

PART OF THE TEAM: BUILDING CLOSER RELATIONSHIPS BETWEEN MLB TEAMS AND INDEPENDENT AGENTS IN THE DOMINICAN REPUBLIC THROUGH AN MLB CODE OF CONDUCT

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INTRODUCTION

Every year in the Dominican Republic, hundreds of boys enter baseball academies run by one of Major League Baseball's (MLB) franchise teams.¹ While there, the players pursue baseball with a single-minded passion, with drills, games, and other instructional activities from dawn until dusk.² Competition is fierce, and many players take performance-enhancing drugs to better their chances of advancing within the system.³ The dream of every player is to be sent to the team's farm system in the United States and from there to be called up to the major leagues, where many Dominican players, including the New York Yankee's Robinson Cano and the Boston Red Sox's David Ortiz, have gone on to make millions of dollars. The reality of the situation, however, is much less glamorous. Over the last decade, only two percent of players signed out of the Dominican Republic made it to the major leagues.⁴ That means that for every Cano or Ortiz, there are 50 players who never even make the League's minimum salary.

While academies provide shelter and a salary for the athletes, only an exceptional few provide an educational component beyond some basic English classes and classes on American culture.⁵ This means that when the vast majority of these athletes, who have devoted their lives to baseball, eventually wash out of the academy system after two or three years, they are thrown back into the working population with little education and no transferrable skills to show for the years they spent playing baseball.⁶

¹ See Sean Gregory, *Baseball Dreams: Striking Out in the Dominican Republic*, TIME, Monday July 26, 2010, available at <http://www.time.com/time/magazine/article/0,9171,2004099-1,00.html>.

² See Diana L. Spagnuolo, *Swinging for the Fence: A Call for Institutional Reform as Dominican Boys Risk Their Futures for a Chance in Major League Baseball*, 24 U. PA. J. INT'L ECON. L. 263.

³ See Gregory, *supra* note 1.

⁴ *Id.*

⁵ See Jesse Sanchez, *Creating Complete, Healthy Players*, MLB.COM, http://mlb.mlb.com/news/article.jsp?ymd=20070918&content_id=2215646&vkey=news_mlb&ext=.jsp&c_id=mlb1.

⁶ See Gregory, *supra* note 1.

The situation is exacerbated by the treatment that players receive before they even get to the MLB academies. In the Dominican Republic, potential baseball players are cultivated as early as their preteen years by independent handler-agents known as *buscones*.⁷ Children represented by *buscones* may be encouraged (or possibly coerced) to drop out of school in order to focus on baseball full time.⁸ Most *buscones* operate independent baseball academies, which, unlike the MLB academies, may not provide any education outside of that needed to develop as a baseball player.⁹ And again in contrast to the official academies that are overseen by MLB and governed by MLB rules, (insofar as the latter provide any guidance) the *buscón*-run academies receive little oversight. Given the young age at which many athletes join unofficial academies, not only are they deprived of secondary education, but potentially primary education as well. While MLB does not contract with *buscones* or have any official connection with the independent camps, MLB, with its network of official academies and scouts throughout the Caribbean, is the only significant outlet for players produced through this system.¹⁰

This article proposes that, given the type and scope of labor rights violations that occur as a result of MLB's presence in the Dominican Republic, MLB should promulgate a voluntary corporate code of conduct to govern the relationship between MLB and *buscones* in the Dominican Republic. In Part I, I explain the differences between the recruitment processes for players in the United States, the United States' territories, and Canada, who are covered by the draft, and for players from the rest of the world, who are signed through international free agency. I then explain the practical effects of international free agency on how MLB operates in the Dominican Republic. In Part II, I draw an analogy between the academy system in the Dominican Republic, which produces MLB players, and a multinational corporation's ("MNC") supply chain. I then use this analogy to identify potential labor and human rights violations that may occur in the Dominican Republic as a result of the system that produces MLB players. In Part III, I introduce the example of corporate social responsibility as a movement under which MNCs have made efforts to self-regulate both their behavior and the

⁷ *Id.*; Steve Fainaru, *The Business of Building Ballplayers*, WASHINGTON POST, June 17, 2001, at A01, available at <http://www.latinamericanstudies.org/sports/dominican-ballplayers.htm> [hereinafter Fainaru, *Business of Building*].

⁸ See Gregory, *supra* note 1.

⁹ See Spagnuolo, *supra* note 2, at 275.

¹⁰ See Bob Ruck, *Baseball's Recruiting Abuses*, Americas Quarterly, available at <http://americasquarterly.org/node/2745> (describing MLB's overwhelming presence in the Caribbean, and how this presence led to the development of the *buscón* system).

behavior of their suppliers, through corporate codes of conduct. In Part IV, I examine the unique features of MLB and how these features affect the potential scope and shape of a code of conduct. In Part V, I examine specific aspects of a code of conduct that could be implemented, including a licensing program for *buscones* and independent academies. While at least one commentator has suggested an MLB code of conduct that would govern behavior in the Dominican Republic academies, I argue that a strict, penalty-based code of conduct would likely be counterproductive. A licensing program with a commitment to dialog instead of punishment might have a better chance of positively affecting the lives of young baseball players. Central to my argument is the recognition that, while MLB may contribute to labor law violations in the Dominican Republic, it also spends a substantial amount of money in the country. Additionally, players who “make it” in the major leagues typically send some part of their earnings back to their families and communities in the Dominican Republic. As such, any solution should encourage cooperation between MLB, the teams, *buscones*, and the Dominican government, instead of punishing players or forcing teams to leave the Dominican Republic if violations are found. In Part VI, I discuss the problem of applying pressure to MLB to adopt a corporate code of conduct for the Dominican Republic.

I

THE SELECTION OF PLAYERS AND ITS EFFECT ON THE DOMINICAN REPUBLIC

A. *Major League Baseball Recruiting*

The Major League Rules (MLR) governs the method by which MLB teams recruit baseball players.¹¹ Under the current rules, teams wishing to sign players who are not already within the MLB system must abide by the draft rules for players from the United States, Puerto Rico, and Canada, or by a different set of rules for international players who are not covered by the draft. Under Rule 3 of the MLR, players who are residents of the United States, Puerto Rico, and Canada are subject to the amateur draft¹² held every June.¹³ Players who are eligible for the draft cannot bargain for the best deal that they can reach with any team; rather, teams pick individual players during successive rounds of drafting. MLB supplies

¹¹ See Major League Rules, available at <http://bizofbaseball.com/docs/MajorLeagueRules-2008.pdf> [hereinafter MLR].

¹² *Id.* § 3(a)(1)(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 First-Year Player draft.”).

¹³ *Id.* § 4(a).

suggested signing bonuses for different draft slots. The slotting system is not binding, and the most eagerly sought after players often garner signing bonuses far above the suggested value.¹⁴ Players who do not sign with the team that drafted them are prohibited from signing with a different team but may enter the draft again in the future.¹⁵ This often occurs with players who are just out of high school and would rather go to college before signing with a team, or players who are already in college and would either like to wait for a better offer in the future or finish college.

The most significant restriction on draft eligibility is that teams may not draft players who are currently in high school.¹⁶ In addition, although teams may sign high school graduates, they are typically prohibited from signing college players until after their junior year.¹⁷ The NCAA and other university regulatory systems may also require teams to abide by additional rules when dealing with college players. Therefore, although there are a few players who sign when they are as young as 17, most players are adults, and a large portion have at least a couple of years of junior college or university education when they sign with an MLB team.¹⁸

Players from the rest of the world are not subject to the draft, but instead are signed as international free agents. The MLR puts few restrictions on how such players are signed. The main restriction is the 17-year-old rule, which prohibits teams from signing international players younger than 17.¹⁹ Even under this rule, a player may be signed when they are 16, so long as they will turn 17 by the end of the current baseball season.²⁰ Under this system, teams may bid against each other

¹⁴ J.P. Breen, *Hard Slotting is Bad for Baseball*, FANGRAPHS (Nov. 9, 2011), <http://www.fangraphs.com/blogs/index.php/hard-slotting-is-bad-for-baseball/>.

¹⁵ MLR, *supra* note 11, § 4(h) (“A player who is selected at a First-Year Player Draft and who does not sign a Major or Minor League contract before being removed from the selecting Club’s Negotiation List . . . shall be subject to selection at the next First-Year Player Draft at which the player is eligible for selection.”).

¹⁶ *Id.* § 3(a)(2)(A).

¹⁷ *Id.* § 3(a)(3)(B)-(E).

¹⁸ Even though the percentage of high school players drafted rose between the 2011 and 2012 draft, high school players still only make up 30% of the players drafted. *See* Kevin Askeland, *MLB Draft 2012 by the Numbers*, MAX PREPS, <http://www.maxpreps.com/news/Yb40hby1E0Ocecbsw72k9w/mlb-draft-2012-by-the-numbers.htm>.

¹⁹ MLR, *supra* note 11, § 3(a)(1)(B)(i).

²⁰ *Id.* § 3(a)(1)(B)(ii).

for a player's talents; though if a player is relatively unknown, a team may be the only one to make an offer.²¹

In addition to the MLB's 17-year-old rule, the country from which the player is drafted may impose additional restrictions on MLB recruitment. For instance, in Japan, another country with a developed professional baseball league, an MLB team wishing to sign a player must pay the player's team a substantial sum even to open negotiations with the player.²² The Dominican Republic, on the other hand, does not have its own professional league, nor does it have independent requirements supplemental to the 17-year-old rule. This means that players from the Dominican Republic are usually lesser known than players coming out of other countries MLB teams target, such as Japan and South Korea. Given the lack of regulation, the chance of finding an underexposed player, and the economic conditions, which lead to lower bonuses and salaries for Dominican players, teams are highly motivated to scout the Dominican Republic for cheap players.

B. MLB in the Dominican Republic

MLB scouting in the Dominican Republic is run out of each team's baseball academy. Once signed by an MLB team, the vast majority of players, whether signed through the draft or as an international free agent, spend years honing their skills in the team's minor-league affiliates, spread throughout the United States.²³ Most players from the Dominican Republic begin by playing for up to three years at the MLB team's academy before even being called up to the United States to play in the minor leagues. Currently, 28 out of the 30 MLB teams run a baseball

²¹ Arturo Marcano & David P. Fidler, *The Globalization of Baseball: Major League Baseball and the Mistreatment of Latin American Players*, 6 IND. J. GLOBAL LEGAL STUD. 511, 538 (1999) ("The power of the MLB scouts *vis-à-vis* a baseball prospect in Latin America is greater than it was in the United States (generally speaking) because of the poverty and relative lack of education suffered by the prospect and his family. As a representative of a MLB team, a scout with the power to sign prospects has tremendous leverage over a vulnerable young player from a poverty-stricken country. In addition, although many MLB teams scout in Latin America, potential prospects may not see scouting frenzies over their talent because the scouting system is not as well structured as the pre-draft American system was. These factors lead to Latino prospects who are generally willing to sign anything a MLB scout puts in front of them without receiving anything close to the kind of signing bonuses received by American baseball draftees.").

²² See *Posting System*, BASEBALL REFERENCE, http://www.baseball-reference.com/bullpen/Posting_System (in 2011, MLB's Texas Rangers paid the Hokkaido Nippon Ham Fighters over \$51 million to negotiate a contract with their star pitcher Yu Darvish).

