Major League Soccer Scores an Own Goal: A Successful Joint Venture Attains Market Power in an International Sport

Mark W. Lenihan

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol62/iss3/13

This Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.
MAJOR LEAGUE SOCCER SCORES AN OWN GOAL: A SUCCESSFUL JOINT VENTURE ATTAINS MARKET POWER IN AN INTERNATIONAL SPORT

“Major League Soccer is approaching its late teens. . . . Now, as Season No. 17 comes ever closer, it’s about time we started thinking about writing our senior thesis.”

INTRODUCTION

Soccer is the world’s most popular and watched sport.2 Approximately 700 million people watched the 2006 World Cup Final.3 Viewership during the 2010 World Cup in South Africa surpassed the Opening Ceremony of the 2008 Beijing Olympics as one of the most watched events in television history.4 It also appears that the world’s sport has finally established itself in the United States.5 During the most recent World Cup, a global sports research consultant quipped that because of ESPN’s increasing online viewership, he had “heard funny stories of entire companies’ networks collapsing, and banks having to shift transactions to secure environments because the weight of [online] traffic was so large.”6 However, as soccer moves to the fore of the national consciousness, legal trouble will likely follow.

The juxtaposition of professional sports leagues and antitrust law has spawned numerous important judicial decisions, countless scholarly articles, and what seems to be a never-ending carousel of in-

3. See id.
6. See Wyatt, supra note 2 (internal quotation marks omitted).
trigue.\textsuperscript{7} Major League Soccer (MLS) has long been an interesting study for both sports fans and antitrust scholars.\textsuperscript{8} In particular, MLS’s single-entity structure has proven particularly compelling.\textsuperscript{9} As a single entity, the team owners share all property interests in MLS and have an undivided interest in their respective teams.\textsuperscript{10} However, some recent developments, such as the Designated Player Rule, more competitive independence for teams, and the Supreme Court’s affirmation of its opposition to single entity sports leagues in \textit{American Needle, Inc. v. National Football League},\textsuperscript{11} severely undermine MLS’s single-entity status.\textsuperscript{12} Therefore, both MLS and the players, represented by the Major League Soccer Players Union (the Players Union), must look to the future if the young and delicate league hopes to not only survive, but also thrive as envisioned.\textsuperscript{13} As recent labor disputes in the NFL and NBA have demonstrated, time wasted is money lost.\textsuperscript{14}


\textsuperscript{9} See sources cited supra note 8.

\textsuperscript{10} Edelman & Masterson, supra note 8, at 295–96. MLS currently operates more like a mixed-mode, centrally-planned structure, but because nothing has changed since \textit{Fraser}, this Comment will refer to MLS as a single entity. \textit{Id.}

\textsuperscript{11} See \textit{Am. Needle}, 130 S. Ct. at 2201–17.

\textsuperscript{12} See Jakobsze, supra note 8, at 167.

\textsuperscript{13} See \textit{id.} at 135.

MLS and the Players Union are facing a slew of challenges in the near future. If MLS's single-entity status is defeated, the Players Union will face a unique challenge in proving that MLS has market power—that MLS exercises significant power within a defined product and geographic market. In what was, to date, MLS's only brush with antitrust scrutiny, the First Circuit Court of Appeals was skeptical of its single-entity status, but ultimately ruled in favor of MLS because the players failed to establish the requisite relevant market. Going forward, the Players Union will face a difficult task that other American sports leagues have not confronted: confining their definition of the relevant market to the United States, despite the sport's global nature.

The waning vitality of MLS's single-entity defense and the Players Union's potential ability to define a relevant market would result in an intriguing, contentious, and expensive antitrust lawsuit. A failure to reach a timely consensus on the next collective bargaining agreement and the ensuing antitrust suit would be disastrous for a number of reasons: (1) most MLS players do not earn enough to wait out a lost season; (2) many of the owners do not have the financial resources to withstand a lockout; and (3) MLS as a whole has only recently started to garner enough goodwill and media support to even contemplate surviving a work stoppage. There is far too much on the line.

MLS's flawed single-entity status has been analyzed over and again. This Comment briefly examines the vitality of MLS's single-entity status, but also takes the additional step of examining the potential consequences of MLS's development with respect to defining a relevant antitrust market. Primarily, this Comment argues that, based on MLS's impressive growth, the Players Union could make a compelling case for a limited relevant market, which should impact how MLS conducts any future labor negotiations. In light of this possibility, MLS should focus on developing and retaining the best American

15. See Fraser v. MLS, L.L.C., 284 F.3d 47, 71 (1st Cir. 2002).
16. See id.
17. Cf. Joe Bill Watkins, Monetary Recovery Under Federal Antitrust Statutes, 45 Tex. L. Rev. 856, 856 (1967) (“First, the complexity and prohibitive cost of an antitrust suit require a generous recovery if the injured party is to risk the great expense of suit and if he is to be compensated in any real sense of the word.”).
20. A limited relevant market finding would fundamentally change how MLS operates because they would almost certainly exercise market power within that limited market and, therefore, be subject to an antitrust violation. See Fraser, 284 F.3d at 59–60.
society players, which would strengthen MLS's product: American soccer.

Part II provides a brief background of antitrust scrutiny and the laws applicable to MLS and the Players Union, including: (1) the relationship between antitrust, labor, and sports law; (2) Fraser v. MLS, L.L.C.; and (3) the definition of market power. Part III argues that, because of its success, MLS has established itself as a unique and differentiated product both in the global game of soccer and in relation to other American sports leagues. Part IV examines the impact of a limited relevant market on collective bargaining between MLS and the Player's Union. Due to the damage MLS would incur if it lost, or even faced, an antitrust suit against the players, it should negotiate the next collective bargaining agreement with this doomsday scenario in mind. Lastly, this Comment argues that such an approach to collective bargaining would ultimately promote MLS's long-term interests by providing an important lesson from another international league.

II. BACKGROUND

A. Antitrust, the Rule of Reason, Labor, and Sports

Section 1 of the Sherman Act provides, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." The Sherman Act and other antitrust laws seek to "promote competition in order to maximize social welfare." Competition, in turn, keeps consumer prices low, maximizes output, and encourages innovation.

Courts have primarily analyzed anticompetitive behavior under three tests: (1) the per se analysis; (2) the rule of reason analysis;
and (3) the "quick look."\textsuperscript{31} Each of these tests, however, focuses on reasonableness.\textsuperscript{32} In other words, "[r]easonable collaboration among competitors does not violate Sherman Act §1."\textsuperscript{33}

Sports leagues are typically analyzed under the rule of reason.\textsuperscript{34} The rule of reason "involves a fact-sensitive inquiry whereby an agreement or restraint is deemed unlawful only if it causes an anticompetitive injury that outweighs procompetitive benefits."\textsuperscript{35} Courts must determine whether the practice would "tend to restrict competition and decrease output" without a procompetitive justification.\textsuperscript{36} Antitrust law often uses market power as a proxy to determine market output restrictions.\textsuperscript{37} "The nature of the market in which the parties operate . . . determine[s] whether a possible threat to competition has or will come to pass," as well as the significance of any impact.\textsuperscript{38} Plaintiffs bringing a claim under the rule of reason have a difficult task; not only must they establish the product and geographic markets in which the defendant is allegedly restraining competition, they must also demonstrate that the defendant exercises a certain degree of power within that market.\textsuperscript{39}

Sports leagues greatly prefer the rule of reason analysis because it is more forgiving, assuring them a greater likelihood of success.\textsuperscript{40} Courts typically apply the rule of reason analysis to sports leagues for two reasons.\textsuperscript{41} First, antitrust jurisprudence has generally trended away from per se condemnation toward application of the rule of reason.\textsuperscript{42} Second, the rule of reason is more appropriate because the

\textsuperscript{30} \textsc{Areeda \& Hovenkamp}, \textit{supra} note 29, ¶ 1500. For the purposes of this Comment, it is only important to understand why sports leagues are analyzed under the rule of reason rather than the per se analysis.

