

10-1-2007

## Fighting Baseball Doping in Latin America: A Critical Analysis of Major League Baseball's Drug Prevention And Treatment Program in the Dominican Republic and Venezuela

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**FIGHTING BASEBALL DOPING IN LATIN AMERICA: A  
CRITICAL ANALYSIS OF MAJOR LEAGUE BASEBALL’S  
DRUG PREVENTION AND TREATMENT PROGRAM IN THE  
DOMINICAN REPUBLIC AND VENEZUELA**

*Arturo J. Marcano Guevara* \*  
*David P. Fidler* \*\*

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## I. INTRODUCTION

The world of professional sports is experiencing a plague of athletes using performance-enhancing drugs (PEDs). Problems with PEDs have arisen in many sports, including sports connected with the Olympics, professional cycling at the Tour de France, professional football in the United States, and Major League Baseball in North and Latin America. Reactions from bodies responsible for overseeing these sports demonstrate the seriousness of the PED problem. Perhaps the best-known entity involved in trying to eliminate PEDs from sports is the World Anti-Doping Agency (WADA),<sup>1</sup> the very name of which indicates the global scope of the problem.

Much of the attention the PED problem garners in national and international media centers on famous, high-profile professional athletes, who are accused of competing unfairly by using PEDs. This phenomenon has been particularly true with respect to the PED-related controversies in Major League Baseball (MLB).<sup>2</sup> One former major league player admitted using steroids when he won a Most Valuable Player award,<sup>3</sup> and another major league player published a sensationalized, but

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<sup>1</sup> World Anti-Doping Agency (WADA), <http://www.wada-ama.org/en/>.

<sup>2</sup> See, e.g., HOWARD BRYANT, *JUICING THE GAME: DRUGS, POWER, AND THE FIGHT FOR THE SOUL OF MAJOR LEAGUE BASEBALL* (2006).

<sup>3</sup> Tom Verducci, *Caminiti Comes Clean: Ex-MVP Says He Won Award While Using Steroids*, *SPORTS ILLUSTRATED*, June 3, 2002, at 36.

still significant book alleging widespread PED use in MLB.<sup>4</sup> Congress has held hearings on MLB's PED problem,<sup>5</sup> and allegations of PED use have shredded the reputations of some of the most famous MLB players, such as Mark McGwire, Rafael Palmeiro, Sammy Sosa,<sup>6</sup> and Barry Bonds.<sup>7</sup>

However, the focus on the most famous, most high-profile athletes obscures the true extent of the PED problem. Such athletes have succeeded in reaching the top levels of their respective sports and, thus, attract the lion's share of the media spotlight. Beneath the glitter of the top levels of most professional sports is an entirely different world where

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<sup>4</sup> See, e.g., JOSE CANSECO, *JUICED: WILD TIMES, RAMPANT 'ROID, SMASH HITS, AND HOW BASEBALL GOT BIG* (2005). Canseco's book played a role in the willingness of Congress to convene hearings in 2005 and, according to James Nafziger, "[t]he Canseco book . . . stimulated additional testing, leading to the revelation that star first baseman Rafael Palmeiro had tested positive." James A. R. Nafziger, *Doping and the Globalization of Baseball*, in *LEGAL ISSUES IN PROFESSIONAL BASEBALL* 187, 194 (L. Kurlantzick ed., 2005).

<sup>5</sup> See, e.g., *Steroids in Baseball and Amateur Sports: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism of the S. Comm. on Commerce, Science, and Transportation*, 107th Cong. (2002); *Issues Related to Ephedra-Containing Dietary Supplements: Hearing Before the H.R. Subcomm. on Oversight and Investigations of the H.R. Comm. on Energy and Commerce*, 108th Cong. (2003); *Effectiveness of Drugs Testing and Preventing Steroid Use: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. (2004); *Anabolic Steroids Penalties: Hearing Before the H.R. Subcomm. on Crime, Terrorism, and Homeland Security of the H.R. Comm. on the Judiciary*, 108th Cong. (2004); *Steroid Use in Sports: Hearing Before the H.R. Subcomm. on Commerce, Trade, and Consumer Protection of the H.R. Comm. on Energy and Commerce*, 109th Cong. (2005); *Steroids in Major League Baseball: Hearing Before the H.R. Comm. on Gov't Reform*, 109th Cong. (2005); *Steroid Use in Major League Sports: Hearing Before the H.R. Comm. on Gov't Reform*, 109th Cong. (2005); *Federal Drug-Testing Standards for Professional Athletes: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 109th Cong. (2005).

<sup>6</sup> *McGwire Mum on Steroids; Sosa, Palmeiro Deny Use in Front of House Panel*, CNN, Mar. 17, 2005, <http://www.cnn.com/2005/ALLPOLITICS/03/17/steroids.baseball/>.

<sup>7</sup> MARK FAINARU-WADA & LANCE WILLIAMS, *GAME OF SHADOWS: BARRY BONDS, BALCO, & THE STEROID SCANDAL THAT ROCKED PROFESSIONAL SPORTS* (2006).

younger athletes struggle to enter the top ranks of their sports. Very few of these young athletes will actually reach the top, making the competition at the lower levels fierce because the stakes are so high. Not surprisingly, the PED problem plagues not only the highest competitive levels of sports but also the lower rungs, where athletes far from the limelight dream of the day when they too will enjoy the fame and riches of top-flight professional athletes.

This article focuses on the PED problem that exists in the Latin American operations of MLB's minor league system. Our analysis unfolds in five parts. First, we look at the relationship between the globalization of sports and PED use. Although PED use in sports occurred well before the current era of globalization, a correlation exists between the increasing concern with PED use and the globalization of the business of sports. In connection with this correlation, we specifically consider the rise of PED use in MLB as it relates to MLB's strategy of globalizing the game of baseball. We describe the evolution of MLB's strategies on PED use, particularly how criticism and pressure forced MLB to take the PED problem in its Latin American minor league operations more seriously.

Second, we focus more closely on the problem of PEDs among players and prospects in MLB's minor league system in Latin America. This part of the article includes background on the structure and dynamics of MLB's involvement in Latin American countries. This background is critical to understanding why and how MLB's approach to the PED problem in its minor league operations differs as between the minor leagues in the United States and Canada and the minor leagues in the Dominican Republic and Venezuela. Next, we analyze MLB's approach to the PED problem in its Latin minor league activities. This analysis includes statistical evidence that provides some sense of the extent of the PED problem in Latin minor league baseball and the impact the current drug-testing program has on players from the Dominican Republic and Venezuela. These statistics reveal that PED use among minor league players and players who want to sign minor league contracts with MLB teams is a serious problem that requires heightened attention from MLB.

Third, we examine the problems with how MLB applies its minor league drug prevention and treatment program in the Dominican Republic and Venezuela. The approach MLB is taking does not adequately address the PED problem in these Latin American countries.

We also analyze the inadequate efforts made by MLB to implement its minor league drug prevention and treatment program in the Dominican Republic and Venezuela.

Fourth, we make recommendations for reforming the way MLB approaches the fight against doping in its minor league operations in Latin America. We base these recommendations on five interdependent reform principles—democratization, centralization, harmonization, specialization, and implementation—that help structure a more effective and sustainable strategy for MLB in tackling doping as a problem in its minor league operations in the Dominican Republic and Venezuela.

We conclude by considering recent developments that may change the structure and dynamics of MLB's approach to the PED problem in its Latin American operations. Among these developments are the changes made in U.S. immigration law that affect how MLB brings minor league players to the United States and concerns about potential actions of the Venezuelan government. We briefly consider how these developments enhance or weaken the prospects for a more effective MLB drug prevention and treatment policy in the Dominican Republic and Venezuela.

## II. THE PROBLEM OF PERFORMANCE-ENHANCING DRUGS IN GLOBAL SPORTS

### *A. Performance-Enhancing Drugs and the Globalization of Sports: Emergence of Global Strategies to Fight Use of PEDs*

From the beginning of organized sporting events, athletes have tried to gain advantages through consumption or use of substances believed to increase their speed, strength, and/or endurance. The development of medical, chemical, and biological sciences in the twentieth century opened up more possibilities for athletes tempted to use performance-enhancing substances. These temptations extended to some governments, which, during the Cold War, extensively used PEDs to enhance the performance of their national athletic teams during international competitions, such as the Olympic Games. Thus, well before the era of globalization that unfolded after the end of the Cold War, the problem of PEDs had developed scientific sophistication, international scope, and political ramifications.

The fall of the Berlin Wall in 1989 and the collapse of the Soviet Union in 1991 influenced politics, economics, business, and culture in

every realm, which in turn spilled over into the world of sports. The ideological lines that gave sports nationalistic and geopolitical overtones (e.g., the Soviet basketball team's win over the United States in the 1972 Summer Olympics and the U.S. hockey team's victory over the Soviets in the 1980 Winter Olympics) disappeared, radically changing where and how many sports promoters searched for talent, marketing opportunities, corporate sponsorships, and consumers.

These structural changes in the politics, economics, business, and culture of sports stimulated an unprecedented globalization of sports as social phenomena. Established professional sports, such as North America's National Hockey League (NHL), moved to exploit talent in parts of Europe previously isolated behind the Iron Curtain. Other sports, such as the National Basketball Association (NBA), National Football League (NFL), and MLB, saw opportunities to expand their efforts into new regions of the world in order to increase both the sale of their products and the size of potential labor pools.

Concerns about the use of PEDs by athletes escalated with the globalization of sports that occurred in the aftermath of the Cold War. As noted above, athlete use of PEDs had been around in national and international sports for decades, but in the 1990s, concern that the problem of PEDs was worsening led to new strategies to address it. In 1993, the World Health Organization (WHO) analyzed the health risks posed by use of PEDs in sports and "concluded that many of the substances used have negative health consequences and create a mild to strong dependence effect upon consumers and that doping should be considered a public health threat."<sup>8</sup> Concerns about the growing PED problem also led to the creation in 1999 of the World Anti-Doping Agency (WADA), an independent international authority supported by the International Olympic Committee (IOC) and relevant agencies of national governments.<sup>9</sup> See Table 1 for WADA's mission and priorities.

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<sup>8</sup> PAULO DAVID, HUMAN RIGHTS IN YOUTH SPORT 110 (2005).

<sup>9</sup> WADA, <http://www.wada-ama.org/en/index.ch2>.

**Table 1. Mission and Priorities of the World Anti-Doping Agency<sup>10</sup>**

The World Anti-Doping Agency (WADA) is the international independent organization created in 1999 to promote, coordinate, and monitor the fight against doping in sport in all its forms.

Composed and funded equally by the sports movement and governments of the world, WADA coordinated the development and implementation of the World Anti-Doping Code (Code), the document harmonizing anti-doping policies in all sports and all countries.

#### **Statutes**

WADA is a Swiss private law Foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada.

#### **Vision**

WADA works towards a vision of the world that values and fosters doping free sport.

#### **Priorities**

WADA's chief activities focus on seven areas emanating from the responsibilities given to the Agency by the Code and reflect the importance of a comprehensive approach to the fight against doping in sport:

- **Code Adoption, Implementation & Compliance:** facilitating sport and government acceptance of the World Anti-Doping Code (Code) and its principles to ensure a harmonized approach to anti-doping in all sports and all countries; monitoring implementation of and compliance with the Code; working for the proper adjudication of results
- **Science & Medicine:** promoting global research to identify and detect doping substances and methods; developing and maintaining the annual List of Prohibited Substances and Methods; accrediting anti-doping laboratories worldwide; monitoring Therapeutic Use Exemptions granted by stakeholders
- **Anti-doping Coordination:** developing and maintaining the Anti-doping Development Management System (ADAMS), the web-based database management system to help stakeholders coordinate anti-doping activities and comply with the Code
- **Anti-Doping Development:** facilitating the coordination of Regional Anti-Doping Organizations by bringing together countries in regions where there are no or limited anti-doping activities so that they can pool resources to implement doping control and anti-doping education

<sup>10</sup> WADA, *Mission & Priorities*, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=255>.



- **Education:** leading and coordinating effective doping prevention strategies and education; assisting stakeholders in their implementation of anti-doping education programs
- **Athlete Outreach:** educating athletes at major international and multi-sport events through direct one-on-one interaction with anti-doping experts, answering their questions about the dangers and consequences of doping; empowering stakeholders to implement high-impact athlete outreach programs
- **Out-of-competition Testing:** contracting with stakeholders to help them fulfill their responsibility of no-notice out-of-competition testing

One of WADA's most important contributions is the World Anti-Doping Code, which provides the basis for the harmonization of anti-doping policies in sports nationally and globally.<sup>11</sup> The main objectives of the Code are to protect the right of athletes to participate in drug-free sports and to ensure the harmonization and coordination of effective anti-doping programs in national and international sports.<sup>12</sup> Since its adoption in 2003, hundreds of national and international sporting organizations around the world have adopted the Code,<sup>13</sup> including the IOC, the International Paralympic Committee, and international sporting federations, such as the Fédération Internationale de Football Association (FIFA) and the International Basketball Association.<sup>14</sup> Experts consider the Code to be the "gold standard" for anti-doping programs in sports.<sup>15</sup> The Code has become part of international sports law and the global *lex sportiva* because it "provides a process and set of

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<sup>11</sup> WADA, *World Anti-Doping Code* (2003), [www.wada-ama.org/rtecontent/document/code\\_v3.pdf](http://www.wada-ama.org/rtecontent/document/code_v3.pdf).

<sup>12</sup> *Id.* at 1.

<sup>13</sup> WADA, *UNESCO International Convention Against Doping in Sports: Overview*, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=273> ("More than 570 sports organizations have already adopted the Code.").

<sup>14</sup> WADA, *World Anti-Doping Code: Code Acceptance*, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=270> (list of all organizations that have accepted the Code).

<sup>15</sup> See, e.g., *Steroids in Major League Baseball: Hearings Before the H.R. Comm. on Gov't Reform*, 109th Cong. (2005) (statement of Gary I. Wadler, Associate Professor, New York University School of Medicine), available at 2005 WL 682056 (calling the World Anti-Doping Code and its related international standards the "gold standard for anti-doping").

rules for harmonizing and enforcing a global regime.”<sup>16</sup> The 191 governments that have signed the Copenhagen Declaration on Anti-Doping in Sports, including the United States, Dominican Republic, and Venezuela, recognize “the role of the Code as the foundation in the world fight against doping in sport.”<sup>17</sup>

The establishment of WADA and the adoption of its Code accelerated international cooperation on actions to prevent athlete use of PEDs, and this cooperation created new treaty law in the anti-doping area that extends beyond previous regional efforts.<sup>18</sup> In 2005, the United Nations Educational, Scientific, and Cultural Organization (UNESCO) adopted the UNESCO International Convention Against Doping in Sports, which, as of May 17, 2007, had 52 States Parties.<sup>19</sup> UNESCO and WADA are working together to increase participation in this new treaty, which compliments and supports WADA’s activities against use of PEDs in sports around the world.

***B. Performance-Enhancing Drugs and the Globalization  
of Baseball: Emergence of Strategies Against PED Use  
in the Major and Minor Leagues***

The trajectory seen in the development of global governance strategies against PEDs in the form of WADA and the UNESCO treaty also appears in MLB in the post-Cold War period, but the path MLB has taken in regulating PED use differs from the global WADA-led effort. As with sports generally, concerns about PED use by MLB players existed before the 1990s, but, over the course of the 1990s and the early years of the twenty-first century, the problem grew in scope and

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<sup>16</sup> Nafziger, *supra* note 4, at 196, 208.

<sup>17</sup> Copenhagen Declaration on Anti-Doping in Sports, Mar. 2003, §4.1, [http://www.wada-ama.org/rtecontent/document/copenhagen\\_en.pdf](http://www.wada-ama.org/rtecontent/document/copenhagen_en.pdf). For a list of the 191 signatory governments as of August 27, 2007, see WADA, *Copenhagen Declaration on Anti-Doping in Sports: List of Signatories*, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=391>.

<sup>18</sup> See, e.g., Council of Europe, Anti-Doping Convention, Nov. 16, 1989, Council of Europe Treaty Series No. 135, available at <http://conventions.coe.int/treaty/en/Treaties/Html/135.htm>; Council of Europe, Additional Protocol to the Anti-Doping Convention, Sept. 12, 2002, Council of Europe Treaty Series No. 188, available at <http://conventions.coe.int/treaty/en/Treaties/Html/188.htm>.

<sup>19</sup> UNESCO, *International Convention Against Doping in Sports: States Parties*, <http://portal.unesco.org/la/convention.asp?KO=31037&language=E&order=alpha>.

seriousness to the point that MLB as a sport was in a state of crisis.<sup>20</sup> The congressional hearings on PED use in MLB in 2002–2005 exposed the crisis,<sup>21</sup> as did the publication of both sensationalistic and investigative articles and books about the depth of the PED problem in MLB.<sup>22</sup>

MLB responded to the exposure of the PED crisis by moving, however reluctantly, towards tougher drug testing programs that would deter PED use and punish transgressors. MLB previously faced opposition to more strict PED policies from the Major League Baseball Players' Association (MLBPA).<sup>23</sup> However, in light of the adverse publicity about the PED problem in MLB and threats of congressional intervention, the MLBPA agreed to work with MLB to create more rigorous policies on the prevention, treatment, and punishment of PED use. The foot-dragging caused MLB and the globalization of baseball reputational damage. Some believe MLB's reluctance to get serious about its PED problem in a timely way contributed to the IOC's decision to drop baseball as an Olympic sport.<sup>24</sup>

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<sup>20</sup> See Ian O'Connor, *Baseball's 'Clean' Superstars Should Demand Random Drug Testing*, USA TODAY, Mar. 6, 2004, available at [http://www.usatoday.com/sports/columnist/oconnor/2004-03-06-oconnor\\_x.htm](http://www.usatoday.com/sports/columnist/oconnor/2004-03-06-oconnor_x.htm) (referring to MLB's problems with PEDs as "an Enron-sized scandal threatening to leave baseball in ruins"); Nafziger, *supra* note 4, at 188–191 (analyzing the emergence of "baseball's doping crisis").

<sup>21</sup> See sources cited in *supra* note 5.

<sup>22</sup> See, e.g., Verducci, *supra* note 3; CANSECO, *supra* note 4; FAINARU-WADA & WILLIAMS, *supra* note 7; BRYANT, *supra* note 2.

<sup>23</sup> See, e.g., *Steroids in Major League Baseball: Steroids in Major League Baseball: Hearing Before the H.R. Comm. on Gov't Reform*, 109th Cong. (2005) (testimony of Donald Fehr, Executive Director and General Counsel, Major League Baseball Players Association) (stating the MLBPA's position "that the testing of an individual, not because of something he is suspected to have done, but simply because he is a member of a particular class, is at odds with fundamental principles of which we in this country are justifiably proud.").

<sup>24</sup> Nafziger, *supra* note 4, at 188–189 (arguing that baseball's demise as an Olympic sport partly resulted from MLB's "reputation for turning a blind eye to its doping problem, which involves an apparent widespread use of performance-enhancing steroids. It is true, of course, that other sports such as cycling, swimming, and track and field have been seriously tainted by doping, but their respective sports federations have taken substantial measures to respond to the problem—generally in conformity with international sports law. . . . The program MLB finally did establish in 2002 and 2005 is still quite limited. In any

The result of the MLB-MLBPA collaboration is Major League Baseball's Joint Drug Prevention and Treatment Program (Major League Joint DPT Program), which was first adopted by MLB and the MLBPA and incorporated into their Basic Agreement in August 2002.<sup>25</sup> In November 2005, MLB and the MLBPA reached agreement on a revised drug program, which included a number of changes, such as tougher sanctions for violating the ban on use of PEDs.<sup>26</sup> In March 2006, the revised version of the Major League Joint DPT Program became part of the latest Basic Agreement, which means that the Program, as revised, will be in place through 2011, when the current Basic Agreement expires.<sup>27</sup>

In March 2006, the MLB Commissioner appointed former Senator George Mitchell to investigate PED use in the major leagues and

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event, it is reasonable to infer from the IOC decision a direct link between MLB noncompliance with international anti-doping standards and baseball's demise in Olympic (and related) competition." See also *WADA at Odds with IBF over Testing*, MLB, (Apr. 5, 2006), [http://mlb.mlb.com/content/printer\\_friendly/mlb/y2006/m04/d05/c1384906.jsp](http://mlb.mlb.com/content/printer_friendly/mlb/y2006/m04/d05/c1384906.jsp) (quoting IOC President Jacques Rogge as stating that "[w]e still have issues about doping [and baseball]. Progress has been made but not to the level where the Olympic family would accept it."); WADA, *WADA Skeptical about Anti-Doping Policy at World Baseball Classic*, Mar. 16, 2006, <http://www.wada-ama.org/en/newsarticle.ch2?articleId=3115248> (reporting on WADA's serious doubts about whether the anti-doping policy implemented at the World Baseball Classic by the International Baseball Federation on behalf of MLB and the MLBPA complied with the World Anti-Doping Code, a failure that "could further jeopardize the sport's re-entry into the Olympic program").

<sup>25</sup> Major League Baseball's Joint Drug Prevention and Treatment Program (2002) [hereinafter Major League Joint DPT Program (2002)] (on file with authors).

<sup>26</sup> *MLBPA Announce New Drug Agreement*, MLB, Nov. 15, 2005, <http://mlbplayers.mlb.com/pa/releases/releases.jsp?content=111505>.

<sup>27</sup> Major League Baseball's Joint Drug Prevention and Testing Program (2006), at 23 [hereinafter Major League Joint DPT Program (2006)] (on file with authors); Barry M. Bloom, *MLB, Union Announce New Labor Deal: New Basic Agreement Will Run through 2011*, MLB.COM, (Oct. 25, 2006), [http://mlb.mlb.com/news/article.jsp?ymd=20061024&content\\_id=1722211&vkey=ps2006news&fext=.jsp&c\\_id=mlb](http://mlb.mlb.com/news/article.jsp?ymd=20061024&content_id=1722211&vkey=ps2006news&fext=.jsp&c_id=mlb).

to propose possible strategies to address the problem.<sup>28</sup> However, Mitchell's investigation is running into various problems, including objections from the MLBPA and the players individually who object to Mitchell's requests for medical records and for individual testimony.<sup>29</sup> As of this writing, Mitchell has not issued his report to the MLB Commissioner.<sup>30</sup>

Although the controversy concerning PEDs focused on their use in the major leagues, MLB also had to respond to the threat that PED use was increasing among minor league players. The PED problem was systemic, touching not only the superstars in The Show but also players and prospects seeking to make it to the major leagues. Minor league players have no union representation in their dealings with MLB teams, so MLB did not have to contend with a players' union in addressing the PED problem in the minor leagues. Thus, in 2001, MLB imposed Major League Baseball's Minor League Drug Prevention and Treatment Program (Minor League DPT Program) on the minor league operations of MLB teams in the United States and Canada. MLB issued the latest version of the Minor League DPT Program in 2007.<sup>31</sup>

However, MLB did not apply its Minor League DPT Program to MLB teams' minor league activities in Latin America from 2001 until 2004 (in the Dominican Republic) and 2005 (in Venezuela). This omission was particularly odd for two reasons.

First, MLB activities in Latin American intensified during the 1990s. MLB teams increased their efforts to recruit baseball talent in Latin America, especially in the Dominican Republic and Venezuela.

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<sup>28</sup> *Mitchell to Head Steroid Investigation*, ESPN, Mar. 30, 2006, <http://sports.espn.go.com/mlb/news/story?id=2389391>.