²³ See *Teams by Affiliation*, MILB.COM, <http://www.milb.com/milb/info/affiliations.jsp>.

academy in the Dominican Republic.²⁴ It has been estimated that MLB has invested more than \$75 million in the Dominican Republic and created more than 2,000 jobs in the country.²⁵ Players in the academies are signed according to the 17-year-old rule. In the past, teams may have hidden younger players at academies and then signed them when eligible; this practice allowed them to avoid having to bid against another team for the player's services and kept the signing bonus owed to the player much lower.²⁶ This type of subterfuge may not be as much of a problem as it once was, since under the current rules teams may only allow an unsigned player to remain at an academy for a month.²⁷ On the other hand, given deficiencies in the Dominican Republic's record keeping system, players younger than the signing age may routinely be admitted to academies under a false birth certificate.²⁸ In a highly publicized case, it was discovered that employees of the Los Angeles Dodgers falsified records to sign the Dominican baseball player Adrian Beltre, who was found to have been 15 when he signed with the team.²⁹ As a result, MLB shut down the Dodger's academy in the Dominican Republic for a year.³⁰

Conditions at the camps vary. While some may be relatively luxurious, others are more spartan.³¹ When journalists first reported on the academies, they found the facilities to be overcrowded and lacking in basic medical facilities—resembling prisons more than athletic training facilities.³² Today, even on the low

²⁴ See Sanchez, *supra* note 5.

²⁵ See Adam Wasch, *Children Left Behind: The Effects of Major League Baseball on Education in the Dominican Republic*, 11 TEX. REV. ENT. & SPORTS L. 99 (citing Office of the Commissioner MLB-Dominican Republic, *MLB Investment in the Dominican Republic*, <http://www.dominican-baseball.com/articles.php?artid=9>).

²⁶ See Spagnuolo, *supra* note 2, at 269-270 ("Many allege that not all players at the academies are actually signed, and that boys between the ages of twelve and sixteen often attend the camps.").

²⁷ See Spagnuolo, *supra* note 2, at 275; Vanessa Marie Zimmer, *Dragging Their Devotion: The Role of International Law in Major League Baseball's Dominican Affairs*, 4 NW. U. J. INT'L HUM. RTS. 418, 421 (2005).

²⁸ See Zimmer, *supra* note 27, at 421 (noting that while it is clear that forging documentation is a problem, it might be more prevalent at the other end of the spectrum with players falsifying their ages to appear younger than they are. This behavior only reinforces the notion that players believe teams put a premium on youth.).

²⁹ See Spagnuolo, *supra* note 2, at 270.

³⁰ *Id.*

³¹ See Gregory, *supra* note 1.

³² *Id.*

end, the academies are much improved, though there are exceptions. After visiting the Chicago Cubs academy for a 2010 article, *Time* magazine reporter Sean Gregory gave the following account of the facility:

At the Cubs academy one hazy afternoon, 10 prospects piled into a room that, at best, could comfortably fit two or three. There were four bunk beds crammed into the space; two kids napped while sharing a mattress on the floor. Several players said they all lived in that room. I snapped a picture of the scene and showed it to Sandy Alderson, the veteran baseball executive who was tapped by MLB commissioner Bud Selig earlier this year to clean up the sport in the D.R. He said the conditions were "not acceptable," though he later insisted that not all 10 prospects actually lived in that room and that players sometimes sleep on the floor because it's cooler. Still, he stood by his "unacceptable" assessment. It's difficult to disagree with a Dominican man who also saw the scene. "It looked like f_____ county lockup," he said.³³

In most academies there is little to do besides play baseball. Players in the academies get up, have breakfast, and are on the field by 7:30; other than a lunch break, they practice until the sun goes down.³⁴

Competition within the camps is fierce. Given the lower cost of signing and training Dominican players, teams are able to take a "quantity over quality approach," signing a large number of players for the same price it would have cost to sign a single American player.³⁵ Because the investment in most Dominican players is small, teams are more concerned with finding a diamond in the rough than developing talent.³⁶ Consequently, only about two percent of academy players ever make it to the American major league system.³⁷ The small percentage of players who make it to America through the minor leagues and onto an MLB team will be able to provide for themselves, their families, and their communities, even if they only play in the majors for a short period, since the league minimum salary

³³ *Id.*

³⁴ See Spagnuolo, *supra* note 2, at 272-73.

³⁵ See *id.*, at 271 (referring to this method of signing Dominican players as the "Boatload Mentality").

³⁶ See Spagnuolo, *supra* note 2, at 271 ("Critics argue that this unabashed behavior by scouts only proves their point: MLB sees these players as commodities and fails to recognize the long-term negative implications that some of their actions might have on the players' lives.").

³⁷ See Gregory, *supra* note 1.

is high. For instance, in 2011, players who made the league minimum were paid \$400,000 for the season.³⁸ By comparison, the per capita GDP in the Dominican Republic is \$8,300,³⁹ and 34.4% of the country lives below the poverty line.⁴⁰ Therefore, the players' incentive is to gain any advantage they can over other players. This includes pushing themselves to their physical limits day after day. It may also include hiding injuries—and thereby exacerbating them—for fear of being cut from the academy.⁴¹ The pressure to succeed may also lead to the use of performance-enhancing drugs.⁴² Such drugs both exacerbate the risk of immediate injury and can contribute to life-long health problems.⁴³

At most camps, the only supplemental education that the participants receive are classes in basic English and classes designed to prepare athletes for life in the United States⁴⁴, although some camps have partnered with local schools.⁴⁵ A few

³⁸ Major League Baseball-Major League Baseball Player's Association Collective Bargaining Agreement, § 7(B)(1) [hereinafter CBA]. In November 2011, MLB and MLBPA negotiated a new CBA extending through the 2015 season, by the end of which the minimum salary will be \$500,000 per season. Jayson Stark, *Major League Baseball Players, Owners Sign New Labor Agreement*, ESPN.COM, http://espn.go.com/mlb/story/_/id/7269300/major-league-baseball-players-owners-sign-new-labor-agreement.

³⁹ See Gregory, *supra* note 1.

⁴⁰ CIA, *The World Factbook*, <https://www.cia.gov/library/publications/the-world-factbook/geos/dr.html>.

⁴¹ In fact, it appears that those players who are cut due to injury after they sign may never receive their signing bonus. See Marcano & Fidler, *supra* note 21, at 545.

⁴² If fact, it appears this "succeed at all costs" mentality does not end once Dominican players reach the United States. Between 2005 and 2007, 58.5% of all players who tested positive for performance-enhancing drugs across major and minor league operations, including those in Latin America, came from the Dominican Republic. See Arturo J. Marcano Guevara & David Fidler, *Fighting Baseball Doping in Latin America: A Critical Analysis of Major League Baseball's Drug Prevent and Treatment Program in the Dominican Republic and Venezuela*, 15 U. MIAMI INT'L & COMP. L. REV. 107, 123-24 (2007).

⁴³ The dangers are exacerbated by the fact that many players take steroids intended for animals. See Fainaru, *Injecting Hope—and Risk: Dominican Prospects Turn to Supplements Designed for Animals*, WASHINGTON POST, June 23, 2003, at A01, available at <http://www.majorwager.com/forums/mess-hall/122165-injecting-hope-risk.html> [hereinafter Fainaru, *Injecting Hope*].

⁴⁴ See Sanchez, *supra* note 5.

⁴⁵ See Sanchez, *supra* note 5. The article notes that four MLB teams, the Boston Red Sox, Cleveland Indians, New York Mets and Seattle Mariners, have established connections with high schools in Santo Domingo.

camps provide educational facilities on site.⁴⁶ When compared with the astronomical salaries paid to MLB players, the cost of running an educational program is small. In 2010, the Pittsburgh Pirates, MLB's poorest team, spent only \$75,000 to run its educational program, a partnership with a local provider that offered high school classes to the athletes in its Dominican academy.⁴⁷

Before players ever get to an academy, most spend time either at an independent camp or under the control of a Dominican agent, known as a *buscón*.⁴⁸ A *buscón* is similar to an agent in that he or she represents unsigned Dominican players in negotiations with a team that wishes to sign the athlete. However, instead of representing a player for a span of his professional career, a player's relationship with a *buscón* ends when he is signed by an academy.⁴⁹ The player receives a signing bonus; the *buscón* takes a percentage cut; and the relationship is severed.⁵⁰ While players younger than 16 may occasionally make it into an MLB academy because of forged papers, *buscones* routinely recruit players as young as 10 or 12.⁵¹ These children may drop out of school and enter the custody of the *buscón*.⁵² Instead of completing compulsory education, which in the Dominican Republic is 8 years,⁵³ these children spend their formative years developing their baseball skills with the sole goal of being signed by an MLB academy.

⁴⁶ See Wasch, *supra* note 25, at 108 (noting that the San Diego Padres built class rooms at their facility and have also “partnered with the Dominican Government, the American Chamber of Commerce in the Dominican Republic and the U.S. Agency for International Development (USAID) to improve the quality of basic public education in the Dominican Republic, specifically, . . . the surrounding schools that sit only a few miles away from the team’s new multi-million dollar baseball academy”).

⁴⁷ See Gregory, *supra* note 1 (noting that in 2010, of the 31 prospects in the academy during that school year, 29 passed their current grade level and 5 were expected to earn high school diplomas).

⁴⁸ See Gregory, *supra* note 1; Fainaru, *Business of Building*, *supra* note 7.

⁴⁹ See Gregory, *supra* note 1; Fainaru, *Business of Building*, *supra* note 7.

⁵⁰ Fainaru, *Business of Building*, *supra* note 7 (stating that not only do *buscones* take a cut, but in some cases steal the signing bonus from the player).

⁵¹ Fainaru, *Business of Building*, *supra* note 7.

⁵² Fainaru, *Business of Building*, *supra* note 7.

⁵³ U.S. DEP’T OF LABOR, BUREAU OF INT’L LABOR AFFAIRS, Dominican Republic (2005) available at http://www.dol.gov/ilab/media/reports/iclp/tda2004/dominican-republic.htm#_ftnref1332 [hereinafter ILAB].

Unlike the MLB camps, which are regulated to some extent by the league through its office in Santo Domingo,⁵⁴ the *buscones* and independent academies have no substantive supervision. Simply put, the Dominican Republic has not made it a priority to regulate the system that places Dominican youths with teams in MLB, an organization that has made significant capital investments in the country.⁵⁵ Therefore, the worrisome behavior that may occur at an MLB academy, including overwork and the use of performance-enhancing drugs, is rampant throughout the domestic system that produces players.⁵⁶ Likewise, problems that may occur less frequently in the MLB system, such as players younger than 16 taking part in the academies, are a fact of life in domestic Dominican baseball.⁵⁷ Exacerbating all of these problems is the fact that a buscón has no financial stake in a player once he has signed with an academy. Therefore, a buscón may not care about players' long-term health or ability to play baseball for any length of time after leaving their care.

II

POTENTIAL LABOR AND HUMAN RIGHTS VIOLATIONS: AN ANALOGY TO A MULTINATIONAL CORPORATION SUPPLY CHAIN

A. Overview

While it may seem unfair in some general, moral sense that MLB academies do not provide transferrable skills for many of the players that pass through their gates, by itself, this treatment is not that much different from how any minor league player is treated; most players wash out of baseball before making it to the majors and without ever making significant money.⁵⁸ The major difference between the treatment of players in the Dominican Republic and in the United States is that while most U.S.-born players will enter professional baseball with at least a high school education,⁵⁹ the combination of the rules governing the signing

⁵⁴ See SANTO DOMINGO OFFICE MISSION STATEMENT, MLB.comDR, http://mlb.mlb.com/dr/santo_domingo.jsp.

⁵⁵ See Wasch, *supra* note 25.

⁵⁶ See Fainaru, *Injecting Hope*, *supra* note 43.

⁵⁷ See Gregory, *supra* note 1.

⁵⁸ See Mike Rosenbaum, *Examining the Percentage of MLB Draft Picks Who Reach the Major Leagues*, BLEACHER REPORT (June 12, 2002), <http://bleacherreport.com/articles/1219356-examining-the-percentage-of-mlb-draft-picks-that-reach-the-major-leagues>. While Rosenbaum notes that sixty-six percent of first round draft picks reach the major leagues, the percentage drops precipitously from there, with players in the last rounds of the draft reaching the major leagues less than ten percent of the time.

