regime’s history.” Within two weeks, Raul had already released twelve prisoners who joined their families and moved to Madrid, Spain. After this, many felt that it was President Obama’s turn to reciprocate.

As previously stated and as is now even more evident, President Raul Castro has taken many steps, which steer away from basic communist policies, in order to improve his country and its economy. However, it is unlikely that Raul will implement more of these changes without action from President Obama.

The United States embargo on Cuba should be eliminated because of the detrimental effect it has had on Cuban citizens, Cuban baseball players, as well as to both the Cuban and American economy. In the early 1960s, President Eisenhower’s implementation of the embargo was warranted: “Cuba was the ally of [the U.S.’s] principal global adversary, the Soviet Union, and . . . Cuba was trying to overthrow other governments in the hemisphere.” However, that was a long time ago and circumstances have changed. While a majority of Americans support a change in U.S.-Cuba policy, President Obama’s administration re-

221 Id. Secretary of State, Senator Hillary Clinton reiterated Obama’s position of maintaining the embargo for the time being because it “provides an important source of leverage for further change in Cuba.” Id. at 69.


223 Id.

224 See Spain Predicts Thaw, supra note 219.

225 As Patrick Symmes, writer for Newsweek, described:

The stone-faced Raúl has put 52 cards on the table. If, after years of advocating tit-for-tat improvements, Washington does not reciprocate—perhaps by increasing trade with the island or finally appointing a U.S. ambassador to a post left vacant since 1961—the Obama administration could look like the unhappy gambler whose bluff was called.

See Symmes, supra note 222, at 9.

226 House Ways and Means Subcommittee on Trade Hearing: Hearing on U.S.-Cuba Policy, Apr. 29, 2010 (testimony of Wayne S. Smith, Senior Fellow, Center for International Policy), [hereinafter Wayne Smith Testimony].

227 See id. Wayne Smith clarifies that not only does the Soviet Union cease to exist, but also the U.S. and the Russian Federation, its successor, now have “friendly relations.” See id. Furthermore, Cuba has “long since halted any efforts to overthrow other governments in the hemisphere. It now has normal diplomatic and trade relations with all of them.” Id. In fact, the U.S. is the only nation in the Western Hemisphere without normal relations with Cuba. See id.

228 The administration declared that the restrictions will remain until Cuba makes substantial steps towards creating a democratic government, such as releasing the political prisoners. See id. (stating that a poll in April 2010 “indicated that 58% of Americans surveyed supported full diplomatic relations with Cuba, while only 33% opposed. And 61% of those polled believed that all U.S. citizens should be allowed to travel to Cuba, and 57% that U.S. companies should be allowed to do business there.”).
quires improbable prerequisites to lift the economic embargo initially imposed on Fidel Castro’s regime in 1960.229

On August 17, 2010, following the release of the political prisoners in Cuba, the Obama administration announced that it plans to lessen the restrictions placed on Americans travelling to Cuba.230 While this may not seem like an obvious advantage to Cuba, an increase of U.S. citizens in Cuba would in fact boost the Cuban economy, as well as promote contact between the two countries.231 President Raul Castro’s proactive stance toward repairing his country proves that he has a strong desire to improve Cuba and help its people. Moreover, the fact that the Obama administration has already lifted restrictions that were imposed by President Bush, and Raul’s tendency to eliminate socialists’ policies that harm the country illustrates that the countries are both taking steps in the right direction.232 Fortunately, if Cuban President Raul Castro and U.S. President Barack Obama continue taking steps toward enhancing the United States-Cuba relationship, there is a good chance that the embargo will eventually be lifted and Cuban baseball players would no longer need to defect to play professional baseball.

PROPOSED SOLUTIONS

Baseball Diplomacy Act

The current MLB rules, which encourages Cuban baseball players to defect, is flawed and there are many plausible plans to remedy them.233 In September of 1995, a year before the enactment of the Helms-Burton Act, U.S. Representative Jose E. Serrano, introduced House Bill 2311, “A Bill to Waive Certain Prohibitions With Respect to Nationals of Cuba Coming to the United States to Play Organized Baseball.”234 This bill, now called the “Baseball Diplomacy Act,” creates an exception to the embargo, allowing Cubans to enter