\textsuperscript{31} \textit{Id.} ¶ 1508. In \textit{American Needle}, the Supreme Court recognized the validity of the quick look method. \textit{See} Am. Needle, Inc. \textit{v.} NFL, 130 S. Ct. 2201, 2216–17 (2010) ("[D]epending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it 'can sometimes be applied in the twinkling of an eye.'" (quoting NCAA \textit{v.} Bd. of Regents, 468 U.S. 85, 109 n.39 (1984))). However, because of the complexities surrounding market definition in MLS's case, a "quick look" examination is unlikely.

\textsuperscript{32} \textsc{Areeda \& Hovenkamp}, \textit{supra} note 29, ¶ 1500.

\textsuperscript{33} \textit{Id.}

\textsuperscript{34} \textit{See} McCann, \textit{supra} note 7, at 737.

\textsuperscript{35} \textit{Id.}

\textsuperscript{36} \textsc{Areeda \& Hovenkamp}, \textit{supra} note 29, ¶ 1503b (internal quotation marks omitted).

\textsuperscript{37} \textit{Id.} ¶ 1503.

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} \textit{Id.}

\textsuperscript{40} McCann, \textit{supra} note 7, at 737.

\textsuperscript{41} \textit{See} id.

\textsuperscript{42} \textit{Id.}
leagues and franchises have typically been viewed as joint ventures. Joint ventures are "association[s] of persons with the intent, by way of either express or implied contract, to engage in and carry out a single business venture for joint profit for which purpose such persons combine their property, money, efforts, skill, and knowledge without creating a partnership or a corporation." Joint ventures are analyzed under the rule of reason because they often provide a new product that otherwise would not have been produced as efficiently.

When reviewing a league's alleged anticompetitive behavior, a court typically analyzes "the extent to which the joint venture deprives the market place of the independent decision-making normally demanded by competition and, conversely, the extent to which the joint venture improves market efficiencies." Sports teams necessarily collaborate in order to provide the final on-field product, agreeing on such terms as field size, length of games, and equipment regulations. However, each team retains autonomy with respect to matters such as personnel decisions and broadcasting rights.

Matters regarding sports and antitrust law inevitably implicate labor law and other related concepts, including the nonstatutory labor exemption and decertification. The nonstatutory labor exemption allows for restraints of trade in labor agreements that would typically violate antitrust law. In *Local Union No. 189 v. Jewel Tea Co., Inc.*, the Court noted that the exemption reflected a decision "of accommodating the coverage of the Sherman Act to the policy of the labor laws"; the benefits of good faith bargaining take precedence over antitrust enforcement. The exemption plays an especially important role in sports, in which owners will negotiate with the collective bargaining body on a number of different issues that would typically draw the ire of antitrust law, such as reserve clauses, player drafts, and salary caps. Due to the nonstatutory labor exemption, the owners can negotiate and reach an agreement without fear of an antitrust viola-

43. Id. The classification of sports leagues as joint ventures has been at the core of scholarly work regarding MLS as well as litigation dealing with other professional sports leagues, most recently in *American Needle*. See *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2207 (2010).
44. 46 AM. JUR. 2D Joint Ventures § 1 (2012).
45. McCann, *supra* note 7, at 738.
46. Id.
47. See id. at 739–40.
48. See id. at 739.
50. Id. at 689.
51. Id. at 689–90.
tion while the players have a stronger bargaining position by operating collectively.\textsuperscript{53}

Decertification, on the other hand, is a measure that player unions will pursue if they believe nothing can be gained from bargaining with the league.\textsuperscript{54} Decertification allows for an antitrust challenge to a league's allegedly anticompetitive actions despite the nonstatutory labor exemption.\textsuperscript{55} However, this challenge comes at a cost: the players are forced to disband the collective bargaining body—the union—in order to nullify the exemption.\textsuperscript{56} Recently, for example, the NFL Player's Union decertified and filed an antitrust action in the hopes of both avoiding a lockout and seeking greater concessions from the owners.\textsuperscript{57} Decertification gives the players greater leverage because the league and owners would be subjected to treble damages in an antitrust suit, which requires that damages be automatically tripled in the event of an antitrust violation.\textsuperscript{58} Consequently, both the nonstatutory labor exemption and decertification will play an interesting and important role in MLS's future.

\textbf{B. MLS, the Single-Entity Defense, and Fraser}

The United States Soccer Federation (USSF) formed MLS in 1995 after the United States successfully hosted the 1994 World Cup.\textsuperscript{59} Hosting the World Cup is an enormous honor and the prospect of establishing a professional soccer league following such a popular event was an incredible opportunity, as well as a monumental challenge.\textsuperscript{60} The only previous attempt to establish Division I, or top-tier, soccer in the United States was the ill-fated North American Soccer League (NASL),\textsuperscript{61} which was doomed by irresponsible financial management, gross competitive disparity, and a lack of fan interest.\textsuperscript{62}
MLS sought to avoid a similar situation by organizing a highly regulated and centralized structure that would operate as a single entity. Under this arrangement, MLS controls almost every aspect of player operations and team management. This structure was specifically designed to do two things: (1) sustain league operations through centralized investment and (2) avoid antitrust liability.

As explained by the First Circuit, MLS "has, to say the least, a unique structure, even for a sports league." Unlike other sports leagues, MLS owns every team, as well as "all intellectual property rights, tickets, supplied equipment, and broadcast rights." Also, unlike most professional sports leagues, players' contracts are negotiated with MLS itself, rather than the individual teams. A board of governors retains control over all MLS operations and generally controls operations of each individual team. However, the operator/investors, who own the individual teams, do have some rights. Perhaps most importantly, the operator/investors control the majority of the seats on MLS's board of governors. Thus, the individual team owners are the dominant figures in MLS's centralized operations.

This structure came under fire in Fraser, but MLS managed to escape unscathed despite the First Circuit's skepticism. Fraser is especially intriguing because MLS became the first league to survive a challenge to its single-entity status, if only indirectly. In Fraser, a group of players challenged MLS's organization and operation. The trial court granted summary judgment to MLS for the Section 1 claim, reasoning that because MLS and its operator/investors comprised a single entity, they were incapable of conspiring, and therefore could not violate Section 1. However, on the other claims the jury found

---

American players could not fill the void. *Id.* As the quality dropped and the already minimal interest waned, the NASL was forced to close its doors. *Id.*


64. *Id.* This structure did not appeal to the "operator/investors" (the equivalent of franchise owners in other sports leagues), so MLS ceded more control to the operator/investors. *See Fraser*, 284 F.3d at 53.


66. *Fraser*, 284 F.3d at 53.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 53–54.

71. *Id.* at 53.


73. *Fraser*, 284 F.3d at 55, 71.

74. *See supra* notes 59–71. The Players Union had not yet been formed at the time *Fraser* was filed.