<sup>29</sup> Duff Wilson, *Sosa and Palmeiro Cited in Steroid Investigation*, N.Y. TIMES, May 9, 2007, available at <http://www.nytimes.com/2007/05/09/sports/baseball/09steroids.html?ex=1179892800&en=d53bc4bfc9e465af&ei=5070>.

<sup>30</sup> For a particularly scathing analysis of MLB's response to PED use in the major leagues, see DICK POUND, *INSIDE DOPE: HOW DRUGS ARE THE BIGGEST THREAT TO SPORTS, WHY YOU SHOULD CARE, AND WHAT CAN BE DONE ABOUT THEM* 124–137 (2006); *Tackling the Problem of Drugs in Baseball*, National Public Radio, June 27, 2007, available at <http://www.npr.org/templates/story/story.php?storyId=11466886> (radio interview with Dick Pound, Chair of the World Anti-Doping Agency).

<sup>31</sup> Major League Baseball's Minor League Drug Prevention and Treatment Program (2007) [hereinafter Minor League DPT Program] (on file with authors).

Such intensified interest in the baseball labor pool in Latin America formed part of MLB's larger strategy of globalizing baseball, a strategy that found MLB reaching out to potential new markets for fans, television revenues, and players. Without question, the Dominican Republic and Venezuela have long been, and continue to be,<sup>32</sup> the best foreign sources of baseball talent, which led MLB teams to scale up their efforts to sign Dominican and Venezuelan prospects to minor league contracts.

Second, MLB and MLB teams knew that significant concerns existed about PED use among prospects and players in these foreign talent markets. Investigative reporting by Steve Fainaru of the *Washington Post* exposed the extent of the Latin PED problem in June 2003, including deaths of young players who used PEDs.<sup>33</sup> Particularly unsettling was "a disturbing twist to the use of these performance-enhancing substances: Poor and uneducated Dominican prospects are increasingly turning to versions designed for animals, according to dozens of interviews with players, coaches, veterinarians and major league scouts."<sup>34</sup> This reporting forced MLB to explain why it only implemented its Minor League DPT Program in the United States, especially when MLB was aggressively recruiting and training minor league talent in the Dominican Republic and Venezuela.

Initially, MLB gave two reasons why it did not apply the Minor League DPT Program to its minor league operations in the Dominican Republic and Venezuela. First, MLB officials indicated that any PED use by Latin minor league players would be caught when such players arrived in the minor leagues in the United States, where MLB applied the Program.<sup>35</sup> This reason demonstrated that MLB did not care about PED use among the vast majority of Latin minor league players and prospects who would never make the minor leagues in the United States. Second, MLB argued that implementing a drug-testing program in the Dominican

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<sup>32</sup> Associated Press, *National Pastime Takes on International Flavor*, ESPN, Apr. 3, 2007, <http://sports.espn.go.com/mlb/news/story?id=2824295> (reporting that 61% of all foreign-born players on major league rosters at the beginning of the 2007 season came from the Dominican Republic and Venezuela).

<sup>33</sup> Steve Fainaru, *Injecting Hope—and Risk: Dominican Prospects Turn to Supplements Designed for Animals*, WASH. POST, June 23, 2003, at A01.

<sup>34</sup> *Id.*

<sup>35</sup> Steve Fainaru, *MLB to Evaluate Drug Test Policy*, WASH. POST, July 14, 2003, at D01.

Republic and Venezuela would be too complicated and expensive,<sup>36</sup> a claim not supported by MLB's own consultant in the Dominican Republic.<sup>37</sup> Robert Manfred, MLB's vice president for labor relations, succinctly captured MLB's reasons and attitude about PED use in Latin America when he said that MLB did not want to spend the resources on implementing a drug prevention and treatment program in Latin America because MLB did not want "to flush a lot of money down the toilet."<sup>38</sup>

MLB's position on its Latin minor league operations caused a firestorm of criticism. Hispanics Across America, a non-governmental organization led by activist Fernando Mateo, attacked MLB for its stance on the PED problem among Latin minor league players and prospects.<sup>39</sup> Others, including the authors,<sup>40</sup> criticized MLB for its complacency and neglect of a problem at the heart of MLB's best sources of foreign baseball talent.

MLB's discriminatory attitude provoked the Governor of New York, George E. Pataki, to hold a press conference in New York City on the day of the MLB All-Star Game in July 2003 in order to express his concerns about MLB's behavior and to encourage MLB to pay more attention to PED use in the Dominican Republic and Venezuela.<sup>41</sup> In his remarks, Governor Pataki stated:

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<sup>36</sup> Fainaru, *Injecting Hope*, *supra* note 33.

<sup>37</sup> Fainaru, *MLB to Evaluate Drug Test Policy*, *supra* note 35.

<sup>38</sup> *Id.*

<sup>39</sup> See Press Release, Governor George E. Pataki, *Governor Supports HAA Effort to Protect Hispanic Youth*, (July 15, 2003) (on file with authors) (describing Hispanics Across America's "effort to encourage Major League Baseball to implement a drug-testing program for its Latin American operations in Venezuela and the Dominican Republic, where two players died after injecting themselves with animal steroids to enhance performance.").

<sup>40</sup> See, e.g., Memorandum from Arturo Marcano and David P. Fidler to Allan H. (Bud) Selig, Sandy Alderson, Robert D. Manfred, Jr., Louis Melendez, and Rafael Perez, on Chemical Substances and Major League Baseball's Minor League System in the Dominican Republic and Venezuela, (June 27, 2003) (on file with authors).

<sup>41</sup> Press Release, Governor George E. Pakaki, *supra* note 39. Fernando Mateo of Hispanics Across America and the authors also spoke at Governor Pataki's July 2003 press conference.

We are saying one thing quite simply: No double standards. We cannot allow Major League Baseball to look the other way. Let's just ask Major League Baseball to look into its heart and to understand that we welcome the talent from around the world, and, in particular from Latin America, but we want them to have the same safeguards and the same potential. That's not too much to ask.<sup>42</sup>

The criticism prompted MLB to address the PED problem in its Latin minor league operations. MLB began a drug-testing program in the Dominican Republic during the 2004 Summer League season, and, in 2005, MLB introduced the program to Venezuela.<sup>43</sup> In this article, we refer to the program used in the Dominican Republic and Venezuela as the Latin Summer League DPT Program. The Program's objective is "to prevent and end the use of Prohibited Substances . . . by non-40 man roster players participating in the . . . Summer League. . . . The Office of the Commission has concluded that the use of Prohibited Substances is potentially hazardous to a Player's health and may give a Player an unfair competitive advantage on the playing field."<sup>44</sup>

This article focuses on the problems with the Latin Summer League DPT Program, but a few points should be raised now to illustrate concerns explored in more detail below. First, the Latin Summer League DPT Program does not apply in full to minor league players in the Dominican Republic. MLB claims that it cannot suspend players who test positive for PEDs in the Dominican Republic because of Dominican labor laws,<sup>45</sup> a claim disputed by persons familiar with MLB's activities

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<sup>42</sup> Steve Fainaru & Christine Haughney, *Pataki Urges MLB on Testing*, WASH. POST, July 16, 2003, at D01.

<sup>43</sup> Geoff Baker, *Growing Pains: Venezuela Deals with Steroid Testing*, SEATTLE TIMES, Nov. 12, 2006, available at <http://archives.seattletimes.nwsourc.com/cgi-bin/texis.cgi/web/vortex/display?slug=steroids12&date=20061112&query=growing+pains%3A+venezuela>. Arturo Marciano provided translations for Geoff Baker during his interviews in Venezuela.

<sup>44</sup> Major League Baseball's Venezuelan Summer League Drug Prevention and Treatment Program, 2006 [hereinafter Latin Summer League DPT Program], at 1.

<sup>45</sup> Tom Farrey, *Results: Dominicans Fail More Tests than U.S. Players*, ESPN, Apr. 14, 2005, <http://sports.espn.go.com/mlb/news/story?id=2033711> (noting that MLB's understanding is that, under Dominican law, "employers are not allowed to suspend employees who fail drug tests").



in the Dominican Republic.<sup>46</sup> Second, the scope of the Latin Summer League DPT Program does not appear to cover all minor league activities MLB teams undertake in Venezuela and the Dominican Republic because the Summer League constitutes only one part of such activities, which operate year-round in the baseball academies of MLB teams. We return to these and other problems later in the article.<sup>47</sup>

MLB's development of the Major League, Minor League, and Latin Summer League DPT Programs in the past six years demonstrates the seriousness of the threat PED use poses to MLB as a global sport. MLB's adoption of these programs parallels the intensified international efforts of groups like the WADA to address PEDs in other sports, such as the establishment and activities of WADA, especially the World Anti-Doping Code. This article now turns its attention to the MLB strategies. The overlap in the international and MLB anti-PED efforts provides an opportunity to use the WADA approaches as comparators in analyzing how MLB has addressed the PED problem in its Latin minor league operations.

### III. THE PROBLEM OF PERFORMANCE-ENHANCING DRUGS AMONG PLAYERS AND PROSPECTS IN MLB'S MINOR LEAGUE SYSTEM IN LATIN AMERICA

#### *A. Empirical Evidence of a Serious Problem of Performance-Enhancing Drug Use by Latin Minor League Players*

As mentioned above, investigative reporting done by Steve Fainaru of the *Washington Post* brought to the public's attention in 2003 the existence of a significant problem of PED use among minor league players and prospects in the Dominican Republic. In 2005, other investigative reporting confirmed the depth and seriousness of the problem, including the continued, widespread use of steroids designed for livestock.<sup>48</sup> Given the extensive involvement of MLB teams in the

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<sup>46</sup> *Id.* (quoting Fernando Mateo of Hispanics Across America as arguing that MLB's claim about the impact of Dominican law on the ability to suspend players is "nonsense").

<sup>47</sup> See *infra* notes 227–307 and accompanying text.

<sup>48</sup> See Geoff Baker, *Life in Needle Park*, TORONTO STAR, May 14, 2005, at E01; Geoff Baker, *Harvesting the Dominican Diamond Mine*, TORONTO STAR, May 15, 2005, at B06.

Dominican Republic and Venezuela, the idea that the teams were not aware of the on-going use of PEDs in these markets for talent is preposterous. Empirical evidence collected in the application of drug-testing programs eliminates any possibility of MLB teams feigning ignorance of the PED problem or MLB claiming that its drug-testing programs have proved successful.

After implementation of the Major League and Minor League DPT Programs in 2005, nearly 50% of those players suspended for using illegal PEDs were from Latin American countries, with 46% of suspensions involving players from the Dominican Republic and Venezuela.<sup>49</sup> See Table 2. Since the start of the 2005 season, 58.5% of players who tested positive for PEDs (169 of 289) in the major leagues, and all minor league operations, including those in Latin America, came from the Dominican Republic. Of the players who tested positive during this time (289), 157 were suspended. Of these 157 suspended players, 37 (approximately 24%) were players from the Dominican Republic playing minor league ball in North America, and 35 (approximately 22%) were Venezuelans playing minor league ball in Venezuela and North America.<sup>50</sup> The other 132 Dominican players who have tested positive since the start of the 2005 season played in the Dominican Summer League, and thus, could not, according to MLB, be suspended under Dominican law.<sup>51</sup> In April 2005, MLB suspended 38 U.S.-based minor league players for testing positive for PEDs, and nearly half of these suspended players cumulatively came from the Dominican Republic (9) and Venezuela (8).<sup>52</sup> In 2006 alone, 74% (25 out of 34) major and minor league players who tested positive for PEDs came from Venezuela (13) and the Dominican Republic (12).<sup>53</sup> It is not clear whether these statistics include positive results from off-season testing under the Latin Summer League DPT Program. In addition, the statistics from the Dominican Republic and Venezuela do not include any testing of players not under contract

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<sup>49</sup> Mike Fish, *Steroid Problem Reaches Critical Mass in the D.R.*, ESPN, Feb. 14, 2007, <http://sports.espn.go.com/mlb/news/story?id=2763194>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Farrey, *supra* note 45.

<sup>53</sup> Baker, *Growing Pains*, *supra* note 43.

with a MLB team, which means the extent of the use of PEDs in these countries is likely greater than the statistics indicate.<sup>54</sup>

**Table 2. Suspensions for Positive PED Tests since Start of 2005 Season<sup>55</sup>**

Country of Nationality	Number of Suspended Players	Percentage of Total Suspensions (157)
United States	72	46%
Dominican Republic	37*	24%
Venezuela	35**	22%
Cuba	3	2%
Japan	3	2%
Mexico	2	1%
Australia	1	.64%
Canada	1	.64%
Colombia	1	.64%
Panama	1	.64%
Puerto Rico	1	.64%

\*This number does not include the 132 Dominicans who played minor league ball in the Dominican Republic and who tested positive because, according to MLB, these players cannot be suspended under Dominican law.

\*\*This number covers Venezuelan minor league players in North and Latin America.

These statistics indicate that PED use by Latin American major and minor league players is a serious problem that MLB knowingly ignored for too long. The empirical evidence of PED use by Latin major and minor league players raises a number of questions that require analysis. First, the statistics reveal a prevalence of PED use among Latin players apparently higher than PED use among non-Latin players in the major and minor leagues. Explaining why this higher prevalence exists requires consideration of many factors,<sup>56</sup> including examination of the

<sup>54</sup> This feature of PED testing in the Dominican Republic upset Fernando Mateo of Hispanics Across America, who criticized MLB for only testing players under contract. See Farrey, *supra* note 45.

<sup>55</sup> Fish, *Steroid Problem Reaches Critical Mass in the D.R.*, *supra* note 49.

<sup>56</sup> U.S. players may, for example, be more adept at disguising their use of PEDs compared to Latin players.

socio-economic context from which most Latin players attempt to enter the minor leagues in the Dominican Republic and Venezuela.<sup>57</sup> Although poverty and the lack of formal education do not excuse Latin players from using PEDs, MLB has to take the socio-economic context into account in designing and implementing its drug-testing and prevention programs for the Latin minor league system.

Second, the statistics suggest serious problems in MLB's initial attempts to apply drug prevention and treatment programs to its minor league operations in the Dominican Republic and Venezuela. Contradictory explanations from MLB about the cause of these problems underscore concerns about the way MLB has handled them. On the one hand, Robert Manfred, MLB's vice president for labor relations, argued that MLB has spent "literally millions of dollars on educational programs in the Dominican Republic"<sup>58</sup> and that the idea of ill-informed players in Venezuela is "nonsense."<sup>59</sup> A high-ranking MLB executive likewise argued, "If you do this as long as I have, there's one thing you learn: People who are positive under these policies, it's never their fault. It's always, 'Somebody didn't tell me,' or 'The dog ate my homework.'"<sup>60</sup>

On the other hand, investigative reporting has revealed a significant level of ignorance and lack of information among Latin minor league players. For example, Ian Gordon of ESPN reported that many Venezuelan players and coaches told him that they had never seen a copy of the Spanish-language version of the Latin Summer League DPT Program.<sup>61</sup> In agreeing to do public service announcements for MLB on the PED problem among Latin minor leaguers, Chicago White Sox manager and Venezuelan Ozzie Guillen lamented that the Latin minor league players "don't know what's good and what's bad...[n]inety-nine percent of the time, those kids don't know what they take or what you can take...it's not fair for the kids to suffer because of ignorance and not

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<sup>57</sup> See *infra* Part III.B.

<sup>58</sup> Associated Press, *Amphetamine Testing Changing Baseball Culture*, SPORTING NEWS, Sept. 28, 2006, available at <http://www.sportingnews.com/yourturn/viewtopic.php?t=132648>.

<sup>59</sup> Baker, *Growing Pains*, *supra* note 43.

<sup>60</sup> Ian Gordon, *Caught Looking*, ESPN THE MAGAZINE, June 4, 2007, available at <http://sports.espn.go.com/mlb/news/story?id=2884650>.

<sup>61</sup> *Id.*

getting good information.”<sup>62</sup> Boston Red Sox player David Ortiz, who is from the Dominican Republic, observed, “You might think everyone’s got the message, but they don’t.”<sup>63</sup> Ronaldo Peralta, who is in charge of MLB’s office in the Dominican Republic, identified the lack of information and education for Latin players as the biggest problem with PEDs.<sup>64</sup> All these observations raise questions about the reality of the alleged “literally millions of dollars”<sup>65</sup> spent on educating players.<sup>66</sup> We take a closer look at this and other problems below,<sup>67</sup> and then we consider the Latin minor league drug program in more detail to provide a deeper understanding of its flaws and ways to make the program more equitable and effective.<sup>68</sup>

***B. Poverty, Children, Buscones, Weak Pharmaceutical Regulation, and Performance-Enhancing Drugs: A Dangerous Cocktail***

As noted earlier, MLB based its drug-testing program for the Dominican Republic and Venezuela on the Minor League DPT Program applied in the United States and Canada. This strategy neglects to consider the different environments in which the minor league systems in North America and Latin America operate. Preventing PED use in the Dominican Republic and Venezuela faces socio-economic challenges that are not confronted in North America. These challenges provide some insight into why Latin minor league drug-testing statistics raise questions about the percentages of Latin players testing positive for PEDs.

The realities of PED use in any sport are complex, and the factors that combine to create the PED problem in MLB’s Latin minor league system produce a tangled web of incentives and influences. Within this complexity four factors are most salient: (1) the impact of

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<sup>62</sup> Scott Melkin, *Guillen Sends Important Message*, MLB, June 6, 2007, [http://www.mlb.com/news/article.jsp?ymd=20070606&content\\_id=2008853&vkey=news\\_mlb&fext=.jsp&c\\_id=mlb&partnered=rss\\_mlb](http://www.mlb.com/news/article.jsp?ymd=20070606&content_id=2008853&vkey=news_mlb&fext=.jsp&c_id=mlb&partnered=rss_mlb).

<sup>63</sup> Gordon, *supra* note 60.

<sup>64</sup> Fish, *Steroid Problem Reaches Critical Mass in the D.R.*, *supra* note 49.

<sup>65</sup> Associated Press, *Amphetamine Testing Changing Baseball Culture*, *supra* note 58.

<sup>66</sup> See Baker, *Growing Pains*, *supra* note 43 (noting criticisms in Venezuela that MLB has done a poor job informing players about the drug-testing program).

<sup>67</sup> See *infra* Part III.C.

<sup>68</sup> See *infra* Part IV.

poverty in the Dominican Republic and Venezuela; (2) MLB's focus in Latin America on recruiting and training children; (3) the involvement of the so-called *buscones* in channeling Latin talent into minor league contracts with MLB teams; and (4) different regulatory environments affecting access to performance-enhancing substances. We look at each factor independently and then consider their cumulative effect in producing an environment that is conducive to PED use in the Dominican Republic and Venezuela.

### *1. The Poverty Problem*

Analyses of MLB's recruiting and training practices in Latin America have often noted that MLB largely targets prospects that live in difficult socio-economic conditions, especially the vast majority of players in the Dominican Republic. MLB often takes pride in being able to offer players who live in poverty the opportunity to have a better life through professional baseball. However, this opportunity generates negative externalities that contribute to the PED problem.

Tom Farrey of ESPN described the temptations to use PEDs that young prospects in the Dominican Republic face as they attempt to escape a life of poverty through MLB:

The lure of big money and a better life has led some Dominican players to put just about anything in their bodies that they believe will help them attract major league scouts. Unable to afford steroids, some turn to cheap veterinary preparations that can be more dangerous than steroids. Some have died after injecting a souped-up vitamin compound called Diamino, which is designed for sick livestock and sold out of pet stores.<sup>69</sup>

In both the Dominican Republic and Venezuela, fierce competition fuels the potential attractiveness of PEDs to young baseball players trying to escape poverty. MLB teams sign hundreds of prospects each

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<sup>69</sup> Farrey, *supra* note 45; see also Fish, *Steroid Problem Reaches Critical Mass in the D.R.*, *supra* note 49 (noting that the "lure of the money that comes with success" is one factor driving children to use PEDs); Merkin, *supra* note 62 (quoting Chicago White Sox manager Ozzie Guillen stating, "If you come from our country [Venezuela] and your family is begging for help and someone says, 'You take this and you'll become a superstar,' obviously you are going to do it").

year, but only a small percentage of these players will ever play minor or major league baseball in the United States. As one Venezuelan prospect put it, “if there’s 20 pitchers at the start, only three go to the U.S ... that’s pressure.”<sup>70</sup> As *Baseball America* noted, “Teen-age Latin players are signed to pro contracts, but there’s little patience shown by MLB teams in helping them develop physically, emotionally and culturally ... too often, the young prospect falls through the cracks and disappears.”<sup>71</sup> In this competitive environment, players may explore any option, including PEDs, which might give them the edge to beat the statistical odds.

MLB is not the source of the poor socio-economic conditions in the Dominican Republic and Venezuela, and poverty provides no excuse for prospects that use PEDs. However, the strategy to address the PED problem in the Latin minor league system should take into account the poverty and socio-economic difficulties that prospects face, year after year. MLB itself promotes the “rags to riches” opportunity it offers, knowing that the vast majority of youth who attempt to seize this opportunity will not succeed. At the very least, MLB should construct and implement its drug program in Latin American countries in a way that demonstrates MLB’s awareness of this unique and difficult environment. Instead, MLB has simply taken the drug-testing program it developed for the minor leagues in North America and applied it to the Dominican Republic and Venezuela. We analyze below how MLB fails to live up to its responsibilities related to the socio-economic context of its Latin American markets.<sup>72</sup>

## 2. *Children Under Contract*

A second important factor in understanding the environment in which PED use among Latin minor league players and prospects occurs involves MLB’s interest in scouting, signing, and training children in the Dominican Republic and Venezuela. The preference MLB teams have for evaluating and signing Latin children who are under the age of 18 is

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<sup>70</sup> Gordon, *supra* note 60.

<sup>71</sup> Tracy Ringolsby, *Ramirez Successfully Aspired to a Hire Position*, ROCKY MOUNTAIN NEWS, May 8, 2006, available at [http://www.rockymountainnews.com/drmn/sports\\_columnists/article/0,1299,DRMN\\_83\\_4621773,00.html](http://www.rockymountainnews.com/drmn/sports_columnists/article/0,1299,DRMN_83_4621773,00.html).

<sup>72</sup> See *infra* Part IV.

well known.<sup>73</sup> The very cohort MLB seeks to attract with opportunities to escape poverty and economic hardship is among the most vulnerable in these societies. International law and the domestic legal systems of most countries recognize that the vulnerability of children heightens the responsibility of parents, businesses, and governments to protect children from harm and exploitation.<sup>74</sup> Paulo David captured the vulnerability of children and the responsibility of adults, in relation to PEDs with the following argument: “Athletes under 18 who are caught using illicit substances should be considered victims rather than criminals and [should] not be judged in the same way as adults.”<sup>75</sup>

In the past, MLB has not properly shouldered the responsibility of protecting Latin American prospects from the harms of PED use. As noted earlier, Steve Fainaru’s investigative reporting brought the extent of the PED problem among Dominican baseball prospects to light in 2003, but Fainaru merely exposed what baseball people in the Dominican Republic already knew was a growing phenomenon. Far from showing leadership in combating the PED challenge within the vulnerable populations that MLB sought to tap, MLB reacted as if it had no responsibilities for responding to the problem it helped create. MLB did not consider the health and welfare of children in the Dominican Republic and Venezuela vulnerable to pressure, persuasion, and ignorance concerning PEDs important enough for MLB to concern it with. Protecting these children from the harms of PEDs was just too complex and expensive for this billion-dollar global business. MLB did not perceive that its economic activities were heightening the vulnerability of children; instead, it worried about “flushing money down the toilet.”<sup>76</sup>

As noted above, MLB’s lack of action in Latin America fueled criticism about its initial complacency concerning PED use in the Dominican Republic and Venezuela.. MLB certainly did not follow the guidance promulgated by WADA, which understands the dangers PEDs

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<sup>73</sup> Under international law, persons under 18 years old are children. United Nations Convention on the Rights of the Child, G.A. Res. 44/25, at art. 1, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/Res/44/24 (Nov. 20, 1989).

