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FROM MAO TO YAO: A NEW GAME PLAN FOR CHINA IN THE ERA OF BASKETBALL GLOBALIZATION

Dustin C. Lane[†]

Abstract: Yao Ming, a Chinese basketball superstar and the top pick in the 2002 NBA draft, became just the third player from China to play professionally in the United States. His departure, however, was met with reluctance by the Chinese basketball bureaucracy and came at a high price: he had to agree to remit more than half of his salary to Chinese government agencies and return to play for the Chinese National Team in certain competitions. While Yao's release demonstrates willingness by the Chinese government to participate in an increasingly globalized sports world, it also highlights the growing pains of a Chinese political system still dominated by the ideology of state control over its citizens. With the potential for more Chinese players in the NBA, China stands at the doorstep of true basketball globalization. Instead of continuing to work within the Chinese framework and sending the message that these burdensome policies are tolerable, the NBA should attempt to work with the Chinese government to reform the way it handles Chinese players. By crafting a bilateral agreement to facilitate the uninhibited transfer of Chinese basketball players, the NBA and China can gain long-term economic, competitive, and human rights benefits. In the end, such an agreement would promote the dual goals of developing international basketball and giving Chinese players the freedom to play basketball anywhere they choose.

I. INTRODUCTION

On October 30, 2002, Yao Ming, a seven-foot six-inch, twenty-two-year-old Chinese basketball superstar and top draft pick in the 2002 National Basketball Association ("NBA") draft, made his NBA debut for the Houston Rockets.¹ The debut was significant on many levels. It marked another prominent milestone in the recent trend of Asian athletes coming to the United States to play professionally.² More importantly, the game was broadcast live in the People's Republic of China ("China" or "PRC"), reaching 287 million Chinese households and demonstrating the overwhelming popularity of Yao Ming and NBA basketball.³ Yao became

[†] The author, an avid Seattle Mariners fan, was inspired to write this comment when powerful forces of sports globalization—namely, Ichiro Suzuki and Kazuhiro Sasaki—led the Mariners to a 116-win season in 2001. The author would like to thank his family, friends, faculty advisor, editors, and the editorial staff of the *Pacific Rim Law & Policy Journal* for making this possible.

¹ Lacy J. Banks, *Yao Era in the NBA Off to a Quiet Start*, CHI. SUN-TIMES, Oct. 31, 2002, 2002 WL 6477235.

² See Michelle Kaufman, *Ichiro. Pak. Yao. Athletes from Asia Are in or Coming to America, and Showing They've Got Game*, MIAMI HERALD, July 28, 2002, 2002 WL 24340874.

³ Tom Fowler, *Yao's Ad Potential Bears Fruit with Apple TV Spot*, HOUSTON CHRON., Jan. 8, 2003, 2003 WL 3229096. Before Yao ever hit the American hardwood, the NBA had been popular in China for years, as American superstars such as Michael Jordan enjoyed icon status among the Chinese. See Jackie

only the third Chinese national to play in the NBA⁴—a league with an increasingly international flavor.⁵

While Yao's NBA debut was a positive development⁶ for a globalizing⁷ sports world, Yao, the Houston Rockets, and various Chinese officials endured a long and difficult six-month process to enable the young Chinese basketball star to play in the United States.⁸ Shortly after Yao led his Chinese team, the Shanghai Sharks, to a national championship in April 2002, the team declared him eligible for June's 2002 NBA draft.⁹ In exchange for releasing him, Yao first had to negotiate what, if any, percentage of his NBA salary would be remitted to the Sharks.¹⁰ When the

MacMullan, *Two Cultures, One Popular Sport: Yao Ming Symbolizes Basketball's Old, Deep Roots with the Chinese*, BOSTON GLOBE, Feb. 23, 2003, 2003 WL 3381487.