75. *Fraser*, 284 F.3d at 55.
that the players failed to prove that the relevant market was limited to Division I professional soccer players in the United States.\textsuperscript{76}

On appeal, the First Circuit expressed its doubts regarding MLS's single-entity status because of what it perceived to be a diversity of entrepreneurial interests.\textsuperscript{77} Further, the operator/investors were not simply servants of MLS, but effectively controlled MLS via their power over the board of governors.\textsuperscript{78} Thus, though it did not provide a definitive answer on the single-entity issue, the First Circuit refused to validate MLS's single-entity status and instead simply classified it as a "hybrid" organization. The court reflected on the possibilities and difficulties of fully defining the "hybrid" organization, yet ultimately concluded that it did not matter in this case.\textsuperscript{79}

According to the court, the exact definition of a "hybrid" organization was irrelevant because the jury found that the players failed to show that MLS had market power.\textsuperscript{80} MLS argued that the relevant geographic and product markets should be international in scope and stretch beyond Division I soccer players.\textsuperscript{81} However, just as it did on the single-entity issue, the First Circuit expressed skepticism.\textsuperscript{82} In dicta, the court indicated that "the peculiar assemblage of evidence, including MLS-authored materials suggesting that it expected to exercise some control over player salaries[,]... makes it impossible to rule out abstractly the possibility of a jury finding of MLS market power in

\textsuperscript{76} Id. The Section 2 monopoly claims went to the jury, which found that the players failed to prove a limited relevant market. \textit{Id.} Section 2 makes it illegal for a company to either: (1) monopolize; (2) attempt to monopolize; or (3) conspire to monopolize a given market. 15 U.S.C. § 2 (2006). The players specifically alleged that MLS conspired and attempted to monopolize the market for Division I professional soccer in the United States, and that it had in fact monopolized that market by eliminating competition for players. Fraser, 284 F.3d at 61.

\textsuperscript{77} Fraser, 284 F.3d at 57, 59. "In all events, we conclude that the single entity problem need not be answered definitively in this case. The case for expanding \textit{Copperweld} is debatable and, more so, the case for applying the single entity label to MLS." \textit{Id.} at 59.

\textsuperscript{78} Id.

\textsuperscript{79} Id. at 58-59.

\textsuperscript{80} Id. at 59 ("As in any other non-\textit{per se} case, players would have to show that MLS exercised significant market power in a properly defined market, that the practices in question adversely affected competition in that market and that on balance the adverse effects on competition outweighed the competitive benefits. Here, the jury said that neither the United States nor Division I delimited the relevant market—findings that imply that MLS faced significant competition for player services both from outside the United States and from non-Division I teams. That inference at a minimum creates uncertainty as to whether the jury could have found market power under section 1." (citation omitted)). A major criticism of the rule of reason is its unpredictable application, especially in jury trials. Note, Leegin's Unexplored "Change in Circumstance": The Internet and Resale Price Maintenance, 121 \textit{Harv. L. Rev.} 1600, 1620 (2008).

\textsuperscript{81} Cf. Fraser, 284 F.3d at 59-60.

\textsuperscript{82} Id. at 60.
The court conceded that there could be a broader market in which the players could prove that greater competition between ownership would lead to higher player salaries and "[i]n that event, assuming that the single entity defense failed, a basis for liability might exist." Thus, some basic understanding of market power is necessary in light of the court's conjecture that MLS could be liable if the single-entity defense failed.

C. Market Power and Defining the Relevant Market

Most lawsuits challenging a sports league's labor practices under Section 1 of the Sherman Act require a showing of market power. "A defendant firm has market power if it can raise price without a total loss of sales." Market power plays an important role in determining whether a firm has taken anticompetitive action and also limits judicial review to meritorious cases in which firms are most likely to impose anticompetitive effects.

Obstacles to attaining market power include "(1) the readiness of defendant's customers to forego the product altogether or (2) the presence of numerous rivals who can and will expand their output to satisfy buyers repelled by the defendant's price increase." However, "[w]ith sufficient demand for the product and no significant rivals, the defendant can reap supracompetitive prices and profits." The presence of market power, however, will only raise antitrust scrutiny if it is substantial and durable. Substantial market power is manifested in a defendant's ability to raise prices above competitive levels in the short-term, accompanied by high-entry barriers and other impediments to rival entry or expansion in the long-term. Substantial market power becomes durable market power when it persists for a significant period of time without erosion of such power by expansion.

83. Id. at 59.
84. Id. at 60.
86. 2B Areeda & Hovenkamp, supra note 29, ¶ 501.
88. 2B Areeda & Hovenkamp, supra note 29, ¶ 501.
89. Id.
90. Id.
91. Id.
and new entry. Ultimately, the question of how much market power is excessive and therefore warrants the intervention of antitrust law "is largely a question of legal policy, not of economic fact." Market definition entails identifying those producers that provide customers of a defendant with alternative sources for the defendant's products or services. Proper market definition excludes suppliers "(1) whose product is too different (product dimension) or too far away (geographic dimension) and (2) who are not likely to shift promptly to offer defendant's customers a suitably proximate (in both product and geographic terms) alternative.

1. Product Market

The Fraser jury found for MLS regarding the definition of both the product and geographic market. With respect to the product market, the jury agreed with MLS that the players had failed to prove that the relevant product market was limited to Division I professional soccer players. However, this decision did not vindicate MLS; the players simply did not meet their burden of proof ten years ago.

Markets are "composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." Separate product markets exist when a significant increase in the price of product A beyond the competitive level "would neither induce customers of A to buy product B instead, nor induce B producers to make A." Courts also typically consider evidence of reasonable interchangeability of use, cross-elasticity of demand, and other "practical indicia" for direct proof of substitutability, as detailed by the Court in Brown Shoe v. United States. The Brown Shoe Court suggested that the "boundaries of such a submarket may be determined by examining such practical indicia as in-

92. Id. Professors Areeda and Hovenkamp explain some problems with this formula, but ultimately conclude that it is appropriate to ask, as a core question, whether a firm can price monopolistically without prompt erosion due to rival entry and expansion. Id.
93. Id.
94. 2B AREEDA & HOVENKAMP, supra note 29, ¶ 530a.
95. Id. (footnotes omitted).
96. Fraser v. MLS, L.L.C., 284 F.3d 47, 55 (1st Cir. 2002).
97. Id. at 59; see also M. Howard Morse, Product Market Definition in the Pharmaceutical Industry, 71 ANTITRUST L.J. 633, 652 (2003) ("[T]he burden of proof on market definition is on the government or private antitrust plaintiff . . . .")
98. Fraser, 284 F.3d at 55.
100. 2B AREEDA & HOVENKAMP, supra note 29, ¶ 561.
industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.”

In the federal antitrust context, the “big four” professional sports leagues constitute their own separate product market. Courts have found that, from the consumer’s perspective, a particular league’s sport is not reasonably interchangeable with other sports or forms of entertainment. Therefore, MLB, the NFL, the NBA, and the NHL are each regarded as separate markets for antitrust purposes, which would limit the market definition and render these leagues susceptible to an adverse antitrust decision or, at the very minimum, affect their bargaining behavior.

2. Geographic Market

The unique global character of soccer presents challenges for any court attempting to define a geographic market. At common law, and as promulgated by the Supreme Court in *Tampa Electric Co. v. Nashville Coal Co.*, a geographic market is defined as where the seller operates and buyer “can practicably turn for supplies.” The lower court similarly framed the question for the jury in *Fraser*, defining the geographic market as the “area ‘to which players can turn, as a practical matter, for alternate opportunities for employment as professional soccer players.’” Practicing lawyers, academics, and economists alike have attempted to develop the “best” test for measuring a geographic market, each with its own backlash. However, not one of these tests has established itself as the preeminent geographic market test—one that is both sophisticated enough to deal with complex economics and straightforward enough to be applied by fact-finders.

102. *Id.* at 325. However, one commentator has stated, “While the *Brown Shoe* factors are certainly relevant to market definition, it is important to recognize that some of those factors are more important than others. Market analysis requires more than tabulating how many *Brown Shoe* factors support a proposed definition.” Morse, supra note 97, at 660 n.99.


104. *Id.*

105. *Id.*


108. *Fraser v. MLS*, L.L.C., 284 F.3d 47, 62-63 (1st Cir. 2002).