<sup>74</sup> *Id.* at Preamble (noting that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth”).

<sup>75</sup> DAVID, *supra* note 8, at 115.

<sup>76</sup> *See supra* notes 35–38 and accompanying text.



pose to children, emphasizes protecting children from PEDs, and promotes educating children about the harm such substances can cause to their health.<sup>77</sup> Starting in 2001, MLB implemented a drug prevention and treatment program for its minor league operations in the United States and Canada, which suggested it understood the threat to the integrity of the game and the health of players PEDs can pose. Yet, MLB's initial response demonstrated that PED use in the Dominican Republic and Venezuela somehow did not constitute a threat to the game's integrity or children's health sufficient to take any action in those countries, despite the fact that they were the best sources of foreign talent for MLB.

The program MLB implemented in the Dominican Republic in 2004 and Venezuela in 2005 came only in response to criticism. Unfortunately, MLB's lack of interest in the needs of children in the Dominican Republic and Venezuela is a long-standing feature of MLB's behavior. For example, although MLB prohibits teams from encouraging prospects in North America from leaving school,<sup>78</sup> it has never attempted to discourage teams from luring children in the Dominican Republic and Venezuela out of school to play professional baseball.<sup>79</sup> A key aspect of

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<sup>77</sup> Richard W. Pound, *Education's Promise*, PLAY TRUE, Issue 3-2004, at 1 (WADA Chairman arguing that "if we do a good job education our children, their parents, and those who help them become better athletes, they will, by and large, play by the rules. Education means teaching young athletes and their entourages that doping is bad for them, that it ruins their health and can lead to long-term fatal consequences. It also means teaching them that doping is wrong.").

<sup>78</sup> Major League Rules (July 2003), 3(a)(2) (prohibiting MLB teams from signing high school players in the United States, Puerto Rico, and Canada during the period of their eligibility to participate in high school athletics), 3(a)(3) (prohibiting MLB teams from signing players in colleges in the United States, Puerto Rico, and Canada except under specific conditions, and 3(g)(1) (prohibiting MLB teams from trying to influence a student to withdraw from high school or college).

<sup>79</sup> Danielle Sessa, *Baseball's All-Star Secret: Camps Offer Kids Low Pay, No School*, BLOOMBERG, Mar. 5, 2007, <http://www.bloomberg.com/apps/news?pid=20601079&sid=a3OpuVpKY5z8&refer=home> (According to Dominican Senator Charles Noel Mariotti, "The academies offer players very little help in finishing their education, drawing the ire of some government leaders". Mariotti says "Social responsibility has been practically nonexistent. There should be a stronger commitment for the things that are key to the country's development.

Part IV of this article will be to determine whether what MLB has put in place sufficiently responds to the need to protect vulnerable children who seek to play professional baseball with MLB teams from the dangers of PEDs. A continued failure to do so will be particularly damning of MLB's attitude and capabilities towards such an important human rights issue.

### 3. *The Business of Buscones*

The third factor to examine in comprehending the context of PED use in the Dominican Republic and Venezuela relates to the structure and dynamics of minor league baseball in these countries. In the United States, Puerto Rico, and Canada, baseball players in high school and college are subject to the annual MLB draft.<sup>80</sup> Four sets of rules protect these players in their relationships with MLB teams.

First, the rules of the MLB draft itself prevent MLB teams from competing for top talent because the prospects are not free agents who can sign with the team making the best offer. As noted above, MLB's rules also prohibit teams from trying to entice players in North America from leaving high school to play professional baseball.<sup>81</sup>

Second, for players in college in the United States, the rules of the NCAA regulate contacts and relationships between players, potential agents, and professional teams.<sup>82</sup> These rules attempt to keep the business of baseball and other professional sports at arms length from the amateur competition in which college teams partake. Third, the MLBPA considers players who are subject to the annual draft to be potential members of the players' association, so the MLBPA negotiates on the

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The vast majority of these youngsters don't have diplomas."'). Some MLB teams have started to re-think how they approach education of their Latin minor league players, but the MLB Commissioner's Office still has no standardized policy on the educational responsibilities of MLB teams. See Melissa Segura, *Social Responsibility: Indians, Mets Lead Charge for Education at Academies*, SPORTS ILLUSTRATED, May 14, 2007, available at [http://sportsillustrated.cnn.com/2007/writers/melissa\\_segura/05/14/onthemoney/index.html](http://sportsillustrated.cnn.com/2007/writers/melissa_segura/05/14/onthemoney/index.html).

<sup>80</sup> ARTURO J. MARCANO GUERVARA & DAVID P. FIDLER, *STEALING LIVES: THE GLOBALIZATION OF BASEBALL AND THE TRAGIC STORY OF ALEXIS QUIROZ* 25 (2002).

<sup>81</sup> See sources cited *supra* notes 78–79.

<sup>82</sup> MARCANO & FIDLER, *STEALING LIVES*, *supra* note 80, at 27–28.

draft through collective bargaining with MLB.<sup>83</sup> Fourth, U.S. and Canadian systems of domestic law apply to the contractual and labor relations between players, agents, and professional teams, which provides another layer of protection against exploitation and abuse.<sup>84</sup>

However, the governance of the relationships between Latin children, young men, and MLB teams is radically different. To begin, Latin prospects are free agents who are not subject to the annual draft. Accordingly, the protections for potential draftees in the United States, Canada, and Puerto Rico do not extend to Dominican and Venezuelan prospects. The layer of regulations applied by the NCAA for college players also does not apply to, or otherwise exist in, the Dominican Republic and Venezuela. Latin minor league players and prospects do not have a players' union to represent their interests vis-à-vis MLB and MLB teams. Finally, although the Dominican and Venezuelan governments have jurisdiction to regulate MLB activities in their territories; domestic laws and governmental efforts to improve the treatment of children in the MLB system have historically been ineffective.<sup>85</sup>

The free agency system in the Dominican Republic and Venezuela has spawned structural features that have no counterpart in the United States, Canada, and Puerto Rico. None of these features is more prominent and problematic than the role played by *buscones*. In brief, *buscones* are people who find, train, and sell baseball talent to MLB teams. *Buscones* are not agents in the way agents work for professional athletes in North America. After a *buscon's* prospect signs a minor league contract and the *buscon* gets his percentage of the signing bonus, the *buscon's* relationship with that player usually ends.<sup>86</sup> The *buscon's*

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<sup>83</sup> See Allan Simpson, *The Amateur Free Agent Draft*, in TOTAL BASEBALL: THE OFFICIAL ENCYCLOPEDIA OF MAJOR LEAGUE BASEBALL 608, 609 (John Thorn, Pete Palmer, & Michael Gershman eds., 4th ed. 1995).

<sup>84</sup> MARCANO & FIDLER, *STEALING LIVES*, *supra* note 80, at 28.

<sup>85</sup> MARCANO & FIDLER, *STEALING LIVES*, *supra* note 80, at 47,181 (noting passage in the Dominican Republic in 1985 of a law mandating baseball academies provide players with adequate food, lodging, and medical necessities and MLB's effort in 2001, in response to criticism and negative press coverage about conditions in the baseball academies, to inspect all training complexes in the Dominican Republic and Venezuela to establish minimum living and training standards).

<sup>86</sup> Some *buscones* seek a percentage of a signed player's salary in addition to a percentage of the signing bonus. See, e.g., Gordon Edes, *Youth Swerved on*

economic incentive is to get as many prospects signed to minor league contracts as possible. What happens to the players after they sign the contracts is of little or no concern to most *buscones*.

The *buscon* systems in the Dominican Republic and Venezuela are diverse enterprises, and the complexity of the situations in both countries should not be overlooked. Some *buscones* work exclusively with one team or a small number of teams. Other *buscones* peddle prospects to the highest MLB team bidder. Some *buscones* try hard to do right by the players with whom they work;<sup>87</sup> however, many *buscones* treat children and young men as commodities to be bought and sold for the highest profit.<sup>88</sup> As described by Barry Svrluga of the *Washington Post*, *buscones* are:

[P]art coaches, part providers, part hustlers, part financial advisers—identifying and cultivating talent, preparing players for tryouts, then selling them in the July following their 16th birthdays to the highest-bidding major league teams. Depending on the arrangement, the *buscones* end up with anywhere from 10 to 30 percent of the signing bonuses—except in the countless instances in which they rip off an illiterate and unsuspecting family.<sup>89</sup>

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*Island: Ortiz Deeply Troubled by Dominican Report*, BOSTON GLOBE, May 4, 2004, available at [http://www.boston.com/sports/baseball/redsox/articles/2004/05/04/youth\\_is\\_swerved\\_on\\_island/?page=1](http://www.boston.com/sports/baseball/redsox/articles/2004/05/04/youth_is_swerved_on_island/?page=1) (reporting on the case of Raul Mondesi, who was sued in Dominican courts by his *buscon* for payment of a percentage of Mondesi's major league salary).

<sup>87</sup> Steve Fainaru, *The Business of Building Ballplayers: In Dominican Republic, Scouts Find the Talent and Take the Money*, WASH. POST, June 17, 2001, at A01 (noting that, “[i]n many cases, buscones . . . are above-board coaches who spend considerable time and resources to support athletes”).

<sup>88</sup> *Id.* (noting that “[t]he increased demand for foreign talent has created a cutthroat industry of street-level entrepreneurs dedicated to the locating and grooming potential major leaguers” and that this “growth has been accompanied by reports of over-charging, extortion and outright theft”).

<sup>89</sup> Barry Svrluga, *Tapping into an Economy of Scale—Dominican Prospects Such as Nationals’ Esmilyn Gonzalez are Products of a System Where Players are Auctioned Off by Sometimes Unethical Agents*, WASH. POST, Dec. 20, 2006, at E01.

MLB teams benefit from the *buscones*' efforts. Ronaldo Peralta, who runs the MLB office in the Dominican Republic, observed that *buscones* "are a very important part of the industry. They help fill a gap, because there's not a lot of organized baseball in the Dominican Republic. They provide a service."<sup>90</sup> Even though it benefits from the *buscones*, MLB considers the *buscones*' business beyond its control and responsibility. Peralta argued, "[o]fficially, we do not have jurisdiction over [*buscones*]. There is only so much we can do."<sup>91</sup> MLB has also said it is "helpless to do anything directly" about the problems associated with the *buscones*.<sup>92</sup>

Analyses of the PED problem in the Dominican Republic and Venezuela often observe that *buscones* are a serious part of the problem. For example, Porfirio Veras, the Dominican Republic's baseball commissioner, lays significant blame for the PED problem in his country on *buscones*, who "are the ones who supply young players with medical substances, like steroids...[*buscones*] use every means to make the kids stronger and more interesting when they show them to the scouts. I know of cases of trainers who injected kids with steroids only days before trying out for the major league scouts."<sup>93</sup> Boston Red Sox player David Ortiz, who is from the Dominican Republic, responded to reports of PED use by Dominican prospects by saying, "They're putting people in danger for money. That's not right. It's not fair what they're doing with those kids. I blame the *buscones*. They're the ones who know that the guys will get paid if they show a good body, show some talent, and then they'll make money."<sup>94</sup> Chicago White Sox manager Ozzie Guillen also blames the "unregulated network of hangers-on, trainers and scouts" because "the main problem is the people who surround these kids, who lie to these kids, who give them supplements they're not supposed to, who say they're going to be better, richer . . . I think those are the people

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Associated Press, *Steroid Rules Tripping Up Latin Players*, DESERET NEWS (SALT LAKE CITY), May 5, 2005, at D5. *See also* Svrluga, *supra* note 88 (noting that "[t]he fight for players is fierce and, sometimes, shady. *Buscones* have been known to juice players on steroids in the weeks before a tryout, adding miles per hour to their fastballs or distance to their home runs.").

<sup>94</sup> Edes, *supra* note 86.

we have to control.”<sup>95</sup> *Buscones* who engage in these practices are exploiting children for profit while exposing them to substances that can harm their health or even kill them. Paulo David has argued that “[t]he situation of the child or adolescent athlete coerced into doping by adults is in some regards comparable to child prostitution.”<sup>96</sup>

If the Dominican baseball commissioner understands the role of *buscones* in the PED problem in his country, MLB and MLB teams cannot pretend that the *buscon* problem is beyond the scope of MLB’s responsibilities in its Latin American operations. In reflecting on the *buscon* system in the Dominican Republic, Steve Fainaru of the *Washington Post* noted that MLB “decries the abuses but effectively created the system that fosters them.”<sup>97</sup> The *buscones* are part of the structure and dynamics of professional baseball in the Dominican Republic and Venezuela, and the role of *buscones* must be tackled in dealing with the PED problem in these countries. In Part IV, we scrutinize whether the drug prevention and treatment program MLB has implemented in Latin America sufficiently addresses the role *buscones* play in influencing children and young men who seek to play professional baseball with MLB teams.

#### 4. Regulation of Access to Performance-Enhancing Substances

A fourth factor influencing the context of PED use in Latin American countries involves differences between how governments regulate access to performance-enhancing substances. A common theme in analyses about the PED problem is the wide-spread availability of performance-enhancing substances in the Dominican Republic and Venezuela. In these countries, access to PEDs is gained both legally and illicitly. Some of the substances on MLB’s prohibited list may legally be purchased and used in the Dominican Republic and Venezuela, which can produce confusion among young Latin players.<sup>98</sup> The scope of the

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<sup>95</sup> Gordon, *supra* note 60.

<sup>96</sup> DAVID, *supra* note 8, at 116.

<sup>97</sup> Fainaru, *The Business of Building Ballplayers*, *supra* note 87.

<sup>98</sup> Baker, *Growing Pains*, *supra* note 43 (noting that most of the drugs prohibited by MLB’s drug-testing and prevention program are legal in Venezuela and are commonly used); BRYANT, *supra* note 2, at 200 (stating that “anabolic steroids were largely legal in . . . the Dominican Republic”); Gordon, *supra* note 60 (“Because pharmaceutical regulations are looser in Venezuela than in the U.S., players who pay little attention to labels may not know what sort of banned

PED problem also suggests that a fair amount of illegal activity is taking place, both in terms of obtaining and of using performance-enhancing substances.

Part of the problem with illicit PED access and use stems from the difficulties the Dominican and Venezuelan governments have with adequately regulating their respective retail pharmaceutical sectors. Public health experts have noted greater unregulated access to pharmaceutical products in many developing countries that generally lack effective regulatory systems and, more importantly, effective enforcement systems. Thus, people can obtain a wide-range of pharmaceutical products, from antibiotics to steroids, over-the-counter with no prescription or guidance as to the appropriate use of the products.<sup>99</sup> These weaker regulatory systems are also vulnerable to ineffective or even harmful counterfeit drugs, which vendors knowingly and unintentionally sell as genuine articles.<sup>100</sup> According to the WHO, “[t]he Dominican Republic’s Public Health Department reported [in 2005] that 50% of the country’s pharmacies operated illegally and 10% of the medicines that arrived in the country were fake. For example, some of the medicines found had expired over 10 years before.”<sup>101</sup>

MLB is not responsible for the pharmaceutical regulatory problems that the governments of the Dominican Republic and Venezuela face in their respective pharmaceutical sectors. Nevertheless, these regulatory issues are an important factor in understanding the environment in which MLB is trying to address PED use in its Latin minor league operations. Therefore, MLB needs to consider these issues and ensure that its overall strategy for reducing PED use is sensitive to the different

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substances are lurking in legal dietary supplements and over-the-counter medicines.”).

<sup>99</sup> Farrey, *supra* note 45 (observing that, in the Dominican Republic “steroids can be obtained from loosely regulated pharmacies”).

<sup>100</sup> World Health Organization International Medicinal Products Anti-Counterfeiting Taskforce, *Counterfeit Medicines: An Update on Estimates*, Nov. 15, 2006, <http://www.who.int/medicines/services/counterfeit/impact/TheNewEstimatesCounterfeit.pdf> (stating that “many developing countries of Africa, parts of Asia, and parts of Latin America have areas where more that 30% of the medicines on sale can be counterfeit.”).

<sup>101</sup> WHO, *Counterfeit Medicines*, Fact Sheet No. 275, Nov. 14, 2006, <http://www.who.int/mediacentre/factsheets/fs275/en/index.html>.

regulatory approaches that the Dominican Republic and Venezuela use. Part IV examines whether MLB's approach is in fact sensitive to these regulatory issues.

***C. Lost in Transition: Issues Emerging from the Application of the Latin Drug Testing Program***

The four factors described above combine to create a very difficult and complex environment for untangling the strands of the PED problem in Latin American countries. In Latin America, the PED problem is more complicated than many other challenges that MLB faces and over which it has more direct control, such as translating minor league contracts into Spanish and providing safe and sanitary conditions in baseball academies.<sup>102</sup> These complexities became apparent as MLB made the transition from no drug testing in Latin America to a drug-testing program that is based largely on the Minor League DPT Program applied in the United States and Canada. In Latin America, this transition to testing for drug use was dramatic and occurred in a compressed period of time because of the intense pressure and criticism that MLB faced for "double standards" in this area.

Newspaper reporting on the impact of MLB's transition to drug testing in Latin America reveals a host of emerging issues that MLB and other stakeholders must address as the transition continues. A frequent complaint about MLB's implementation of its Latin American drug-testing effort is a lack of knowledge on the part of players, scouts, and *buscones* regarding the rules MLB applies.<sup>103</sup> Concerns have also arisen about the fairness of the drug-testing program, particularly in light of the socio-economic differences between the United States and Canada, and Latin American countries.<sup>104</sup>

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<sup>102</sup> On MLB's past practices on these issues, see MARCANO & FIDLER, *STEALING LIVES*, *supra* note 80, at 41–44 (on contracts) and 44–48 (on baseball academies).

<sup>103</sup> See generally Fish, *Steroid Problem Reaches Critical Mass in the D.R.*, *supra* note 49 (noting lack of information as a problem for Latin minor league players); Gordon, *supra* note 60, (reporting on lack of information among Venezuelan minor league players); Baker, *Growing Pains*, *supra* note 43 (reporting the same).

<sup>104</sup> Baker, *Growing Pains*, *supra* note 43.



One of the fairness concerns involves MLB's application of sanctions against players who test positive for PEDs. MLB claims that it cannot sanction a player in the Dominican Republic who tests positive under the drug-testing program because local Dominican labor law prevents it. However, MLB sanctions Venezuelan players who test positive for the same PEDs. This different treatment raises the complex concerns mentioned earlier. Is MLB to blame for Venezuelans being punished but not Dominicans, if Dominican law does not permit sanctions for testing positive for PEDs? Is Dominican labor law really the barrier to sanctions that MLB asserts, or is something else going on that skews MLB's application of the drug-testing program in the Dominican Republic?

The remainder of this article critically analyzes MLB's drug-testing efforts in the Dominican Republic and Venezuela in order to shed light on these and other issues emerging from the transition from no drug testing to the Latin version of the Minor League DPT Program. Problems with such a dramatic change were sure to develop, but the manner in which MLB made this transition has unnecessarily exacerbated the problems. Fundamental notions of fairness towards, and respect for, Latin children and young men have been lost in this transition.

#### **IV. CRITICAL ANALYSIS OF THE LATIN VERSION OF THE MINOR LEAGUE DRUG PREVENTION AND TREATMENT PROGRAM**

Initially, MLB argued that the Minor League DPT Program would be too complex and costly to apply in the Dominican Republic and Venezuela.<sup>105</sup> However, when MLB could no longer maintain its position that it has no responsibility for drug testing in Latin America, MLB fell back on the Minor League DPT template implemented in 2001 for its minor league operations in the United States and Canada. In this section, we first describe the Minor League DPT Program to provide an overview of the rules and institutions it creates. We then consider how MLB adapted and implemented the Minor League DPT Program in the Dominican Republic and Venezuela.<sup>106</sup>

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<sup>105</sup> Fainaru, *Injecting Hope—and Risk*, *supra* note 33.

<sup>106</sup> *See infra* Part IV.B.

### ***A. The Basic Framework: The Minor League DPT Program***

MLB established the Minor League DPT Program “to prevent and end the use of Prohibited Substances...by non 40-man roster Minor League players” because “the use of Prohibited Substances is potentially hazardous to a Player’s health and may give a Player an unfair competitive advantage on the playing field.”<sup>107</sup> The Minor League DPT Program bans the use of “Prohibited Substances” by minor league players, establishes a regime of random testing, creates sanctions for players who test positive for Prohibited Substances, contains an appeal process for players to challenge positive tests results, and constructs institutional mechanisms to oversee and implement the Program. Below, we describe each of these major components of the Minor League DPT Program.

#### *1. Ban on Prohibited Substances*

The key substantive rules in the Minor League DPT Program are those banning the use, possession, selling, or distribution of any Prohibited Substance. The Program defines “Prohibited Substance” as either a “Drug of Abuse” or a “Performance Enhancing Substance.”<sup>108</sup> Drugs of Abuse are any drug or substance that appears in Schedules I and II of the U.S. Code of Federal Regulations Schedule of Controlled Substances,<sup>109</sup> except those substances the Program defines as a Performance Enhancing Substance.<sup>110</sup> In addition to PEDs that are specifically identified in the program, MLB can designate new Performance Enhancing Substances “at any time if it determines that the ingestion of such substance would result in a player having an unfair competitive advantage on the playing field.”<sup>111</sup> Table 3 lists the Program’s non-exclusive list of Drugs of Abuse and Performance Enhancing Substances.

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<sup>107</sup> Minor League DPT Program, *supra* note 31, at 1.

<sup>108</sup> *Id.* at 2.

<sup>109</sup> 21 C.F.R. Part § 1308 (2007).

<sup>110</sup> Minor League DPT Program, *supra* note 31, at 2.

<sup>111</sup> *Id.* at 2–3. Interestingly, this provision does not state that the MLB can designate a new Performance Enhancing Substance if it threatens the health of the player, one of the key objectives of the policy.

**Table 3. Minor League DPT Program Non-Exclusive List of Drugs of Abuse and Performance Enhancing Substances<sup>112</sup>**

<i>Drugs of Abuse</i>	<i>Performance Enhancing Substances</i>
<ul style="list-style-type: none"> <li>• Cocaine</li> <li>• LSD</li> <li>• Marijuana</li> <li>• Opiates (heroin, codeine, morphine)</li> <li>• Phencyclidine (PCP)</li> <li>• MDMA (Ecstasy or X)</li> <li>• GHB</li> </ul>	<ul style="list-style-type: none"> <li>• Anabolic androgenic steroids</li> <li>• Prohormone nutritional supplements</li> <li>• Amphetamine and its analogs</li> <li>• Ephedrine and related substances</li> <li>• Human Growth Hormone (HGH)</li> <li>• Insulin-like growth factors (e.g., IGF-1), related releasing factors and substances with similar biological effects</li> <li>• Erythropoietin (EPO)</li> <li>• Diuretics and masking agents</li> <li>• Miscellaneous anabolic agents (e.g., clenbuterol, zeranol, zilpaterol)</li> </ul>

## 2. Testing

The Minor League DPT Program establishes two types of testing for minor league players. First, the Program annually subjects players to as many as four unannounced tests for Drugs of Abuse and Performance Enhancing Substances.<sup>113</sup> The Program may subject any player who tests positive for a Prohibited Substance to additional testing beyond the standard four annual tests.<sup>114</sup> Second, if any member of the Minor League Health Policy Advisory Committee (MLHPAC), the committee created to administer and oversee the Program (see more below), has reasonable cause to believe that a player has engaged in the use, possession, or distribution of a Prohibited Substance, the player in question can be tested immediately.<sup>115</sup> The Minor League DPT Program spells out the procedures for collection of test samples and contains the testing protocols for determining the presence of a Prohibited Substance.<sup>116</sup> Failure or refusal to take a required test or any attempt to substitute,

<sup>112</sup> *Id.* at 2–5.