229 See Sullivan, supra note 141, at 22; Resistant to Sticks and Carrots, supra note 196.
231 See id. (explaining that the expansion of travel opportunities for Americans “was meant to loosen restrictions on academic, religious and cultural groups that were adopted under President George W. Bush, and return to the ‘people to people’ policies followed under President Bill Clinton.”).
232 See Resist to Sticks and Carrots, supra note 196; see generally Lacey, supra note 196. Wayne Smith, a former American Diplomat to Havana and a Senior Fellow for the Center of International Policy, proposed several ways for an improvement in U.S.-Cuba relations. Smith suggests the removal of travel restrictions as the first step. See Wayne Smith Testimony, supra note 226. Smith explains that Miami’s “Cuban exile community” appreciates—and is taking full advantage of—the small step taken by the Obama administration to lift the limitations on travel and family remittances of Cuban-Americans. See id. He concedes that at the very least the administration needs to eliminate restrictions on academic and “people-to-people” travel. See id. Furthermore, he asserts two simple steps that the U.S. should: an increase in agricultural sales to Cuba and the removal of Cuba from the list of “state sponsors of terrorism.” See id. Smith argues that Cuba does not engage in terrorist activities. See id. Since the U.S. has no evidence proving Cuba’s involvement, removing the name would demonstrate to the rest of the world that the U.S. is shifting towards a more stance against terrorism that centers on “factual analysis rather than propaganda ploys.” Id. Finally, Smith proposes launching an open dialogue between the U.S. and Cuban governments to civilly discuss their countless disagreements. See id. Although both Castro and Obama have mentioned this open dialogue, it has yet to successfully occur. See id.
233 See Cwiertny, supra note 18, at 425-27; Greller, supra note 7, at 1700-12; Lopez, supra note 20, at 355-78.
234 See H.R. 2311, 104th Cong. § 1 (1994); Cwiertny, supra note 18, at 422.
CUBAN BASEBALL PLAYERS

America on a visa to play baseball.235 Specifically, H.R. 187 provides a special work visa to Cuban baseball players, permits them to bring their salary back to Cuba, restricts the time they may stay in the U.S. to the duration of the baseball season, and expresses that the players do not need to renew their contract each year, as long as it is valid.236 Since 1995, Representative Serrano continues to raise this issue; however, the law has yet to be enacted.237 Therefore, despite the Act’s good intentions, its inception is unlikely.

Worldwide Draft

Recently, baseball, America’s national pastime, has become more of a global sport, as evidenced by the implementation of the World Baseball Classic238 (“WBC”) in 2006.239

---

235 See Cwiertny, supra note 18, at 422; see also Jamail, supra note 5, at 132 (“Serrano’s bill would allow the U.S. Immigration and Naturalization Service to grant work visas similar to those given to players from other countries.”).


Sec. 2. Removal of Certain Restrictions.

(a) Restriction on Embargo Authority- The authorities of section 620(a) of the Foreign Assistance Act of 1961, those authorities under section 5(b) of the Trading with the Enemy Act that were being exercised with respect to Cuba on July 1, 1977, as a result of a national emergency declared before that date, and are being exercised on the date of the enactment of this Act, and section 203 of the International Emergency Economic Powers Act may not be exercised to regulate or prohibit—

(1) those transactions permitted under section 515.571 of title 31, Code of Federal Regulations, by or on behalf of a Cuban national who enters the United States from Cuba on a visa issued under section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act for the purpose of playing organized professional baseball; and

(2) a Cuban national described in paragraph (1) from returning to Cuba with the earnings made in playing organized professional baseball.

(b) Restriction on Immigration Authority- The authority contained in section 212(f) of the Immigration and Nationality Act may not be used to deny a visa described in subsection (a)(1) to a Cuban national for the purpose of playing organized professional baseball.

(c) Inapplicability of Other Restrictions- This section applies notwithstanding section 102(h) of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996.

Sec. 3. Duration of Visa.

A visa described in section 2(a)(1)—(1) shall permit the alien to whom the visa is issued to remain in the United States only for the duration of the baseball season; and (2) need not be renewed for subsequent entries into the United States for the duration of a valid contract entered into between the alien and the professional baseball team with which the alien played in the preceding baseball season.

Id.


In the past few years, a large number of international players have left their home country to play in the U.S. or Canada as part of MLB. Due to a flood of new ballplayers, several commentators and team officials have lobbied for establishing a worldwide draft, and even Commissioner Selig can be counted among the proposal’s supporters. Reasons for a global draft vary, but generally advocates believe that it could resolve the issue of competitive balance by providing small-market baseball clubs the opportunity to sign a top foreign prospect.