110. Cf. *id.* at 51.
While courts in the United States have applied antitrust law to sports leagues, they have not faced the challenge of applying antitrust law to a sport as global as soccer. Even in *Fraser*, a jury, and not the court, answered the market power question.\textsuperscript{111} Thus, because of the complexities surrounding geographic market definition, courts continue to use the standard promulgated in *Tampa Electric*.\textsuperscript{112}

III. Analysis

This Comment argues that MLS no longer operates as a single entity. Further, because the rule of reason is unpredictable in its application, a fact-finder could reasonably conclude that MLS exercises power over a unique relevant market: American soccer. Recent developments in MLS have only strengthened the argument that it exercises market power over Division I soccer players in the United States.\textsuperscript{113} MLS has restrained competition by forcing players to deal exclusively with MLS instead of individual teams, which depresses salaries and limits movement,\textsuperscript{114} and has established itself as the preeminent domestic soccer league with little to no threat of rival expansion or new entry. The impending demise of MLS’s single-entity status and the increased likelihood of the Players Union defining a more limited relevant market would doom MLS in an antitrust suit. Losing an antitrust lawsuit would be catastrophic, if not fatal, for MLS.\textsuperscript{115} Therefore, MLS must bargain in earnest with domestic players in order to both avoid an antitrust suit and ensure MLS’s future.

\textsuperscript{111} See *Fraser*, 284 F.3d at 56.

\textsuperscript{112} See Eblen, *supra* note 109, at 56.

\textsuperscript{113} Many of the factors undermining MLS’s single-entity structure also strengthen the Players Union’s relevant market definition. However, MLS should be encouraged by these developments because they ultimately signal the strength and vitality of MLS.

\textsuperscript{114} It is beyond the scope of this Comment to conduct an in-depth analysis of player harm and the harm on competition. However, the theory of monopsony—when a single buyer can exert some degree of control over the purchase price of their inputs—has regularly been applied to sports leagues. See Chi. Prof’l Sports Ltd. P’ship v. NBA, 95 F.3d 593, 599 (7th Cir. 1996) (observing that from the players’ perspective the NBA “looks more like a group of firms acting as a monopsony” than as a single source of the product called “NBA Basketball”); Brown v. Pro Football, Inc., 50 F.3d 1041, 1061 (D.C. Cir. 1995) (Wald, J., dissenting) (“Athletic prowess is . . . a unique and highly specialized resource, of precisely the genre vulnerable to monopsony manipulation.”). For a thorough discussion of monopsony in sports, see Salil K. Mehra & T. Joel Zuercher, *Striking Out “Competitive Balance” in Sports, Antitrust, and Intellectual Property*, 21 BERKELEY TECH. L.J. 1499, 1525 (2006). The players’ sunk costs, choices, and differentiation should all be taken into consideration. See, e.g., Warren S. Grimes, *Buyer Power and Retail Gatekeeper Power: Protecting Competition and the Atomistic Seller*, 72 ANTITRUST L.J. 563 (2005) (arguing that certain types of sellers, including athletes and other professionals, are especially vulnerable to powerful buyers).

\textsuperscript{115} Cf. *Davis*, *supra* note 18 (explaining the damage a strike would have on MLS).
A. Why Major League Soccer Is No Longer a Single Entity

The single-entity classification has protected MLS from legal challenges and also provided it with a certain degree of bargaining leverage. However, MLS has changed significantly since its inaugural season, and many of these changes severely undermine the unity of interest required for continued classification as a single entity. This Part outlines these developments, which have helped MLS's bottom line, but also altered its legal status. Some of the most important changes include the Designated Player Rule, increased competition for players, and soccer-specific stadiums.

Since the First Circuit spared MLS from greater antitrust scrutiny, MLS has continued to operate as a single entity. In 2003, two years after Fraser, the players formed the Players Union, which negotiated the 2004 and 2010 collective bargaining agreements. Typically, a sports league that undertakes anticompetitive measures, such as a draft or age limitations, will not face antitrust scrutiny if the measures were collectively bargained because of the non-statutory labor exemption. Once the collective bargaining agent decertifies the union, however, the league is no longer shielded from antitrust scrutiny and the injured party may be entitled to treble damages if the defendant is found to have entered an agreement in restraint of trade. However, because of MLS's current, perhaps illusory, single-entity status, there can be no “agreement” between competitors for purposes of a Section 1 claim. Therefore, the Players Union is stripped of bargaining leverage because decertification would not expose the league to treble damages. Nonetheless, developments since Fraser have cast serious doubt on whether MLS still qualifies as a single entity and, therefore, whether it deserves this protection.

116. See Jakobsze, supra note 8, at 155.
118. Id.
119. See McCann, supra note 7, at 737.
122. Jakobsze, supra note 8, at 150.
123. Id.; cf. McCann, supra note 121.
124. While this Comment briefly addresses why MLS is no longer a single entity to illustrate the progression of an antitrust claim and its effects on the relevant market and collective bargaining process, many other articles address this issue in more depth. See sources cited supra note 8.
The Supreme Court's ruling in *American Needle* reaffirmed the importance of objectively determining whether the teams are potential competitors.\(^{125}\) One of the most important factors in this analysis is competition among the teams for player services.\(^{126}\) While free agency remains notably absent from MLS,\(^ {127}\) the competition between respective teams is rapidly growing.\(^ {128}\)

First, teams compete for the services of "Designated Players," who constitute a special subclass of players. The Designated Player Rule was instituted to lure premier international players to MLS\(^ {129}\) and fosters competition by allowing teams to spend beyond their cap to meet high wage demands.\(^ {130}\) However, MLS only pays a nominal amount of a Designated Player's salary, and the player's team pays the remainder.\(^ {131}\) For the 2012 season, a Designated Player's salary counted between $150,000–$335,000 against a team's salary cap, which is paid by MLS.\(^ {132}\) All costs exceeding the amount paid by MLS must be paid by the individual team's operator/investor.\(^ {133}\) Each team's individual spending severely undermines MLS's single-entity status because the individual teams are pursuing players independent of MLS and other teams, creating competition among teams for the players' services.\(^ {134}\) With each team competing for players' services, the teams have divergent competitive interests and are functioning more like a joint venture, similar to the NFL.\(^ {135}\)


\(^{126}\) See Chi. Prof'l Sports Ltd. P'ship v. NBA, 95 F.3d 592, 600 (7th Cir. 1996) ("NBA ... is best understood as a joint venture when curtailing competition for players who have few other market opportunities.").


\(^{128}\) See Jakobsze, supra note 8, at 164.

\(^{129}\) Bernhard, supra note 8, at 425.

\(^{130}\) See id. at 425–26.

\(^{131}\) Id. at 426.


\(^{133}\) See Jakobsze, supra note 8, at 167.


Teams also compete against one another through the appointment of technical directors. The technical director at each club negotiates contracts with Designated Players, oversees youth development programs, and scouts players both domestically and abroad. Thus, teams seek to hire the finest technical directors in order to secure the best players for their team—not for MLS or a rival owner. Additionally, similarly to other professional sports leagues, teams have started trading non-MLS players, which further indicates diverse competitive interests beyond MLS.

Finally, teams have started to build soccer-specific stadiums. Building these stadiums has forced the operator/investors to personally acquire a combination of public and private financing, often without the assistance of MLS. This places an operator/investor’s individual entrepreneurial interests before that of MLS and the other operator/investors. As individual operator/investors demonstrate their autonomy and entrepreneurial interest, MLS’s grip on the single-entity classification weakens. All of these factors greatly undermine MLS’s single-entity status.

But what if MLS no longer qualifies as a single entity? What are the consequences? Ultimately, this is a sign of progress for MLS. While single-entity structuring may have been necessary in MLS’s infancy, it is of little use for well-established sports leagues. Economically, the single entity lacks the necessary incentives, and conversely accountability, that allows individual owners and their teams to thrive. While a single-entity structure can entice the first wave of

136. Jakobsze, supra note 8, at 165–66. The technical directors operate in a similar capacity to the general managers in Major League Baseball, who oversee the development of a franchise’s prospects or “farm system.” See id.