<sup>113</sup> *Id.* at 5.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 7.

<sup>116</sup> *Id.* at Addendum A.

dilute, mask, or adulterate a test specimen or in any other way alter a test is considered a positive test under the Program.<sup>117</sup>

### 3. *Consequences of Positive Tests for a Prohibited Substance*

If a player tests positive for any Prohibited Substance, the MLHPAC informs the player's team of the positive result, the collection date, and the substance for which the player tested positive.<sup>118</sup> The team is responsible for notifying the player of the positive test.<sup>119</sup> The Minor League DPT Program immediately places a player who tests positive on what is called the "Administrative Track," and the player is subject to discipline. Table 4 summarizes the disciplines the Program imposes on players in specific circumstances. All suspensions are without pay.<sup>120</sup> All suspensions are entered into the "Baseball Information System" as a suspension for a specified time period for violating the Minor League DPT Program, which information may be made publicly available.<sup>121</sup> Any players on the Administrative Track for using a Drug of Abuse will be evaluated for placement in a "Treatment Program" designed to prevent them from using Drugs of Abuse in the future.<sup>122</sup>

If a player voluntarily admits to using a Drug of Abuse before being tested under the Program, that player may be placed on the "Clinical Track," which is not available for players who have used a Performance Enhancing Substance.<sup>123</sup> A player on the Clinical Track is not subject to discipline unless the player fails to comply with the Treatment Program.<sup>124</sup> Any and all information relating to a player's involvement with the Minor League DPT Program's Clinical Track shall be disclosed only to the MLHPAC and the player's team, which must keep the information confidential.<sup>125</sup>

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<sup>117</sup> *Id.* at 6.

<sup>118</sup> *Id.* at 6.

<sup>119</sup> *Id.* at 2. The process of notification is different for Drugs of Abuse and Performance Enhancing Substances. *See infra* notes 172–175 and accompanying text.

<sup>120</sup> *Id.* at 11.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 8–9.

<sup>123</sup> *Id.* at 7.

<sup>124</sup> *Id.* at 7–8.

<sup>125</sup> *Id.* at 7.

**Table 4. Disciplines for Minor League Players Who Test Positive for Use of Prohibited Substances<sup>126</sup>**

<i>Offenses</i>	<i>Failure to Comply with Treatment Program</i>	<i>Positive Test for Drug of Abuse</i>	<i>Positive Test for Performance Enhancing Substance</i>
First	50-game suspension	Enters the Administrative Track and placed in Treatment Program	50-game suspension
Second	100-game suspension	50-game suspension	100-game suspension
Third	Permanent suspension	100-game suspension	Permanent suspension
Fourth	NA	Permanent suspension	NA
Possibility for Reinstatement after Permanent Suspension?	Yes, if MLHPAC concludes that a player successfully completed a Treatment Program and is no longer at risk to test positive in the future	Yes, if MLHPAC concludes that a player successfully completed a Treatment Program and is no longer at risk to test positive in the future	No

Players who are convicted of, or plead guilty to, use of a Prohibited Substance, or who are involved in the sale or distribution of a Prohibited Substance are subject to punishment under the Minor League DPT Program (see Table 5).<sup>127</sup> In addition, if an employee of a MLB team provides a player with a Prohibited Substance and the player tests positive because he used it, then both the team and the employee are subject to a minimum fine of \$10,000.<sup>128</sup>

<sup>126</sup> *Id.* at 10–11.

<sup>127</sup> *Id.* at 11.

<sup>128</sup> *Id.* at 12.

**Table 5. Disciplines for Conviction for Use or Involvement in the Sale of Prohibited Substances<sup>129</sup>**

<i>Offenses</i>	<i>Conviction for Use of Prohibited Substance</i>	<i>Involvement in Sale or Distribution of Prohibited Substance</i>
First	Minimum 50-game suspension	One-year game suspension And \$10,000 fine
Second	At least a 100-game suspension	Permanent suspension
Third	Permanent suspension	NA

The Minor League DPT Program also permits the MLB Commissioner to discipline a player for violating the Program in ways not specifically stated in the Program.<sup>130</sup> Any MLB team that conceals or fails to disclose to the MLB Commissioner's Office any information concerning a player using, possessing, distributing, or selling a Prohibited Substance shall be fined up to \$2,000,000.<sup>131</sup> This disclosure duty includes any positive test results produced through a team-initiated and administered drug-testing program.<sup>132</sup>

#### *4. The Appeal Process*

The Minor League DPT Program allows a player to appeal a positive test result in three situations:

If the player (1) has sufficient reason to believe that the chain-of-custody of his sample was not properly administered pursuant to the Program's requirements for collecting test specimens, which resulted in an erroneous positive test result; (2) has sufficient reason to believe that the laboratory did not properly administer the testing of the specimen, which resulted in an erroneous positive test result; or (3) qualifies for a "Therapeutic Use Exemption," which excuses, subject to certain conditions, a positive test result caused by the player's use of a needed, prescribed amphetamine.<sup>133</sup> Table 6 provides the criteria for the Therapeutic Use Exemption in the Minor League DPT Program and WADA's international standard for therapeutic use exemptions.

<sup>129</sup> *Id.* at 11.

<sup>130</sup> *Id.* at 12.

<sup>131</sup> *Id.* at 15.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 12.

**Table 6. Criteria for the Therapeutic Use Exemption (TUE)**

<b>Minor League DPT Program<sup>134</sup></b>	<b>WADA International Standard on TUE<sup>135</sup></b>
The team's physician was aware of the player's use of the amphetamine prior to the player being tested.	The Athlete should submit an application for a TUE no less than 21 days before participating in an Event.
The player provides proper documentation of the prescription that was written either by or in consultation with the team physician.	
The player has received a proper diagnostic evaluation completed by a board-certified neurologist, board-certified psychiatrist, or a licensed psychologist familiar with the diagnosis and treatment of ADD/ADHD	
The player would have serious adverse consequences if he stopped taking the medication.	The Athlete would experience a significant impairment to health if the Prohibited Substance or Prohibited Method were to be withheld in the course of treating an acute or chronic medical condition.
There are no reasonable alternatives to the medication.	There is no reasonable therapeutic alternative to the use of the otherwise Prohibited Substance or Prohibited Method.
The medication does not enhance the player's performance more than if that player returned to normal health.	The therapeutic use of the Prohibited Substance or Prohibited Method would produce no additional enhancement of performance other than that which might be anticipated by a return to a state of normal health following the treatment of a legitimate medical condition.

<sup>134</sup> *Id.* at 12–13.

<sup>135</sup> WADA, *World Anti-Doping Code: International Standard for Therapeutic Use Exemptions*, 9 Jan. 2005, [http://www.wada-ama.org/rtecontent/document/international\\_standard.pdf](http://www.wada-ama.org/rtecontent/document/international_standard.pdf).

For an appeal to be considered, the player must submit a written request stating the basis of the appeal within 48 hours of being informed of the positive test result.<sup>136</sup> The player must send the written request by overnight mail or fax to the MLB Commissioner's Office in New York.<sup>137</sup> Any request for an appeal that (1) does not provide a sufficient basis for an appeal, or (2) is received outside of the 48-hour appeal window is automatically rejected.<sup>138</sup> The MLHPAC considers all appeals requested by players under the Program within 72 hours of their submission.<sup>139</sup> The MLHPAC has three weeks after the appeal is submitted to send the player a written decision.<sup>140</sup> If a player requests that his "B" sample be tested to confirm that the laboratory erroneously tested his "A" sample, the player must pay for the second test. However, if the "B" sample does not confirm the "A" sample, the player will be reimbursed.<sup>141</sup>

##### *5. The Institutional Framework*

As noted above, the MLHPAC has the responsibility of administering and overseeing the Minor League DPT Program. The MLHPAC has three members: the medical representative of the MLB Commissioner's Office and two other representatives, one of which must be a licensed attorney.<sup>142</sup> MLB's Executive Vice President of Labor Relations and Human Resources appoints or removes the MLHPAC's members.<sup>143</sup> MLHPAC's current members are Robert Manfred (MLB Vice President for Labor Relations and Human Resources), Jennifer Gefsky (MLB Deputy General Counsel), and Larry Westreich, M.D. (Consultant on Drug Issues to the MLB Commissioner's Office).<sup>144</sup> Table 7 contains the MLHPAC's duties and responsibilities under the Program.

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<sup>136</sup> Minor League DPT Program, *supra* note 31, at 14.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 14.

<sup>140</sup> *Id.* at 15.

<sup>141</sup> *Id.* at 14.

<sup>142</sup> *Id.* at 1.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*



**Table 7. MLHPAC Duties and Responsibilities under the Minor League DPT Program<sup>145</sup>**

1. Establish advisory groups, as necessary, to help the effective administration of the Program	7. Create, or participate in creating, individualized treatment programs for players in the Clinical Track
2. Prepare and undertake educational presentations supporting the Program's objectives	8. Monitor and supervise player's treatment program progress
3. Administer the Program's testing requirements	9. Establish, monitor, maintain, and supervise the collection procedures and testing protocols of the Program
4. Establish uniform guidelines and requirements related to the Program for the teams' Employee Assistance Programs (EAPs) and monitor the performance of all such EAPs	10. Review periodically the Program's operation and make recommendations to the MLB Commissioner's Office for appropriate amendments
5. Conduct investigations	11. Take any and all other reasonable actions necessary to ensure the proper administration of the Program
6. Determine a player's placement on either the Clinical or Administrative Track	

Teams must create Employee Assistance Programs (EAPs), which have various functions. For example, EAPs are responsible for informing players when they test positive for a Drug of Abuse,<sup>146</sup> and EAPs are involved in the flow of information among players, teams, and the MLHPAC regarding the Program and its operation. The EAPs are also involved in evaluating what kind of treatment program a player who has used a Drug of Abuse should undergo and in monitoring the player's progress in the treatment program selected.<sup>147</sup>

<sup>145</sup> *Id.* at 1–2.

<sup>146</sup> *Id.* at 6.

<sup>147</sup> *Id.* at 8.

### 6. *Concerns with the Minor League DPT Program*

Although this article addresses problems with the drug prevention and treatment program that MLB applies in Latin America, some sense of the concerns that exist about the Minor League DPT Program proves useful. These concerns often arise from comparisons of the Minor League DPT Program against the Major League Joint DPT Program (2006). One significant difference between these two Programs is that the Major League Joint DPT Program (2006) is the product of collective bargaining negotiations between MLB and the MLBPA. The MLBPA's involvement produced numerous substantive and procedural provisions in the Major League Joint DPT Program (2006) that are more protective of players than the rules in the Minor League DPT Program. Minor league players in the United States and Canada are not represented in their dealings with MLB by any union or collective bargaining process, so MLB unilaterally created and imposed the Minor League DPT Program on minor league players without any involvement or input from them.<sup>148</sup>

Lisa Masteralexis, the Head of the Department of Sports Management at the Isenberg School of Management of the University of Massachusetts (Amherst) and who acts as an agent for U.S. minor league players, described her experience with the Minor League DPT Program in this way:

In the minor leagues, things are not that clear-cut because players lack the protection of labor laws afforded their unionized major league counterparts. My own experience with the minor league policy was that I was unable to gather information, I felt stonewalled by the process set forth by the Commissioner's office, and I found that my client was not given a fair and impartial hearing to challenge the test results. When players do not have a union, and with it the ability to bargain over drug

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<sup>148</sup> Larry Westreich, Remarks at the Reunion Anual de Scouts y Representantes (May 12, 2006), *Política de Drogas para la Liga Profesional de Béisbol 2006*, at 2 (stressing that the Minor League DPT Program is a policy not negotiated with any players' union) (on file with authors).

testing, player concerns are left out when creating policies and procedures.<sup>149</sup>

A few examples illustrate differences between the major league and minor league programs that reflect the impact of collective bargaining. Despite the risk to the game of baseball and the health of the players being the same, the Major League Joint DPT Program (2006) and the Minor League DPT Program do not have identical lists of Prohibited Substances. Prior to the changes to the Major League Joint DPT Program (2002) agreed upon between MLB and the MLBPA in 2005, the major league program covered a narrower range of Drugs of Abuse than the minor league program.<sup>150</sup> The Major League Joint DPT Program (2006) broadened the scope of the definition of Drugs of Abuse,<sup>151</sup> but the latest versions of the major league and minor league programs still are not identical in terms of the provisions on Drugs of Abuse.

For example, the Minor League DPT Program includes as a Drug of Abuse any drug or substance not listed on Schedule I or II but that is similar in nature and cannot be lawfully (1) taken without a valid prescription and has potential for abuse, or (2) obtained or used in the United States.<sup>152</sup> The Major League Joint DPT Program (2006) does not have this provision as part of its definition of Drug of Abuse.<sup>153</sup> Similarly, the Minor League DPT Program states that its list of seven specific

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<sup>149</sup> Lisa P. Masteralexis, *Drug Testing Provisions: An Examination of Disparities in Rules and Collective Bargaining Agreement Provisions*, 40 NEW ENG. L. REV. 775, 779 (2006).

<sup>150</sup> The Major League Joint DPT Program (2002) defined Drugs of Abuse to be any and all drugs or substances included on Schedule II of the U.S. Code of Federal Regulations, as amended, and all Schedule I drugs listed in Addendum B to the Program. Major League Joint DPT Program (2002), *supra* note 25, at 3. The Minor League DPT Program defines Drugs of Abuse as any and all drugs or substances in Schedules I and II of the U.S. Code of Federal Regulations' Schedule of Controlled Substances, as amended, excluding those substances included as a Performance Enhancing Substance. Minor League DPT Program, *supra* note 31, at 2.

<sup>151</sup> Major League Joint DPT Program (2006), *supra* note 27, at 3–4.

<sup>152</sup> Minor League DPT Program, *supra* note 31, at 2.

<sup>153</sup> Major League Joint DPT Program (2006), *supra* note 27, at 3.

Drugs of Abuse is a non-exhaustive list,<sup>154</sup> but the Major League Joint DPT Program (2006) does not make this statement.

More broadly, the Major League Joint DPT Program (2006) and the Minor League DPT Program use different categories to divide up Prohibited Substances. The Minor League DPT Program separates Prohibited Substances into Drugs of Abuse and Performance Enhancing Substances,<sup>155</sup> while the Major League Joint DPT Program (2006) divides Prohibited Substances into Drugs of Abuse, Performance Enhancing Substances, and Stimulants.<sup>156</sup> Under the Minor League DPT Program, Performance Enhancing Substances are defined to include nine categories of substances, including anabolic androgenic steroids, amphetamine and its analogs, erythropoietin (EPO) and related compounds, and diuretics and masking agents.<sup>157</sup> The Major League Joint DPT Program (2006) defines Performance Enhancing Substances only as anabolic androgenic steroids covered by Schedule III of the Code of Federal Regulations' Schedule of Controlled Substances.<sup>158</sup>

The major and minor league programs differ at more detailed levels as well. The non-exhaustive lists of anabolic androgenic steroids in both programs are not identical.<sup>159</sup> The Minor League DPT Program applies to prohormone nutritional supplements, insulin-like growth factors (e.g., IGF-1), EPO, and diuretics and masking agents, none of which is expressly covered by the Major League Joint DPT Program (2006). In terms of EPO, the Major League Joint DPT Program (2006) requires assessment of samples collected in 2005 for the presence of EPO. The

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<sup>154</sup> Minor League DPT Program, *supra* note 31, at 2.

<sup>155</sup> *Id.* at 2–5.

<sup>156</sup> Major League Joint DPT Program (2006), *supra* note 27, at 3–5.

<sup>157</sup> Minor League DPT Program, *supra* note 31, at 3–5.

<sup>158</sup> Major League Joint DPT Program (2006), *supra* note 27, at 4.

<sup>159</sup> Minor League DPT Program, *supra* note 31, at 3–4 (listing five anabolic androgenic steroids (boldione, danazol, oxabolone, quinbolone, and 18a-homo-17-hydroxyestr-4-en-3-one), which are not listed in the Major League Joint DPT Program (2006); Major League Joint DPT Program (2006), *supra* note 27, at 4–5 (listing four items as anabolic androgenic steroids (clenbuterol, desoxymethyltestosterone, any salt, ester or ether of any listed item, and human growth hormone) not listed in the Minor League DPT Program's non-exhaustive list of anabolic androgenic steroids). The Minor League DPT Program lists clenbuterol and HGH as Performance Enhancing Substances but not as anabolic androgenic steroids. Minor League DPT Program, *supra* note 31, at 4–5.

results of this EPO assessment shall be reported to MLB and the MLBPA, which “shall then determine the appropriate treatment of EPO.”<sup>160</sup> With respect to diuretics or masking agents, the Major League Joint DPT Program (2006) states that the presence of such substances in a major league player’s sample “shall result in the Player being re-tested” and “shall be treated as a positive test result if the Independent Program Administrator determines that the Player intended to avoid detection of his use of a Prohibited Substance.”<sup>161</sup>

Finally, Prohibited Substances may only be added to the Major League Joint DPT Program (2006) by unanimous decision of the Health Policy Advisory Committee (HPAC), which includes representatives from both MLB and the MLBPA.<sup>162</sup> Under the Minor League DPT Program, the MLHPAC can add Performance Enhancing Substances unilaterally without input from minor league players.<sup>163</sup>

In terms of testing, the Major League Joint DPT Program (2006) subjects major league players to in-season, random, and reasonable-cause testing for Performance Enhancing Substances and Stimulants.<sup>164</sup> Off-season tests in the major leagues test only for the presence of Performance Enhancing Substances but not for Stimulants or Drugs of Abuse.<sup>165</sup> Under the Major League Joint DPT Program (2006), major league players cannot be subjected to testing for Drugs of Abuse, except when the HPAC agrees by majority vote that reasonable cause exists to test a player for use of such substances.<sup>166</sup> The Minor League DPT Program subjects minor league players to mandatory in-season, off-season, and reasonable-cause testing for all Prohibited Substances.<sup>167</sup>

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<sup>160</sup> Major League Joint DPT Program (2006), *supra* note 27, at 6.

<sup>161</sup> *Id.* at 8.

<sup>162</sup> *Id.* at 6. The only exception to this rule involves the addition by the U.S. federal government of a substance to Schedules I, II, or III of the Code of Federal Regulations’ Schedules of Controlled Substances. *Id.*

<sup>163</sup> Minor League DPT Program, *supra* note 31, at 2–3. *See also* Masteralexis, *supra* note 149, at 788 (“The list at the minor league level is mandated from above, whereas, at the major league level, the list is negotiated between union and management.”).

<sup>164</sup> Major League Joint DPT Program (2006), *supra* note 27, at 6–7.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 7.

<sup>167</sup> Minor League DPT Program, *supra* note 31, at 5, 7.

Institutionally, the Major League Joint DPT Program (2006) empowers an Independent Program Administrator not affiliated with MLB, any MLB team, or the MLBPA to be responsible for the scheduling of tests. This Independent Program Administrator supervises the collection process and the transportation of samples to a WADA-certified laboratory, oversees the laboratory, and reports positive test results.<sup>168</sup> The Minor League DPT Program does not have a similar independent entity that handles collection, testing, and reporting responsibilities.

The differences in procedural rules between the Major League Joint DPT Program and the Minor League DPT Program also illustrate how the Major League Joint DPT Program (2006) is more protective of players' interests. The Major League Joint DPT Program (2006) recognizes that a player may have good cause for failing to take a mandatory test for Performance Enhancing Substances or Stimulants or reasonable-cause testing for a Prohibited Substance.<sup>169</sup> The Minor League DPT Program deems any failure to take any test as a positive result, potentially exposing the player to sanctions. It contains no flexibility for a minor league player's failure to take a test for good cause.<sup>170</sup>

The procedures for notifying major and minor league players of positive tests also differ. Under the Major League Joint DPT Program (2006), the Independent Program Administrator immediately notifies HPAC of a positive test result. HPAC must immediately notify both the player and his team of the positive result.<sup>171</sup> The Minor League DPT Program has different, more complicated notification procedures for positive test results involving Drugs of Abuse and Performance Enhancing Substances. For Drugs of Abuse, the MLHPAC must immediately notify the team's General Manager, Farm Director, and EAP of a

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<sup>168</sup> Major League Joint DPT Program (2006), *supra* note 27, at 2–3; *MLB, MLBPA Announce New Drug Agreement*, *supra* note 26.

<sup>169</sup> Major League Joint DPT Program (2006), *supra* note 27, at 8; *see also* Masteralexis, *supra* note 149, at 788 (“Major league players can have a “good cause” excuse for missing a test if they are not available at the time of the testing and the committee deems it acceptable.”).

<sup>170</sup> Minor League DPT Program, *supra* note 31, at 6.

<sup>171</sup> Major League Joint DPT Program (2006), *supra* note 27, at 9.

player's positive result.<sup>172</sup> The EAP then must inform the player.<sup>173</sup> After a positive test for a Performance Enhancing Substance, MLHPAC must immediately inform the team's General Manager and Farm Director of the positive result and the discipline being imposed, either of whom may inform, at his discretion, inform the EAP.<sup>174</sup> The General Manager or the Farm Director must inform the player of the positive test result and the discipline being imposed.<sup>175</sup>

The standard for assessing whether a player violates the program differs as between the Major League Joint DPT Program (2006) and the Minor League DPT Program. Under the Major League Joint DPT Program (2006), a player does not violate the rules "if the presence of a Prohibited Substance in his urine was not due to his fault or negligence."<sup>176</sup> The MLB Commissioner's Office has the initial burden of establishing that a player's sample tested positive pursuant to a valid test,<sup>177</sup> and then the player "has the burden of establishing that his test result was not due to his fault or negligence."<sup>178</sup> The Minor League DPT Program operates on the basis of strict liability. If a minor league player's sample contains a Prohibited Substance, the player automatically violates the rules and is subject to sanctions regardless of the player's intent, fault, or negligence, subject to the limited grounds of appeal (discussed earlier and again below).<sup>179</sup>

The sanctions for violating each program also differ between the major and minor leagues.<sup>180</sup> The Minor League DPT Program's sanctions

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<sup>172</sup> Minor League DPT Program, *supra* note 31, at 6.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 6–7.

<sup>176</sup> Major League Joint DPT Program (2006), *supra* note 27, at 19.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 20.

<sup>179</sup> Minor League DPT Program, *supra* note 31, at 12 (listing the limited grounds for appeal); Westreich, *supra* note 148 (informing MLB scouts and team representatives in Venezuela that the Minor League DPT Program "*es una 'política de responsabilidad terminante'*"). The proper term in Spanish for strict liability is, however, *responsabilidad absoluta*.

<sup>180</sup> The Major League Joint DPT Program (2006) contains tougher sanctions than the Major League Joint DPT Program (2002), and these tougher sanctions are responses to external pressure MLB and the MLBPA received in the 2002–2005 period, including pressure from the U.S. Congress. *Compare* Major

were described above.<sup>181</sup> Table 8 compares the sanctions that the major and minor league programs impose on players for failure to comply with a Treatment Program. Table 9 compares the sanctions imposed for a conviction for use of, or involvement in the sale of, Prohibited Substances. Table 10 compares the major and minor league programs' sanctions for testing positive for Prohibited Substances. These tables reveal that the Major League Joint DPT Program (2006) often applies more lenient sanctions than the Minor League DPT Program. The gray-shaded cells in Tables 8–10 indicate more lenient treatment at the major league level.