One commentator, Scott Cwiertny, argues that in order to mend the defections dilemma, MLB needs to alter its rules concerning Cubans. In other words, MLB should adopt a worldwide draft consisting of players of foreign residency. This would completely abolish free agency status for foreign players, which would have considerable effects on Cuban defectors. First, it would lower the monetary incentives for agents and scouts to aggressively and unlawfully pursue players in Cuba. Second, the end of free agency would remove bidding wars for Cuban free agents who live outside of the U.S., consequently diminishing agents’ motivation for inflating players’ abilities in order to tempt them to defect. Finally, it would lessen MLB scouts incentives to breach the Kuhn Directive, and thus the Cuban embargo.

Cwiertny also claims that the Baseball Diplomacy Act is inherently problematic. He alleges that even if the bill is enacted, it will fail to prevent both teams and agents from breaching the Cuban embargo. Furthermore, this bill will never pass due to Congress’ fifteen-year reluctance. Lastly, he asserts that the members of the Major League Baseball Organization, instead of Congress, should resolve the troubles pertaining to Cuban baseball players. In 2000, MLB’s owners granted Commissioner Selig “more unilateral power than any commissioner in baseball history.” Because of Selig’s plenary power, MLB is better

---

239 See Frankel, supra note 2, at 418 (noting the “rapid influx of foreign ballplayers into the MLB ranks during the 1990s”).
240 See Weiss, supra note 64, at 129.
241 See Baseball Commissioner Bud Selig Says Playoff Schedule Will Have Fewer Days Off, HAMILTON SPECTATOR, Nov. 18, 2009.
242 See Frankel, supra note 2, at 418-19.
244 See id. at 426.
245 See id. at 426; Frankel, supra note 2, at 419.
246 See Frankel, supra note 18, at 426; Frankel, supra note 2, at 419.
247 See Cwiertny, supra note 18, at 426; Frankel, supra note 2, at 419. The success rates of Cuban defectors are very low, agents will often tell players that their skill levels are better than they actually are in order to convince them to defect. See Kevin Baxter, For Cuban Athletes Who Defect, Success in Sports is Elusive, MIAMI HERALD, June 2, 2002.
248 See Cwiertny, supra note 18, at 426; Frankel, supra note 2, at 419 (explaining that if every team has access to each international player, it is less likely that individual teams would profit from assisting in a Cuban player’s defection).
249 See Cwiertny, supra note 18, at 422.
250 See id.
251 See id.
252 See id. at 422-423.
CUBAN BASEBALL PLAYERS

equipped to remedy these issues because its process of executing any new measures would be quicker and more proficient than Congressional action.254

However, even if the commissioner adopts a worldwide draft, it is unclear whether Raul Castro would be willing to hand over his baseball players to MLB. Ballplayers in Cuba were pivotal to Fidel Castro’s “propaganda”; his regime heralded the amateur and national teams’ successes, identifying them as victories for the revolution and the Cuban citizens.255 Furthermore, baseball players were “expected to be political as well as athletic examples for others to emulate.”256 If Bud Selig amends the restrictions facing Cuban players, it is questionable whether Raul would follow his brother’s strict practice by preventing them to play in the professional league. However, until Fidel passes away, it is likely that the current system will remain the same.

According to Cwiertny, his proposition is not infallible, especially concerning agents; however he proposes other means to monitor them.257 Under the global draft model, an agent such as Joe Cubas would lack monetary incentive to assist in a player’s, such as El Duque’s, defection because the player would not be a free agent.258 Moreover, any agent breaching the Cuban embargo would face severe penalties.259 However, in order for this process to work, the MLB and the MLBPA (“Major League Baseball Players Association”) will need to be much more active in their position against this type of illegal behavior.260

Rick Lopez proposed another option; he suggests implementing a worldwide draft that excludes Cuba.261 If MLB were to implement the global draft including Cuba, then, due to the Kuhn Directive, the drafting teams would be forced to sign players without the opportunity to scout.262 Lopez believes that this global draft alternative would drive Congress to take action and adopt the Baseball Diplomacy Act.263