⁵⁹ *Id.*

of international players and the Dominican Republic's poor education system, leads many young players to drop out of school at a much earlier age. Since there is no domestic professional baseball,⁶⁰ the only reason these children take up baseball (either willingly or because they are coerced by a *buscón* or parent) is the hope of being signed by an MLB team. Because MLB is the dominant employer of Dominican baseball players who take up baseball with the aim of playing professionally, we should establish a legal duty that runs from MLB to the players to protect the labor and human rights of Dominican players inside official MLB academies, as well as children who have not signed but have spent their childhood preparing for the opportunity, under a *buscón*'s care. While it may be difficult to bring a legal claim based on the duty, the existence of one would provide labor and human rights advocates leverage to convince MLB to better regulate their behavior. Any solution must also take into account MLB's large investment in the country and the fact that those players who are signed, especially those who eventually make major league salaries, typically send a large percentage of their earnings to their families and communities.⁶¹

The first step is to identify the ways in which MLB owes an obligation to protect labor and human rights. Then, Part D will identify, which, if any, labor and human rights standards have been violated.

B. Is This Labor At All? An Analogy to the Multinational Corporation Supply Chain

In the globalized economy, MNCs operate across national borders. While the international scope of economic activity is nothing new, globalized MNCs exhibit a cohesiveness that prior forms of international economic activity did not.⁶²

⁶⁰ There is a professional "winter league" in the Dominican Republic, but its players are drawn mostly from MLB players looking to stay in shape in the offseason, as opposed to a long-term domestic employment opportunity. *See Dominican League*, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/bullpen/Dominican_League (last visited Feb. 20, 2013).

⁶¹ Spagnulo, *supra* note 2, at 278 ("Remittances from family members in the United States are one of the largest contributors to the Dominican economy.").

⁶² "'Internationalization' refers to the geographic spread of economic activities across national boundaries. As such, it is not a new phenomenon. Indeed, it has been a prominent feature of the world economy since at least the seventeenth century when colonial empires began to carve up the globe in search of raw materials and new markets for their manufactured exports. 'Globalization' is much more recent than internationalization because it implies functional integration between internationally dispersed activities." Gary Gereffi, OUTSOURCING AND CHANGING PATTERNS OF INTERNATIONAL COMPETITION IN THE APPAREL COMMODITY CHAIN (2002), available at <http://www.colorado.edu/IBS/PEC/gadconf/papers/gereffi.html>.

As described by Gary Gereffi, globalized supply chains may be divided into two types – “producer-driven” and “buyer-driven” global commodity chains:⁶³

Producer-driven commodity chains are those in which large, usually transnational, manufacturers play the central roles in coordinating production networks This is characteristic of capital- and technology intensive industries such as automobiles, aircraft, computers, semiconductors, and heavy machinery. *Buyer driven commodity chains*, on the other hand, refer to those industries in which large retailers, marketers, and branded manufacturers play the pivotal roles in setting up decentralized production networks in a variety of exporting countries, typically located in the third world. This pattern of trade-led industrialization has become common in labor-intensive, consumer goods industries such as garments, footwear, toys, handicrafts, and consumer electronics. Tiered networks of third world contractors that make finished goods for foreign buyers carry out production. Large retailers or marketers that order the goods supply the specifications.⁶⁴

In a buyer-driven commodity chain, companies often receive goods or services from many low-level suppliers, or through an intermediary.⁶⁵ While a lead firm may have a contract with some of its suppliers, those suppliers, in turn, deal with their own constellation of lower-level suppliers.⁶⁶ At the lowest end, or in very small shops, individuals supply piecemeal work to other unregulated firms—some within a lead firm’s chain, but often supplying to many different firms.⁶⁷ While a lead firm may have a direct relationship with some other firms on the supply chain, it likely does not know that the firms on the lowest end even exist, let

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Citing a Department of Labor Study, one commentator mapped J.C. Penny’s complex supply chain: “J.C. Penney purchases its childrens’ apparel from Renzo, a U.S.-based importer; Renzo imports from Robillard Resources, its Filipino agent; Robillard purchases from a number of contractors in the Philippines, one of whom is Castleberry [sic]; Castleberry subcontracts to about thirty plants; these plants employ factory workers and subcontract out certain jobs like smocking or embroidery to home workers on a piece work basis.” Maria Gillen, *The Apparel Industry Partnership’s Free Labor Association: A Solution to the Overseas Sweatshop Problem or the Emperor’s New Clothes?*, 32 N.Y.U J. INT’L. L. & POL. 1059, 1085 (2000).

⁶⁶ *Id.*

⁶⁷ *Id.*

alone have a contractual relationship with them.⁶⁸ Typically, even if an MNC would like to do so, lead firms have a difficult time policing the bottom rungs of their supply chain.⁶⁹ However, as I show in the following sections, through the advent of corporate codes of conduct, MNCs have developed a system to attempt to regulate the behavior of their suppliers, as well as those their suppliers buy from.

MLB shares characteristics with both producer-driven and buyer-driven supply chains. At higher levels, such as in MLB's minor leagues, or even the MLB-owned academies in Latin America, MLB teams are directly responsible for molding the growth of their potential major leaguers, even though that development is relegated to a lower rung of the organization. In this way, MLB teams can be seen as producer-driven: a central entity coordinating its disparate production network.⁷⁰ The independent academies and the demand for cheap players from the Dominican Republic (and other parts of Latin America) lends this arrangement an aspect of the buyer-driven supply chain, in which MLB teams "buy" players. However, even though this arrangement may, at first glance, resemble the bottom rung of a buyer-driven supply chain, there are aspects of the relationship between MLB and the *buscones* that run the independent academies that may allow us to categorize these academies as entities analogous to a subsidiary branch of the MLB. While MLB teams do sign players from these independent academies, the players are neither raw recruits nor fully formed

⁶⁸ *Id.*

⁶⁹ See Gillen, *supra* note 65 and accompanying text. For instance, the soccer federation, FIFA, has had difficulty regulating the production of soccer balls, in part because the production is spread between many low-level suppliers. In 1996, after the use of child labor to make "official" FIFA soccer balls was exposed, labor unions and international soccer's governing body reached an agreement by which FIFA would regulate the labor conditions of soccer ball manufacturers. See Frederick B. Jonassen, *A Baby-Step to Global Labor Reform: Corporate Codes of Conduct and the Child*, 17 MINN. J. INT'L L. 7, 39-40 (2008). In addition to the physical requirements (such as size and weight), manufacturers that wished to produce FIFA soccer balls, which included the corresponding label, would be required to meet the core ILO labor standards. *Id.* However, after FIFA established the program, NGOs uncovered continued use of child labor in the manufacturer of "official" FIFA soccer balls. *Id.* In 2003, FIFA and the ILO entered into an agreement to try and stop the use of child labor called "The Red Card to Child Labor." *Id.* (citing FIFA Tolerates Massive Violations of Labour Law, BERNE DECLARATION, (Feb. 5, 2002), available at <http://www.evb.ch/en/p25001374.html>.) However, as late as 2010, NGOs were still reporting widespread use of child labor in the manufacture of soccer balls. See Press Release, World Cup Soccer Balls: Exploitation Still the Norm, CLEAN CLOTHES CAMPAIGN, (June 7, 2010), available at <http://www.cleanclothes.org/media-inquiries/press-releases/world-cup-soccer-balls-exploitation-still-the-norm>.

⁷⁰ See Gereffi, *supra* note 62.

baseball players. Unlike a buyer-driven supply chain, in which the producers at the lowest rung produce textiles or shoes,⁷¹ players produced by the independent academies are not fungible; MLB teams must scout players at the independent academies, deal directly with *buscones*, and decide which players to sign.⁷² Finally, as noted earlier, MLB's presence in the Dominican Republic is responsible for the development of the independent academy system.⁷³ Although the MLB teams do not have a contract with the *buscones*, similar to low-level suppliers in a buyer-driven supply chain, the actual teams operate in the Dominican Republic and deal directly with the *buscones* and players in the independent academies.⁷⁴ As such, MLB's relationship with the bottom rung is, in some ways, more like a producer-driven supply chain and is certainly a closer relationship than a typical MNC with its suppliers in a buyer-driven supply chain.⁷⁵ The lack of a contractual relationship and the fact that *buscones* operate according to their own prerogatives may prevent us from defining the independent academies as subsidiaries of MLB as a legal matter, but the analogy to a supply chain would lend legitimacy to a movement to pressure MLB to adopt a code of conduct for dealing with *buscones*.

Even if independent academies can be analogized to the bottom rung of a supply chain, can the activities performed by Dominican players be defined as labor in such a way that it would be recognized under international labor and human rights standards? In the case of athletes who enter the official academies, this question is easily answered in the affirmative. Quite simply, the players in the official academies are employees as defined by common law master-servant agency principles,⁷⁶ and accordingly, the employment relationship is subject to the international laws described in the proceeding section, which apply to employment conditions. Under agency law, although no one factor is determinative, the issues

⁷¹ See *id.*

⁷² See Ruck, *supra* note 10.

⁷³ *Id.*

⁷⁴ See Gereffi, *supra* note 62.

⁷⁵ See Gillen, *supra* note 65 and accompanying text. When set against the attenuated buyer-side supply chain that Gillen describes, the relationship between MLB teams and *buscones* seems exceedingly familiar.

⁷⁶ In a series of cases, the United States Supreme Court has determined the statutory scope of the term "employee," when used in a statute, and otherwise undefined, as describing the master-servant relationship as understood by common-law agency doctrine. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (citing *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 439-40 (1989)). In looking at the situation in the Dominican Republic, I believe common-law agency principles are applicable here, especially since I am proposing guidelines to govern the behavior of a U.S. multinational.

to consider when determining whether someone is an employee include the following:

[T]he skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party⁷⁷

In the case of the official MLB academies, these factors weigh heavily in favor of classifying the players as employees. The players sign contracts with the individual teams, receive pay for the time spent playing and training at the academy, and while there, are under the control of the staff of the academy.⁷⁸ However, as noted in the previous section, while there may remain a problem within the official academies, MLB understands that they bear some responsibility

⁷⁷ *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989). This list is adapted from the Restatement (Second) of Agency, which provides the following factors to determine whether one is a servant or independent contractor:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

§ 220(2).

⁷⁸ *See* Gregory, *supra*, note 1.

to the players in those academies. The argument about the regulation of official academies is an argument over the scope, not the existence of a duty.

The independent academies, on the other hand, are a substantively different problem. It is not immediately clear that what the players at these academies do is labor in a traditional sense, despite the long hours and physical toll that life in the academy may have on their bodies. Although many have argued that the activity of amateur college athletes constitutes labor and should be covered by U.S. labor and employment law,⁷⁹ unlike college athletes, players in independent academies do not play for revenue generating teams. Just because one trains to become a baseball player does not automatically qualify that activity as labor. Millions of children spend substantial amounts of time practicing an athletic or artistic skill; whatever obligations the parent(s) of a young oboe player owes the child, it would be a stretch to argue that international labor standards apply to teenage musicians' practice regimes. Similarly, although attending school may require a good deal of work in the form of studying, writing papers, and taking tests, that activity is not labor; rather, it is a personal investment in cultivating skills that will lead to a better job than one could get without such education.

However, the role of the *buscones* in the independent academies lends a unique feature to the situation that is not present in typical training programs; the children in the academies spend their time training to become the player that is produced by the academies, from which the *buscones* make their living.⁸⁰ Unlike the intensive training that takes place under the tutelage of, say, a gymnastics or swimming coach in the United States, the *buscones* receive their money when the player signs with a team, not upfront from a parent whose child is an Olympic hopeful. *Buscones* make a living by training players and then taking a cut of the player's signing bonus or receiving a finder's fee for their services.⁸¹ While the time at which the trainer receives her money might seem like a semantic distinction, under the master-servant principles enumerated above, this distinction militates in favor of treating the young athletes under the care of a *buscón* as servants and thus employees. If a parent sends his child to an independent

⁷⁹ See, e.g., Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71 (2006); Jonathan L. H. Nygren, *Forcing the NCAA to Listen: Using Labor Law to Force the NCAA to Bargain Collectively with Student-Athletes*, 2 VA. SPORTS & ENT. L.J. 359 (2003); Stephen L. Ukeiley, *No Salary, No Union, No Collective Bargaining: Scholarship Athletes Are an Employer's Dream Come True*, 6 SETON HALL J. SPORTS L. 167 (1996).