137. Id.

138. See, e.g., LA Galaxy Trade Juan Pablo Angel to Chivas USA, supra note 134.

139. Jakobsze, supra note 8, at 169.


141. Stuck, supra note 140, at 566.

142. See id. at 565–66.

143. See id.

144. For more in-depth treatment of this issue, see sources cited supra note 8.


146. Edelman & Masterson, supra note 8, at 306–07.
investors by minimizing risk, once a league is established it can and should transition from minimizing risk to promoting growth.\textsuperscript{147}

Regardless of the benefits, this competitive independence severely undermines MLS's single-entity status. MLS will likely be subject to the rule of reason in its next brush with antitrust scrutiny because the unity of interest that theoretically makes agreement impossible is no longer present. Therefore, the most important question remaining is whether MLS has sufficient market power to be found guilty of anticompetitive behavior—what Fraser did not do.\textsuperscript{148} Thus, it is necessary to examine MLS's role in both the United States and the world of soccer.

\textbf{B. The Stability of Major League Soccer and Other Indicia of Relevant Market}

MLS has established its stability in the United States and faces no competition for the U.S. soccer market.\textsuperscript{149} MLS's finances, in addition to a number of other factors, make this very clear. This Part briefly addresses MLS's increasing profitability, as well as a number of other issues regarding its vitality.

In its early existence, MLS was notoriously secretive with respect to its financials and health.\textsuperscript{150} However, as MLS has continued to grow at impressive rates, more financial information has become available.\textsuperscript{151} For the years 2011–2015, MLS has projected that total stadium revenues will average between $14–$15 million per year.\textsuperscript{152} MLS also reported a 26% increase in season ticket sales for the majority of teams over the relevant time period.\textsuperscript{153} Additionally, in 2011 MLS passed the NBA and NHL in per-game attendance due to a 7% increase in attendance over the previous year.\textsuperscript{154} The push towards soc-

\textsuperscript{147} Id.
\textsuperscript{148} Fraser v. MLS, L.L.C., 284 F.3d 47, 55 (1st Cir. 2002).
\textsuperscript{149} Id. at 53 (noting that, from the inception of MLS, it was the goal of USSF to establish only one soccer league in the United States).
\textsuperscript{152} Berger, supra note 150.
\textsuperscript{153} Id.
\textsuperscript{154} Ray Sanchez, \textit{Major League Soccer Passes NBA and NHL in Per-Game Attendance}, HUFFINGTON POST (Nov. 9, 2011, 12:00 PM), http://www.huffingtonpost.com/2011/11/08/major-league-soccer-surpa_n_1082593.html. While it should be noted that MLS has fewer games annu-
cer-specific stadiums will further help teams sustain long-term profits.155 Lastly, MLS’s most profitable franchise, the Los Angeles Galaxy, recently signed a ten-year, $55 million television contract.156

Although these developments, among others,157 are important in proving that MLS has established itself as the premier Division I soccer league in the United States, there is more to MLS’s stability than financial clout. Simply because soccer players have a greater number of options to seek employment abroad compared to other professional athletes should not necessarily imply that all foreign leagues should be included in the relevant geographic market.158 Instead, courts should look at equitable concerns, including divergent salaries and costs,159 entry barriers facing rival leagues,160 MLS’s citizenship requirements,161 and the ability of players to play both domestically and abroad.162

1. MLS’s Unique Salary Structure

The U.S. Government’s Horizontal Merger Guidelines require a fact-finder to examine whether a “small but significant and nontransitory” price increase would cause enough buyers to shift to other products and thus make the increase unprofitable to the potential monopolist.163 For MLS, because the players are an input, the question would be whether greater salary depression would cause players to seek employment elsewhere. However, applying this test to MLS player salaries is inappropriate in light of the divergent and varying salaries that result from MLS’s innovative (and confusing) salary structure.

---

155. See Stuck, supra note 140, at 555–57.
159. See infra notes 163–79. For a fascinating study in the price disparity between some of the higher salaries in Europe and the United States, see Sarah Rudd, Comparing the Top 100 Salaries from MLS and Europe, ON FOOTBALL (June 7, 2011), http://onfooty.com/2011/06/comparing-the-top-100-salaries-from-mls-and-europe.html.
160. See infra notes 180–86.
161. See infra notes 187–201.
162. See infra notes 202–11.
163. See U.S. DEP’T OF JUSTICE & THE FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 1.11 (rev. ed. 1997); see also Morse, supra note 97, at 660.
Because MLS has a hard salary cap for most of its players, but an entirely different set of rules for Designated Players, gauging the value and market for players is extremely difficult. In most professional sports leagues, and other soccer leagues abroad, players are paid based on their talent and contribution to the team. Due to the MLS’s salary structure, however, there is remarkable disparity between the earnings of the highest and lowest paid member of each team. This is due in part to Designated Players, whose salaries are based predominately on brand and international success, rather than current ability. As soccer scribe Leander Schaerlaeckens recently noted,

In MLS, which has an outlandish appetite for big foreign names but no free market, there is no correlation between expenditure and quality—not until 2011 did a team that employed a designated player, first allowed in 2007, even win the league. This means that you can’t rank MLS among other leagues around the world based on the salaries paid to its players.

This phenomenon complicates any economic approach to determining market power. For example, Rafa Márquez, one of the greatest Mexican soccer players of all time, decided to play for the New York Red Bulls after a wildly successful career in Europe and was paid $4.6

---


165. Id. ("The Designated Player Rule allows clubs to acquire up to three players whose salaries exceed their budget charges, with the club bearing financial responsibility for the amount of compensation above each player’s budget charge. Designated Player slots may be used to acquire players new to MLS or to retain current MLS players, subject to MLS approval."). MLS also has different salary rules for its Generation Adidas and other “Off-Budget” players. Id.; see also Scott French, UCLA’s Rowe Joins GA List, ESPN (Dec. 29, 2011, 2:34 PM), http://espn.go.com/blog/los-angeles/soccer/post/_/id/13486/uclas-rowe-joins-ga-list#more (explaining that Generation Adidas contracts do not count against their clubs’ roster sizes or salary caps, making them an attractive option for teams); Ives Galarcep, MLS Shifting Resources Away from Generation Adidas, Fox Soccer, http://msn.foxsports.com/foxsoccer/mls/story/generation-adidas-class-major-league-soccer-increased-costs-010512 (last updated Jan. 7, 2012, 1:54 PM).


168. Schaerlaeckens, supra note 166.

169. Id.

170. Id.
million per year. While Márquez may have helped MLS develop a following in Mexico, his former partner in defense, twenty-four-year old Tim Ream, was only paid approximately $63,000 even though he received substantial accolades in his rookie season. Yet Ream is now playing in England, and Márquez was released following the 2012 season, which led some to question whether he was one of the worst signings in MLS history. This raises an obvious question with long-term implications: Why would MLS allow one of its brightest, and perhaps more importantly, cost-controlled, stars to leave for a relatively modest sum? Regardless, this unique salary structure complicates any change-in-price analysis.

These examples illustrate the problem in applying the government’s Horizontal Merger Guidelines’ test to player salaries. To whose salary should a price decrease be applied? To Rafa Márquez’s salary? Márquez left Barcelona, one of the greatest soccer clubs of all time, to live in New York. The same can be said for Thierry Henry, who chose to play in New York for a $6.5 million per year. French striker Nicolas Anelka, who is of approximately the same skill as Henry, chose to play in the Chinese soccer league for roughly $14 million per season. Anelka, in addition to other players, turned down MLS in favor of a more lucrative contract.

