

# Resolving (then Un-resolving) the Human Trafficking Issue for Cubans Joining America's National Pastime

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On December 20, 2018, Major League Baseball (“MLB”), Major League Baseball Players Association (“MLBPA”), and the Cuban Baseball Federation (“FCB”) announced an Agreement allowing Cuban-based baseball players to sign with MLB teams without first resorting to defection or having to travel to another country before seeking entry into the United States. This Agreement came to fruition against the backdrop of the decades-long embargo against Cuba and the dangerous and corrupt practice of smuggling players into the United States.

The motivation behind the historic Agreement is clear - alleviating the human smuggling of Cuban baseball players by criminal organizations. In the words of Dan Halem, MLB’s deputy commissioner and chief legal officer, “Cuban players coming to MLB have been smuggled out by human trafficking organizations that are often tied to other criminal organizations, and often they lose a big chunk of their bonus to pay for their passage out of Cuba.” Moreover, “unsavory characters continue to harass the player or their family if they believe they weren’t given the full amount.”<sup>1</sup> “This is strictly about ending human trafficking; . . . [w]e are just trying to create a safe way for Cubans to play in the major leagues.”<sup>2</sup>

MLB entered into the historic Agreement with the FCB with the goal of stopping the smuggling of baseball players. The most recent, and likely most notorious, tale of smuggling (and kidnapping) efforts involves Yasiel Puig, outfielder for the Cincinnati Reds (formerly of Los Angeles Dodgers). According to a truly remarkable profile published in the Los Angeles Magazine in April 2014, Puig had made at least five attempts to leave Cuba with the intent of signing a free agent contract with an MLB club. His journey began when he was picked up by smugglers affiliated with a well-known Mexican crime syndicate. These smugglers were promised \$250,000 by criminal elements from Miami and in return for getting Puig out of Cuba, Puig would owe 20 percent of his future earnings to the Miamian. Puig was hastened to Mexico where Puig was essentially held captive while his captors communicated with sports agents in the United States demanding immediate payment of money. The captors threatened to “chop off an arm, a finger, whatever” if they did not receive payment.<sup>3</sup> It was not until a “staged kidnapping” prompted by the original underwriter of Puig’s defection (the Miamian) to rescue Puig from the smugglers that Puig was able to make it to the United States, where he eventually signed a seven-year, \$42 million contract. Yet, reports are that even after having reached the United States, Puig continued to receive death threats from his smugglers, even after having paid them \$1.3 million in what was effectively a ransom.

In 2007, a sports agent in the United States was convicted of smuggling five Cuban players into the country. The tale is not as harrowing as that of Puig’s adventures, but the clandestine, illegal activity existed nonetheless. The sports agent, Gustavo Dominguez, was found guilty of 21 felony counts of

smuggling, conspiracy and harboring the Cuban players. The players defected from Cuba and made it to the Florida Keys. Once in U.S. territory, Dominguez orchestrated the transportation of the players to California where they were harbored, and left waiting to sign with interested clubs. Evidence included Dominguez paying \$225,000 to an alleged drug trafficker and Cuban smuggler to finance the operation.

While MLB and the FCB seek to eliminate the dangers arising from smuggling Cuban players, the current Administration touts the same protections but takes aim at the very mechanism that is specifically intended to afford those safeguards. Upon releasing the announcement of the historic Agreement, a senior Trump Administration official warned that it is “actively assessing the Obama-era policies that major League Baseball appears to have leveraged to enter into this arrangement with the Cuban Baseball Federation” under a premise that “[w]e do not condone the actions of any person or entity that contribute to the violation of human rights of Cuban citizens and the Cuban regime’s schemes to profit from the labor of its people abroad while keeping them in thrall to an oppressive political system.”<sup>4</sup>

### *A Brief History of Cuban Embargo*

As Cuba, under the regime of Fidel Castro, strengthened its ties with the Soviet Union in the early 1960s, the United States passed the Foreign Assistance Act of 1961, authorizing the president to impose a total embargo upon all trade between the United States and Cuba. Thereafter, the Department of Treasury, through the Office of Foreign Assets Control (“OFAC”), promulgated the Cuban Assets Control Regulations (“CACR”) which intended to limit the transfer of money from the United States to Cuba. Among other things, the CACR was initially aimed at prohibiting direct financial transactions with certain Cuban entities and sub-entities, including unblocked individuals.