⁴ Yao joined his countrymen, seven-foot one-inch center Wang Zhizhi of the Los Angeles Clippers and six-foot eleven-inch forward Mengke Bateer of the San Antonio Spurs. See, e.g., Robert MacLeod, *Yao's Start Ripples Beyond the NBA*, GLOBE & MAIL (Toronto), Oct. 31, 2002, at S1. The Chinese media has referred to this trio of tall basketball players as China's "Walking Great Wall." See, e.g., Feng Lu, *Wang Paves Way to NBA for Chinese Players*, CHINA DAILY, Jan. 7, 2002, 2002 WL 7166677.

⁵ See Daniel Eisenberg, *The NBA's Global Game Plan*, TIME, Mar. 17, 2003, at 59.

⁶ Yao's move to the NBA signaled the Chinese basketball bureaucracy's willingness to allow its most gifted athletes to venture overseas to play professional sports, an attitude that may open the Chinese athlete market to the world of sports globalization.

⁷ In this Comment, the term "globalization" refers to the phenomenon of top athletes moving across national boundaries and playing with and competing against other international athletes on a daily basis in a single league. In this way, a league based in one country actually features a heterogeneous mixture of talented players from around the world and exposes fans to higher-level competition.

⁸ See generally *Rockets' GC Ignites Chinese Fireworks*, NAT'L L.J., Nov. 25, 2002, at A16 (Col. 1). One writer aptly described the process as "arguably the most complicated negotiations in NBA history." John Denton, *Is He Ready for the NBA?*, FLA. TODAY, June 25, 2002, 2002 WL 16428500.

⁹ See, e.g., Feng Lu, *Yao Set to Join NBA This Year*, CHINA DAILY, Apr. 22, 2002, 2002 WL 7168286. After Yao attracted the attention of NBA scouts by playing on a Nike-sponsored summer team in the United States during the summer of 1998, he became interested in pursuing an NBA career. Stefan Fatsis et al., *Great Leap: A Basketball Star From Shanghai is Big Business*, WALL ST. J., Oct. 22, 2002, at A1. The Shanghai Sharks were prepared to let Yao go to the NBA in 1999 under an agreement with a U.S.-based sports agency. See Jeff Rozic, *The Next Big Thing: Michael Coyne Searches for Another NBA Foreign Gem*, INSIDE BUS., Dec. 1, 2002, 2002 WL 10895374. Under the deal, 33% of Yao's salary would have gone to his American agent, who would have then turned over 98% of that amount to the Sharks and other Chinese government entities. Steve Friess, *Signing Yao Will Take Plenty of Paperwork*, USA TODAY, May 14, 2002, 2002 WL 4725981. The deal broke down when another American agent convinced Yao that the contract would not work under NBA rules. *Id.*

When Yao tried to enter the 2001 NBA draft, the Shanghai Sharks refused to grant him permission to do so, citing his overloaded schedule full of National Team obligations. Feng Lu, *supra* note 4. It was also widely reported that Yao would not be released until he led the Shanghai Sharks to a national championship. See, e.g., Steve Friess, *Think Agents are Tough? NBA Dealing with China for Yao*, USA TODAY, June 26, 2002, 2002 WL 4728720.

¹⁰ The Sharks felt they deserved a large portion of Yao's NBA salary. Fatsis, et al., *supra* note 9. As Li Yaomin, the Sharks' vice general manager, explained, "[w]e cultivated him, taught him to be a star." *Id.* Yao eventually agreed to remit an undisclosed portion of his NBA salary to the Shanghai Sharks as a condition of his release. *Yao Reaches "Agreements in Principle" with Sharks*, XINHUA NEWS AGENCY (China), June 22, 2002, 2002 WL 22619910. Newspaper reports suggested that this amount depends on the length of Yao's career in the NBA: if Yao plays less than three years in the United States, the Sharks would