Yet many players have decided, for various reasons, to play in the United States for less money. Should a price decrease be applied only to non-Designated Players, whose entire salaries count against the salary cap, since Designated Player’s might make exponentially more

175. Id.
176. 2011 MLS Player Salaries, supra note 171.
and are in their own special category? Many of these players are American and have either chosen to stay in the United States for personal reasons or have never had the opportunity to go abroad, which further complicates the idea of geographic market definition. Thus, determining price is an exercise in futility with respect to MLS, and a fact-finder must examine other factors to determine the relevant market.

2. Entry Barriers Facing Other Leagues

MLS is the only Division I professional soccer league in the United States. While MLS has, without question, demonstrated a shrewd business sense in building itself from the ground up in a nation that has not traditionally supported the sport, it is essential to remember that MLS did not reach this point purely through efficient operation. MLS received the blessing of the USSF in 1993 as the sole and exclusive Division I professional soccer league in the United States. Consequently, MLS's position as the only Division I soccer league in the United States is unquestioned and durable.

Moreover, no Division II soccer league has posed a challenge to MLS since its inception. In fact, Division II leagues are consistently weakened by its teams joining MLS. Four teams have recently made the switch. In 2010, MLS added the Seattle Sounders from the United Soccer League. In 2011, MLS added both the Portland Timbers and Vancouver Whitecaps from the United Soccer League. Finally, in 2012, the Montreal Impact became the fourth team to leave a Division II soccer league and join MLS. These recent additions demonstrate that MLS is expanding at the expense of its rivals, and American soccer has officially become a one-league show.

180. Fraser v. MLS, L.L.C., 284 F.3d 47, 53 (1st Cir. 2002).
181. Id.
182. Id.
3. The Domestic Player Requirement

MLS's allotment of a limited number of "international player slots" severely undermines any claim that the United States is not the relevant market. While the use of nationality restrictions is a common source of controversy in international soccer, the practice is common in both the MLS and abroad. Though the quotas abroad are relatively malleable, they have still come under some scrutiny; yet MLS's requirements are much more stringent.

MLS divides players into two classes: domestic and international. A domestic player is a United States citizen, green card holder, or recipient of a special status exemption such as a refugee seeking asylum. Unlike the diluted player quota in England, it is not enough for a foreign player to have simply trained with a team for a period of time.

For the 2011 season, MLS capped the number of international roster slots at 144, which were divided among the eighteen MLS teams, a limit of eight international players per team. Since its inception, however, MLS has placed no such restrictions on domestic players. As MLS executive Todd Durbin recognized, "The backbone of the league has been and will continue to be the U.S. domestic players."

Many U.S. players may have started their careers in MLS because foreign leagues simply do not scout them—there is not necessarily an-

188. Id. at 627.
190. For example, the Premier League of England is not necessarily focused on nationality, but instead on whether the player is trained for three years under the age of twenty-one by somebody in the English and Welsh professional system. See UEFA Approves Foreign Quota Plan, supra note 189.
192. See Duru, supra note 187, at 617–18; see also 2011 MLS Roster Rules, supra note 164.
193. 2011 MLS Roster Rules, supra note 164.
194. Id.
195. See UEFA Approves Foreign Quota Plan, supra note 189.
196. 2011 MLS Roster Rules, supra note 164.
197. Duru, supra note 187, at 618. Upon MLS's inception, teams were originally limited to only four international players. Id.
other option.199 MLS should have learned the perils of ignoring domestic talent from the demise of the NASL, and it seems that the domestic player requirement may have been made with this lesson in mind.200 The impact of these limitations is that, while domestic players compete for every roster position in MLS, international players compete in a different subset due to the limited number of roster slots.201 MLS’s requirement that teams assemble an active roster comprised primarily of domestic players is a strong indication that MLS views the relevant market as the United States.

4. MLS’s Unorthodox Calendar

Major League Soccer utilizes a calendar that looks very different from its foreign counterparts,202 and this unique calendar allows MLS to operate at a time of year when very few of the other international soccer leagues are in season. Most international soccer leagues, especially the most powerful, operate from August through May.203 However, the 2012 MLS season was just the opposite, operating from March to December—longer than any previous calendar.204 FIFA President Sepp Blatter has openly called for MLS to change its schedule to mirror that of the more prominent European Leagues.205 Blat-


200. Andrei Markovits and Steven Hellerman explained the problematic lack of domestic players in the NASL:

Realizing that only top quality soccer would draw major league-type crowds to matches, the owners of the NASL had competed with each other in lavishing huge contracts upon players from abroad. Revenues never matched the salary outlay for these players, though without these players there would be no revenue at all, as the quality of play on the field would not draw spectators, nor attract a network television contract. That there were few American players on these teams was a powerful factor in limiting spectatorship both in-person and on television, once Pele had retired in 1978. But American players were simply not good enough to provide the league with the necessary quality of play. . . . The only alternative would have been to build slowly, with limited revenue and an emphasis on home-grown talent.

Markovits & Hellerman, supra note 62, at 247.


203. Id.


ter reasoned that the move would benefit MLS in the long-term.\textsuperscript{206} However, after Qatar was awarded the 2022 World Cup over the United States in what was perceived by many as a snub on the part of FIFA and Blatter,\textsuperscript{207} MLS Commissioner Don Garber unequivocally stated that the current schedule would remain intact.\textsuperscript{208}

While MLS’s recent success stands to challenge Blatter’s assertion, its schedule is an important factor in proving a relevant market. MLS’s unorthodox schedule allows for its players to play in more than one league in a calendar year. The two most prominent examples of this were MLS’s brightest, and arguably most talented, stars: David Beckham and Landon Donovan.\textsuperscript{209} Both stars have completed these “loan moves” in the past\textsuperscript{210} and are constant targets for loan opportunities every winter when MLS is in the offseason and European Leagues are mid-season.\textsuperscript{211} This schedule further illustrates that MLS considers itself clearly distinct from European leagues, and moreover, does not consider them competition.

MLS should be proud of its recent successes and stature. However, MLS’s triumphs are accompanied by new responsibilities as well. Assuming MLS’s single-entity status is defeated, it will be exposed to

\textsuperscript{206} Id.


\textsuperscript{208} See MLS: No Plans Soon for International Calendar, supra note 202; see also Straus, supra note 167.


\textsuperscript{210} David Moyes Welcomes Landon Donovan Loan Deal to Everton, supra note 209; Beckham Signs AC Milan Loan Deal, supra note 209.

Section 1 scrutiny for the first time. If MLS is exposed to Section 1 scrutiny, it is likely that a fact-finder could find that it operates in a unique relevant market and could have violated the nation’s antitrust laws if the restraints of trade outweigh the procompetitive benefits. Further application of the rule of reason is a fickle exercise and MLS should avoid it entirely. Therefore, this Comment argues that MLS should not expose itself to such a debilitating finding, but instead collectively bargain with the Players Union in recognition of this relevant market. Not only is this approach legally beneficial, it will ultimately assist MLS in realizing its most ambitious goals.

IV. IMPACT

Major League Soccer is at a crossroads: it must discern where it hopes to go and how domestic players fit into that plan. It has experienced impressive growth, support, and success over the past seventeen years. Further, MLS has survived contraction, entered lucrative TV deals, and built soccer-specific stadiums. Although MLS has not yet established itself as either a premier soccer league, globally, or joined the “big four” professional sports leagues domestically, it is not unreasonable to believe that these goals could be accomplished in the near future. Because of the uniquely global character of soccer, no American sports league can guide MLS Commissioner Don Garber in executing his vision. Like all ambitious undertakings, Garber and MLS’s is replete with risk. MLS’s single-entity structure will soon be broken, and the Players Union will be able to make a much more compelling argument for a narrowly de-

212. Jakobsze, supra note 8, at 155.
213. This Comment avoids any definite predictions because of the rule of reason’s unpredictable nature, which is one of its major criticisms; this is especially true when the rule is applied by juries. Leegin’s Unexplored “Change in Circumstance”: The Internet and Resale Price Maintenance, supra note 80, at 1620 (citing Richard A. Posner, The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality, 48 U. CHI. L. REV. 6, 14–15 (1981)).
215. Commissioner Don Garber’s stated goal is to become one of the greatest soccer leagues in the world by 2022. Wahl, supra note 5.
216. Freedman, supra note 1.
219. See Wahl, supra note 5.
220. Id.
fined relevant market than the players in *Fraser*. These two developments, in addition to the unpredictability of antitrust litigation, would place MLS in a precarious situation if the Players Union were to decertify and bring suit.