⁸⁰ See Fainaru, *Business of Building*, *supra* note 7.

⁸¹ *Id.*

academy, as opposed to paying to board their child with a coach, the food, shelter, and training provided by the buscón is a form of payment for the athlete's services. The fact that not every child under the buscón's care eventually makes it to an MLB team makes this more like a traditional employment relationship than some sort of deferred payment scheme for the training that the athletes receive, since the buscón pays out whether or not the athlete makes him money. If one views the room, board, and potential stipend as payment, the rest of the factors for determining whether the athletes under the buscón's care are employees weigh in favor of categorizing them as such.⁸² The athletes train on facilities controlled by the *buscones*; the relationships can exist from the time the athletes are in their preteens until they are signed by an MLB academy; the type and extent of training is dictated by the *buscones*; and, the *buscones* are in the business of training players, from which they make their living.⁸³ Also, the temporal difference likely has a large effect on how the child athletes are treated. While children under both a traditional coach and a buscón may be pressed to their physical limit, a coach also has a stronger incentive to maintain her reputation. If, for instance, word gets out that a coach treats the athletes under her care poorly, she may lose customers. Similarly, if a parent discovers that her child is being neglected in favor of another athlete, that parent may simply find another coach. The buscón's incentives, on the other hand, only run towards getting the largest signing bonuses for the athletes under his care. This means he is likely to push a large number of athletes whose skills are on the margins to the breaking point in search of the handful that have the talent and training necessary to sign with an MLB academy.⁸⁴ A parent may object to the treatment of players, but given the poverty and lack of education in the Dominican Republic, they may feel they have little choice other than to send their children to train with the buscón who gives them the best deal.⁸⁵ This feature further highlights the particularly coercive and controlling nature of the buscón-athlete relationship under the master-servant analysis.

Because there is no other significant outlet for the training the players receive at the academies, the academies operate as the de facto bottom rung of MLB's supply chain, analogous to very low-level manufacturing on an integrated supply chain that ultimately provides players—as both goods and laborers—to

⁸² See *Cnty. for Creative Non-Violence*, 490 U.S. 730.

⁸³ See Gregory, *supra*, note 1.

⁸⁴ As noted above, this can include the use of steroids. See Fainaru, *Injecting Hope*, *supra* note 43.

⁸⁵ See Ruck, *supra* note 10 ("Parents, who are most often poorly educated and know little about the business of baseball, rarely serve as a check on less-than-ethical *buscones*.").

MLB teams. Since the players produce themselves and the *buscones* make a living off of those players, it is sufficiently analogous to labor to be so understood when determining whether the regulated party, in this case the *buscones*, is violating international human rights and labor laws.

Although independent academies and the *buscones* who run them are similar to typical low-level suppliers in some ways, such as their lack of contracts with MLB, there are ways in which they are different that would make it easier for the league to regulate them. Unlike low-level manufactures that supply goods to MNCs, either to a number of MNCs or a large supplier of goods, independent academies only supply MLB teams and the number of players “sold” is small.⁸⁶ Agents of the teams must scout the players represented by a *buscón* and come to an agreement with both the player and the *buscón*.⁸⁷ As described above, the connection in this regard has elements of a production-based supply chain, in which the MNC is more finely attuned to the behavior down the supply chain.⁸⁸ This means that the connection between MLB and the independent academies, despite the lack of a legal contract, may be much tighter than that between a supplier of widgets and the MNC that eventually buys them, thereby making it more feasible to regulate than it would be in a scenario in which hundreds of micro manufacturers ship fungible products to the next step up the supply chain.⁸⁹

C. Sources of Potentially Applicable Labor and Human Rights Standards

Given the fact that under an analogy to an MNC supply chain, MLB may owe a duty to child athletes in independent academies, the next step is identifying the duties that MLB and the Dominican Republic may have under international law, as well as potential violations of such duties. Although I am not advocating bringing a claim before an international body, especially given the fact that the duty owed by MLB is only analogous to a typical MNC supply chain, sources of international law serve as a reference point for corporate codes of conduct developed under a corporate social responsibility model.

⁸⁶ The number of players entering the academies each year is only in the hundreds, as opposed to the millions of small pieces that may be manufactured when making small machinery, or, say, shoes. *See* Gregory, *supra* note 1.

⁸⁷ *See* Fainaru, *Business of Building*, *supra* note 7.

⁸⁸ *See* Gereffi, *supra* note 62.

⁸⁹ *Id.* (noting that an “attenuated supply chain is . . . perhaps the biggest obstacle to ensuring a code of conduct is implemented at all levels of production.”).

1. International Labor Organization (ILO)

The International Labor Organization (ILO) promulgates conventions that set international labor standards.⁹⁰ Both the United States and the Dominican Republic are members of the ILO.⁹¹ Countries that ratify any given convention are obligated to make the convention a part of their national law.⁹² However, in addition to voluntary ratification, in 1998 the ILO adopted the “Declaration of Fundamental Principles and Rights at Work.”⁹³ In the declaration, the ILO noted that the following are fundamental rights: “(a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) *the effective abolition of child labour*; and (d) the elimination of discrimination in respect of employment and occupation.”⁹⁴ Whether or not a country has ratified the conventions underlying the fundamental rights, they “have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions.”⁹⁵

2. UN Convention of the Rights of the Child

In 1989, the UN General Assembly adopted and opened for ratification the Convention of the Rights of the Child.⁹⁶ The Convention covers a broad spectrum of rights tailored to the specific needs and dangers present for developing, non-autonomous children, covering such topics as child labor,⁹⁷ education,⁹⁸ and health

⁹⁰ Constitution of the International Labour Organisation, *available at* <http://www.ilo.org/ilolex/english/constq.htm> (last visited Apr. 13, 2012) [hereinafter ILO].

⁹¹ Alphabetical List of ILO Member Countries, <http://www.ilo.org/public/english/standards/relm/country.htm> (last visited Apr. 13, 2012).

⁹² See ILO, *supra* note 90, 19 ¶ 5(d).

⁹³ ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (adopted June 18, 1998 (Annex revised June 15, 2010)), *available at* <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm> (last visited Apr. 13, 2012).

⁹⁴ *Id.* ¶ 2 (emphasis added).

⁹⁵ *Id.*

⁹⁶ UN Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 44 (entry into force Sep. 2, 1990), *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

⁹⁷ *Id.* at Article 32.

⁹⁸ *Id.* at Article 28.

and safety.⁹⁹ Both the United States and the Dominican Republic have ratified the Convention without reservation.¹⁰⁰

The UN Committee on the Rights of the Child oversees compliance with the Convention.¹⁰¹ The countries that have ratified the Convention are required to prepare reports documenting their compliance.¹⁰² In addition, NGOs are allowed to file “alternative reports” with the committee if they believe the government’s report is not an accurate reflection of the conditions for children in the country.¹⁰³

D. Potential Violations

1. Child Labor

One of the ILO’s core tenets is the prohibition of child labor, including the Minimum Age Convention (No. 138),¹⁰⁴ to which the Dominican Republic is a signatory.¹⁰⁵ The fundamental convention sets the minimum age for employment at 15.¹⁰⁶ However, there is an exception for countries “where the economy and educational facilities are insufficiently developed,” in which case the minimum allowable working age is 14¹⁰⁷ (13 for light work).¹⁰⁸ The Dominican Republic ratified under the exemption.¹⁰⁹ No matter which standard governs the Dominican Republic, if official MLB academies admit children under the age of 14, either because the children lie about their age or are taken in without a contract, the team’s actions would violate the treaty. Although there may be ambiguity as to whether players in unofficial academies are employees, players in the official academies undoubtedly are, as they receive a salary and the MLB academies are an extension of their respective team’s minor league system. However, it appears such

⁹⁹ *Id.* at Article 32.

¹⁰⁰ Status of treaty ratification as of Apr. 13, 2012, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

¹⁰¹ *Monitoring the Fulfilment of States Obligations*, UNICEF, http://www.unicef.org/crc/index_30210.html (last updated Nov. 5, 2005).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Convention Concerning Minimum Age for Admission to Employment, June 26, 1973, 1015 U.N.T.S. 297 [hereinafter Minimum Age Convention].

¹⁰⁵ *Ratifications of C138 – Minimum Age Convention, 1973 (No. 138)*, INT’L LAB. ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:2002906217888221::NO:11300:P11300_INSTRUMENT_ID:312283 (last visited Mar. 8, 2013) [hereinafter *Ratifications C138*].

¹⁰⁶ Minimum Age Convention, *supra* note 104, art. 2, no. 3, at 300.

¹⁰⁷ *Id.* at art. 2, no. 4.

¹⁰⁸ *Id.* at art. 7, no. 1, at 302.

¹⁰⁹ *Ratifications C138*, *supra* note 105.

violations are isolated, and if not accidental, then at least not flagrantly willful either.¹¹⁰

If we extend the earlier analogy of the independent academy as a small firm, at the domestic level there may be widespread violations of the child labor standard.¹¹¹ Although baseball may be a game and *buscones* would likely dispute the characterization of their young charges as employees, these independent agents make their living by “producing” baseball players for the official MLB academies. In such a situation, to the extent that the production of players results in conditions that would violate the convention, it makes sense to apply the convention to the players as a means of regulating the *buscones*. Therefore, in instances where a Dominican player is under the age threshold and is primarily pursuing baseball as a career—instead of playing in a school or recreational league as an ancillary matter to attending school—under the above conception of the domestic Dominican baseball industry as the bottom rung of a multinational supply chain, that activity is sufficiently analogous to employment to be a violation of the Minimum Age Convention.

2. Education

The UN Convention of the Rights of the Child (Article 28)¹¹² and the UN Declaration of Human Rights (Article 26)¹¹³ raise education to the level of a human right. The right to education is a human right with a labor rights connection since it puts a laborer in a better position to realize her other rights, whether human, labor, political, or economic. The declarations and conventions call for compulsory primary education and insist on the right to secondary education.¹¹⁴

Other than in the rare instance in which a player would use deception to get into an MLB academy, it does not appear that the academies directly violate the right to education by taking players of an age that the international and regional communities declare should otherwise receive primary education. And while there might be pressure to drop out of high school to attend an academy, it does not appear that athletes are, strictly speaking, required to do so.

¹¹⁰ See Zimmer, *supra* note 27, at 421 and text accompanying note 128.

¹¹¹ See Fainaru, *Business of Building*, *supra* note 7; Gregory, *supra* note 1.

¹¹² See UN Convention of the Rights of the Child, *supra* note 96, art. 28, at 53.

¹¹³ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 26, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

¹¹⁴ See *id.*; United Nations Convention of the Rights of the Child, *supra* note 96, art. 28, at 53.

On the other hand, the presence of the MLB academies is the sole reason for the existence of the domestic baseball training system. In the domestic system, there is no doubt that children are dropping out of school to pursue playing baseball in the academies.¹¹⁵ The *buscones* and independent academies that take in young children and prevent them from going to school directly violate the child's right to education. The players that are then lucky enough to be signed by an academy often arrive without the requisite education. The players that are not signed by MLB academies are returned to the labor market with very little education—not even the rudimentary English skills taught in most MLB academies.¹¹⁶

Although the Dominican Republic requires nine years of compulsory education, it is clear that most children do not receive the required level.¹¹⁷ Therefore, the argument could be made that the independent academy system does not make the situation any worse in the Dominican Republic than it would be without such a system. However, even if most participants in baseball academies might drop out in any event, the academies arguably violate the right to education by providing a reason for doing so. This argument is made stronger in cases in which it would be impossible or at least incredibly difficult, given the time commitment, for children both to train at a *buscón*-run facility and to finish compulsory education. As outlined above and developed further below, I believe MLB should bear responsibility for the actions further down the player production chain as the party ultimately responsible for the existence of the *buscones* and independent academies.