For example, the Major League Joint DPT Program (2006) contains no sanction provisions for testing positive for Drugs of Abuse while the Minor League DPT Program imposes sanctions for the same offense. Another example of more lenient sanctions involves a positive test for amphetamines. Under the Minor League DPT Program, amphetamines are Performance Enhancing Substances,<sup>182</sup> the use of which results in a 50-game suspension for the first positive test.<sup>183</sup> Under the Major League Joint DPT Program (2006), amphetamines are Stimulants,<sup>184</sup> the use of which results in only follow-up testing for the first positive test, and only a 25-game suspension for a second positive test.<sup>185</sup> The more lenient treatment of players under the Major League Joint DPT Program (2006) is the direct result of the collective bargaining that MLBPA undertakes on behalf of major league players.

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League Joint DPT Program (2006), *supra* note 27, at 14–19, with Major League Joint DPT Program (2002), *supra* note 25, at 11–15.

<sup>181</sup> See *supra* Tables 4 and 5.

<sup>182</sup> Minor League DPT Program, *supra* note 31, at 4.

<sup>183</sup> *Id.* at 11.

<sup>184</sup> Major League Joint DPT Program (2006), *supra* note 27, at 5.

<sup>185</sup> *Id.* at 15. See Associated Press, *Perez is First Player Disciplined for Testing Positive for Stimulant*, ESPN, July 7, 2007, <http://sports.espn.go.com/mlb/news/story?id=2927670> (reporting on the first MLB player suspended for testing positive for a Stimulant under the Major League Joint DPT Program (2006)).



**Table 8. Comparison of Sanctions for Failure to Comply with Treatment Program<sup>186</sup>**

<i>Offenses/ Failure to Comply</i>	<i>Minor League DPT Program</i>	<i>Major League Joint DPT Program (2006)</i>
First	50-game suspension	At least a 15-game but not more than a 25-game suspension
Second	100-game suspension	At least a 25-game but not more than a 50-game suspension
Third	Permanent suspension	At least a 50-game but not more than a 75-game suspension
Fourth	NA	At least a one-year suspension
Beyond four	NA	MLB Commissioner imposes further discipline on player, consistent with the concept of progressive discipline
Possibility for reinstatement after permanent suspension?	Yes, if MLHPAC concludes that a player successfully completed a Treatment Program and is no longer at risk to test positive in the future	NA

<sup>186</sup> Minor League DPT Program, *supra* note 31, at 10; Major League Joint DPT Program (2006), *supra* note 27, at 14–15.

**Table 9. Comparison of Sanctions for Conviction for Use of, or Involvement in the Sale of, Prohibited Substances<sup>187</sup>**

Offenses	Conviction for Use of Prohibited Substance			Involvement in Sale or Distribution of Prohibited Substance		
	Minor League*	Major League		Minor League*	Major League	
		Performance Enhancing Substance	Drugs of Abuse (including a Stimulant)		Performance Enhancing Substance	Drugs of Abuse (including a Stimulant)
<i>First</i>	Minimum 50-game suspension	At least a 60-game but not more than 80-game suspension	At least a 15-game but not more than a 30-game suspension	One-year suspension and \$10,000 fine	At least a 80-game but not more than 100-game suspension	At least a 60-game but not more than a 90-game suspension
<i>Second</i>	100-game suspension	At least a 120-game but not more than a one-year suspension	At least a 30-game but not more than a 90-game suspension	Permanent suspension	Permanent suspension from major and minor league baseball	Two-year suspension
<i>Third</i>	Permanent suspension	Permanent suspension from major and minor league baseball	One-year suspension	NA	NA	Up to permanent suspension from major and minor league baseball
<i>Fourth</i>	NA	NA	Up to permanent suspension from major and minor league baseball	NA	NA	NA

\*Sanctions are the same for testing positive for Drugs of Abuse and Performance Enhancing Substances.

**Table 10. Comparison of Sanctions for Testing Positive for Prohibited Substance<sup>188</sup>**

Offenses	Minor League DPT Program		Major League Joint DPT Program (2006)	
	Drugs of Abuse	Performance Enhancing Substances	Performance Enhancing Substances	Stimulants
First	Enters Administrative Track	50-game suspension	50-game suspension	Follow-up testing
Second	50-game suspension	100-game suspension	100-game suspension	25-game suspension

<sup>187</sup> Minor League DPT Program, *supra* note 31, at 11; Major League Joint DPT Program (2006), *supra* note 27, at 16–17.

<sup>188</sup> Minor League DPT Program, *supra* note 31, at 10–11; Major League Joint DPT Program (2006), *supra* note 27, at 15.

Third	100-game suspension	Permanent suspension	Permanent suspension from major and minor league baseball	80-game suspension
Fourth	Permanent suspension	NA	NA	Up to permanent suspension from major and minor league baseball
Possibility for reinstatement after permanent suspension?	Yes, if MLHPAC concludes that a player successfully completed a Treatment Program and is no longer at risk to test positive in the future	No	Yes, at the discretion of the MLB Commissioner	No

Differences between the major and minor league programs also appear in the appeal process. To begin, the Major League Joint DPT Program (2006) subjects any determination that a player has violated its rules, and any determination about the level of sanctions applied, to review by the Arbitration Panel established by the Basic Agreement.<sup>189</sup> By contrast, the Minor League DPT Program does not permit the player to appeal to a neutral party at any stage in the appeal proceedings. The MLHPAC is the sole decision-maker under the minor league program, and the MLHPAC is entirely composed of persons appointed by the MLB Commissioner. Thus, the MLHPAC “may be seen as both

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<sup>189</sup> Major League Joint DPT Program (2006), *supra* note 27, at 19; 2007–2011 Basic Agreement, Article XI (establishing Arbitration Panel) (on file with authors).

prosecutor and judge in minor league drug policy violations.”<sup>190</sup> This approach raises questions about whether the Minor League DPT Program provides players with adequate due process.<sup>191</sup> This concern is compounded by the Minor League DPT Program’s failure to provide players and their legal representatives with complete information concerning alleged violations.<sup>192</sup> Further, players and the players’ legal representatives are not allowed to appear before the MLHPAC.

The Major League Joint DPT Program (2006) does not restrict the grounds on which a player may challenge a positive test result. As noted earlier, the initial burden rests with the MLB Commissioner’s Office to establish that a player tested positive pursuant to a valid test.<sup>193</sup> The MLB Commissioner’s Office does not have to establish “intent, fault, negligence, or knowing use of a Prohibited Substance on the

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<sup>190</sup> Masteralexis, *supra* note 149, at 780.

<sup>191</sup> WADA’s World Anti-Doping Code requires, for example, that any athlete accused of violating the Code be accorded a fair hearing, which includes, among other things, a “fair and impartial hearing body”. WADA, *World Anti-Doping Code* (2003), *supra* note 11, at 24.

<sup>192</sup> Masteralexis described her experience with the MLHPAC as follows:

In my experience representing the minor league player, I, too felt a lack of due process. Due to the very short timeline for filing an appeal, I called the committee [MLHPAC] on my client’s behalf before the forty-eight hours expired to give notice that I would be faxing an appeal. One of the committee members responded, Don’t bother, he’s guilty. In addition, I was told that the press release with all those testing positive is done and will be going out in twenty minutes. Since the policy states a player’s positive test will be held in abeyance until a decision of the committee is made, I notified the committee member that my client was within his right to appeal, that until that appeal was filed that a decision on my client’s case should not be made, and that I expected my client’s name to be removed from the press release. I assume the press release went out with my client’s name on it as I saw Internet reports in which my client’s name was listed as testing positive, although the appeal was filed, no decision had been returned in the case and according to the policy, the testing information is to be confidential during the appeal.

Masteralexis, *supra* note 149, at 786.

<sup>193</sup> Major League Joint DPT Program (2006), *supra* note 27, at 19.

Player's part to establish such a violation."<sup>194</sup> Once the MLB Commissioner's Office has met this initial burden, the player "then has the burden of establishing that his test result was not due to his fault or negligence."<sup>195</sup> To meet his burden, the player must provide objective evidence that supports his claim. This evidence may, among other things, "question the accuracy or reliability of the 'positive' test result."<sup>196</sup>

By contrast, as discussed earlier,<sup>197</sup> the Minor League DPT Program severely restricts the grounds on which a player may appeal a positive test finding.<sup>198</sup> Two of these grounds for appeal require the player to have access to information about either the chain-of-custody of his sample or the administration of sample testing at the laboratory.<sup>199</sup> The Minor League DPT Program provides the player with no additional information about the positive test result that might be useful in utilizing these grounds for appeal. As Lisa Masteralexis observed, these "two bases of appeal are difficult to conduct discovery on because there is not a collectively-bargained right to get access to documentation on either the chain-of-custody or the lab procedures."<sup>200</sup>

The Major League Joint DPT Program (2006) has detailed appeal provisions concerning appeal of a first positive test for Performance Enhancing Substances or a second positive test for Stimulants.<sup>201</sup> The provisions lay out an automatic, highly structured, and transparent process that reviews all information related to the first test results that could produce game-suspension sanctions against a player. This process operates without a player having to file a formal, written appeal in a very short space of time, in contrast to the appeal process in the Minor League DPT Program. In addition, the decision whether a test result is positive within the meaning of the Major League Joint DPT Program (2006) is made together by the MLB Commissioner's Office and the MLBPA,

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<sup>194</sup> *Id.* at 19–20.

<sup>195</sup> *Id.* at 20.

<sup>196</sup> *Id.*

<sup>197</sup> See *supra* note 133–134 and accompanying text.

<sup>198</sup> Minor League DPT Program, *supra* note 31, at 12 (limiting the player to three grounds for appeal).

<sup>199</sup> *Id.*

<sup>200</sup> Masteralexis, *supra* note 149, at 787.

<sup>201</sup> Major League Joint DPT Program (2006), *supra* note 27, at 20–21.

assisted by their respective legal counsels.<sup>202</sup> Thus, the decision is not left entirely in the hands of employees of the MLB Commissioner's Office, as is the case with the Minor League DPT Program. The major league appeal process includes an automatic testing of a player's "B" sample by the Independent Program Administrator, which testing may be observed by a representative of the player, the MLB Commissioner's Office, and the MLBPA.<sup>203</sup>

In addition, major league players do not have to pay in advance for "B" samples to be tested, which contrasts with the Minor League DPT Program's requirement that the appealing players pay for such testing in advance.<sup>204</sup> If an appeal is unsuccessful, the Minor League DPT Program forces the player to pay for the costs associated with an appeal.<sup>205</sup> The Major League Joint DPT Program imposes no penalty for losing an appeal.<sup>206</sup> Thus, the Minor League DPT Program creates serious financial disincentives for minor league players to challenge MLHPAC decisions.

The major league program's appeal process for a first positive test for Performance Enhancing Substances or a second positive test for Stimulants allows players to challenge any game-suspension penalty imposed for a reported positive test.<sup>207</sup> Players have three days from the MLB Commissioner's notification of sanctions to be imposed to file a grievance under the procedures established in the Basic Agreement. Grievances "shall be automatically appealed to the Arbitration Panel."<sup>208</sup> As already noted, the Minor League DPT Program only allows players to appeal to the MLHPAC, which is not an independent body. It is composed entirely of MLB employees. In addition, the Minor League DPT Program does not allow the players or their representatives to appear before the MLHPAC as part of the appeal process, which contrasts with players' rights to be present and represented in the appeal process of the Major League Joint DPT Program (2006). The minor league approach runs counter to the right the World Anti-Doping Code accords athletes to

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<sup>202</sup> *Id.* at 21.

<sup>203</sup> *Id.* at 20.

<sup>204</sup> Minor League DPT Program, *supra* note 31, at 14.

<sup>205</sup> *Id.*

<sup>206</sup> Major League Joint DPT Program (2006), *supra* note 27, at 23.

<sup>207</sup> *Id.* at 21.

<sup>208</sup> *Id.*

be present, and to be represented by counsel, before anti-doping agencies reviewing alleged positive doping tests.<sup>209</sup> Under the Minor League DPT Program, MLHPAC makes a decision on an appeal on the basis of only a player's written appeal and the information the MLHPAC possesses, which the MLHPAC is not required to provide to the player.

The time periods for the appeal process in the Major League Joint DPT Program (2006) are also not as stringent as those in the Minor League DPT Program. The Minor League DPT Program mandates that a player file a written appeal with the MLB Commissioner's Office within 48 hours of being notified of a positive result and provides that any request for an appeal received outside the 48-hour window is automatically rejected.<sup>210</sup> This short appeal window makes appeals difficult for minor league players, even if they have the assistance of an agent or lawyer.<sup>211</sup> The Major League Joint DPT Program (2006) contains no such draconian time limits in any of its provisions. Indeed, the Major League Joint DPT Program allows a player to "challenge a positive test result at any time on the basis of newly discovered scientific information that questions the accuracy or reliability of the result."<sup>212</sup> A player may challenge a result previously upheld by the Arbitration Panel.<sup>213</sup>

A final example of the differences between the major and minor league programs involves the Therapeutic Use Exemption (TUE). Under both programs, a TUE can be used to explain and justify a positive test, but the Minor League DPT Program's TUE provisions are much more restrictive than those in the Major League Joint DPT Program (2006). To use a TUE under the Major League Joint DPT Program (2006), a sample containing a Prohibited Substance will not be deemed positive if the player was authorized to ingest the Prohibited Substance in question by a valid, medically appropriate prescription provided by a duly licensed physician.<sup>214</sup> If the "issuing physician is not a Club physician (or one designated by the Club to treat the Player), the Player . . . shall notify the

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<sup>209</sup> WADA, *World Anti-Doping Code*, *supra* note 11, at 24.

<sup>210</sup> Minor League DPT Program, *supra* note 31, at 13.

<sup>211</sup> *See, e.g.*, Masteralexis, *supra* note 149, at 786 (describing her frustrations with trying to file an appeal on behalf of a minor league player within the 48-hour period).

<sup>212</sup> Major League Joint DPT Program (2006), *supra* note 27, at 22.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 8.

Player's Club Physician of the existence of the prescription prior to the sample being taken."<sup>215</sup> The Major League Joint DPT Program (2006) does not limit the Prohibited Substances or the medical conditions for which TUEs may be used, nor does it require players to apply for TUEs prior to being tested.

By contrast, as noted earlier,<sup>216</sup> the TUE provisions in the Minor League DPT Program seriously limit the availability of TUEs to positive tests for amphetamines prescribed for the treatment of ADD/ADHD.<sup>217</sup> In addition, the Minor League DPT Program only recognizes a TUE for purposes of appealing a positive test when the appealing player had submitted a TUE application before the test was conducted.<sup>218</sup> Further, the Minor League DPT Program empowers the MLHPAC to make all decisions on therapeutic use exemptions,<sup>219</sup> whereas, under the major league program, the Independent Program Administrator determines whether a positive test should be excused under a TUE.<sup>220</sup>

In addition to differing significantly from the major league program, the minor league approach contradicts WADA's guidance on how national anti-doping organizations should handle TUE exemptions. Under WADA's International Standard for Therapeutic Use Exemptions, national anti-doping organizations must establish a Therapeutic Use Exemption Committee (TUEC), which makes all decisions related to the availability of therapeutic use exemptions. Such Committees "should include at least three physicians with experience in the care and treatment of *Athletes* and a sound knowledge of clinical, sports and exercise medicine."<sup>221</sup> MLHPAC only has one physician.<sup>222</sup> Further, WADA's International Standard provides that, "[i]n order to ensure a level of independence of decision, a majority of the members of the TUEC should not have any official responsibility in the *Anti-doping*

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<sup>215</sup> *Id.*

<sup>216</sup> See *supra* notes 214–215 and accompanying text.

<sup>217</sup> Minor League DPT Program, *supra* note 31, at 11–12.

<sup>218</sup> *Id.* at 12.

<sup>219</sup> *Id.* at 13.

<sup>220</sup> Major League Joint DPT Program (2006), *supra* note 27, at 9.

<sup>221</sup> WADA, *World Anti-Doping Code: International Standard for Therapeutic Use Exemptions*, *supra* note 135, at 11.

<sup>222</sup> Minor League DPT Program, *supra* note 31, at 1.



*organization.*<sup>223</sup> All the members of MLHPAC serve in official capacities for MLB,<sup>224</sup> meaning that the MLHPAC contains no members who are independent of the MLB Commissioner's Office.

These differences between the major league and minor league programs help illustrate why concerns have been raised about the Minor League DPT Program's fairness to minor league players. Under the Minor League DPT Program, the substantive rules (e.g., the scope of Prohibited Substances) and the procedural provisions (e.g., the appeals process) are unilaterally imposed, much stricter in application, and more unforgiving in terms of process for minor league players—all in a context where none of the players have union assistance and only some of them have agents to help them navigate the system.

The Minor League DPT Program is probably even more daunting for Latin players in the minor leagues in the United States and Canada. These Latin players face language, educational, and cultural barriers that players from the United States and Canada do not confront. With 46.2% of all minor league players being foreign-born in 2007,<sup>225</sup> and the vast majority of these hailing from Latin American countries, the disadvantages facing Latin minor leaguers in the United States with respect to the Minor League DPT Program deserves some attention from MLB. Indeed, the statistics provided earlier,<sup>226</sup> showing that Latin minor and major league players were disproportionately represented in positive drug tests and suspensions in 2005 and 2006, indicate that more attention for Latin players is needed not only in the minor leagues in the United States but also in the Major League Joint DPT Program.

Given the threat to the health of players and the integrity of the game created by PED use, serious substantive and procedural rules are needed to deter and punish use. However, the serious consequences to a player's professional and personal life of positive drug tests under the Major League Joint DPT Program (2006) and the Minor League DPT Program underscore the importance of transparency, education, and

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<sup>223</sup> WADA, *World Anti-Doping Code: International Standard for Therapeutic Use Exemptions*, *supra* note 135, at 11.

<sup>224</sup> Minor League DPT Program, *supra* note 31, at 1.

<sup>225</sup> Associated Press, *National Pastime Takes on International Flavor*, ESPN, Apr. 3, 2007, <http://sports.espn.go.com/mlb/news/story?id=2824295>.

<sup>226</sup> See *supra* notes 49–55 and accompanying text.

adequate due process. Anti-doping strategies need to be not only effective and cost-efficient but also fair.

However, the problems that Latin major and minor league players in North America face are not the focus of this article. We raise these problems as important background for the following analysis of the ways in which MLB applies the Minor League DPT Program in the Dominican Republic and Venezuela. The issues that might arise with Latin minor leaguers in North America *vis-à-vis* the Minor League DPT Program pale in comparison to the difficulties created by the manner in which MLB approaches drug testing in its most important foreign markets for baseball talent.

### ***B. Overview of the Latin Summer League DPT Program***

As noted earlier, the Minor League DPT Program serves as the template for the Latin Summer League DPT Program. In other words, MLB took the program designed for application to minor league players in the United States and Canada, made some minor adjustments, and applied it to minor league players in the Dominican Republic and Venezuela. As we argue below, this strategy creates serious problems that MLB should address by more appropriate tailoring of its drug-testing program to the realities of minor league baseball in Latin America.

The term “Latin Summer League DPT Program” is misleading because MLB’s application of the Minor League DPT Program in its Latin minor league operations is not uniform. As observed above, MLB does not apply the Latin Summer League DPT Program the same way in the Dominican Republic and in Venezuela. The difference is the lack of sanctions for Dominican minor leaguers who test positive for use of Prohibited Substances. MLB claims that Dominican law prevents it from applying drug-related suspensions to Dominican players under minor league contracts with MLB teams.<sup>227</sup> Thus, the lack of sanctions for Dominican players eliminates a critical feature of the drug-testing strategy from Dominican minor league operations.

The application of the sanctions in Venezuela gives Venezuela the distinction of being the target of “MLB’s most complete and punitive drug sweep ever carried out on foreign soil.”<sup>228</sup> Thus, many of the

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<sup>227</sup> Mike Fish, *Activist: MLB Should Keep Promise to Test Prospects*, ESPN, Feb. 14, 2007, <http://sports.espn.go.com/mlb/news/story?id=2763304>.

<sup>228</sup> Baker, *Growing Pains*, *supra* note 43.

problems discussed in this part of the article arise from cases in Venezuela in which MLB has fully applied the Latin Summer League DPT Program.

### ***C. Evaluation of the Latin Summer League DPT Program***

In this section, we work through each part of the Latin Summer League DPT Program to demonstrate where MLB exacerbates problems for Latin minor league players and where the Program contains inadequate provisions given the nature of the PED problem in the Dominican Republic and Venezuela. As this analysis proceeds, the importance of the “dangerous cocktail” of poverty, children, *buscones*, different regulatory contexts, and PEDs returns to inform our critique of MLB’s approach.

#### *1. Objective of the Latin Summer League DPT Program*

The objective of the Latin Summer League DPT Program is to prevent and end the use of Prohibited Substances by non 40-man roster players participating in the Summer Leagues because the MLB Commissioner concluded that use of Prohibited Substances may both be hazardous to players’ health and give players unfair competitive advantages on the playing field.<sup>229</sup> This objective, and the reasons behind it, is identical to the one stated in the Minor League DPT Program.<sup>230</sup>

The first concern with this objective is its scope. The objective singles out minor league players participating in the Summer Leagues, which run from May to August in the Dominican Republic and Venezuela. The Summer Leagues are for entry-level players and consist of games between the minor league teams of the MLB clubs that have operations in Latin America. The Summer Leagues are important venues for MLB teams to evaluate Latin minor league talent. However, rosters for Summer League teams may not include all minor league players that are under contract with MLB teams. In the Dominican Republic and Venezuela, MLB teams operate year-round minor league facilities called baseball academies. Often, MLB teams have players under minor league contracts who do not play in the Summer Leagues. Therefore, the Latin Summer League DPT Program does not apply to all Latin minor league players. By contrast, the Minor League DPT Program applies to all minor league players who are under contract with MLB teams.

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<sup>229</sup> Latin Summer League DPT Program, *supra* note 44.

<sup>230</sup> Minor League DPT Program, *supra* note 31, at 1.

The objective of the Latin Summer League DPT Program also reveals that the program does not apply to Latin prospects who have yet to sign minor league contracts with MLB teams. Understandably, MLB argues that it should not be responsible for testing all prospects working with or without *buscones* in the Dominican Republic and Venezuela who have not signed minor league contracts. Critics of MLB's drug-testing approach in Latin America, such as Fernando Mateo, complain the MLB is turning a blind-eye to the rampant PED use that occurs *before* a prospect signs a minor league contract.<sup>231</sup>

This complaint connects back to the concerns raised about how *buscones* often provide PEDs to prospects they groom for tryouts with MLB teams. MLB argues that it is not responsible for the regulation of *buscones* because they are not employees of MLB teams.<sup>232</sup> MLB teams do subject some players who have signed minor league contracts to medical examinations, which may include drug testing,<sup>233</sup> but this practice is not uniform among all MLB teams. However, the application of drug testing in the Summer Leagues may have the perverse effect of making PED use worse in the period before a prospect signs a minor league contract. The drug-testing regimen creates incentives for *buscones* and prospects to use PEDs to land the minor league contracts and coveted signing bonuses.

Both MLB and its critics make valid points about the pre-contract PED problem, especially as exacerbated by *buscones*, but the problem remains unaddressed. MLB is correct that it should not have to test every prospect for a minor league contract in the Dominican Republic and Venezuela, but it can craft a more effective approach that responds constructively to the nature of the PED problem in these countries. This approach would involve mandatory testing for all prospects signed to minor league contracts.