Another critic, Matthew Greller, suggests a four-part method toward improving U.S.-Cuba relations through baseball diplomacy, which includes incorporating Cubans into the amateur draft.264 Greller requires: (1) the MLB, the United States, and Cuba to abolish their exclusionary procedures265; (2) then the MLB must change Rule 4(a) and Rule (3)(a)(1) to enable Cubans to participate in the amateur draft266; (3) next MLB should impose a reason-
able tax on teams that sign Cuban players in order to support Cuban scouting and infrastructure267; and (4) finally, the U.S. needs to amend existing immigration laws to permit Cubans to play professional baseball in America without being forced to defect.268

While each of these ideas introduces several potential benefits for MLB, it is unlikely that a worldwide draft or a draft including Cubans is in the imminent future. Even with the latest defection of Aroldis Chapman269 fresh in the Commissioner’s mind, the implementation of the worldwide draft currently seems improbable for several reasons. For one, there is strong opposition, especially from members of the MLBPA, MLB officials, and agents.270 Additionally, big-market teams, such as the Yankees, Mets, Red Sox, and Dodgers, disagree with the idea of an international draft.271 One scout stated his concern that teams with poor scouting skills would be rewarded in a global draft.272 Furthermore, several scouts are skeptical that the draft would actually solve the competitive balance problem it is meant to address.273 Opponents of the global draft also believe that more problems will be created than solved.274 For example, MLB would need to decide the sufficient number of rounds for an international draft.275 It is also questionable whether this draft is legal and if so, whether it can then be enforced worldwide.276 As a result of these quandaries, the adoption of a worldwide draft in the near future is not likely.

267 See id. at 1705.
268 See id. at 1708-10; see also Frankel, supra note 2, at 418.
269 See Chasing Dreams—Part 1, supra note 3.
271 See Frankel, supra note 2, at 420 n. 306; John Delcos, Baseball Feels a Draft Coming On, JOURNAL NEWS (Westchester Cty., N.Y.), Mar. 31, 2003, at 8K; Sheinin, Player Draft, supra note 270.
272 See Delcos, supra note 271.
273 See Frankel, supra note 2, at 420 n. 306; see also Sheinin, Player Draft, supra note 270 (Jim Callis, executive editor of Baseball America, which is deemed the nation’s authority on amateur baseball, said: “‘Nobody thinks it would resolve the [competitive-balance] issue. Before the Expos could find a Vladimir Guerrero and sign him for cheap. Now they’d have to draft him and negotiate a huge signing bonus.’”).
274 See Frankel, supra note 2, at 420. For example, major questions concerning age eligibility would arise: North American players are entitled to enter the draft after their high school class graduates, while international players may be signed at the age of sixteen and a half. See Sheinin, Player Draft, supra note 270. Some important questions arise concerning age eligibilities: “Under a worldwide draft, should the eligibility age for Latin Americans remain 16 1/2, would that be fair to North American players? Or should the age be raised to 18—and how would that affect the development of Latin American players?” Id.
275 See Sheinin, Player Draft, supra note 270; see also Frankel, supra note 2, at 420 n. 306 (explaining that the MLBPA and the owners disagree over the number).
276 See Frankel, supra note 2, at 420 n.306.

Even if MLB can overcome philosophical and logistical opposition to a global draft, the league must contend with the real question of whether the draft is legal and enforceable. The United States already has a treaty in place with Japan, the Republic of Korea, and Taiwan that prohibits “roster raiding” between the professional baseball leagues in each country. These three Asian nations believe the treaty’s provisions apply to amateur ballplayers, as well, making it likely that they would be excluded from any worldwide draft system. With respect to those countries that would not be excluded from the draft by treaty, MLB would be treading on politically sensitive ground. Various labor- and foreign policy-related conflicts could arise from drafting players in foreign countries, especially those with developed professional baseball leagues. MLB would be hard pressed to extend the draft to countries such as Mexico and the Dominican Republic, where rules already closely regulate whether and how teams from outside the country can
CUBAN BASEBALL PLAYERS

Theoretically, a worldwide draft is a good solution to some of the current problems facing MLB.277 However, it does not resolve the issue of Cuban defectors. In fact, one sports writer, Dave Sheinin, noted that the “supposed need for a worldwide draft may be over-blown.”278 Sheinin pinpointed the exact problem for Cuban players, using the Aroldis Chapman deal as a prime example. Following the 2009 baseball season, Chapman received one of the biggest free agent contracts from the Cincinnati Reds, a small market team.279 Sheinin noted that all of the big market teams ultimately withdrew from the bidding war.280 These teams were not concerned about Chapman’s pitching skills, but they would rather use their money on “known commodities.”281 If worldwide draft advocates are worried about the big market teams signing all of the quality international free agents, their concerns appear to be exaggerated.