3. Health and Safety

The ILO has promulgated standards regarding occupational health and safety.¹¹⁸ Although the Dominican Republic has ratified some health and safety standards for particularly dangerous employment sectors, such as construction,¹¹⁹ it

¹¹⁵ See Fainaru, *Business of Building*, *supra* note 7.

¹¹⁶ See Gregory, *supra* note 1.

¹¹⁷ See Wasch, *supra* note 25, at 107 (noting that only the Dominican Republic spends only 2.3% of GDP on education and that only 58.9% of Dominican boys who enter first grade complete fifth grade).

¹¹⁸ *Occupational Health and Safety*, INT'L LAB. ORG., <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/occupational-safety-and-health/lang--en/index.htm> (last visited Mar. 7, 2013).

¹¹⁹ *Ratifications of C167 - Safety and Health in Construction Convention, 1988* (No. 167), INT'L LAB. ORG., <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:>

has not ratified broader, cross-industry standards.¹²⁰ While academy athletes do not toil under life-threatening working conditions, they may be at risk of preventable injuries, and may not receive adequate care for the injuries they do receive (perhaps just getting cut from the program instead of receiving any treatment for injuries). Likewise, to the extent that steroid use is under regulated, it presents health and safety concerns. Given the fierce competition and the all-or-nothing stakes, despite a testing program, players appear to abuse steroids in high numbers.¹²¹ As with any of the potential violations noted in this article, the violations are likely worse and more pervasive in *buscón*-run independent academies. Since the *buscón* has no economic commitment to the players outside of the bonus they receive—a relationship that is severed the moment the *buscón* gets his cut of the bonus—some may actively promote steroid use or otherwise disregard player's injuries and long-term health.¹²²

More broadly, Article 32 of the UN Convention of the Rights of the Child recognizes the right of children to be “protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.”¹²³ There is no question that steroid use that is either forced or enabled by baseball organizations and personnel in the Dominican Republic violates Article 32. Likewise, a system of child labor that leaves the child susceptible to routine injury, as is the case in baseball—both as a matter of accidents and stress injuries that result in muscle, tendon, and ligament damage—without adequate preventative measure, would violate the Convention. Moreover, even without steroid use and injury concerns, any situation in which adults make money by taking a share of any eventual signing bonus received by children coerced to drop out of school and take up a profession that provides few transferrable skills and a low probability of success is surely both economically exploitative and harmful to a child's development. As such, no matter how

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¹²⁰ *Ratifications of C155 - Occupational Safety and Health Convention, 1981* (No. 155), INT'L LAB. ORG., http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:2643525827901069::NO:12100:P12100_ILO_CODE:C155:NO (last visited Mar. 22, 2013).

¹²¹ See Guevara & Fidler, *supra* note 42, at 123-24.

¹²² See Fainaru, *Injecting Hope*, *supra* note 43.

¹²³ See U.N. Convention of the Rights of the Child, *supra* note 96, art. 32, at 54.

pervasive the use of steroids is,¹²⁴ the treatment of young baseball players in the Dominican Republic surely violates Article 32.

III CORPORATE CODES OF CONDUCT

A. Overview

There are two obvious places at which pressure could be directed to remedy the labor and human rights abuses taking place within baseball academies: the Dominican government and Major League Baseball. Most commentators have suggested primarily pressuring one or the other.¹²⁵ At least one writer has suggested that the situation in the baseball academies is primarily a Dominican problem, since she believes that to the extent abuses occur, they occur almost exclusively within independent Dominican-run academies; therefore, any violation of domestic or international law falls squarely at the feet of the nation responsible for such conditions.¹²⁶ Even if this claim is true, I believe that MLB is responsible for conditions in the independent academies. The presence of MLB is the primary, if not the only, reason such academies exist.¹²⁷ In that way, as outlined above, the independent academies are analogous to supplier factories from which MNCs buy commodities to make their goods. In fact, since the independent academies (and the Dominican Republic more generally) are producing players almost exclusively for MLB teams, MLB's connection to the player protection chain is tighter than it might be for other MNCs, even when a MNC has a supplier contract with a factory in a buyer-driven commodity chain.¹²⁸ While *buscones* may not be employees of MLB, independent academies are sufficiently analogous to supplier factories to apply pressure to MLB to help regulate the behavior of *buscones*. In other words, both the Dominican Republic and MLB should share responsibility for abuses.

¹²⁴ See Fainaru, *Injecting Hope*, *supra* note 43; Guevara & Fidler, *supra* note 42, at 123-24.

¹²⁵ Also, one writer has suggested that the United States and Latin American countries producing baseball players enter into a multinational agreement that would govern the situation. See Jessica N. Trotter, *Rooting for the "Home Team": How Major League Baseball and Latin America Can Better Provide for the "Safe"-ty of Their Players*, 13 SW. J.L. & TRADE AM. 445 (2006).

¹²⁶ See Zimmer, *supra* note 27.

¹²⁷ See Ruck, *supra* note 10.

¹²⁸ See Gillen, *supra* note 65, at 1065-67 (identifying attenuation in the international production chain that "allows multinationals to disclaim responsibility for the inhumane labor standards" in developing countries).

If pressure is only applied to the Dominican Republic, there is little hope of changing the status quo. Although the Dominican Republic is a signatory to the ILO and has education laws on the books that ostensibly make some of the practices within the independent academies illegal, because of intense poverty and an otherwise low level of development, there is little chance that increased scrutiny of labor practices alone would provide sufficient incentives to the Dominican Republic to turn off or even regulate the spout of cheap, young talent flowing into the MLB academies.¹²⁹ This is doubly unlikely given the island nation's fascination with baseball and the large amount of money that MLB spends in the Dominican Republic each year.¹³⁰ As such, it is necessary to make MLB shoulder some of the burden to ensure that players have not had their rights abused.

Unlike the Dominican Republic, MLB is highly susceptible to public pressure. Part of the product they sell is a sense of sportsmanship and fair play. In this way, MLB is no different than the countless consumer brands that offer a good or service that depends in some degree on the goodwill of the consumer.¹³¹ I believe that a combined approach, bringing attention to the Dominican Republic's failure to protect its young players and using that information to expose MLB's role in that failure, stands the best chance of improving the conditions for Dominican baseball players. Although legal channels may be technically available, such as bringing a claim against MLB under the Alien Tort Claims Act (ATCA), such a claim is highly unlikely even to get far enough to expose MLB to substantial negative publicity.¹³² Although the ATCA has been used to prosecute torts "in violation of the law of nations,"¹³³ the state of the law is in flux.¹³⁴ It is

¹²⁹ See Natasha Rossel Jaffe & Jordan D. Weiss, *The Self-Regulating Corporation: How Corporate Codes Can Save Our Children*, 11 FORDHAM J. CORP. & FIN. L. 893, 901 (2005) ("Underdeveloped countries benefit greatly from the presence of MNCs, and the incentives are skewed against regulating them. They create wealth in the states where they operate by providing jobs, producing goods and services, introducing technologies, and developing markets." (footnotes omitted)).

¹³⁰ See Wasch, *supra* note 25, at 101.

¹³¹ See Jonassen, *supra* note 69, at 42-48 (describing the responses of a number of MNCs to scandals over labor conditions within their supply chains).

¹³² Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 202 (2002) ("The ATCA presents the potential to address claims involving intentional physical or mental harm, but is not likely to reach less extreme but much more common claims, including abominable working conditions.").

¹³³ 28 U.S.C. § 1330 (2006).

¹³⁴ The Supreme Court is currently deciding *Kiobel v. Royal Dutch Petroleum Co.*, where the questions include whether the ATCA applies to corporations, and whether and under what

currently unclear whether a corporation can be found responsible under the ATCA, and if one is, to what degree a corporation must be aiding and abetting a state action.¹³⁵ In this case, it is even less clear whether MLB owes a duty to the players in the independent academies that could be violated under the ATCA. Even if someone brought a claim against the Dominican Republic for labor rights abuses, the claim is highly unlikely to get any traction with a court. In its broadest reading, claims under the ATCA typically deal with extreme issues, such as political murder and forced labor.¹³⁶ Therefore, the most efficacious way to improve conditions for young baseball players in the Dominican Republic is for the public and NGOs to push MLB to develop a code of conduct that puts MLB in the position of working with the Dominican Republic to ensure that players who enter MLB academies have received the proper education and are not exploited as child laborers. Recognizing the limits of a legal challenge to conditions in the academies, this type of campaign would rely on the moral underpinnings of the domestic and international law as opposed to the formal mechanisms of the various international institutions. In this way, the campaign would resemble the anti-sweat shop campaigns that led MNCs such as Nike and Levi Strauss to develop corporate codes of conduct (CCOC) under which these companies attempt to regulate their suppliers. While another commentator has suggested a code of conduct as a method to remedy potential abuses,¹³⁷ previous scholarship has promoted an “all-or-nothing” approach that would do more harm than good to both the children in independent academies as well as the Dominican Republic more broadly.

B. MLB and a Corporate Code of Conduct

Major League Baseball is a MNC whose success is highly dependent on fan perception.¹³⁸ One way in which other MNCs whose business depends on public

circumstances the ATCA applies to violations occurring within the territory of a sovereign other than the United States. No. 10-1491 (U.S. argued Oct. 1, 2012).

¹³⁵ See Collingsworth, *supra* note 132, at 197.

¹³⁶ See Collingsworth, *supra* note 132, at 185-95.

¹³⁷ See Wasch, *supra* note 25, at 123.

¹³⁸ One needs look no further than the ongoing steroid scandals in baseball for evidence of how difficult it is for baseball to deal with issues of integrity. Although baseball attendance did not decline during the so-called “steroid” era, that period of baseball history has left a stain on the current game, including seriously tarnishing the reputations and post-baseball careers of those persons implicated. See Wayne G. McDonnell, Jr., *A Hall of Fame Quandary Involving Sportsmanship, Integrity and Character*, FORBES (Jan. 4, 2013, 9:25 PM), <http://www.forbes.com/sites/waynemcdonnell/2013/01/04/a-hall-of-fame-quandary-involving-sportsmanship-integrity-and-character/>.

goodwill have attempted to garner approval is through the development of a CCOC for dealing with supplier factories and other contractors in the developing world.¹³⁹ Because of their vast economic power, the presence of MNCs may overwhelm the public regulatory system of many developing states. This outcome occurs even in situations where the company does not make a conscious effort to subvert regulation of labor standards. Where the country and its citizens are desperate for contract work, the race (to the bottom) to produce goods at low cost creates a situation where the country would rather have jobs than enforce the domestic labor laws. During the 1990s, in response to a number of reports on horrible working conditions in supplier factories for some of the leading apparel and sporting goods companies,¹⁴⁰ companies began to see the benefit of corporate social responsibility (CSR), one part of which was establishing CCOC as a method of dealing with public outrage over MNCs' complicity in labor and human rights abuses. While some of the codes of conduct may have been drafted proactively and presented to the public as an altruistic reflection of the corporation's moral principles, many such codes were passed in response to a human or labor rights scandal, uncovered by activists, non-governmental organizations (NGOs), or journalists, implicating the company.¹⁴¹ Over time, some corporations have also seen CCOC as a means to achieve other business ends, such as efficiency and retention of employees¹⁴² and not merely as a public relations ploy. Whatever the reason for passing the code of conduct, the measure of success of any code of conduct is both the substance of the code itself, and, more importantly, the tangible steps taken by the MNC to prevent abuses. Although many CCOC began as vague, aspirational statements of principles, increased transparency, monitoring and enforcement efforts, including

¹³⁹ Of course, a CCOC need not only apply to a MNC's operations in the developing world. I am focusing on codes that do so apply because they represent a private regulatory enforcement function that is likely to exist in the absence of a functioning public regulatory system in many developing countries.

¹⁴⁰ See Jonassen, *supra* note 69, 42-46.