Given that some MLB teams already subject prospects who sign contracts to drug testing, applying this approach across the Latin minor league system would harmonize an existing strategy. The sanction for a positive drug test would be either, at each team's discretion, (1) termination of the contract, or (2) no signing bonus. The testing should be

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<sup>231</sup> Farrey, *supra* note 45; Fish, *Steroid Problem Reaches Critical Mass in the D.R.*, *supra* note 49.

<sup>232</sup> Svrluga, *supra* note 89.

<sup>233</sup> Fish, *Activist: MLB Should Keep Promise to Test Prospects*, *supra* note 227.

standardized and regulated under MLB's control to prevent teams from manipulating test results simply to deny signing bonuses. Any positive test at signing would count as the player's first offense under the Latin Summer League DPT Program, meaning the next positive test produces the sanctions described in the Program for second offenses.

The termination of the contract or the denial of a signing bonus would send the right economic signals downstream to *buscones*, prospects, and parents. The economic incentives that exist for PED use pre-contract would decline significantly because a positive test would generate such adverse economic consequences for all those with a stake in the signing bonus. This strategy will not entirely eliminate the PED problem because *buscones* could become more sophisticated at using PEDs to avoid positive tests at signing. However, the strategy would raise the stakes and risks associated with PED use by minor league prospects, thereby having a deterrent effect that would contribute to the overall objective of preventing and terminating PED use in MLB's Latin minor league operations.

In addition, MLB could institute a system under which prospects signing minor league contracts would be required to disclose whether they worked with a *buscon* prior to signing, and if so provide the name and contact information for his *buscon*. If a prospect using a *buscon* tested positive for use of a PED after signing a minor league contract, MLB would issue a warning to the *buscon* in question that any other positive post-signing test by any of his prospects will result in a permanent ban on MLB teams signing prospects trained by him. Although MLB does not directly control *buscones*, MLB can regulate how MLB teams interact with *buscones*, which gives MLB tremendous power to regulate constructively behavior by *buscones* that threatens the integrity of the game and the health and welfare of children and young men.

## 2. *The Minor League Health Policy Advisory Committee (MLHPAC)*

The Latin Summer League DPT Program has exactly the same MLHPAC, which has exactly the same responsibilities, as the one in the Minor League DPT Program.<sup>234</sup> Incredibly, MLB made no changes to MLHPAC and this key institution's activities for purposes of addressing the PED problem in MLB's Latin minor league operations. The

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<sup>234</sup> Latin Summer League DPT Program, *supra* note 44, at 1–2.

Dominican Republic and Venezuela are MLB's two biggest markets for foreign talent, and are the markets in which PED use has been identified as a serious problem. Despite these facts, the Latin Summer League DPT Program establishes a MLHPAC with no personnel resident in, or with expertise about, these Latin American countries. Nor does the Latin Summer League DPT Program give MLB's office in the Dominican Republic any official role in administering and overseeing the Program.<sup>235</sup>

Having the same MLHPAC with the same members may serve the purpose of making policies for all minor league DPT programs consistent. However, as we argued above,<sup>236</sup> the environments affecting PED use in the Dominican Republic and Venezuela are so different from the situation in the United States and Canada that utilizing the same MLHPAC makes little sense, unless MLB is simply avoiding the costs it would incur to take the PED problem in Latin America as seriously as the one in the minor leagues in North America. The socio-economic differences, the heavy MLB interest in children as prospects, the impact of *buscones*, and the different regulatory environments for pharmaceutical and nutritional products combine to underscore the need for the key institution overseeing the Latin Summer League DPT Program to have more direct connection with the Dominican Republic and Venezuela.

Surprisingly, given how significant Latin America is as a source of foreign baseball talent, MLB has not built much of an institutional foundation in the Dominican Republic or Venezuela on which to base more robust involvement. Despite MLB teams recruiting players and operating baseball academies in the Dominican Republic for decades, MLB only opened its office in the Dominican Republic in 2000 in response to criticism about the behavior of MLB teams in Latin America.<sup>237</sup> Although the office is responsible for overseeing MLB activities in Latin America, it is staffed by only five employees. Two are administrative assistants, and one employee is responsible for

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<sup>235</sup> The MLB office in the Dominican Republic is involved in aspects of the Latin Summer League DPT Program, but the Program itself neither mentions this office nor assigns it formal responsibilities.

<sup>236</sup> See *supra* Part III.B.

<sup>237</sup> MARCANO & FIDLER, *STEALING LIVES*, *supra* note 80, at 179–181.

administrative oversight and financial matters.<sup>238</sup> MLB has no offices or employees in Venezuela. In essence, MLB has tasked two professional staff members to oversee all MLB issues in both the Dominican Republic and Venezuela. MLB's offices in Tokyo (4 professionals) and London (3 professionals) have staffs larger than the professional staff in the MLB office in the Dominican Republic.<sup>239</sup> Astonishingly, MLB does not even include its Dominican Republic office in the list of international offices that MLB maintains on its website.<sup>240</sup>

The lack of MLB's institutional commitment to the Dominican Republic and Venezuela has real significance for the anti-PED effort in these countries. Earlier we noted MLB's claim that it has spent "literally millions of dollars" on educating Dominican baseball players about the drug-testing program and the dangers of PED use. With only two full-time professional staff in the Dominican Republic who have no formal role in the Latin Summer League DPT Program, and with none of the members of the MLHPAC being resident or based in the Dominican Republic, on what exactly did MLB spend these millions of dollars? To answer this question, MLB should release audited accounts that show in detail what MLB spends on anti-PED activities in the Dominican Republic and Venezuela. We suspect that such accounts would demonstrate that MLB has not spent millions of dollars on educating people in the Dominican Republic about its drug-testing program.

The key point is that MLB is missing a tremendous opportunity to involve stakeholders in the Dominican Republic and Venezuela through the Latin Summer League DPT Program and the MLHPAC in its anti-PED efforts. Involving Dominicans and Venezuelans worried about the PED problem in their countries could help MLB spread the word about its strategy, program, and objectives.<sup>241</sup> The governments of both

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<sup>238</sup> Oficina Major League Baseball Republica Dominicana, *Informacion General* (on file with authors).

<sup>239</sup> The Official Site of Major League Baseball, *International: Contact Information*, [http://mlb.mlb.com/mlb/international/index.jsp?feature=mlbi\\_contact](http://mlb.mlb.com/mlb/international/index.jsp?feature=mlbi_contact).

<sup>240</sup> *Id.*

<sup>241</sup> The pro-active involvement of Chicago White Sox manager and native Venezuelan Ozzie Guillen in making public service announcements for MLB's use in the Dominican Republic and Venezuela is a step in the right direction, even if it was Guillen, not MLB, who expressed concern about the lack of

the Dominican Republic and Venezuela signed the Copenhagen Declaration on Anti-Doping in Sports,<sup>242</sup> so political leaders in both countries have expressed awareness about, and commitment to addressing, the PED problem in sports. The involvement of children in MLB's Latin American recruiting and drug-testing program calls for higher standards of protection than apply in the minor leagues in the United States and Canada, where the players are older and more educated. Unfortunately, MLB's establishment of the MLHPAC for the Latin Summer League DPT Program demonstrates a singular lack of appreciation for the realities in these countries and a lack of imagination regarding ways to harness Dominican and Venezuelan input to make the anti-PED campaign more powerful and sustainable for the sake of the health and welfare of Latin children and young men.

### 3. *Rules on Prohibited Substances*

The Latin Summer League DPT Program states the following:

Although many drugs are available both over-the-counter and with a prescription in other countries, the Venezuelan [and Dominican] Summer League Drug Testing Program is based on the drug laws of the United States. Therefore, despite the fact that certain drugs may be lawful in other countries, a player will be penalized according to this Program. In other words, a player's excuse that his positive test is the result of either a lawful over-the-counter product or a lawful prescription will not be a valid defense under the Program.<sup>243</sup>

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information Latin players were receiving. See Melkin, *supra* note 62. Broader and deeper involvement of other caring and committed Dominicans and Venezuelans is, however, possible. See also POUND, *INSIDE DOPE: HOW DRUGS ARE THE BIGGEST THREAT TO SPORTS, WHY YOU SHOULD CARE, AND WHAT CAN BE DONE ABOUT THEM*, *supra* note 30, at 225–227 (stressing the importance of seeking partners in the battle against PEDs).

<sup>242</sup> WADA, *Copenhagen Declaration on Anti-Doping in Sports: List of Signatories*, *supra* note 17.

<sup>243</sup> Latin Summer League DPT Program, *supra* note 44, at 2. The only similar warning in the Minor League DPT Program states that “a player may test positive for a Schedule III steroid from taking an over-the-counter supplement. This is especially true for nutritional supplements purchased outside the United



This warning in the Latin Summer League DPT Program connects to one factor that contributes to the PED problem in the Dominican Republic and Venezuela—the differences in regulation of pharmaceutical and related products.<sup>244</sup> MLB's approach to reducing and eliminating the PED problem in its North and Latin American minor league operations would be weakened if it applied three different lists of Prohibited Substances based on what products are lawful in the United States, Dominican Republic, and Venezuela. Rather than using U.S. law as the basis for harmonization, MLB could have used the prohibited list generated by WADA.<sup>245</sup> Nevertheless, the choice of U.S. law as the basis for harmonized standards has consequences that the Latin Summer League DPT Program should confront more forthrightly.

The Latin Summer League DPT Program contains lists of Drugs of Abuse and Performance Enhancing Substances similar but not identical to the lists in the Minor League DPT Program.<sup>246</sup> However, these lists do not identify those substances that are on the list of controlled substances in U.S. law but that are legally available in the Dominican Republic and Venezuela. Nor is there, apparently, a list of what players could take and not test positive under the Program.<sup>247</sup> Such

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States.” Minor League DPT Program, *supra* note 31, at 4. The Latin Summer League DPT Program contains the same language. Latin Summer League DPT Program, *supra* note 44, at 4. Given the significant numbers of Latin players in the minor league system in North America, the Minor League DPT Program should contain more information and warnings about national differences and practices that could get a Latin or foreign player into trouble with the Program.

<sup>244</sup> See *supra* notes 98–101 and accompanying text.

<sup>245</sup> WADA, *Prohibited List*, <http://www.wada-ama.org/en/prohibitedlist.ch2>.

<sup>246</sup> Compare Latin Summer League DPT Program, *supra* note 44, at 2–4 with Minor League DPT Program, *supra* note 31, at 3–5. The Minor League DPT Program and the Latin Summer League DPT Program have the same list of Drugs of Abuse, but, in terms of Performance Enhancing Drugs, the Minor League DPT Program lists more anabolic androgenic steroids (boldione, oxabolone, quinbolone, and 18a-homo-17-hydroxyestr-4-en-3-one), insulin-like growth factors (e.g., IGF-1), and miscellaneous anabolic agents (e.g., clenbuterol, zeranol, and zilpaterol) not found in the 2006 version of the Latin Summer League DPT Program.

<sup>247</sup> Gordon, *supra* note 60 (quoting Ramón Ferreira, director or operations of the Venezuelan Summer League, stating “[t]here’s no list of what players can take. At least I don’t have it.”).

lists, which would not be difficult to compile with input from Dominican and Venezuelan experts, would provide more transparency and clarity for the warning the Latin Summer League DPT Program gives concerning use of legally available drugs in other countries.

Basing the lists of Prohibited Substances on U.S. law, as amended, raises the importance of MLB immediately notifying minor league players subject to its drug-testing programs of such changes. Neither the Minor League nor the Latin Summer League DPT Program contains any obligation on MLB or the MLHPAC to provide such information to minor league players in a timely fashion. This notification is particularly important for Latin minor leaguers, who will be the least likely to have any idea that the U.S. Code of Federal Regulations on Controlled Substances has been amended. The same duty of immediate notification should exist when MLHPAC exercises its prerogative to add Prohibited Substances to the list. WADA's World Anti-Doping Code supports this notification principle when it states that drug-testing programs need to ensure that the participants receive updated and accurate information related to, among other things, the list of prohibited substances.<sup>248</sup>

Transparency, clarity, and notification are critical for the Latin minor leagues because children living in poor socio-economic circumstances are the ones largely involved in this process. The Minor League and Latin Summer League DPT Programs are difficult, complex documents. Even highly trained legal and sports professionals have difficulty with them. Thorough and repeated information, training, and education about the Prohibited Substances, and other aspects of the Latin Summer League DPT Program are critical to successfully reducing PED use.

The statistics recording the number of Dominican and Venezuelan players testing positive for PED use suggests that MLB has not been doing a good job fulfilling its responsibilities on education. Investigative reporting in Venezuela also indicates that MLB has done a poor job providing clear and transparent information to minor league players in that country. Geoff Baker of the *Seattle Times* investigated the stories of Venezuelan players suspended for testing positive but who had little knowledge or understanding about the Summer League DPT Program.<sup>249</sup> None of the players Baker interviewed had ever seen or received a copy

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<sup>248</sup> WADA, *World Anti-Doping Code*, *supra* note 11, at 50.

<sup>249</sup> Baker, *Growing Pains*, *supra* note 43.

of the Program, in any language.<sup>250</sup> Ian Gordon of ESPN found the same situation in his report on the impact of the drug-testing program in Venezuela in 2007.<sup>251</sup> Ivan Gonzalez, a Venezuelan journalist, interviewed Dr. Pedro Delgado, who identified himself as a consultant to MLB who gives once-a-year talks on behalf of the MLHPAC at MLB baseball academies in Venezuela on the Latin Summer League DPT Program.<sup>252</sup> Delgado, who is apparently the only person retained by MLB to engage in part-time PED education in Venezuela, admitted that he did not know much about critical aspects of the Program, such as the process by which samples are taken from players and the appeal process.<sup>253</sup> From his investigations, Gonzalez concluded that players in the Venezuela Summer League “are not getting any guidance about what they should do in order to stay clean.”<sup>254</sup>

When asked by Geoff Baker about the apparent lack of knowledge among Venezuelan players about the Latin Summer League DPT Program, MLB vice president and MLHPAC member Robert Manfred blamed the players for their ignorance, “saying players can’t sit back and expect information to be handed to them. After all, they are the ones testing positive.”<sup>255</sup> Manfred continued: “At some point, the fundamentals are that it’s the player’s responsibility to stay informed. They know there’s a policy. They know it’s out there. And if they don’t know the details, then it’s up to them to find that out.”<sup>256</sup> Manfred told ESPN that “administrators are instructed to pass out both English and Spanish copies of the drug policy.”<sup>257</sup> He then stated, “Did I physically see that happen? No, but I know it is supposed to happen.”<sup>258</sup>

As a member of MLHPAC, Manfred has the responsibility to educate and inform Latin minor league players about the Latin Summer

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<sup>250</sup> *Id.*

<sup>251</sup> Gordon, *supra* note 60 (reporting that many Venezuelan coaches and players told him that they had never seen the drug policy document in any language).

<sup>252</sup> Ivan Gonzalez, *Dopaje afecta carrera de juvenes peloteros*, EL MUNDO, Oct. 23, 2006, at 5.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> Baker, *Growing Pains*, *supra* note 43.

<sup>256</sup> *Id.*

<sup>257</sup> Gordon, *supra* note 60.

<sup>258</sup> *Id.*

League DPT Program.<sup>259</sup> The duties and responsibilities of the MLHPAC in the Latin Summer League DPT Program include preparing and undertaking educational presentations that support the Program's objectives and taking any and all other reasonable actions necessary to insure the proper administration of the Program. Manfred's responses to reporters' inquiries are disturbing. Is Manfred seriously arguing that children, who make up the vast majority of minor league players in these countries, some of whom are illiterate, and most of whom have little formal education and live in poor socio-economic conditions, are responsible for finding out the details of the Latin Summer League DPT Program because "they know there is a policy?" Is it an acceptable standard that educational efforts are "supposed to happen?" This attitude fails not only to appreciate the context in which MLB is implementing its Latin drug-testing program but also to draw on international best practices on anti-doping education programs, such as those emphasized by WADA.<sup>260</sup>

#### *4. Random, Off-Season, and Reasonable Cause Testing*

The Minor League DPT Program and the Latin Summer League DPT Program are virtually identical in their provisions on random testing (including off-season testing) and reasonable cause testing for use of Prohibited Substances.<sup>261</sup> See Table 11.

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<sup>259</sup> Latin Summer League DPT Program, *supra* note 44, at 1, 2.

<sup>260</sup> WADA, *World Anti-Doping Code*, *supra* note 11, at 50; WADA, *Model Guidelines for Core Information/Education Programs to Prevent Doping in Sport*, (2005), [http://www.wada-ama.org/rtecontent/document/EDU\\_MODEL\\_GUIDELINES\\_En.pdf](http://www.wada-ama.org/rtecontent/document/EDU_MODEL_GUIDELINES_En.pdf).

<sup>261</sup> Minor League DPT Program, *supra* note 31, at 4–5, 6; Latin Summer League DPT Program, *supra* note 44, at 5–7.

**Table 11. Random and Reasonable Cause Testing in the Minor League and Latin Summer League DPT Programs<sup>262</sup>**

**3. Random Testing**

**A. Drugs of Abuse**

1. In addition to the testing set forth in Section 4 below, all Players will be subject to four unannounced tests per year for the use of any Drug of Abuse. If a Player tests positive for a Drug of Abuse, MLHPAC may subject that Player to additional testing beyond the four tests per year generally required under the Program.
2. If a Player tests positive for any Drug of Abuse, he shall immediately enter the Administrative Track and shall be subject to the discipline set forth in Section 8 below.

**B. Performance Enhancing Drugs**

1. In addition to the testing set forth in Section 4 below, all Players will be subject to up to four unannounced tests per year for the use of Performance Enhancing Substances. If a Player tests positive for a Performance Enhancing Substance, MLHPAC may subject that Player to additional testing beyond the four tests per year generally required under the Program.
2. If a Player tests positive for any Performance Enhancing Substance, he shall immediately enter the Administrative Track and shall be subject to the discipline set forth in Section 8 below.

**C. Off-Season Testing**

All Players will be subject to random, unannounced tests during the off-season. Players are responsible for ensuring that the Office of the Commissioner has the Player's most recent contact information (e.g., home phone number, cell phone number and address) and the dates for which a Player may not be reachable. If the Office of the Commissioner attempts to test a Player during the off-season but is unable to contact the Player using the information provided by the Player, Player will be charged with a "positive" drug test and will be disciplined in accordance with Section 8 of the Program.

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<sup>262</sup> Minor League DPT Program, *supra* note 31, at 5; Latin Summer League DPT Program, *supra* note 44, at 5–7.

[Latin Summer League DPT Program:] Players should contact Chris Guinty at the Center for Drug Free Sports to provide updated or changed contact information. Chris can be reached at (816)474-8655 x121 or [cguinty@drugfreesport.com](mailto:cguinty@drugfreesport.com).

[Minor League DPT Program:] Players should contact the Center for Drug Free Sports either by phone at (877) 677-4287, ext. 114 or by e-mail at [sic] to provide updated or changed off-season contact information.

#### **4. Reasonable Cause Testing**

In the event that any MLHPAC member has information that gives him/her reasonable cause to believe that a Player has, in the previous year, engaged in the use, possession or distribution of a Prohibited Substance, such member shall immediately request a meeting (or conference call) to present this information to the other MLHPAC members. Upon hearing the information presented, MLHPAC may either immediately determine if there is reasonable cause to believe that the Player has engaged in the use, possession, or distribution of a Prohibited Substance or MLHPAC may conduct a prompt investigation to ascertain certain facts. If MLHPAC determines that such reasonable cause exists, the Player will be subject to immediate testing in accordance with the procedures and protocols set forth in Addendum A hereto.

The off-season testing rules raise special concerns for Latin players whether they play in the North American or Latin American minor league system. However, the concerns are most acute with those who play minor league ball in the Dominican Republic and Venezuela, which is our focus. The Minor League DPT Program and Latin Summer League DPT Program provide that, if the MLB Commissioner's Office is unable to contact the player using information provided by him, the Program charges the player with a "positive" drug test and will subject him to sanctions.<sup>263</sup> This approach seems overly harsh because it exposes a player to potentially career-ruining sanctions and stigma because the MLB Commissioner's Office was not able to contact him. The punishment is the same in this context as when a player refuses to take a random test during the season. The rule provides no flexibility for

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<sup>263</sup> Minor League DPT Program, *supra* note 31, at 5; Latin Summer League DPT Program, *supra* note 44, at 5.

malfunctions or inefficiencies in the communications systems in Venezuela or the Dominican Republic. The rule also fails to account for players who may need to be away from their homes for family emergencies or other unexpected reasons having nothing to do with nefarious PED use.

Without undermining the importance of off-season testing, the Minor League DPT Program and Latin Summer League DPT Program could apply rules that was more even-handed in their effect on players. For example, players could be provided with the opportunity to show that they were in fact available through the contact information provided or they had good cause for not being reachable at the time the MLB Commissioner's Office attempted to contact them. In addition, the rules could limit players to one "good cause" excuse for off-season testing in order to prevent abuse of the additional flexibility.

The rules could more be more fair for players if the Minor League DPT Program and Latin Summer League DPT Program allowed Latin players to contact their teams, an official representative of MLB, or the MLHPAC in their home countries about changes in their contact information or their availability. The rules currently require the player to ensure that the MLB Commissioner's Office has his most recent contact information and the dates for which a player may not be reachable.<sup>264</sup> The rules provide that a player should call or e-mail the National Center for Drug Free Sport, Inc. in Kansas City, Missouri<sup>265</sup> to provide updated or changed contact information.<sup>266</sup>

The National Center for Drug Free Sport acts as the agent for MLB in connection with drug-testing that occurs under the Minor League DPT Program and the Latin Summer League DPT Program. The necessity of forcing Dominican and Venezuelan children and young men, many of whom have no access to e-mail, cell phones, or inexpensive international telephone services, to call the United States to update contact information is not clear. More efficient and perhaps effective would be to establish official contact points in the Dominican Republic

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<sup>264</sup> Minor League DPT Program, *supra* note 31, at 5; Latin Summer League DPT Program, *supra* note 44, at 5.

<sup>265</sup> National Center for Drug Free Sport, Inc., <http://www.drugfreesport.com/index.asp>.

<sup>266</sup> Minor League DPT Program, *supra* note 31, at 6; Latin Summer League DPT Program, *supra* note 44, at 5.

and Venezuelan to facilitate better flows of contact (and other forms of) information.

Under the Program, each MLB team must have an Employee Assistance Program (EAP), which could serve as the conduit for contact information for off-season testing, or MLHPAC could establish focal points in the Dominican Republic and Venezuela for the transfer of information critical to making off-season testing (and other parts of the Program) function effectively and fairly. MLB's failure to establish any administrative capabilities or resources in these countries for the Latin Summer League DPT Program makes the single focal point strategy currently unfeasible.

### 5. Collection Procedures

The procedures under which MLB collects test samples from players are almost identical under the Minor League DPT Program and the Latin Summer League DPT Program.<sup>267</sup> A problem that arises under these collection procedures in the Latin Summer League DPT Program is that MLB is often subjecting children (i.e., players under 18 years of age) to the collection of testing samples. The need to have higher standards of care when children are being subjected to drug testing regimes is emphasized by WADA. In its Model Rules, WADA provides that “[t]esting under these Anti-Doping Rules may only be conducted on a *Minor* where a *Person* with legal responsibility for that *Minor* has given prior consent.”<sup>268</sup>

The Latin Summer League DPT Program fails to respect this internationally recognized principle concerning drug testing for child athletes. In fact, this age-of-consent problem raises other concerns with the Program. For example, the Program includes forms players must sign

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<sup>267</sup> Minor League DPT Program, *supra* note 31, at Addendum A; Latin Summer League DPT Program, *supra* note 44, at Addendum A. The Minor League DPT Program has added some additional language regarding incomplete specimens as well as a Policy for Partial Urine Specimens dated March 1, 2006. Minor League DPT Program, *supra* note 31, at Addendum A. Although not found in the 2006 version of the Latin Summer League DPT Program, MLB could be applying the same rules on partial or incomplete specimens in both North and Latin America.