Baseball’s Potential Benefits for the U.S. and Cuba Requires an Alternative Solution

Cuban participation in Major League Baseball benefits both the U.S. and Cuba

When the embargo is ultimately lifted, or if the Baseball Diplomacy Act is passed, unrestricted Cuban participation in MLB will be beneficial to both the United States and Cuba for several reasons. Since Major League teams are lacking homebred quality players, they are forced to import players from overseas.282 The U.S. generates an insufficient number of valuable players to fill thirty major league team rosters. On the other hand, Cuba produces a surplus.283 While the best athletes in the U.S. choose between a wide array of sports, including football, basketball, soccer, or volleyball, the best in Cuba choose baseball.284 Moreover, the Cuban athletic system excels at identifying and advancing young players.285 Lastly, the Cuban health care and educational systems are far superior to those of the Dominican Republic, presently the chief supplier of international players for MLB.286 Hence, unrestricted ac-

Id. (internal citations omitted).

277 See Sheinin, Player Draft, supra note 270; see also Cwierney, supra note 18, at 425-27 (proposing the worldwide draft as a solution to the defection problem); Diana L. Spagnuolo, Comment, Swinging for the Fence: A Call for Institutional Reform as Dominican Boys Risk their Futures in Major League Baseball, 24 U. PA. J. I NT’L E CON. L. 263, 282-83 (2003) (suggesting the implementation of a worldwide draft to solve recruitment problems of Dominican players); Bill Madden, Moving Toward a World Draft: Baseball Looks to Keep Big Market Teams from Stockpiling Cheap Talent, N.Y. DAILY NEWS, May 26, 1999; see generally Lopez, supra note 20 (proposing a global draft as a solution to the bonus skating problem).

278 See id.

279 See id.

280 See id.

281 See id.

282 See Jamail, supra note 5, at 10 (explaining that “[w]hile some U.S. major league teams go into Latin America, Asia, Australia, and Europe as a cost-cutting measure, the baseball industry also must recruit talent overseas because it suffers from a shortage of quality players at home”).

283 See Jamail, supra note 5, at 10; Biertempfel, supra note 193.

284 See Jamail, supra note 5, at 11.

285 See id.

286 See id.
cess to the best, well-coached, well-educated, and healthiest international baseball players (Cubans) would certainly be advantageous to the U.S.

Cuba would also benefit from participation with the MLB. For one, Cuban baseball players who desire to play professionally would not be forced to defect from their home country. A commonly held belief in Cuba is that the current baseball system, which prohibits professional baseball, is insufficient.\(^{287}\) While Roberto González Echevarría, a Cuban baseball historian, is apprehensive about the idea of MLB presence in Cuba, he believes that “anything is better than what we have now.”\(^{288}\) Gilberto Dihigo a Cuban baseball journalist whose father, Martín Dihigo, is in the Baseball Hall of Fame in Cooperstown, New York, is more optimistic.\(^{289}\) Dihigo supports Cuban participation in the majors for two reasons. First, he explained that it would greatly impact the players because they would have the opportunity to make money and receive well-deserved recognition.\(^{290}\) Secondly, he believes it would benefit the Cuban fans because “‘[t]hey could see Cubans in the big leagues as well as when the peloteros [ballplayers] return home to play in the winter. It would be good for everyone except Fidel.’”\(^{291}\)

Sports anthropologist Alan Klein asserts that unrestricted Cuban participation in MLB would present incredible opportunities for a vast number of Cuban players, if it were handled correctly.\(^{292}\) For example, Klein states that the best scenario would include MLB feeling “a refined sense of responsibility, of cultural responsibility and economic responsibility, and [doing] what it takes to grow the game in those [Latin American] countries.”\(^{293}\) Furthermore, he asserts that a stronger system of Cuban baseball, as opposed to the current weaker structure, is more beneficial for everyone, especially MLB and Cuban ballplayers.\(^{294}\)