¹⁴¹ Famous sweatshop scandals include the discovery by a New York Times journalist of sweatshop conditions in a factory in El Salvador where GAP clothing was made, and the National Labor Committee allegations that Kathie Lee Gifford-brand clothing was made with the use of child labor in Honduras. Kathie Lee Gifford later became an outspoken advocate against the use of child labor. See Jonassen, *supra* note 69, 42-46.

¹⁴² These values are espoused by consultancy organizations such as Business for Social Responsibility. BSR, <http://www.bsr.org/> (last visited Mar. 7, 2013).

the use of independent agencies, have moved many CCOC past hortatory claims to enforceable regulatory mechanisms.¹⁴³

Companies such as Levi Strauss,¹⁴⁴ Nike,¹⁴⁵ and Reebok¹⁴⁶ want to appear to be good corporate citizens. They have done so, in part, by developing codes meant to establish the company's commitment to core labor, human, social, or economic rights. Organizations such as the Federation Internationale de Football Association (FIFA), the Swiss organization that governs international professional soccer, have created labeling programs that require suppliers of "official" gear to abide by such standards.¹⁴⁷ Under either type of code, many CCOC incorporate labor standards as set out by the ILO "Declaration of Fundamental Principles and Rights at Work."¹⁴⁸ This often means making sure that the factories that are part of their production chain, either as producers of the product or the raw materials from which the products are made, respect certain minimum rights. Because it appears to be particularly frowned upon by Western consumers, the use of child labor is of core importance.

Levi Strauss is an example of a MNC with a highly developed, self-imposed code of conduct. Levi Strauss initially developed its code not just for ethical reasons, but also to protect its brand image in the face of other scandals implicating apparel companies in the abusive labor practices of their overseas contractors.¹⁴⁹

¹⁴³ The movement from code to a regulatory mechanism often requires additional public pressure. For example, media scrutiny of—and subsequent consumer displeasure with—the conditions under which Apple products are made at the FoxxConn Factories in China has led Apple and FoxxConn to agree to a more intrusive self-regulatory scheme, including allowing independent monitoring firms access to the factories. See Charles Duhigg & Steven Greenhouse, *Electronic Giant Vowing Reforms in China Plants*, N.Y. TIMES (Mar. 29, 2012), <http://www.nytimes.com/2012/03/30/business/apple-supplier-in-china-pledges-changes-in-working-conditions.html?pagewanted=1>.

¹⁴⁴ See LEVI STRAUSS & CO., SOCIAL AND ENVIRONMENTAL SUSTAINABILITY GUIDEBOOK (2010), available at <http://www.levistrauss.com/sites/default/files/librarydocument/2010/6/session-2010-guidebook.pdf>.

¹⁴⁵ See NIKE, INC., CODE OF CONDUCT (2010), available at http://www.nikeinc.com/system/assets/2806/Nike_Code_of_Conduct_original.pdf.

¹⁴⁶ See ADIDAS GRP., WORKPLACE STANDARDS (2007), available at http://www.adidas-group.com/en/sustainability/assets/workplace_standards/English_Workplace%20Standards.pdf.

¹⁴⁷ See Jonassen, *supra* note 69, at 39-40.

¹⁴⁸ In fact, Levi-Strauss references ILO-equivalent standards throughout its code of conduct. See LEVI STRAUSS & CO., LEVI STRAUSS AND CO. GLOBAL SOURCING AND OPERATING GUIDELINES [hereinafter LEVI GLOBAL SOURCING], available at <http://www.levistrauss.com/sites/levistrauss.com/files/librarydocument/2010/4/CitizenshipCodeOfConduct.pdf>.

¹⁴⁹ See Jonassen, *supra* note 69, at 43.

Levi's dealings with contractors in countries across the globe are governed by the two-part "global sourcing and operating guidelines."¹⁵⁰ Through its "country assessment guidelines," Levi Strauss determines if a country in which it is considering doing business meets minimum levels of health and safety protections, human rights guarantees, a functioning legal system, and political stability.¹⁵¹ If Levi Strauss decides to do business within a country, it then monitors the conditions in its contracting factories under its "Terms of Engagement" (TOE).¹⁵² The TOE covers wages and benefits, working hours, child labor, prison and other kinds of forced labor, discrimination, and disciplinary practices.¹⁵³ Levi Strauss works with the third party, non-profit monitoring organization, Verité, to ensure that its suppliers comply with the code of conduct.¹⁵⁴ In some instances, Levi Strauss has withdrawn from countries for violations of the TOE.¹⁵⁵ According to a self-published case study, Levi Strauss says it withdrew production from Mauritius because of TOE violations as a result of discrimination against migrant workers in Mauritian factories.¹⁵⁶ According to the company, it met with the U.S. government to ask them to pressure Mauritius to investigate and change labor practices within the country as a condition to retaining trade benefits with the U.S.¹⁵⁷ Levi Strauss maintains that its actions led the Mauritian government to create the "Inter-Ministerial Committee on Foreign Labor" to examine labor conditions for migrant workers and strengthen labor protections.¹⁵⁸

¹⁵⁰ See LEVI GLOBAL SOURCING, *supra* note 148.

¹⁵¹ See LEVI GLOBAL SOURCING, *supra* note 148.

¹⁵² See LEVI GLOBAL SOURCING, *supra* note 148.

¹⁵³ *Id.*

¹⁵⁴ Verité, Client Testimonials, <http://www.verite.org/AboutUs/ClientTestimonials> (last visited Apr. 12, 2012).

¹⁵⁵ Lisa G. Baltazar, *Government Sanctions and Private Initiatives: Striking a New Balance for U.S. Enforcement of Internationally-Recognized Worker's Rights*, 29 COLUM. HUM. RTS. L. REV. 687, 719 (1998).

¹⁵⁶ Levi Strauss, "LS & CO. Affects Positive Change in Mauritian Labor Conditions," available at <http://www.levistrauss.com/library/lsco-affects-positive-change-mauritian-labor-conditions>.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

IV

AN MLB CORPORATE CODE OF CONDUCT FOR THE DOMINICAN REPUBLIC

A. Features of MLB that Would Effect the Implementation of a CCOC

The hierarchy of the League is a unique feature that could make it easier to monitor and enforce a code of conduct. MLB as an organization oversees and coordinates 30 franchise teams. It, along with the players association, has developed a complicated set of rules governing how teams operate and how they treat their players.¹⁵⁹ Since MLB already operates as a top-down governing body of the teams, it is in a position to promulgate a CCOC that applies to the behavior of the franchises. It is also better able to monitor and enforce a code against teams, since unlike a manufacturer who receives the products produced by noncompliant suppliers, violations by low level producers (independent academies and *buscones*) directly benefit only the franchises. Because the League has less of a stake in whether a team is able to exploit players,¹⁶⁰ it will be better able to make sure that the teams are living up to their obligations. However, while this might be theoretically true, it is also true that MLB has been reticent to act as a monitor and enforcer in the past, such as when it was pressured to institute a drug-screening program in the wake of steroid scandals in the league.¹⁶¹ The issue of developing a code of conduct for MLB academies would not likely be contentious in the same way, since the players association does not represent the players in the Dominican academies.

There are also a number of ways in which MLB's relationship with the Dominican Republic is different than the typical MNC-developing country relationship, which make it difficult for MLB to enforce a code or create a situation in which strictly enforcing a code would have a deleterious impact on the same young athletes MLB should be trying to help. For instance, MLB's relationship with *buscones* and independent academies is different than that between MNCs and in-country contractors. As noted earlier, MLB academies do not have an ongoing contractual relationship with independent academies and *buscones*. In fact, although MLB teams may visit independent academies or meet with scouts to determine which players they would like to sign, the only contractual relationship

¹⁵⁹ See MLR, *supra* note 11.

¹⁶⁰ Though of course MLB has a stake in the production of star players, since such players drive interest in MLB generally.

¹⁶¹ For a timeline of MLB's response and eventual implementation of a drug testing program see Drug Policy Coverage, *MLB.com*, http://mlb.mlb.com/mlb/news/drug_policy.jsp?content=timeline (last visited Apr. 20, 2012).

is likely to be between the boys and the *buscones* who represent them. The lack of a contractual relationship makes it even harder to regulate the behavior at the very bottom.¹⁶² Even if MLB develops a CCOC that calls for compulsory education and the prevention of the usage of child labor, *buscones*, parents, and players will continue to see a system that results in very large payout for those that make it to the top. CCOC or not, it would be nearly impossible for MLB to have in-school monitors to make sure potential future players are receiving an adequate education. Likewise, if a young boy is a promising baseball talent, but dropped out of school before completing compulsory education, there is an incredibly strong incentive for that child to forge the proper documentation or otherwise shirk the CCOC. This problem is exacerbated by the fact that the education system is poor in the Dominican Republic to begin with, and that, baseball player or not, many children drop out of school after the 5th grade.¹⁶³ After all, the player very literally has nothing to lose and everything to gain.

Similarly, even if MLB were to institute a code that requires players to receive compulsory education and prohibits independent academies from engaging in practices that amount to the use of child labor, an all-or-nothing approach would likely end up only hurting the Dominican Republic as a whole. This is analogous to a CCOC that requires a company to pull out of a country entirely if it finds that the factory or the country in which it operates is a flagrant violator of code provisions. A CCOC with such an enforcement mechanism gives the MNC leverage to make its partner accede to its demands—at least where the partner country or factory is able to meet those demands.¹⁶⁴ However, there are situations in which a partner cannot meet the standards set by the MNC. If the only recourse is ending business with that firm or in that country, while it might assuage the guilt of Western consumers, it does little to improve the conditions for workers in that country or factory who could have used the capital that the MNC would have expended to improve their economic situation, perhaps long term.

This situation is exacerbated in an industry like baseball and in a country like the Dominican Republic, where the primary focus of the code would be the regulation of behavior at the very bottom of the production chain. This behavior is typically difficult to regulate, given the fact that employees' only competitive advantage is the low cost of their labor. This is especially true since every boy is in

¹⁶² See Gillen, *supra* note 65, at 1085.

¹⁶³ See Wasch, *supra* note 25, at 107.

¹⁶⁴ See Baltazar, *supra* note 155, at 718-19 (noting that under Levi-Strauss's guidelines, it may withdraw from countries which fail to comply with its code of conduct).

competition with every other boy; there is every incentive to cheat the system, especially when complaining about one's treatment is likely the surest way to lose one's chance to advance.¹⁶⁵ Even in the face of MLB pulling out of the country, as long as individual *buscones* see that other scouts and players are able to get an advantage out of not following the CCOC, they will also cheat the system. If an individual follows the rules and others do not, the individual loses out. If MLB pulls out of the country because the independent academies and *buscones* refuse to follow the rules en masse, the individual does not lose any more, but the rest of the country does, since MLB takes its \$75 million a year investment with it. Also, without MLB in the country developing talent, there would be fewer Dominican players in the league and, therefore, less money being sent back by such players to families and communities throughout the Dominican Republic.

Instituting a corporate code of conduct vis-a-vis independent academies in the Dominican Republic presents another unique challenge. The product that the academies produce is not a good but a laborer in the form of baseball players. This presents problems because, in addition to creating ambiguity as to whether a player should be considered a laborer at all, it compounds the enforcement issues outlined above. If a code of conduct prohibits an MLB academy from signing a player who was taken out of school or otherwise exploited, it is an injury almost exclusively borne by the individual player. Therefore, any code of conduct adopted by MLB regarding the Dominican Republic should be drafted to avoid harming players, who, through little fault or their own, may have already been exploited by overzealous *buscones*. Any solution should work to create a closer connection between MLB and the independent academies and scouts who provide the academies with players. Likewise, instead of merely pulling out of the country or even scaling back its investment, any solution should provide incentives for MLB, the Dominican Republic, and domestic academies to work together to make sure core labor and human rights standards are met. This would go beyond the all-or-nothing approach of many codes and could lead to both a greater investment in the country by MLB and an increased commitment to public regulation by the Dominican Republic.

¹⁶⁵ See Zimmer, *supra* note 27, at 428.