MLS, however, must avoid an antitrust suit at all costs. As stated above, an antitrust suit would be calamitous for all parties: players are not in a position to strike, many owners do not have the financial resources or patience to withstand a lost season or antitrust suit, and MLS would squander any goodwill it has established.221 This Comment argues that such an unpredictable, expensive, and paralyzing event can be avoided, while providing long-term benefits for all parties. The solution lies in the special relationship between labor and antitrust law.222 While the prospect of a successful antitrust suit and the accompanying treble damages will be a powerful bargaining tool for the Players Union, it is a cumbersome and expensive course of action.223 Therefore, both the MLS and the Players Union should look to resolve their issues at the bargaining table. If Garber’s ambitious vision is to be achieved, this Comment argues that MLS must not only accept, but also embrace its role as the producer of American soccer by keeping the best young soccer players in MLS. If MLS accepts this role, it will be able to avoid the mistakes made by Nippon Professional Baseball and continue its growth, as opposed to stagnating and watching its best players leave for greener pastures.

A. Bargaining in Earnest with Domestic Players: Why It Goes Against Traditional Collective Bargaining Principles, Yet Is Best for All Parties

Because the domestic players have been most harmed by MLS’s depressed wages and restrictions on player movement, this Comment argues that the possibility of an unfavorable relevant market finding for MLS should spur it into earnest negotiations with those domestic players when negotiating the next collective bargaining agreement. In collective bargaining, the individual’s bargaining power is sacrificed for the greater good of all members of the bargaining representative, which strengthens the bargaining agent’s position.224 This is especially

223. Id.
224. See Jacobs & Winter, Jr., *supra* note 7, at 7. “National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of
relevant with respect to those employees or athletes possessing a superior skill-set. A star player or skilled employee will fetch more on the open market outside of the collective bargaining unit in almost all sports or industries, but star players sacrifice some of their earning power by bargaining collectively. For example, free-spending NBA owner Mark Cuban would likely pay Lebron James well over the maximum salary allowed by the CBA if there were no such restrictions. But James salary is capped so that lesser players stand to earn more. However, MLS’s unique structure, soccer’s image in the United States, and MLS’s long-term goals all undermine this basic principle of collective bargaining because, as illustrated above, MLS’s best players are not necessarily the highest earners.

MLS aspires to be one of the finest soccer leagues in the world. Commissioner Don Garber hopes for this dream to come to fruition by 2022, and has acknowledged that MLS must develop a steady stream of young domestic players as a counterweight to the international stars. Typically, the Designated Players would strengthen the bargaining position of the lesser-known domestic players, yet this is not the case because the Designated Players operate under an entirely different salary structure than domestic players. Has Rafael Marquez’s presence in New York allowed MLS to sign and retain the finest young American talent? The question is not only impossible to answer, but also illustrates the disconnect between the Designated Players and their effect on the rest of MLS.

The United States’ ability to produce world-class soccer players is not yet proven; some players have experienced success abroad, while others have not. But an examination of where the premier young players and senior members of the U.S. Men’s National Team ply their trade is disconcerting for a league seeking to retain its premier domes-

225. See Jacobs & Winter, Jr., supra note 7, at 7.
226. See id. at 9.
227. Wahl, supra note 5.
228. Id.
229. See supra notes 163–79.
tic talent. Soccer journalist Jeff Carlisle recently ranked the ten best young soccer players for the United States; five were already playing abroad and, based on past experience, others will surely follow. In an anonymous player survey before the 2013 season, Grant Wahl surveyed eighteen MLS players and asked the most important issues MLS needs to address. Four responses garnered multiple votes: non-guaranteed contracts (five); lack of free agency (four); low minimum salaries (three); and unhappiness with the single-entity operation (two). For Garber’s dream to become a reality, MLS must retain these players and address these concerns.

The most effective way for MLS to sustain its impressive growth is to focus its investment on young, talented, domestic players. This would serve MLS’s long-term interests in a number of ways. First, developing and retaining the best American soccer players would strengthen MLS’s product, American Soccer, while engendering domestic support. Second, and perhaps more importantly, negotiating the next collective bargaining agreement with a bargaining agent focused on domestic players would strengthen MLS’s standing as a direct competitor with respect to the other major soccer leagues throughout the world, instead of a farm system or feeder league. MLS’s future lies in dynamic, young, cost-effective talent—not the aging risks that so many of the Designated Players represent. If MLS engaged the Players Union in serious collective bargaining, it would

---

231. At the 2010 FIFA World Cup in South Africa, the United States unquestionably fielded its best side. Against England and Slovenia, the United States started only two players based in MLS: Landon Donovan (Designated Player) and Robbie Findley (since left for Europe). Against Algeria, the United States once again only started two players based in MLS: Donovan and Jonathan Bornstein (since left for Mexico). In fact, of the twenty-three players brought to South Africa in 2010—the best U.S. soccer players—only four played in MLS. 2010 World Cup Roster, U.S. SOCCER, http://www.ussoccer.com/tournaments/fifa-world-cup/2010-fifa-world-cup/training-camp-roster/100526-roster.aspx (last visited Mar. 18, 2013).


234. Id.

235. Wahl, supra note 5. Commissioner Don Garber explained the need to “have some young American players that people can believe in.” Id.


signal MLS’s intent to compete with European Leagues instead of simply losing young talent to the highest bidder, as was the case with Tim Ream, Clint Dempsey, Michael Bradley, and Jozy Altidore. To be fair, MLS’s international stature has grown as a result of each of these signings, but as MLS enters its seventeenth season, a fresh approach is required.

B. Avoiding the Nippon Professional Baseball Trap: A Lesson for Major League Soccer

While MLS might initially be averse to collective bargaining with lesser players because of the likely increase in player movement and salaries, it need look no further than Nippon Professional Baseball (NPB) to see its future if it refuses to change its current course. For years, NPB has watched as Major League Baseball (MLB) teams have lured its finest players stateside. Whether it is Hideki Irabu, Hideo Nomo, Alfonso Soriano, Ichiro Suzuki, Daisuke Matsuzaka, or most recently, Yu Darvish, NPB has seen its star players leave time and again. The current accord between the respective baseball leagues has allowed MLB to treat NPB as a minor-league farm system. Based on Commissioner Garber’s vision—and perhaps common sense—continually selling its best players while occupying a subservient role in the global market place is something MLS undoubtedly hopes to avoid.