Cuban baseball players would truly benefit from lifting the embargo act or from simply enacting the Baseball Diplomacy Act. For example, many Cuban players do not have the opportunity to advance to new levels because only a limited number of openings are available in the Cuban League, with a considerably smaller amount of openings for Equipo Cuba, the elite twenty-four-man team.\(^{295}\) In addition, similar to the major leagues in the U.S., veteran players, with long careers, receive priority.\(^{296}\) With a limited amount of roster space, this places younger players in a tough situation because they are not given the opportunity to


\(^{288}\) Id. Echevarría fears that once Cubans are able to participate in MLB, the situation in Cuba will resemble that in the Dominican Republic and Puerto Rico. He claims that in these countries the interest in playing for one’s own country is fading and the leagues are treated more as a holding station for the athletes, where they develop their talents at home and then move to the United States to advance their careers. Id.

\(^{289}\) See Jamail, supra note 5, at 11.

\(^{290}\) See id. at 138.

\(^{291}\) Id at 138.

\(^{292}\) See Future of Cuban Baseball, supra note 287.

\(^{293}\) Id. Klein argues that MLB will gain a great amount of talent when Cuban ballplayers are treated the same as the other international players. Therefore, MLB should assist in setting up an organized system in Cuba. See Stealing Home: Cuban National League, PBS.org, http://www.pbs.org/stealinghome/debate/cnl.html (last visited Aug. 29, 2010) [hereinafter Cuban National League].

\(^{294}\) See Future of Cuban Baseball, supra note 287.

\(^{295}\) See Jamail, supra note 5, at 66.

\(^{296}\) See id. at 66-67 (“Prior to 1995, retirement from Cuban baseball was almost identical to what occurs in the U.S. major leagues: a player, due to age or deteriorating skills, moves out of the game.”).
CUBAN BASEBALL PLAYERS

develop their skills to their utmost potential. Therefore, if Cubans were permitted to play baseball in the U.S., more players would be able to participate, develop their talents, and ultimately fulfill their dreams of playing professional baseball. There is a concern among Cubans that the baseball players will lose their Cuban identity if they are allowed to play in the United States. Klein dismisses this matter, “Cubans will not become instant prostitutes for some kind of form of capitalism”; many players will continue to play baseball in Cuba. However, he stresses that certain people or groups, such as MLB officials or Cuban baseball officials, should make it their responsibility to ensure that Cubans maintain their identity.

Both the U.S. and Cuba would benefit from unrestricted Cuban participation in MLB. The problem is determining how to create this symbiotic relationship. The obvious solution is removal of the U.S. embargo on Cuba. However, an immediate solution is to utilize baseball as a means to achieving that end.

Baseball as the solution to the U.S.-Cuban problem

The United States and Cuba should utilize their common baseball history as a means to improve their current relationship. Throughout U.S. history, baseball has been used for more than just entertainment; it has been used to overcome some of the nation’s largest issues. Jackie Robinson, the first African-American Major League player, not only broke the color barrier on the baseball field, but was also instrumental in bringing about a new political relationship between blacks and whites off the field. More recently, after the September 11th tragedy, President Bush and Commissioner Selig used baseball as a coping mechanism for the American people. In fact, “as baseball became a ritualistic performance of American faith and patriotism, it supported George W. Bush’s declaration of war against evil and the subsequent invasion of Iraq.” These instances prove that baseball can be utilized to further political and social agendas.

Therefore Commissioner Selig should remove player restrictions placed by the embargo by revoking the Kuhn Directive and creating an agreement with the Cuban amateur league, which permits the international movement of Cuban baseball players from Cuba to the United States. One critic claims that the Kuhn Directive merely restates the restrictions placed

297 Id. at 66.
298 See Cuban National League, supra note 293.
299 Id.
300 See id.
301 See Greller, supra note 7, at 1683 (stating that “[o]ff the field, [Jackie] Robinson’s heroic struggle eventually changed the political landscape and sparked legislation that re-evaluated race relations in American society.”); Frankel, supra note 2, at 388 n.3.

[It] is clear that the game was to be seen as an instrument of healing. Selig himself commented at the time that “we are a social institution. As such, I hope that the game, and the games, will contribute to the nation moving forward, to helping people.” Further, the attitude of the players, as expressed by Trot Nixon of the Boston Red Sox, was that they could “be part of the antidote for all of this stuff because the game can take some of the focus off all of the tragedy.”