*B. Suggested Features of an MLB Code of Conduct**1. Establish a Buscón Licensing Program*

One way that MLB could potentially attempt to remedy the situation would be the adoption of a code of conduct that includes a buscón licensing program under which *buscones* would not be allowed to represent players unless they can verify that players under their control have finished compulsory education and have not been exposed to unduly hazardous conditions while under a buscón's care. In the Dominican Republic, children are currently required to finish eight years of compulsory education.¹⁶⁶ However, most children drop out after the fifth grade.¹⁶⁷ Even if this is the case, since entrance to MLB is the primary reason such children take up baseball and its academies are the only real conduit for talent off of the island, MLB has an imperative to make sure that it is not responsible for children leaving school.

Given both the state of the Dominican education system and the international norm of requiring only compulsory education,¹⁶⁸ requiring players to have graduated high school is currently an unrealistic goal. In fact, such a standard would do more harm than good. If MLB teams were unable to sign Dominican players who have not completed high school, MLB teams would have to scale back their operations in the Dominican Republic without a corresponding educational benefit to potential players.

A code of conduct provision requiring documentation of completion of compulsory education would also have the effect of reducing any child labor violations within the independent academies. Requiring children to finish compulsory education would help correct the school-baseball balance. If baseball training was relegated to an after school activity, it would be less likely to qualify as employment under common law agency principles, since both the duration of the activity would be shortened and the player would be better able to set the bounds of his participation.¹⁶⁹

One Note has argued that creating an obligation on the part of MLB to make sure academy players received an adequate education is not feasible because, even if MLB has an obligation to make sure the children who play in its academies have

¹⁶⁶ See ILAB, *supra* note 53, at 152.

¹⁶⁷ See Wasch, *supra* note 25, at 107.

¹⁶⁸ See Wasch, *supra* note 25, at 107.

¹⁶⁹ See *Cnty. for Creative Non-Violence*, 490 U.S. 730.

received an education, MLB's efforts would not affect the children playing in independent academies.¹⁷⁰ If a code of conduct results in only baseball players receiving a better education in the Dominican Republic, I would consider it a success. MLB might have a general obligation to all children on some vague moral level, but as I argue in my prior analysis, it has a specific obligation to the children who drop out of school to become baseball players and enter the independent academies that supply players to MLB academies. There are also the indirect effects of both drawing more attention to the Dominican Republic's poor educational system and contributing to the solution.¹⁷¹ Heightened public awareness of the educational crisis in the Dominican Republic may spur further action by the Dominican government, NGOs, and other MNCs. Therefore, even if MLB only has an obligation to its players, that encompasses an obligation to verify that baseball players entering its academies have received adequate education. By enforcing such a rule, MLB would help children throughout the Dominican Republic.

Commentator Adam Wasch, focusing on prohibiting child athletes from working at the expense of education, provides an example of what a code of conduct of this kind might look like:

Enforcement of MLB's Child Labor Code of Conduct. Major League Baseball will discontinue cooperation with any third-party that persists in non-compliance with our MLB Child Labor Code of Conduct.

Apprenticeship Programs. Major League Baseball accepts apprenticeship programs for children between the ages of fourteen and sixteen years, but only under certain conditions. The total number of hours spent on work and school together should never exceed seven hours per day. The apprentice must prove that work is not interfering with the child's education, that the apprenticeship is limited to a few hours per day, that the work is light and clearly aimed at training, and that the child is properly cared for, housed, and fed. Apprenticeship program directors must file a report with the league that details that their apprentices are receiving a quality, formal education. We will

¹⁷⁰ See Zimmer, *supra* note 27, at 427.

¹⁷¹ See Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives*, 30 LAW & POL'Y INT'L BUS. 111, 152-56 (1998) (detailing indirect effects of CCOC).

not work with apprenticeship programs that do not comply with these terms.

Special Recommendations. Major League Baseball acknowledges that according to Article 1 of the UN Convention on the Rights of the Child, a person is a child until the age of eighteen. We therefore recommend that children in the age group of 14-18 be treated accordingly (i.e., by limiting the total number of working hours per day and implementing appropriate rules for overtime). Children in this age group are not allowed to perform strenuous work that will impair their ability to receive an education.¹⁷²

While his proposed Child Labor Code of Conduct is a decent first step, it would likely be insufficient to remedy the child labor and education violations committed by *buscones*. First, it has been established that the record keeping system in the Dominican Republic is open to manipulation.¹⁷³ As such, an enterprising player or *buscón* could likely forge any required documentation to show that the requisite education has been received. This is especially true for exceptionally talented players, for whom there is an incentive to forge documentation or to do a less than thorough job of investigating dubious documents.¹⁷⁴ On the other hand, it is necessary because it makes the Dominican Republic responsible for enforcing its own education laws if it wishes to keep MLB academies in the country. After all, if verification becomes too difficult, MLB teams might significantly scale back their operations in the country.

Likewise, Wasch's code suffers from an adversarial, all-or-nothing approach. Under his code, independent providers of baseball players would operate under a cloud of suspicion; and, if they fail to meet the strictures of the code, they will be cut out.¹⁷⁵ In a country without adequate regulation to prevent *buscones* from violating labor rights, a code that treats each *buscón* or academy as an independent data point will likely be ineffective in bringing the domestic system in line with international labor standards. As long as some independent actors are able

¹⁷² See Wasch, *supra* note 25, at 123-4.

¹⁷³ See Zimmer, *supra* note 27, at 421.

¹⁷⁴ Note the case of Adrian Beltre, who was signed at age 15, perhaps knowingly, by the Los Angeles Dodgers. See Spagnuolo, *supra* note 2, at 270.

¹⁷⁵ See Wasch, *supra* note 25, at 123 ("Major League Baseball will discontinue cooperation with any third-party that persists in non-compliance with our MLB Child Labor Code of Conduct.").

to get away with violating labor standards, there will be intense pressure for others to push their luck.

A potentially more effective approach, which would retain the same thrust as Wasch's code, is one that creates a closer partnership between MLB and the independent actors which supply the MLB academies with players, as well as the government of the Dominican Republic. For instance, the code could require Dominican scouts and independent academies to apply for a license from MLB. The license would require the independent provider to abide by certain minimum labor and educational standards, as set by Dominican law. In turn, MLB would require the teams in the league to sign only players who are represented either by a licensed scout or institution. Alternatively, MLB teams could sign players who are at least 17 years old and are currently attending or have already graduated from high school and, therefore, have received both the compulsory education required by Dominican law and are eligible to be signed under MLB rules governing international players. This combined approach would provide incentives for independent providers to abide by Dominican law but would not punish those players who decided to stay in school past the compulsory period. In fact, creating a closer relationship with *buscones* would inure to the benefit of the scouts, since only they would be allowed to make a premium off of players signed by MLB teams, likely more than offsetting the cost of compliance with the code.

The franchise structure of MLB could be useful in facilitating a partnership between the teams, *buscones*, and government. Since MLB is a corporation that exists outside of the teams it oversees, it has the ability to implement a code that governs the teams and *buscones* without the need for an outside monitoring group (though perhaps there is a role for such a group). Through the monitoring program, MLB would oversee the independent producers. Under this approach, instead of immediately withdrawing a license when violations are found, MLB should require the independent actors to demonstrate why they are unable to meet their obligations and what steps they are taking to reach compliance. MLB already has an international office in Santo Domingo.¹⁷⁶ If it implements a licensing program for *buscones*, it could use its office in the Dominican Republic to serve as a meeting place for all of the regulated entities to discuss violations, as well as successes and concerns with the program. For instance, *buscones* may complain that the education system in the country is in bad shape; children are not actually required to finish compulsory education and, in fact, most do not—therefore, the independent operators are unable to meet their obligations under the licensing

¹⁷⁶ See Sanchez, *supra* note 5.

program. The dialogue created through a partnership between MLB and independent baseball scouts could then be used to pressure the government to better enforce its education laws.¹⁷⁷ A code that produces communication instead of merely the threat of withdrawal of benefits would likely benefit young baseball players and the Dominican Republic.

2. Require Teams to Provide Additional Education, Either On-Campus or Through a Partnership with Local Schools

Even if MLB develops partnerships with *buscones* and independent academies, given the economic jackpot that a player receives if they are skilled enough to make it to the major leagues, the pressure to cheat would still be intense. Therefore, MLB may need to take additional proactive steps to ensure that its presence in the Dominican Republic does more good than harm. One method would be to require MLB academies to offer additional education to players in the academy. This could be accomplished either by bringing teachers to the academies to teach classes in addition to the English and American culture classes already taught, or alternatively, academies could provide busing from the academies to nearby schools. This educational component would be required for the high-school-age players (16-18) and, perhaps, could also be offered to older players who did not graduate high school as an optional program.

In fact, some MLB teams have already instituted additional education at the academies. As noted earlier, five teams currently either bus players to nearby schools¹⁷⁸ or have on-site educational facilities.¹⁷⁹ Given the relatively low cost to the teams,¹⁸⁰ the high value to the players, and the remedial benefit for athletes who dropped out of school to pursue baseball, there should be a push to get MLB to add such a provision to any code of conduct it adopts. The policies of the MLB academies would be easier to monitor than those in the independent academies. If MLB discovers that a team is not fulfilling the educational requirement, the league could impose fines and implement the program itself, charging the cost to the team.

¹⁷⁷ Although Levi's did withdraw before it entered into negotiations to push the Mariatas to adopt stronger anti-discrimination laws, given MLB's position as the major employer of Dominican baseball players, it likely has more leverage to negotiate with the Dominican government without taking such a drastic measure. *See Levi Strauss, "LS & CO. Affects Positive Change in Mauritian Labor Conditions,"* *supra* note 156.

¹⁷⁸ *See Wasch, supra* note 25, at 108-9.

¹⁷⁹ *See Gregory, supra* note 1.

¹⁸⁰ As noted earlier, the Pittsburgh Pirates, MLB's poorest team, paid \$75,000 in 2010 to run an educational program at its academy. *Id.*

While MLB should be more willing to penalize a team than they would an independent operator, the penalty should be aimed at improving conditions for players and should not include forcing the team to close the academy, since the effects of that penalty would be felt most strongly by the Dominican players.

3. International Draft

Perhaps the mechanism most likely to change the fortunes of players in the Dominican Republic is the institution of an international draft. In fact, the latest collective bargaining agreement (CBA) between MLB and the Major League Baseball Players Association calls for an investigation into instituting such a draft.¹⁸¹ An international draft would require teams to pick all first-time signers, instead of leaving those players subject to free agency and the vagaries of the market. Players chosen in an international draft may fall into “slots” with corresponding signing bonus values.¹⁸² Even if there were not a hard slotting system with mandatory signing bonuses, a player would only be able to negotiate with the team that picked him. Proponents of an international draft believe it would be more fair, both to players from developing countries as well as to players already subject to the draft, who may not be able to command the same kind of premium that a proven talent from Japan or Korea could get.¹⁸³

Most significantly, the institution of an international draft would largely undercut an MLB team’s incentive to maintain an academy in the Dominican Republic. The academy could still be the first stop for many drafted Dominican players; however, the reason that teams run academies is so they are able to give a

¹⁸¹ MLB.com, “MLB, MLBPA reach new five-year labor agreement,” http://mlb.mlb.com/news/article.jsp?ymd=20111122&content_id=26025138&vkey=pr_mlb&c_id=mlb (last accessed Apr. 12, 2012) (“By December 15, 2011, the parties will form an International Talent Committee to discuss the development and acquisition of international players, including the potential inclusion of international amateur players in a draft or in multiple drafts.”).

¹⁸² Although the current draft also has a suggested slotting system, it is not clear that teams and players feel bound by the suggested signing bonus figures.