238. See Bolton Signs Tim Ream from MLS, supra note 173.
241. Altidore to Be Sold to Villareal for $8 Million (Updated), SOCCER BY IVES (June 4, 2008), http://www.soccerbyives.net/soccer_by_ives/2008/06/altidore-sold-t.html.
244. Id. at 82–83.
MLB’s history with respect to labor and antitrust law is far from pristine.\(^\text{247}\) Whether it is MLB’s initial exemption from antitrust law,\(^\text{248}\) its ban placed on Americans that had played professionally in Mexico,\(^\text{249}\) or the infamous reserve clause litigation,\(^\text{250}\) MLB is no stranger to antitrust and labor strife. As both the global economy and the sport of baseball have experienced the inescapable effects of globalization, new issues have arisen.\(^\text{251}\) A primary concern facing both MLB and NPB will be globalization’s effects on player movement between the leagues and any labor agreements going forward to preserve the leagues’ interests.\(^\text{252}\)

1. Major League Baseball and Nippon Professional Baseball

In 1995, Hideo Nomo, a star in NPB, used a loophole in his contract that allowed him to “retire” at the age of twenty-six, an age typically associated with a pitcher’s prime rather than his golden years.\(^\text{253}\) After Nomo’s retirement, the Los Angeles Dodgers were able to sign him to a three-year, $4.3 million contract.\(^\text{254}\) A similar controversy surrounding Alfonso Soriano was the final straw for NPB. Despite breaching his contract with the Hiroshima Carp,\(^\text{255}\) MLB declared Soriano a free agent on July 13, 1998, and he was subsequently signed by the New York Yankees.\(^\text{256}\) For NPB, it was clear that a formal agreement was necessary.\(^\text{257}\) MLS might be near this proverbial “breaking point.” Will it accept the role thrust upon it in its infancy as a lesser organization, or will it raise the stakes and compete on the international stage?

2. The Posting Process

Following the above events, MLB entered formal agreements with both Japan and Korea.\(^\text{258}\) These agreements developed the “posting

\(^{247}\) See, e.g., Gould IV, supra note 222, at 285–87; Gould IV, supra note 242, at 89–99.


\(^{249}\) See Gardella v. Chandler, 172 F.2d 402, 403 (2d Cir. 1949).


\(^{251}\) See Gould IV, supra note 242, at 85–87.

\(^{252}\) See Gould IV, supra note 222, at 289.

\(^{253}\) Rosner & Conroy, supra note 242, at 82.

\(^{254}\) Id.

\(^{255}\) Id. at 83.

\(^{256}\) Jeff Pearlman, He’s Arrived, SPORTS ILLUSTRATED, Aug. 26, 2002, at 40, 43.

\(^{257}\) Rosner & Conroy, supra note 242, at 83.

\(^{258}\) Gould IV, supra note 242, at 113. However, these agreements do not include the Major League Baseball Players Association as a party, which makes application of the nonstatutory labor exemption problematic. See Kurlantzick, supra note 236, at 322.
process” for player transfers between the respective countries. But the posting process is hardly the perfect solution to the tension between NPB and MLB. Scott Rosner and William T. Conroy argue that the posting system is suboptimal in five ways: (1) the sealed and anonymous bidding process inflates bids from competing teams, (2) Japanese players are unable to realize their full market value in contract negotiations, (3) Japanese players have no choice in which MLB team they will play for, (4) the system can adversely affect competitive balance in MLB, and (5) the loss of marquee players negatively impacts NPB as a league. This last problem should especially concern MLS and force it to recognize the unique American product in premier domestic talent and thus bargain in earnest to retain it.

3. The Posting Process’s Deleterious Effect on Nippon Professional Baseball

William Gould posits that the posting process was put in place so that Japanese sensibilities about MLB imperialism would be respected. The Japanese did not want to see their own league become a farm system for American teams and stand idly by as their top players fled. However, the posting process has done nothing to assuage these fears; the best Japanese players consistently leave for MLB via the posting process. This has had a detrimental effect on NPB and the posting teams’ medium and long-term business.

While the short-term revenues accompanying the sale of posted players constitute a windfall for many of the teams, it has led to a talent drain in NPB, leading one manager to observe, “If this keeps up, Japanese baseball is truly finished.” Japanese players are leaving to play in MLB because of the increased pay, improved living and working conditions, and greater challenge. Japanese fans used to

259. Rosner & Conroy, supra note 242, at 83–86. A Japanese player with less than nine years of experience in NPB seeking a move to an MLB team may ask his Japanese team to “post” him. Once a player is posted, MLB teams can then bid for that player’s services. However, the bids are submitted to the MLB Commissioner’s office and communicated to NPB anonymously, to avoid any form of collusion between NPB and MLB teams. The NPB team must then decide whether it will accept the highest bid; a bid has yet to be turned down. The posting system applies only to MLB teams seeking to sign NPB players, and not vice versa. See id.

260. See id. at 86 (explaining the inefficiencies and suboptimalities of the posting process for both players and teams from both the United States and Japan).

261. Id.


263. Id.


265. Id. at 92.

266. Id. at 92–93 (internal quotation marks omitted).

267. Id. at 93.
attach a stigma to leaving, but because MLB games are broadcast in Japan and over the Internet—another wonder of globalization—they can watch their favorite players in MLB and that stigma has been dropped.  

Further, the economic benefits of selling the rights to a player are not in the long-term interest of NPB.  The proceeds are rarely reinvested into player development.

The parallels are glaring. MLS and NPB are both youths in the world of their respective sports. NPB has allowed itself to become MLB’s personal feeder of foreign talent. Allowing some American players to leave MLS for better salaries in Europe for the monetary reward may have served MLS’s purpose in its infancy, but the deleterious effects of continuing to allow domestic stars to leave over and again has been illustrated in the case of NPB. Through the domestic player requirement, the construction of soccer-specific stadiums, and investment in player development, MLS has demonstrated its recognition of the United States as its relevant labor and product market. Allowing MLS to operate as the rest of the world’s minor league severely undermines its stated goals of being one of the preeminent soccer leagues in the world. Taking steps to retain the finest American players will signal to the rest of the world that MLS is serious about competing in the world of club soccer and, perhaps, international players may start leaving their home leagues to play in the United States.

V. CONCLUSION

The United States is in a fascinating position as a world superpower during a period of incredible globalization. One of the most important lessons to glean from this globalization is that it is inevitable. Therefore, the courts and professional sports leagues cannot afford to turn a blind eye to its effects and pretend as though our current understanding of sports leagues will remain viable. As these develop-

268. Id.
269. Id. at 94.
270. See Rosner & Conroy, supra note 242, at 94.
271. While MLB teams also recruit and sign a large number of players from Latin America, none of those countries have established leagues comparable to NPB or an agreement similar to the posting process. See id. at 117 n.206.
272. See supra notes 242–70.
274. See Gould IV, supra note 242, at 119. Examining the effect of globalization on other sports leagues is beyond the scope of this Comment, but certainly bears watching in the coming years. Additionally, the United States has been defeated in international basketball competitions. See Edelman, supra note 85, at 580. Additionally, the United States, home of the World
ments unfold, MLS will continue to find itself in this interesting and precarious position.

If the Players Union is not satisfied with ensuing collective bargaining agreement negotiations, they will likely decertify and bring an antitrust suit. A court will then examine MLS’s single-entity structure and whether it possesses market power more seriously in light of its impressive growth over the last ten years. MLS’s wage structure will also likely come under fire, especially the way it pays its American players—the core of MLS—relative to the high-priced Designated Players. Lastly, courts will examine whether MLS’s success and power to depress salaries complies with the spirit of U.S. antitrust and labor laws. If the Players Union brings suit in the near future, a fact-finder could rule against MLS, which would be disastrous. Therefore, if MLS wants to become one of the finest soccer leagues in the world, and one of the largest sports leagues in America, it must embrace its character and bargain accordingly.

Mark W. Lenihan*

Series, has twice lost the World Baseball Classic, an event designed to determine the most talented baseball nation in the world. Gould IV, supra note 222, at 290.

* J.D. Candidate 2013, DePaul University College of Law; B.A. 2009, Rockhurst University. Many thanks to Volumes 61 and 62 of the DePaul Law Review, Professor Michael Jacobs, and Professor Marc Edelman for their invaluable insight and feedback. A very special thanks to my incredible family for their support and inspiration, Germany 2006, and waking up at all hours to watch matches with me. Any and all errors are mine.