<sup>268</sup> WADA, *Model Rules for National Anti-Doping Organizations*, June 2004, §5.7, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=375> (emphasis in original).



that authorize the release of medical information to MLHPAC and team management.<sup>269</sup> The authorization forms do not contain any acknowledgement that parents or legal guardians of players under 18 also should sign such forms. MLB teams must get parental or legal guardian consent to sign children to minor league contracts,<sup>270</sup> and the same principle should apply to the legal forms and administrative procedures of the Latin Summer League DPT Program.

The lack of any attention to the issue of applying a drug testing program to children is significant in a context in which MLB teams seek to recruit, sign, and train players as young as possible. Children *are* the target of MLB teams' efforts in the Dominican Republic and Venezuela. MLB must shoulder the responsibilities created by seeking to deal legally and commercially with children. WADA has promulgated the internationally recognized standard of parental or legal guardian consent that should also guide the administration of the Latin Summer League DPT Program.

#### 6. *Testing Protocols*

The protocols used for testing whether a sample is positive are identical in the Minor League DPT Program and the Latin Summer League DPT Program.<sup>271</sup> The main issue with the testing protocols from the perspective of Latin minor league players concerns Performance Enhancing Substances. Unlike the Major League Joint DPT Program, which has threshold levels for a positive test for Stimulants,<sup>272</sup> the Minor League DPT Program and the Latin Summer League DPT Program trigger a positive test if any Performance Enhancing Substance is present in the sample, apparently no matter how small the amount.<sup>273</sup> This lack of any tolerance underscores how rigorous these two Programs are, which heightens the importance of transparency, clarity, and education of

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<sup>269</sup> Latin Summer League DPT Program, *supra* note 44, at Addendum B–C (Authorization for the Release of Treatment History for Treatment Purposes and Authorization for the Release of Treatment History to Club Management).

<sup>270</sup> Uniform Minor League Player Contract, Parents or Guardians Consent, *available at* <http://monsternac.princeton.edu/proguide/minorleaguecontract.html>.

<sup>271</sup> Minor League DPT Program, *supra* note 31, at Addendum A; Latin Summer League DPT Program, *supra* note 44, at Addendum A.

<sup>272</sup> Major League Joint DPT Program (2006), *supra* note 27, at Addendum A.

<sup>273</sup> Minor League DPT Program, *supra* note 31, at Addendum A; Latin Summer League DPT Program, *supra* note 44, at Addendum A.

players affected by them. As analyzed earlier, concerns exist about MLB's performance on precisely these issues with respect to Latin minor league players.

### 7. Notification of Positive Test Results

The process by which a player learns whether he has tested positive for a Prohibited Substance is almost identical in the Minor League and the Latin Summer League DPT Programs.<sup>274</sup> Under the Latin Summer League DPT Program, for Drugs of Abuse, MLHPAC must immediately notify the team's General Manager, Farm Director, and EAP of a player's positive test result, the date of collection, and the substance for which the player tested positive.<sup>275</sup> Then, "the Office of the Commissioner's Venezuelan-based EAP shall be responsible for informing the Player of the positive test result."<sup>276</sup> This provision is odd because the Latin Summer League DPT Program defines an EAP as the "Employee Assistance Programs" of teams and not of the MLB Commissioner's Office.<sup>277</sup> In the Minor League DPT Program, the EAP of the team informs the player of the positive test for a Drug of Abuse.<sup>278</sup> Who or what is the MLB Commissioner's EAP is not defined in the Latin Summer League DPT Program.

The confusion continues in the next provision of notification for positive results for Drugs of Abuse: "If a Player tests positive for a second time, MLHPAC shall notify the Club's General Manager, Farm Director and the Venezuelan-based EAP of the discipline and the General Manager or Farm Director shall be responsible for disclosing this information to the Player."<sup>279</sup> Is the "Venezuelan-based EAP" in this provision the MLB Commissioner's or the team's EAP?

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<sup>274</sup> Minor League DPT Program, *supra* note 31, at 6–7; Latin Summer League DPT Program, *supra* note 44, at 6.

<sup>275</sup> Latin Summer League DPT Program, *supra* note 44, at 6.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 1.

<sup>278</sup> Minor League DPT Program, *supra* note 31, at 6.

<sup>279</sup> Latin Summer League DPT Program, *supra* note 44, at 6. The reference to only a Venezuelan-based EAP in this provision is a reminder that MLB only fully applies the Latin Summer League DPT Program presently in Venezuela not the Dominican Republic, as discussed *supra* notes 227–228 and accompanying text and *infra* notes 290–294 and accompanying text.

The EAP confusion gets worse in the provisions on notification of positive results for Performance Enhancing Substances. For such results, MLHPAC must immediately notify the team's General Manager and Farm Director of a player's positive result, the date of collection, the substance for which the player tested positive, and the discipline being imposed.<sup>280</sup> Then, the team's "General Manager and/or Farm Director may, at his discretion inform the EAP of such positive test result."<sup>281</sup> Even more confusingly, the provision continues: "The Club's Venezuelan-based EAP shall be responsible for informing the Player of the positive test result and the discipline imposed."<sup>282</sup> The provision never states that some entity, such as the MLHPAC or the team's General Manager, *must* inform the Venezuelan-based EAP of the positive test result so that this EAP can fulfill its obligation to inform the player.

This confusion crops up in very important provisions in the Latin Summer League DPT Program concerning how the Program notifies a player of a positive test. The complex and confusing notification provisions perhaps help to explain why investigative reporting in Venezuela has uncovered instances of players learning of their positive tests in ways not prescribed by the rules.<sup>283</sup> The chain of communication is particularly important because the Latin Summer League DPT Program requires that information on the player's positive test remain confidential, especially until the player's rights of appeal have been exhausted.<sup>284</sup> The chain of communication is also critical for informing the player of his rights to appeal and how to appeal a positive test.

Stepping back from the confusion helps provide a sense of the unnecessary complexity the Latin Summer League DPT Program contains on notification of positive test results. Figures 1 and 2 map the chain of communication in the notification processes for positive results for Drugs of Abuse and Performance Enhancing Substances in the Latin Summer League DPT Program. As the Figures illustrate, these notification processes are unduly complicated and should be simplified in a way that maximizes the rapidity of communication to the player and the confidentiality of the information about the positive test result.

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<sup>280</sup> *Id.*

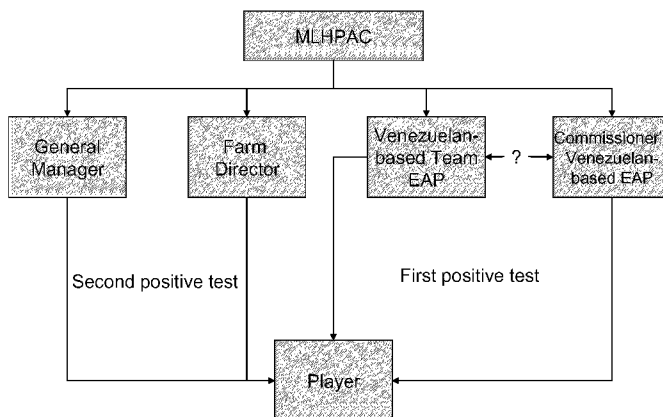
<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

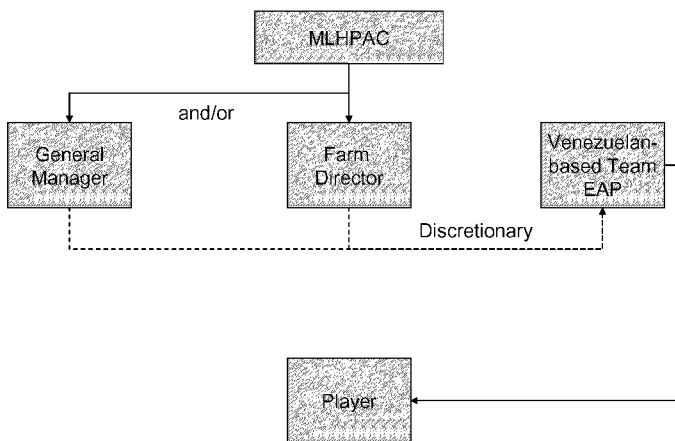
<sup>283</sup> Baker, *Growing Pains*, *supra* note 43.

<sup>284</sup> Latin Summer League DPT Program, *supra* note 44, at 8.

**Figure 1. Notification of Positive Test Results for Drugs of Abuse**



**Figure 2. Notification of Positive Test Results for Performance Enhancing Drugs**



*8. Sanctions for Violating the Drug-Testing Program*

The Minor League DPT Program and the Latin Summer League DPT Program impose the same sanctions for violations of their respective rules.<sup>285</sup> See Table 12. Although the sanctions are the same, the impact of the sanctions is different for players participating at different levels of the minor league system because of the varying number of games played in a season. This disparate impact is described in Table 13.

**Table 12. Sanctions for Violating Drug-Testing Program**

<b>Offenses</b>	<b>Failure to Comply with Treatment Programs</b>	<b>Positive Test for Drug of Abuse</b>	<b>Positive Test for Performance Enhancing Substance</b>
First	50-game suspension	Enters Administrative Track and placed in treatment program	50-game suspension
Second	100-game suspension	50-game suspension	100-game suspension
Third	Permanent suspension	100-game suspension	Permanent suspension
Fourth		Permanent suspension	

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<sup>285</sup> Until the 2006 season, the Minor League DPT Program had less severe sanctions than the Latin Summer League DPT Program, namely a 15-game suspension for a first violation (rather than the 50-game suspension in the Latin Summer League) and a 30-game suspension for a second violation (rather than a 100-game suspension in the Latin Summer League). Major League Baseball's Minor League Drug Prevention and Treatment Program (2005) (on file with authors), at 9–11. MLB increased the sanctions in the Minor League DPT Program before the 2006 season so that it and the Latin Summer League DPT Program have the same sanctions. Mark Thoma, *50-Game Bans for Cal Leaguers*, THE PRESS-ENTERPRISE, Apr. 18, 2006, [http://www.pe.com/sports/baseball/breakout/stories/PE\\_Sports\\_Local\\_D\\_suspensions\\_19.13232ff8.html](http://www.pe.com/sports/baseball/breakout/stories/PE_Sports_Local_D_suspensions_19.13232ff8.html).

**Table 13. Relative Impact of Sanctions on Different Parts of the Minor League System**

<b>Minor League</b>	<b>Number of Games Per Season<sup>286</sup></b>	<b>Percentage of Season Lost from 50-Game Suspension</b>	<b>Percentage of Season Lost from 100-Game Suspension</b>
AAA	144	34.7%	69.4%
AA (Eastern League)	142	35.2%	70.4%
AA (Southern League, Texas League)	140	35.7%	71.4%
A-Advance	140	35.7%	71.4%
A	140	35.7%	71.4%
Short Class A	76	65.8%	One entire season + 31.6% of the next season
Rookie Advance (Appalachian League)	68	73.5%	One entire season + 42.1% of the next season
Rookie Advance (Pioneer League)	76	65.8%	One entire season + 31.6% of the next season
Rookie (Arizona League)	56	89.3%	One entire season + 78.6% of the next season
Rookie (Gulf Coast League)	54	92.6%	One entire season + 85.2% of the next season
Dominican Summer League	70-72	71.4%-69.4%	One entire season + 42.9%-38.9% of the next season
Venezuelan Summer League	60	83.3%	One entire season + 66.7% of the next season

<sup>286</sup> BASEBALL AMERICA DIRECTORY 135, 143, 152, 159, 165, 170, 176, 181, 187, 194, 202, 209, 214, 219, 224, 289 (23rd ed., 2006).

Table 13 helps illustrate how serious the sanctions are for players in the rookie leagues in the United States and in the Summer League in Venezuela. As noted above and discussed more below, MLB claims that it cannot impose these game-suspension sanctions on Dominican players in the Dominican Summer League. The impact on Venezuelan players in the Summer League is not disproportionate to players in the rookie leagues in the United States. However, the severity of the sanctions heightens the importance of transparency, clarity, and education in operating both Programs. Sufficient concerns exist to indicate that MLB could do a much better job making the Latin Summer League DPT Program more transparent and clear to teams, scouts, players, their parents, and *buscones*. The importance of transparent, clear, and comprehensive information is well understood in other sports affected by PEDs, as the emphasis on these objectives by WADA illustrates.<sup>287</sup> The more severe the penalties, the more critical education, awareness, and process become to effective and equitable anti-PED strategies.

A worrying anomaly in the sanctions context is the purported inability of MLB to apply the game-suspension sanctions against Dominican players in the Dominican Summer League. As noted above, MLB claims that it cannot suspend the players because Dominican law prohibits such suspensions. A number of people have challenged MLB's reading of Dominican law, claiming that MLB's position is "nonsense."<sup>288</sup> There seems to be no disagreement that MLB teams can terminate a Dominican player's contract and release him for testing positive for PED use. It seems odd that MLB teams would not be able to impose the less severe penalty of suspension upon Dominican players.

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<sup>287</sup> WADA, *World Anti-Doping Code*, *supra* note 11, at 50; WADA, *Model Guidelines for Core Information/Education Programs to Prevent Doping in Sport*, *supra* note 261.

<sup>288</sup> Farrey, *supra* note 45 (noting that Fernando Mateo of Hispanics Across America called MLB's claim "nonsense"); Julio C. Malone, *A Challenge to Major League Baseball*, HISPANIC LINK, Aug. 14, 2005, <http://www.hispaniclink.org/newsservice/columns/2005/4110e.htm> (Dominican journalist arguing that MLB's position is "juiced-up nonsense"); Baker, *Life in Needle Park*, *supra* note 48 (reporting that Dr. Mauro Di Pasquale, a former University of Toronto Professor and steroid expert, "scoffed at MLB's blaming of Dominican law for not suspending players").

Of course, this question is a question of Dominican law, and we are not experts in Dominican law. However, our research suggests that MLB's claims about Dominican law raise some important questions. Dominican law allows employers to suspend employees "either by mutual consent of the parties or due to one of the other causes expressly provided by the Labor Code (Art. 51)."<sup>289</sup> Article 51 of the Dominican Labor Code provides that employment contracts can be suspended through the mutual consent of the parties, which could be achieved through provisions in the employment contract agreed to by the employer and employee.<sup>290</sup> Critics of MLB's stance on Dominican law have used this reasoning.<sup>291</sup> In addition, Article 50 of the Dominican Labor Code allows employment suspensions to be without pay.<sup>292</sup>

Thus, Dominican law appears to provide MLB with a way to suspend Dominican players in the Dominican Summer League who violate the Latin Summer League DPT Program. MLB's position may hinge on the fact that the Uniform Minor League Player Contract, which all minor league players sign, does not contain express clauses allowing MLB teams to suspend players for violating the drug-testing program.<sup>293</sup> MLB may have received legal advice from Dominican lawyers opining that, absent such express contractual clauses, MLB cannot suspend Dominican players for violating the prohibitions on PED use.

The irony, of course, is that MLB unilaterally sets the terms of the Uniform Minor League Player Contract. MLB could easily include provisions specific to suspensions for violating the drug policy and maintain uniform contracts. Such provisions would apply to minor league players signed in North America or Latin America now that MLB

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<sup>289</sup> Fabio J. Guzmán, *An Overview of Dominican Labor Law* §5.6, [http://drl.com/legal/business/Labor\\_Law.pdf](http://drl.com/legal/business/Labor_Law.pdf).

<sup>290</sup> Código de Trabajo de la República Dominicana (Ley 16-92), May 29, 1992, Artículo 51 ("Son causas de suspensión de los efectos del contrato de trabajo: 1. El mutuo consentimiento de las partes . . .").

<sup>291</sup> Farrey, *supra* note 45 (quoting Fernando Mateo arguing that "[t]he Dominican government cannot impose themselves on a contract between an individual and corporation. When these kids sign on a dotted line, they are under contract with their firm.").

<sup>292</sup> Código de Trabajo de la República Dominicana, *supra* note 290, at Article 50.

<sup>293</sup> Uniform Minor League Player Contract, *supra* note 270.



has drug-testing policies in all its minor league operations. If this analysis is correct, then MLB's position that it cannot suspend Dominican players under Dominican law ingenuously tells only part of the story. If this line of reasoning is accurate, why has MLB not moved to remedy the discrepancy in enforcing the Latin Summer League DPT Program in the Dominican Republic?

### 9. *The Appeal Process*

The appeal process in the Minor League DPT Program and the Latin Summer League DPT Program are almost identical except in one important area, the scope of the Therapeutic Use Exemption. Both Programs limit the bases for a player's appeal of a positive test result to three grounds: (1) the player has sufficient reason to believe that the chain-of-custody of his sample was not properly administered pursuant to Program requirements, which produced the erroneous test result; (2) the player has sufficient reason to believe that the laboratory did not properly administer the testing of the specimen, which resulted in an erroneous test result; or (3) the player qualifies for a Therapeutic Use Exemption (TUE).<sup>294</sup> The 2007 version of the Minor League DPT Program contains additional provisions related to the TUE that do not appear in the 2006 version of the Latin Summer League DPT Program.<sup>295</sup>

As highlighted above,<sup>296</sup> the first two bases for filing an appeal seem nearly impossible for a minor league player, whether from the United States or a Latin American country, to use. How is a Latin teenager, with little education, no ability to speak English, and often no agent to provide assistance, going to develop sufficient reasons to believe that the transnational chain-of-custody of his sample was not properly administered or that the laboratory in Kansas City, Missouri did not properly test his specimen? Even though MLB applies the same rules to minor league players in North America and Latin America, the particular context of minor league baseball in the Dominican Republic and Venezuela makes these rules even more difficult for players in these

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<sup>294</sup> Minor League DPT Program, *supra* note 31, at 11; Latin Summer League DPT Program, *supra* note 44, at 11–12.

<sup>295</sup> Minor League DPT Program, *supra* note 31, at 12–14. These additional TUE provisions include detailed instructions on applying for a TUE and for making a TUE appeal. *Id.* at 13–14, Addendum F.

<sup>296</sup> See *supra* notes 295–296 and accompanying text.

countries to contemplate utilizing effectively. In effect, Latin minor league players receive harsher treatment.

Similar harsh treatment occurs with respect to the process through which players have to appeal a positive test result. The process for appealing is nearly identical in the Minor League and the Latin Summer League DPT Programs,<sup>297</sup> but, in this case, making the processes virtually the same produces *de facto* discrimination. Earlier we described the appeal process in the Minor League DPT Program,<sup>298</sup> and the application of this process to players in Latin America creates inequities that MLB could eliminate in favor of a more effective process.

The Latin Summer League DPT Program requires children and young men from Latin American countries to file a written appeal with the MLB Commissioner's Office in New York within 48 hours of being informed of a positive test result.<sup>299</sup> This short period of time contrasts with WADA's various model rules, which give athletes up to 21 days to appeal positive test results.<sup>300</sup> The time period to file an appeal matters because completing this task requires: (1) being informed properly of the positive test result; (2) understanding the complex rules on appealing positive results, especially the narrow bases for filing an appeal; (3) having the ability of writing down cogently an appeal that would pass muster under the rules; and (4) delivering this document to the MLB Commissioner's Office in New York by overnight mail or fax.<sup>301</sup> In addition, if the player wants his "B" sample tested to confirm his argument that the "A" sample was erroneously tested, the player has to pay for such test in advance.<sup>302</sup> The player is also responsible for the costs associated with his appeal if MLHPAC rejects it.<sup>303</sup>

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<sup>297</sup> Minor League DPT Program, *supra* note 31, at 12; Latin Summer League DPT Program, *supra* note 44, at 12. The 2007 version of the Minor League DPT Program contains additional instructions on submitting a TUE appeal that do not appear in the 2006 version of the Latin American DPT Program. Minor League DPT Program, *supra* note 31, at 12, Addendum F.

<sup>298</sup> See *supra* notes 133–141 and accompanying text.

<sup>299</sup> Latin Summer League DPT Program, *supra* note 31, at 12.

<sup>300</sup> WADA, *Models of Best Practice for International Federations* (2003), at 29 (giving athletes 21 days to appeal a positive test result to the Court of Arbitration for Sports).

<sup>301</sup> Latin Summer League DPT Program, *supra* note 44, at 12.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

As noted above in the overview of the Minor League DPT Program,<sup>304</sup> MLB has designed the appeal process to be very difficult for minor league players to use, even for minor league players who have the assistance of an agent.<sup>305</sup> For minor league players in Venezuela, the appeal process is not impossible to utilize<sup>306</sup> but it is unnecessarily inequitable and unfair. Why minor league players in Latin America cannot communicate appeals to someone or some entity connected to MLB in their own countries is not clear beyond the fact that MLB has built no institutional systems in these countries to handle such a responsibility. Instead of making such country-level investments, MLB forces Latin players, who often have no agents or legal representation, to maneuver through a very difficult and non-independent appeal process located entirely in New York City. The substantive bases for appealing positive tests are so narrow and difficult to establish that they would prevent an in-country appeals communication channel from producing an avalanche of frivolous appeals.

Reporting on the problems with MLB's drug-testing program in Venezuela also reveals a lack of understanding about the appeal process on the part of players affected by positive test results.<sup>307</sup> Leaving aside the difficulties of making appeals, MLB can, and should, do much more to educate MLB teams and Latin players about the appeal process. Accomplishing this objective will require something MLB has so far been reluctant to do—invest more time and resources into educating communities in the Dominican Republic and Venezuela affected by the Latin Summer League DPT Program.

#### ***D. Concluding Thoughts on the Critical Analysis of the Latin Summer League DPT Program***

Our critical analysis of the Latin Summer League DPT Program reveals many problems that create inequities and unfairness for players in the Dominican Republic and Venezuela who are subject to its rules.

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<sup>304</sup> See *supra* notes 106–147 and accompanying text.

<sup>305</sup> See, e.g., Masteralexis, *supra* note 149, at 786–87 (describing difficulties of the appeal process for minor league players in the United States).

<sup>306</sup> Baker, *Growing Pains*, *supra* note 43 (noting that Robert Manfred of the MLB Commissioner's Office indicated that three appeals from Venezuela players have been made).

<sup>307</sup> *Id.*

These problems begin with the one-sided, unilaterally imposed Minor League DPT Program, which MLB developed for the minor leagues in the United States and Canada but used as the template for its drug-testing activities in Latin America. Changes that MLB made to the Minor League DPT Program in applying it to Latin America have increased the unfairness of MLB's unilateral approach to drug testing in the minor leagues or added to this unfairness by creating rules that, in effect, discriminate against Latin children and young men.

In the last part of this article, we make some recommendations for how MLB can transform its drug-testing program in Latin America into a more effective, fair, and equitable tool. The way in which MLB has approached, and continues to approach, the PED problem in the Dominican Republic and Venezuela is neither necessary nor prudent. Whether MLB is serious about addressing the PED problem in its Latin markets for baseball talent hinges on its ability to revise its strategy and efforts in ways that will improve not only the health of players but also the integrity of the game of baseball.