While OFAC, by and through the CACR, was charged with enforcing the embargo by forbidding certain transactions with Cuban nationals or entities (and most definitely the Cuban government), the Trading with the Enemy Act of 1917 (“TWEA”)<sup>5</sup> gave the president unilateral authority to make changes to the regulations. Simply, the TWEA affords the president power to restrict (or remove restrictions from) any and all trade between the United States and its “enemies.”<sup>6</sup>

### *Ironically, there are Benefits to Defecting to a Third Country First*

Before exploring the terms of the Agreement and the protocols endorsed to end smuggling activities, it is important to understand why Cuban players often first defected to third countries with the hope of later making it to the United States to sign with an MLB Club. Certainly, the CACR prohibits signing Cuban players (and residents) directly, but from a financial viewpoint there was an added advantage to first obtaining residency in a third country before coming to the United States.

MLB Clubs operate under Major League Rules. When a player is a resident of another country and is eligible to sign with an MLB Club, he does so as a “free agent”—in baseball parlance—giving him the right to negotiate with all 30 Clubs, thus increasing the value of his contract. Rule 3 states that while a player who is a resident of another country can negotiate with any team, legal U.S. residents must be subject to the amateur (Rule IV) draft and be limited to signing with the one club that drafted him. Before Obama repealed the so-called “wet foot, dry foot” policy implemented in the 1990s, a Cuban citizen who defected and made it to the United States would obtain asylum, residency, and be given rights as a U.S. citizen. So, in the (business) world of baseball, if a Cuban player made it directly to the United States, he would be subject to the amateur draft, thus taking away his right to negotiate with all 30 clubs. Thus, ironically, it was actually more beneficial for a Cuban player to first defect to another country, obtain residency there, and then make himself available—as a “free agent”—to negotiate and sign with any of the MLB Clubs.

## *Negotiation of the Agreement*

Puig's and Dominguez's stories are just a glimpse of the travails of hundreds of Cuban defectors who have experienced some form of smuggling or another. As MLB began negotiating with the FCB to establish a working mechanism to preserve the humanitarian concerns, it did so against the backdrop of the CACR regulations and certain amendments to transactions made in 2016. Specifically, Section 515.571(a)(5)(i) of the CACR was amended to authorize the receipt of salary or other compensation by a Cuban national provided that the national of Cuba is not subject to any special tax assessments by the Cuban government in connection with the receipt of the salary or compensation. Thus, even though a Cuban national could be paid by a U.S. company, including an MLB club, there nevertheless could not be any payment of such salary or compensation, directly or indirectly, to the Cuban government. That caveat was intended to ensure that no funds reach the Cuban regime.

While this regulation may have helped usher in better relations with Cuban nationals, it did not remove the barriers entirely. Cuban nationals, including baseball players, would still have to obtain a passport from the Cuban government before going to the United States. The Cuban government, while acknowledging reforms directed at a more open relationship and freedoms to work abroad, still required that those nationals who did work outside the country pay a certain percentage of their income to the Cuban government, or they would receive no passport. That remuneration back to the Cuban government violates the CACR.

In February 2015, MLB announced to all 30 MLB Clubs that Cubans would be considered free agents as long as a player signed an affidavit attesting that he is, or has established residency, in another country and will not, or cannot, return to Cuba. Thus, Cuban players no longer needed the previous "unblocking license" issued by OFAC, so long as the player cut off all ties (money, family, residency, etc.) with Cuba. While such efforts and attestation of a Cuban player were to be in keeping with the CACR, it nonetheless did not cure the sordid exploitative actions of smugglers to get Cuban players to defect and establish residency elsewhere.<sup>7</sup> While MLB sought to achieve regulatory compliance with the CACR, it did not alleviate the rampant smuggling activities utilized to get players out of Cuba to another country. This mechanism likewise fostered sham affidavits. So, in 2016 MLB obtained a license from OFAC of the Treasury Department to negotiate with and enter into a business Agreement with the FCB for the signing and transfer of Cuban players. In turn, the Treasury Department determined that the FCB was not affiliated with the communist regime - the Cuban government. Thus, with the FCB being deemed separate or independent from the Cuban government, MLB and its member clubs were free to enter into an Agreement with the FCB for the signing of Cuban players—with no risk (perceived or real) of money flowing to the Cuban government - in keeping with the amended CACR. Simply, with the Treasury Department's official determination that the FCB was not affiliated with the Cuban government, the Agreement between MLB and the FCB would be in compliance with the CACR. The key determination was that the FCB was independent from the Cuban government.

## *The Agreement*

The Agreement between the MLB, MLB- PA, and the FCB is on par with MLB's agreements with other foreign leagues such as the NPB (Japan), KBO (Korea) and CPBL (China). The key provisions of the Agreement, set to expire October 31, 2021, are:

- Only Cuban players who have a playing contract with the FCB are covered by the Agreement. Any Cuban player who does not have a contract with the FCB is eligible to sign with any MLB Club to the same extent as any other unsigned international amateur.
- All FCB players fall into one of two categories, FCB Professionals who are 25 years old or older with six or more years of professional experience and FCB Amateurs who are all other FCB Players who are at least 18 years old.