¹⁸³ Incredibly, one commentator has argued that the current system disadvantageous players in the draft to the benefit of international free agents to such a degree that it amounts to national origin discrimination. See Daniel Hauptman, *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 (2010). In fact, some players have threatened to establish residency in another country to escape the strictures of the draft, and presumably command a higher signing value. See *id.* at 264. However, the bargaining power that a player in that position has is greater than a player with equal skills who grew up in a developing country.

large number of cheap players a test run before making a larger commitment to the players and sending them to the U.S. to play in the minor, and perhaps eventually, the major leagues. If teams were only allowed to sign the limited number of players that fell to them through a draft, which encompassed not only Dominican players but players from all over the world, this key function of the academies would be lost.

Some have argued that undercutting MLB teams' incentive to operate academies in the Dominican Republic is a good thing.¹⁸⁴ While MLB's current policies may contribute to labor and human rights violations in the country, the background conditions in the Dominican Republic are not rosy. MLB teams spend a significant amount of money in the country, including providing some infrastructure improvements.¹⁸⁵ Likewise, players in the official MLB academies make a wage that is many times higher than the prevailing factory wages.¹⁸⁶ Therefore, while there may be gains, such as more children pursuing occupations other than baseball, the goal should be for MLB to make a greater commitment to helping the Dominican Republic reach international standards—not reducing MLB's investment in the country. After the institution of an international draft, there might not even be an appreciable decline in Dominican boys dropping out of school to pursue it; even without an academy system, there is still the lure of the enormous payday and a tradition of players who went on to become international sporting celebrities. Likewise, while there may be less money to go around, an international draft would likely not undercut the incentives for *buscones* to develop, represent, and garnish the signing bonuses of players to the same degree that it would reduce MLB's investment in the country. Therefore, while it might be an inevitable development, it is not likely a good one for the Dominican Republic or its baseball players.

V

DEVELOPMENT OF AN MLB CORPORATE CODE OF CONDUCT

Currently, MLB does not have a corporate code of conduct independent of the collective bargaining agreement (CBA) negotiated between team owners and

¹⁸⁴ See Timothy Poydenis, *The Unfair Treatment of Dominican-Born Baseball Players: How Major League Baseball Abuses the Current System and Why it Should Implement a Worldwide Draft in 2012*, 18 SPORTS LAW. J. 305 (2011); Wasch, *supra* note 25; Spagnuolo, *supra* note 2.

¹⁸⁵ See Wasch, *supra* note 25, at 108.

¹⁸⁶ According to the interviews conducted by Spagnuolo in 2001, players in the academies made between \$600 and \$700 per month, while garment workers made around \$100 per month. See Spagnuolo, *supra* note 2, at 273.

the Major League Baseball Players Association (MLBPA), whose only relevant provision for this discussion is the requirement that MLB teams offer English-as-a-second-language courses if any major league player requests it.¹⁸⁷ Additionally, MLB maintains an office in Santo Domingo in the Dominican Republic, which has established rules regarding field conditions, housing, and nutrition in the academies.¹⁸⁸ Therefore, the rules governing MLB's conduct in the Dominican Republic are the bare-bones requirements found in Rule 3(a)(1)(B)(i) and (ii) requiring that players are either 17 when signed, or will be 17 by the end of the current season.¹⁸⁹ That means most players in the Dominican MLB academies receive little outside training besides baseball-related English classes, and even then it is generally agreed that players do not develop English skills until they come to the United States.¹⁹⁰ Given the unique features of the academy system—including very young players, dire poverty, lack of government regulation, and an incredibly small chance of success—it is unlikely that Dominican players will develop the bargaining power necessary to substantially change their conditions. Any player who speaks out would likely be immediately let go from the academy. As such, the pressure to develop a code of conduct will need to come from an outside combination of public and MLBPA pressure, backed by the guidelines furnished by international labor and human rights law.

Although the MLB rules govern player selection and development, whenever there is conflict between the rules and the CBA, the CBA governs.¹⁹¹ This means that players through the MLBPA have the ability to shape the rules to protect labor rights in the Dominican Republic. In fact, given the strength of the player's association, its cooperation may be required to institute any rule change or corporate code of conduct governing MLB behavior in the Dominican Republic. Therefore, while an independent corporate code of conduct would help protect Dominican players, the player's association insistence on adding the code to the CBA would carry additional moral force and operate not only as a self-imposed code but also as a binding contract with the MLBPA.

¹⁸⁷ CBA, *supra* note 38, § 15(F).

¹⁸⁸ See Wasch, *supra* note 25, at 106 (quoting http://www.usatoday.com/sports/baseball/2004-04-13-cover-latinos_x.htm).

¹⁸⁹ MLR, *supra* note 11, § 3(a)(1)(B)(i)-(ii).

¹⁹⁰ Tom Weir and Blane Bachelor, *Spanish-Speaking Players Get Lesson in American Life*, USA TODAY (Apr. 4, 2004), http://www.usatoday.com/sports/baseball/2004-04-13-cover-latinos_x.htm.

¹⁹¹ See CBA, *supra* note 38.

One potential problem with taking this approach is convincing the MLBPA to use their bargaining power to protect players not currently in the association. Even Dominican players, who make up a substantial minority of MLB players,¹⁹² may not see the benefit in pushing for better treatment of other Dominican players; after all, they made it out of the Dominican system—some of them as millionaires. Also, as one commentator has pointed out, Dominican players may also be acutely aware of their fragile position as foreign baseball players, and may not be willing to stick their neck out, lest they be labeled troublemakers.¹⁹³ In fact, given the precarious position of most MLB players, even those who believe the situation in the Dominican Republic needs to change may be unwilling to rock the boat for the benefit of young future players. However, if the issue in the Dominican Republic could be shown to have a negative effect on the major leagues, the MLBPA might make a greater push toward remedying the education and child labor problems in the Dominican Republic. Perhaps the MLBPA would become stronger advocates for change in the Dominican Republic if it could be shown that the lower bonuses and salaries paid to players signed in the Dominican Republic suppress salaries across the league. Similarly, the MLBPA might take a lead role if the relatively unregulated international free-agent market leads MLB to focus attention on the Dominican Republic, churning through many players, few of whom become members of the association, instead of focusing on countries covered by the draft, in which a higher percentage of players initially signed, eventually make it to the majors. In that instance, the MLBPA would be most likely to push for a fix that levels the playing field for all potential major league players, such as the institution of an international draft.

Even without the involvement of the player's association, MLB could adopt a corporate code of conduct that requires MLB teams operating in the Dominican Republic or elsewhere to abide by a set of rules, since those players are not currently covered by the CBA. In fact, unlike other codes of conduct, by which companies self-regulate, there is more distance between MLB and its independently owned franchises; while still self-regulation, this structure separates enforcement and compliance. However, MLB has been reticent to fully confront the labor rights violations that their presence in the Dominican Republic might cause. This reticence persists despite years of media coverage on the potential problems caused by academies.¹⁹⁴ The plight of Dominican players was even

¹⁹² In 2010, over 10% (86 of 833) of players on MLB opening day rosters were from the Dominican Republic. See Gregory, *supra* note 1.

¹⁹³ See Zimmer, *supra* note 27, at 428.

¹⁹⁴ See Gregory, *supra* note 1; Fainaru, *Business of Building*, *supra* note 7.

documented in the feature film *Sugar*.¹⁹⁵ Therefore, it may require additional public pressure for MLB to see that a CCOC is in its best interest.

Admittedly, a public campaign faces some pitfalls that were not present in the campaigns against sweatshop labor in the 1990s. For one, the problem is potentially more nuanced. Unlike a sweatshop where all of the workers, perhaps including child laborers, make subsistence (or lower) wages for work performed under dangerous conditions, there are large numbers of Dominican-born players in MLB that make millions of dollars a year, some of whom are the face of their franchise.¹⁹⁶ The plight of school-age children may not seem so pressing when there is such dramatic upside for a few lucky players. Similarly, unlike the anti-sweatshop movement, which drew strength from many interrelated groups and causes,¹⁹⁷ there may not be a similar block of baseball fans dedicated to labor rights. I have no doubt that there are individual baseball fans who care about labor conditions in the Dominican Republic, but baseball is, after all, a spectator sport, and many baseball fans wish to escape real-world problems. If the average fan's critical faculties are engaged, they are likely directed toward dissecting the decisions of the team on the field, not the labor conditions that produced the players on the team.¹⁹⁸ However, it is likely that the prospect of getting Western

¹⁹⁵ *Sugar* (2008). Although *Sugar* was a drama, not a documentary, it showed the path of one player who began his career in the Dominican academies, made it to the American minor leagues, but due to injury and lack of an adequate support system, dropped out of baseball. Unlike players who stop playing baseball while still in the Dominican Republic, after the protagonist in *Sugar* leaves baseball, he is left to fend for himself in the United States with no education and rudimentary English skills.

¹⁹⁶ David Ortiz of the Boston Red Sox and Robinson Cano of the New York Yankees, to give two prominent examples.

¹⁹⁷ See Michele Micheletti & Dietlind Stolle, *The Politics of Consumption/The Consumption of Politics: Mobilizing Consumers to Take Responsibility for Global Social Justice*, 611 ANNALS 157, 163-64 (2007) (noting that the global anti-sweatshop movement was made up of "more than one hundred organizations representing church groups; student groups; think tanks; policy institutes; foundations; consumer organizations; international organizations; local to global labor unions; labor-oriented groups; specific antisweatshop groups; no-sweat businesses; business investors; and international humanitarian and human rights organizations, networks, and groups.").

¹⁹⁸ Commentators such as Noam Chomsky have posited that there is a real danger in the vigor with which people consume sports, in that the energy used to follow, and criticize a sports team takes up critical thinking skills and might otherwise be used to examine and criticize institutional power. See Noam Chomsky, *MANUFACTURING CONSENT: NOAM CHOMSKY AND THE MEDIA* (1992).

consumers to care about the conditions under which their jeans and shoes were produced seemed similarly dire in early days of the anti-sweatshop movement.

On the other hand, because the problem is less extreme than some labor law violations, such as widespread labor and health and safety violations throughout a global supply chain, and the fixes would cost less, it may take less pressure before MLB decides that the benefit of implementing a code of conduct regarding players in the Dominican Republic is worth the cost. In fact, through continued discussions about possibly instituting an international draft, MLB may be coming to the conclusion that its brand will suffer if it continues to ignore the circumstances that produce players in the Dominican Republic. The degree to which a commitment to even an international draft is real, and not just a way of kicking the can down the road, is yet to be seen.¹⁹⁹ Although management and the players association may both agree with the draft in principle, neither appears to be willing to expend bargaining power to make it a reality. Without additional public pressure, even this small change may never come to pass.

CONCLUSION

While MLB has delivered benefits to the Dominican Republic, including making some of its citizens very rich, baseball has left many aspiring Dominican players who pursue a career in the big leagues with little educational or vocational skills. Exacerbating this problem is the presence of *buscones*, who have no incentive to make sure the children they train get a proper education or receive sufficient medical care. Given that MLB has contributed to this situation, as the only organization paying for young baseball players, it should bear some responsibility for remedying the educational and health deficit. Like MNCs, MLB should adopt a corporate code of conduct to regulate its behavior in the Dominican Republic. A corporate code of conduct, which institutes a licensing program for *buscones*, would go part of the way toward ensuring that children receive a better education and are not otherwise abused by licensed *buscones*. However, since such a licensing program would promote dialog over rigid punishment, the code of conduct may also need to require MLB academies to provide supplemental education, at least until improvement is shown in school attendance and conditions improve for child players at independent academies. Some commentators have called for the institution of an international draft. While an international draft may

¹⁹⁹ Although, the institution of an international draft has been floated for many years, the latest collective bargaining agreement merely says that the issue will be revisited at the end of the current agreement, which expires at the end of 2015. See *MLB.com, supra* note 181.

help prevent abuses, it would also have the effect of removing the incentives for MLB to invest in the Dominican Republic. Finally, any solution to the problem would require increased public pressure, since MLB has been slow to confront the scope of its obligation in the Dominican Republic. Although the prospect of rallying baseball fans around labor conditions in the Dominican Republic may seem daunting, given the scope of the harm and the relatively small changes required, it may not be as insurmountable a task as it seems.