#### **V. RECOMMENDATIONS FOR IMPROVING MLB'S DRUG PREVENTION AND TREATMENT PROGRAM IN LATIN AMERICA**

In our prior efforts to encourage MLB to change the way it approaches Latin minor league players, we developed five general and interdependent principles to guide the reforms needed.<sup>308</sup> These reform principles are: democratization, centralization, harmonization, specialization, and implementation. We believe these principles provide useful guidance with respect to the operation of MLB's drug prevention and

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<sup>308</sup> We have applied these general reform principles to proposals for a worldwide draft and to MLB's proposed standards for baseball academies in the Dominican Republic and Venezuela. See Letter from Arturo J. Marciano and David P. Fidler on the Worldwide Draft Proposal to MLB Commissioner Allan H. (Bud) Selig and MLBPA Executive Director Don Fehr (Sept. 9, 2002) (on file with authors); Memorandum from Arturo J. Marciano and David P. Fidler on Preliminary Analysis of "MLB Academy Standards and Compliance Inspection Procedure" to Rafael Perez, MLB Commission's Office, Dominican Republic (Jan. 17, 2003) (on file with authors).

treatment program in Latin America. In this part, we apply these principles to this program in an effort to recommend constructive changes to the way in which MLB seeks to address the PED problem in the Dominican Republic and Venezuela.

### *A. Democratization*

A feature of MLB's behavior in connection with its minor league operations has been a tendency not to involve interested parties in the Dominican Republic and Venezuela.<sup>309</sup> Concerning other problems with MLB's behavior in Latin America, we urged MLB to seek more significant input and participation from interested actors in the Dominican Republic and Venezuela. We call this effort to broaden the base of local participation "democratization." The manner in which MLB set up the Latin Summer League DPT Program is a classic example of MLB's failure to integrate local stakeholders. The program fails to create a formal role for interested organizations and individuals in the Dominican Republic and Venezuela. MLB does not have one employee resident in Venezuela assigned to handle any issue, let alone the Latin Summer League DPT Program. The Program does not even officially create a role for the MLB office in the Dominican Republic. All decisions concerning Latin American minor league baseball are made entirely in New York City and by U.S.-based employees or consultants of MLB. The laboratory that conducts the testing on samples from Latin minor league players is in Kansas City, Missouri. Latin minor league players have to communicate any issues with drug-testing directly to persons or entities in the United States.

The lack of local involvement in the Latin Summer League DPT Program stems partly from the fact that MLB simply applied the Minor League DPT Program, which was developed for the minor leagues in the United States and Canada, to the Dominican Republic and Venezuela. MLB's failure to integrate Dominicans and Venezuelans systematically into the Program reveals the reluctance of the MLB Commissioner's Office to create sustainable and productive partnerships in Latin American countries. PED use not only threatens the integrity of the game of baseball but it also threatens the individual health of players and

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<sup>309</sup> A similar concern could be raised about MLB's approach to regulating drug-testing in its North American minor league operations, but our focus is on the minor league operations in Latin America.

prospects, and the health of the overall population in these countries. The Latin Summer League DPT Program could be a powerful engine for creating synergies between governments, non-governmental organizations, private enterprises, schools, and community organizations, all of which have an interest in curtailing the use of PEDs by children and young men. Applying the reform principle of democratization would allow MLB to reach out and build partnerships that could, collectively, constitute a critical mass against the ever-present and dangerous temptations to use PEDs.

As noted earlier, the governments of both the Dominican Republic and Venezuela have signed the Copenhagen Declaration on Anti-Doping in Sports.<sup>310</sup> Thus, MLB has an opportunity to work more closely with the Dominican and Venezuelan governments to address the PED problem. MLB outreach to schools, sports and community organizations, and more high-profile involvement of Latin major league players could deepen and broaden the anti-PED message that MLB claims that it wants to spread.<sup>311</sup> As with many social problems in a globalized world, leaders have to think globally but act locally. Ultimately, individuals at the local level make the decision whether to reject or use PEDs. MLB is wasting an opportunity to build a more democratic approach to anti-doping in the Dominican Republic and Venezuela, which would benefit the health of children and young men, the overall public health, improve the integrity of the game of baseball from the local level through global level, and help fulfill MLB's social responsibility in these Latin American countries.

### ***B. Centralization***

A second principle we have used to encourage reform in MLB's activities in Latin America has been centralization. We applied this

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<sup>310</sup> WADA, *Copenhagen Declaration on Anti-Doping in Sports: List of Signatories*, *supra* note 17.

<sup>311</sup> See Merkin, *supra* note 62 (reporting on Venezuelan and Chicago White Sox manager Ozzie Guillen's public service announcements warning of the dangers of PED use); Geoff Baker, *Challenging Drug Abuse; Jays' Batista Urges Dominican Youngsters to Stay Off Juice*, TORONTO STAR, May 24, 2005, at E06 (reporting on efforts of major leaguer Miguel Batista to encourage more collective effort by MLB, the Dominican government, and Dominican major league players to fight PED use in the Dominican Republic).

principle in situations in which MLB had not designed a central system of regulation for its minor league activities in the Dominican Republic and Venezuela. For example, until recently, MLB had no central set of standards for baseball academies in these countries, even though standards existed for minor league baseball facilities in the United States and Canada. MLB's initial reaction to the public disclosure of the PED problems in Latin America in 2003 was to cling to de-centralization because it did not want to create a drug prevention and treatment program for its minor league operations in Latin America. MLB's failure to recognize its responsibility for PED use not only in the North American minor league system but also in its Latin American operations led to it being denounced for applying "double standards" that treated Latin players in a callously discriminatory manner.

The creation of the Latin Summer League DPT Program in response to outside pressure constituted MLB's attempt to create a central regulatory system for PED use in its minor league operations in both North and Latin America. The existence of the Latin Summer League DPT Program suggests that MLB, however reluctantly, has reformed its approach in a manner consistent with the principle of centralization. The major problem under the centralization principle involves the purported inability of MLB to suspend Dominican players for testing positive for PEDs. This problem needs to be addressed in a more forthright manner because it constitutes a serious weakness in achieving a central regulatory approach that does not discriminate against equally situated minor league players. As argued above, we, and others, are skeptical of MLB's claim that Dominican law prohibits the suspension of Dominican players who test positive for PEDs. Assuming MLB is correct on the suspension issue, it should explore potential ways to work with the Dominican government to make it possible for sanctions to be applied. As a signatory to the Copenhagen Declaration on Anti-Doping in Sports, the government of the Dominican Republic is committed to taking serious actions against athletes who engage in doping, including sanctions. More determined efforts on the part of MLB to engage local constituencies in the Dominican Republic (as encouraged by the democratization principle) would help build support for changing Dominican law, should such legal reform actually be necessary.

### *C. Harmonization*

Much of our past work has involved efforts to try to get MLB to accord Latin minor league players equivalent protections and treatment as is provided for minor league players in the United States. For example, standards regulating the quality of minor league training and playing facilities should be the same. MLB's application of the Minor League DPT Program, originally developed and only applied in North America, to its Latin minor league operations would seem to correspond with the harmonization reform principle. Many of our concerns with the way the Minor League DPT Program applies in Latin America fall under a different reform principle, specialization, which we look at below. However, we do have problems with the manner in which MLB has harmonized drug prevention and treatment programs across its minor league operations in the United States and Latin America.

These problems arise from the substantive and procedural rules found in the Minor League DPT Program. In other words, the underlying rules being harmonized are flawed and need reforming. Earlier, this article identified many concerns about the Minor League DPT Program itself, especially its appeal process. Ultimately, these concerns arise because MLB unilaterally established the rules and applied them to its minor league operations in the United States and Canada with no input from minor league players, who have no union to represent their interests in negotiations with MLB. The creation of such a union is not likely, so recommendations for reform under the harmonization principle have to look elsewhere for guidance. For us, WADA's Anti-Doping Code and its related international standards on the various aspects of anti-doping programs provide MLB with an internationally recognized source of strategies and approaches for improving the anti-PED effort throughout MLB's minor league operations.<sup>312</sup>

In short, the harmonization reform principle calls for the WADA-ization of MLB's drug prevention and treatment programs for its minor league operations. This article has frequently compared aspects of the Minor League and Latin Summer League DPT Programs to WADA rules and standards. However, we have not, by any means, undertaken a comprehensive comparative examination of MLB's approach against

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<sup>312</sup> See also Nafziger, *supra* note 4, at 208 (arguing for the importance of the World Anti-Doping Code as an instrument of global anti-doping harmonization).



WADA's guidance for international and national anti-doping efforts. Such a comprehensive comparison should be undertaken, preferably, through cooperation between the MLB Commissioner's Office, WADA, and local stakeholders in the Dominican Republic and Venezuela.

Nearly 600 national and international sports organizations have adopted the World Anti-Doping Code,<sup>313</sup> and 191 countries<sup>314</sup>—including the United States, the Dominican Republic, and Venezuela—have recognized, through the Copenhagen Declaration on Anti-Doping in Sports, the World Anti-Doping Code as “the foundation in the world fight against doping in sport.”<sup>315</sup> Therefore, WADA's harmonization efforts provide a strong foundation on which to reform MLB's approach to its minor league operations in both the United States and Latin America. MLB's track record working outside the WADA system is not impressive, either at the major league or minor league level, as evidenced by the PED crisis afflicting both levels of professional baseball. MLBPA's influence in negotiations with MLB over the Major League Joint DPT Program (2006) means that this Program is less amenable to WADA-ization than the minor league program. MLB's total control over the minor league drug prevention and treatment program creates the opportunity to transform the minor league program collaboratively into a harmonized system based on the international standards developed by WADA and adopted universally by many sports organizations.

Using WADA as a guide for harmonization does not guarantee that MLB can completely prevent PED use. Other global sports, such as professional cycling, utilize the World Anti-Doping Code and still experience serious problem with doping by athletes.<sup>316</sup> The application of the substantive and procedural rules in the World Anti-Doping Code has been challenged in high-profile cases, such as the one involving cyclist

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<sup>313</sup> WADA, *World Anti-Doping Code: Code Acceptance*, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=270>.

<sup>314</sup> WADA, *Copenhagen Declaration on Anti-Doping in Sports: List of Signatories*, *supra* note 17.

<sup>315</sup> Copenhagen Declaration on Anti-Doping in Sports, *supra* note 17, at §4.1.

<sup>316</sup> See POUND, *INSIDE DOPE: HOW DRUGS ARE THE BIGGEST THREAT TO SPORTS, WHY YOU SHOULD CARE, AND WHAT CAN BE DONE ABOUT THEM*, *supra* note 30 (analyzing the doping problems in contemporary global sports).

and 2006 Tour de France winner Floyd Landis.<sup>317</sup> No “magic bullet” exists that will eliminate the pressures and attitudes that feed the temptation to use PEDs or the misuse of anti-doping rules and procedures by sports organizations. WADA-based harmonization may also be severely challenged in all sports by the development and use of increasingly sophisticated and hard-to-detect performance-enhancing substances.<sup>318</sup> However, the global acceptance of the World Anti-Doping Code by sports organizations, and the support governments and international organizations have provided the Code in the form of the Copenhagen Declaration on Anti-Doping in Sports and the UNESCO International Convention Against Doping in Sports, demonstrate the importance of the Code in the next generation of anti-doping efforts in global sports, including MLB.

#### *D. Specialization*

Although harmonization is an important strategic objective, we have in past work on MLB’s minor league operations in Latin America stressed the need to adapt the rules to meet the particular circumstances of minor league baseball in the Dominican Republic and Venezuela. Our earlier analysis of the critical importance of understanding the poverty problem, MLB’s recruiting interests in children, the problems caused by *buscones*, and the different and weaker pharmaceutical regulatory systems connect directly to the specialization reform principle. Even if subjected to WADA-ization, the Minor League DPT Program has to be

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<sup>317</sup> See FLOYD LANDIS & LOREN MOONEY, *POSITIVELY FALSE: THE REAL STORY OF HOW I WON THE TOUR DE FRANCE* (2007). According to Landis’ web site, this book “delivers a powerful indictment of the unchecked governing bodies of cycling and the Olympic Games that place the bureaucratic ambitions of a few over the integrity of sport as a whole. He describes the inner workings of the cycling world—a place with no union or bargaining power where the athletes are subject to the upside-down world of anti-doping, replete with antiquated science, flawed interpretive protocols and a draconian legal process.”). [floydlandis.com](http://www.floydlandis.com), “*Positively False: The Real Story of How I Won the Tour de France*” Officially on Sale Today, June 26, 2007, <http://www.floydlandis.com/blog/> (last visited Sept. 4, 2007).

<sup>318</sup> Nafziger, *supra* note 4, at 208 (“The new specter of undetectable or difficult-to-detect doping, highlighted by the BALCO controversy in the United States, serves as a reminder that we have entered a Brave New World of doping and doping control in sports.”).

adjusted or supplemented to account for the conditions of Latin America in order to produce an effective and sustainable anti-PED effort.<sup>319</sup>

MLB has to acknowledge that the context of poverty and the recruitment of children in poverty make anti-doping efforts in the Dominican Republic and Venezuela different from similar efforts in the North American minor leagues. This acknowledgment must involve a much more sincere and serious approach to the social responsibilities MLB and MLB teams face in these countries. MLB's past behavior in these countries does not inspire confidence that the MLB Commissioner's Office even understands why social responsibility should be a strategic component of its activities in Latin America. In the context of PEDs, MLB's constant refrain that it bears no responsibility for the adverse effects of the *buscon* system is evidence of the willful blindness and lack of leadership in the Commissioner's Office. In our nearly ten years of working to try to improve MLB's behavior in Latin America, we have not seen one instance in which the Commissioner's Office made any changes, except when confronted with significant external criticism and pressure. Unfortunately, the same dynamic has played out in the PED context at the major league level. It effectively took threats from Congress to get MLB and the MLBPA to agree to confront seriously doping by major league players, and it took outside intervention, which included the Governor of the State of New York, to prod MLB toward applying drug-testing regulations in its Latin minor league operations.

Operationalizing the specialization principle can connect with the democratization principle because tailoring a drug prevention and treatment program for the context in which MLB's Latin minor leagues operate requires local involvement and input. As argued earlier in the article, MLB can take steps to minimize the incentives that *buscones* have to "juice" prospects for minor league contracts, and taking these steps would be an example of how MLB could apply the specialization reform principle. Even with taking these steps, effective regulation of *buscones* would have to involve local actions coordinated with MLB, which has tremendous power to facilitate and support local activism.

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<sup>319</sup> Nafziger points out that the World Anti-Doping Code "despite its theme of harmonization, does not require anti-doping organizations to adopt a single results management and hearing process. Each signatory organization can design its own process so long as it satisfies the Code's general requirements." *Id.* at 205-206.

Rather than constantly trying to wash its hands of any culpability for the negative externalities caused by *buscones*, MLB can apply the specialization and democratization reform principles to help the Dominican Republic and Venezuela mitigate and perhaps eliminate these negative externalities.

### ***E. Implementation***

The final principle for reform is implementation. In the past, MLB has established rules, such as the 17-year-old rule, only to fail to implement and enforce them effectively.<sup>320</sup> This article has argued that MLB has failed, and continues to fail, to implement a drug prevention and treatment program effectively in the Dominican Republic and Venezuela. The implementation failure stems mainly from MLB's poorly executed efforts to educate and inform Latin minor league players about the Minor League DPT Program and the Latin Summer League DPT Program. MLB argues that it has committed serious resources to the educational campaign, claiming that it has spent "literally millions of dollars" on education in the Dominican Republic alone. We do not believe this claim is credible for the reasons analyzed above, but, even if it was true the statistical evidence concerning positive tests among minor league players indicates that those millions of dollars have not been effectively spent.

For us, the implementation and specialization reform principles converge to help point MLB in directions it should consider. In our view, MLB must invest in building a proper infrastructure to manage and oversee a drug prevention and treatment program in both the Dominican Republic and Venezuela. At the moment, MLB has a grand total of two professional staff members resident in the Dominican Republic (and none in Venezuela) tasked with dealing with all issues related to MLB's two biggest sources of foreign baseball talent. MLB has more professional staff stationed in its office in London, which is essentially an office that markets MLB in Europe, the Middle East, and Africa. These regions collectively contributed 0 players to the major leagues in

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<sup>320</sup> See MARCANO & FIDLER, *STEALING LIVES*, *supra* note 80, at 31–36 (analyzing the problems with MLB's 17-year-old rule).

2007.<sup>321</sup> The particular context of minor league baseball in the Dominican Republic and Venezuela demands that MLB create a more robust institutional presence and commitment than it has, to date, believed necessary. Otherwise, implementation of anti-PED strategies will continue to be superficial and haphazard, which will harm the health and welfare of children and young men, overall public health, and the integrity of the game of baseball. Experts, including the authors, have blasted MLB's proclivity to get "Latin players on the cheap."<sup>322</sup> MLB should avoid continuing to implement an anti-doping program in Latin America "on the cheap."

## VI. CONCLUSION

The problem of PEDs in professional sports promises to retain a high profile for the foreseeable future. The issue has become too large and controversial to ignore. Indeed, the White House has spearheaded an effort to get the four major sports leagues in the United States, the U.S. Olympic Committee, and the NCAA to cooperate and coordinate more on their respective fights against doping.<sup>323</sup> Barry Bonds' successful pursuit of Hank Aaron's home run record kept the shadow of steroid use hanging over MLB on almost a daily basis, and the report of former Senator George Mitchell on how to address the PED problem in the major leagues is eagerly anticipated by many concerned about the doping crisis in MLB.

These high-profile developments, stories, and future reports will, in all likelihood, dwell on the highest levels of professional sports and will probably not address, in any significant way, the level of professional baseball on which this article focused. Whether continuing

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<sup>321</sup> Associated Press, *National Pastime Takes on International Flavor*, *supra* note 225 (listing no players from these regions on major league rosters at the beginning of the 2007 season).

<sup>322</sup> Arturo J. Marcano & David P. Fidler, *The Globalization of Baseball and the Mistreatment of Latin American Baseball Talent*, 6 IND. J. GLOBAL LEGAL STUD. 511,513 (1999); Samuel O. Regalado, "Latin Players on the Cheap": *Professional Baseball Recruitment in Latin America and the Neocolonialist Tradition*, 8 IND. J. GLOBAL LEGAL STUD. 9 (2000); MARCANO & FIDLER, *STEALING LIVES*, *supra* note 80 at 30–31.

<sup>323</sup> Associated Press, *Leaders Fight Problem of Performance-Enhancing Drugs*, ESPN, May 15, 2007, <http://sports.espn.go.com/espn/news/story?id=2870644>.

scandals and controversies in the major leagues will have a trickle-down effect on the PED problem in the minor leagues remains to be seen. Other changes may affect the future trajectory of anti-PED efforts in MLB's Latin minor league operations. For example, in December 2006, Congress changed U.S. immigration laws in a way that allows MLB teams to bring more foreign minor league players to the United States.<sup>324</sup> According to MLB vice president Ed Burns, previous immigration law set limits on the number of foreign minor league players MLB teams could bring to the United States, and Burns estimated that these limits prevented MLB teams from bringing an extra 350 players to the United States in 2004 and 2005, most of which had to remain in the Dominican and Venezuelan minor league systems.<sup>325</sup>

However, the continued flow of players to the U.S. minor leagues from Venezuela has been a source of concern because of rumors and discussions revolving around plans for the Venezuelan government to regulate MLB teams' operations more tightly.<sup>326</sup> These concerns combine with existing problems for MLB teams in Venezuela, which have meant that "almost half the U.S. clubs that once had training academies in the country have abandoned them in recent years, driven away by rampant crime and political instability."<sup>327</sup> MLB officials held meetings with Venezuelan government officials in March 2007 to discuss the matter, and the Venezuelan Minister of Sport indicated that the government wants to work with MLB to improve the operations and conditions of MLB teams' academies. The Venezuelan government is especially interested in the process of signing players, training players, providing medical assistance, and other things related to the lives of the

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<sup>324</sup> Creating Opportunities for Minor League Professionals, Entertainers, and Teams through Legal Entry Act of 2006, Pub. L. No. 109-463, 120 Stat. 3477 (codified as amended in scattered sections of 8 U.S.C.).

<sup>325</sup> Frederic J. Frommer, *New Law Benefits Foreign Minor Leaguers*, SEATTLE POST-INTELLIGENCER, Dec. 15, 2006, [http://seattlepi.newssource.com/other/sports/2080AP\\_Sports\\_Visas.html](http://seattlepi.newssource.com/other/sports/2080AP_Sports_Visas.html). See also J.J. Cooper & Chris Kline, *New Law Should Eliminate Visa Issues*, BASEBALL AMERICA, Dec. 13, 2006, <http://www.baseballamerica.com/today/minors/news/262999.html>.

<sup>326</sup> Jeff Eisenberg, *Instability in Venezuela Could Threaten Flow of Baseball Talent to U.S.*, THE PRESS-ENTERPRISE, May 20, 2007, [http://www.pe.com/sports/breakout/stories/PE\\_News\\_Local\\_S\\_venezuelan\\_baseball.3faf5b2.html](http://www.pe.com/sports/breakout/stories/PE_News_Local_S_venezuelan_baseball.3faf5b2.html).

<sup>327</sup> *Id.*

players.<sup>328</sup> Given the impact of the Latin Summer League DPT Program on Venezuelan players, MLB's efforts on drug testing could well be on this list of items MLB and the Venezuelan government may discuss. Although reassured by the March 2007 meeting, many involved in MLB remain worried about Venezuela because of "the volatility of [President Hugo] Chavez, the unapologetic face of a rising tide of anti-American sentiment in Latin America," and so major league executives "peruse Venezuelan newspapers, scan U.S. State Department reports, chat with scouts stationed in Latin America or travel there themselves, all in hopes of finding a harbinger of which direction things will go."<sup>329</sup>

How the change in U.S. immigration law and potential changes in Venezuelan policy will affect the dynamics of minor league baseball in the United States, the Dominican Republic, and Venezuela is not yet clear. To be sure, if MLB teams take advantage of the new U.S. immigration law, more Latin minor league players will play in the United States, and thus, will be subject to the Minor League DPT Program. For us, this potentiality underscores the need to reform the Minor League DPT Program, as discussed above, to address the situation of Latin players. The transition to having more Latin minor league players in the North American minor league system can be positively affected by a better and more effective campaign against PEDs in the Dominican Republic and Venezuela. In short, the change in the U.S. immigration law highlights the necessity to look systemically at the anti-PED effort for minor league baseball because the effort really applies to a single, interdependent, and transnational system of labor recruiting, training, and performance.

In this sense, MLB has the opportunity to put itself on the cutting edge of global responses to the problem of doping in sports. MLB's dismal responses to the PED problem in both the major and minor leagues does not augur well for its ability to see this opportunity. With sufficient prodding by those who are concerned about the threat doping poses to athletes, public health, and the integrity of sports around the world, MLB might shed its insular, non-transparent, discriminatory, and

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<sup>328</sup> YAHOO! DEPORTES, *Ministerio del Deporte de Venezuela y MLB firmarán acuerdo de trabajo*, Mar. 9, 2007, <http://espanol.sports.yahoo.com/09032007/54/deportes-ministerio-deporte-venezuela-mlb-firmar-n-acuerdo-trabajo.html> (last visited Sept. 4, 2007).

<sup>329</sup> Eisenberg, *supra* note 327.

ineffective approaches to PED use and contribute to a more effective global effort. MLB has a window of opportunity in which to turn itself around in this area. Hopefully, some of the younger, more enlightened leaders emerging in the system, who understand the good and the bad of the globalization of baseball, can exert sufficient influence to transform MLB from a pariah to a paragon in terms of the fight against PEDs in professional baseball specifically and global sports generally.