- Each off-season, the FCB must re-lease all FCB Professionals who wish to sign with an MLB club. Once re-leased by the FCB, all FCB players are treated the same as other international players under the Collective Bargaining Agreement between MLB and the MLBPA, and may negotiate and sign with any MLB club that is willing to pay a formulated release fee (to be paid by MLB club to FCB).
- The released FCB players will be scouted and signed in Cuba by MLB clubs, and will travel to the United States (or Canada) to perform services for their MLB club pursuant to a standard work visa.
- Additionally (and very significant to Cuban players), any former FCB player signed by an MLB club may return to Cuba during the off-season, and may play in off-season tournaments or leagues in Cuba.
- Any disputes between MLB and the FCB will be resolved through neutral arbitration before the International Chamber of Commerce.

The terms of the Agreement foster free movement of Cuban players and the MLB Clubs' rights to sign such players without violating the embargo (and regulations enforcing same). Most importantly, Cuban players will have all the benefits of but none of the deleterious effects of having to defect to another country in the hopes of making it to the United States. Again, the direct aim of this Agreement is "strictly about ending human trafficking."<sup>8</sup>

### *The Current Administration Rejects the Agreement*

Although premised on warmer relations with the Cuban government, and expressed in terms of preserving human rights, immediately after the historic Agreement was announced by MLB and the FCB, the Trump Administration criticized its terms as endorsing the Cuban government's ability to profit from U.S. businesses while exploiting Cuban players. The historic Agreement was denounced as one that would greenlight continuous human rights violations and exploitations.

Just as President Obama used his executive authority per the TWEA to warm relations and re-establish ties with Cuba, President Trump could utilize the same executive authority to scale back the relations.

Senator Marco Rubio of Florida vowed to fight the Agreement. Similar to the mantra of Administration officials, Senator Rubio expressed concern the Agreement would "further exploit the Cuban people."<sup>9</sup> Senator Rubio had reportedly asked the Secretary of State, Mike Pompeo, to side against the Treasury Department's findings and rule that the FCB is indeed controlled by the Cuban government, thus nullifying the Agreement. Pompeo requested a ruling that the Cuban government controls the FCB in an effort to nullify the Agreement.

Thus, on April 8, 2019, it was announced that OFAC, having consulted with the U.S. Department of State, determined that any payments made to the FCB are unauthorized per § 515.571(e) of the CACR because such payments are in turn made to the Cuban government - a complete reversal of the Treasury Department's determination in 2016. By simply finding that the release fee paid will go to the Cuban government (arguably driven only by political motivation without any accompanying findings of fact), the historic Agreement was deemed null and void.

The criticisms prompting the reversal of the Treasury Department's initial findings do not take into account that the intent of the Agreement between MLB and FCB was expressly to avoid the type of exploitation over which the Administration expresses concern. The position that the Agreement actually propagates the exploitation of Cuban citizens is unfounded. There may be no greater exploitation of a Cuban player than placing him in the hands of a smuggling cartel while being captive to a seemingly perpetual ransom and very real threat of physical harm. Rather than subjecting otherwise eligible Cuban players to the dangers and oppressive conditions arising from having to defect, they would have been able to sign directly with any of the 30 MLB Clubs. Instead of criticizing efforts to alleviate human trafficking, the historic Agreement between MLB and the FCB should have been applauded. Rescinding this Agreement will serve to continue the very oppression the Administration denounces, by again forcing

Cuban nationals to defect to third countries (which will often be at the hands of smugglers) before they may seek the opportunity to play here in America.

**Endnotes:**

1. Dave Sheinin and Karen Young, MLB, *Cuban Baseball Federation Reach Agreement; Trump Administration signals it has issues with deal*, The Washington Post, December 19, 2018.
2. *Id.*
3. Jesse Katz, *Escape from Cuba: Yasiel Puig's Untold Journey to the Dodgers*, Los Angeles Magazine, April 14, 2014.
4. Sheinin and Young, *supra* note 1.
5. 50a U.S.C. §§ 1-40 (transferred and now codified 50 U.S.C. §§ 4301–4341).
6. 50 U.S.C. § 4305(a),(b)(1).
7. See Samuel Rubinfeld, *MLB Policy Changes Make Cuban Baseball Players Fee Agents in U.S.*, Wall Street Journal, February 4, 2015.
8. *MLB announces Cuban players won't have to defect to play in U.S.*, <http://www.cbsnews.com/news/mlb-announces-cuban-players-wont-have-to-defect-to-play-in-u-s/>, December 20, 2018.
9. See Franco Ordoñez, *Trump Administration aims to stop professional baseball deal with Cuba*, McClatchy DC Bureau, <https://www.mcclatchydc.com/>, December 29, 2018.

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