Id. (internal citations omitted).
303 See id. at 109.
by the embargo into baseball terms. Further, he argues “it would only be a symbolic gesture to revoke the Kuhn Directive before the embargo is substantively altered to accommodate Cuban ballplayers.” However, if Selig develops an agreement with the Cuban League regarding the movement of international players, then removing the Kuhn Directive would have a stronger effect.

A concerted effort of the MLB and the current administration could use baseball as a catalyst and bring Cuban-United States relations to the forefront of the general public's concerns. The awareness of the populations of both countries, united by a common thread, would be a significant driving force in lifting the embargo.

CONCLUSION

Baseball is as much a part, if not more, of United States-Cuba past relations and should be an integral part of the future United States-Cuba relationship. Altering the current Cuban baseball policy has the potential of effecting U.S.-Cuban relations as a whole.

Due to the U.S. trade embargo on Cuba and the Kuhn Directive, Cubans are forced to defect to participate in the MLB. Not only is defecting dangerous, but it requires Cubans to leave their home, with the possibility of never returning. Unfortunately, it seems that Cuban ballplayers will continue to defect as long as the embargo remains in effect. Although the complete revocation of the embargo is some years away, other solutions exist.

Members of the baseball community have suggested a worldwide draft as a possible solution to the issue of Cuban defections. This argument is flawed for several reasons. For one, a global draft is far from being implemented. Regardless of this, due to the current status of the U.S. embargo on Cuba, a worldwide draft would have no effect on Cubans baseball

304 See Frankel, supra note 2, at 422.
305 Id. at 422-23.
306 Selig should consult the agreements regulating the international movement of players that MLB has already established with other foreign leagues, such as those used by Japan, Korea, and China. See Lewis Kurlantzick, The Tampering Prohibition and Agreements Between American and Foreign Sports Leagues, 32 COLUM. J.L. & ARTS 271, 299-300 (2009). For example, MLB has implemented an agreement with the Japanese Professional Baseball:

The professional league in Japan is known as the Nippon Professional Baseball Organization of Japan (NPB). NPB is composed of two leagues, Central and Pacific, each consisting of six teams. The Central League members are the Chunichi Dragons, Hanshin Tigers, Hiroshima Toyo Carp, Tokyo Yakult Swallows, Yokohama BayStars and Yomiuri Giants. The Pacific League members are the Chiba Lotte Marines, Fukuoka SoftBank Hawks, Hokkaido Nippon Ham Fighters, Orix Buffaloes, Saitama Seibu Lions and Tohoku Rakuten Golden Eagles.

In contrast, amateur baseball players from countries that are not subject to the MLB draft (e.g., Venezuela) may be signed by any Major League organization and may be signed at age 16. As only residents of the United States, Puerto Rico and Canada (and foreigners enrolled at U.S. universities) are subject to the reverse-order amateur draft, all other foreign ballplayers come to the United States as free agents. Foreign-born players today constitute more than one-fifth of all major leaguers. Major League Baseball also has an accord with Korean Professional Baseball. The terms of this pact closely parallel those of the U.S.-Japanese agreement. Major League Baseball has also entered into an agreement with the China Baseball Association that permits major league teams to scout and sign Chinese players.

Id. at 300 n.95 (internal citations omitted).
CUBAN BASEBALL PLAYERS

players—they would still need to leave the country in order to participate. This is because of
the Kuhn Directive, which prohibits communication with anyone in Cuba. Rather, a global
draft is a solution to the competitive imbalance present in Major League Baseball, not
defection.

To immediately deter Cuban baseball players from defecting, Commissioner Selig
should remove the Kuhn Directive and negotiate an agreement with the Cuban amateur league
that would allow Cubans to play in the Major Leagues and provide scouts the opportunity to
see the Cuban talent. In addition, supporters of the Baseball Diplomacy Act should lobby to
other members of Congress to institute this policy.

By emphasizing the embargo’s effect on both baseball and political affairs, the base-
ball community can prove its importance not only to politicians, but also to the general public
of the U.S. and Cuba. Elevating the awareness of their citizens can create a significant driving
force for each administration; a force which would see the restriction lifted for the good of
both countries and their national past times. Ultimately, Americans and Cubans should utilize
baseball to improve the current international relationship, eventually leading to the removal of
the fifty-year embargo.