NBA's Houston Rockets were awarded the top draft pick in May,¹¹ they began negotiating with officials from the Sharks and the Chinese Basketball Association ("CBA") for Yao's release,¹² eventually drafting him with the first overall pick in the June draft, despite lingering uncertainty as to Yao's ultimate availability.¹³ Rockets officials spent the summer of 2002 negotiating with officials from the Chinese basketball bureaucracy over compensation issues and Yao's availability to represent China in future international tournaments.¹⁴ The Rockets finally secured his release in late October and signed him to an NBA player contract.¹⁵

The negotiations to bring Yao to the Rockets culminated in four separate agreements. First, Yao secured his own release from the Shanghai Sharks by consenting to remit an undisclosed portion of his NBA salary.¹⁶ Second, the Rockets arranged to compensate the Shanghai Sharks by paying a one-time US\$ 350,000 fee in addition to assisting with commercial and sports development matters.¹⁷ Third, the Rockets and the CBA agreed to

be entitled nothing, whereas if Yao plays as long as twelve years, the Sharks will receive between US\$ 8-15 million. Fatsis et al., *supra* note 9.

¹¹ The Rockets won the right to pick first in the June 26, 2002 draft in a league-wide lottery held May 19, 2002. See, e.g. Howard Fendrich, *The Houston Rockets Hope Things Work Out As Well As ...*, FT. WORTH STAR-TELEGRAM, May 20, 2002, 2002 WL 19049184.

¹² Rockets officials first met with Yao's representatives, Erik Zhang (his distant cousin and a business student at the University of Chicago) and John Huizinga (a professor at the University of Chicago's business school), to get acquainted. Joseph Duarte, *Rockets Courting Yao's Associates*, HOUSTON CHRON., May 24, 2002, 2002 WL 3265466. They then made a trip to the PRC in early June to negotiate with the Sharks and the CBA. Erica Lehrer Goldman, *Made in China: Houston Lawyer Helps Slam-Dunk Deal to Sign Chinese Basketball Star*, TEX. LAW., Aug. 12, 2002, at 1.

¹³ Because nine parties had to agree to the contract before releasing Yao, see Gregory Dole, *Yao Faces Hurdles to Playing in U.S.*, WASH. TIMES, May 10, 2002, 2002 WL 2910337, there was no guarantee that Yao would be released. The Rockets, however, received assurances from the Shanghai Sharks and the CBA. See John P. Lopez, *Rockets, Chinese, not Worlds Apart*, HOUSTON CHRON., June 13, 2002, 2002 WL 3269931. Furthermore, the Rockets received written assurance from the CBA just hours before the draft. See Goldman, *supra* note 12.

¹⁴ The Rockets' general counsel, Michael Goldberg, traveled to China twice after the draft to get a written release for Yao from the Shanghai Sharks and the CBA. Goldman, *supra* note 12. Negotiations between the Rockets and the Sharks revolved primarily around compensation issues, with the Shanghai team requesting money, help in identifying players that might come to China to play (every Chinese team may have up to two foreign players), and marketing advice. *Id.* The Shanghai Sharks eventually signed off on Yao's release on July 26, 2002. *Id.*

The negotiations between the Rockets and the CBA were more difficult because they centered on Yao's availability to play in competitions for the Chinese National Team. *Rockets' GC Ignites Chinese Fireworks*, *supra* note 8. While the Chinese officials wanted Yao to be able to play for the National Team whenever called upon, the Rockets wanted assurances that Yao would not be recalled to play for China's National Team during the NBA season or playoffs. See *id.*; Goldman, *supra* note 12.

¹⁵ The CBA released Yao after he played for the Chinese National Team in the Asian Games. Michael A. Lutz, *China's Yao Expected in Houston Soon*, AP ONLINE, Oct. 18, 2002, 2002 WL 10156373.

¹⁶ *Yao Reaches "Agreements in Principle" with Sharks*, *supra* note 10.

¹⁷ *Rockets' GC Ignites Chinese Fireworks*, *supra* note 8. The Rockets agreed to set up a training camp for the Shanghai Sharks and co-establish a basketball school in Shanghai as part of a general sport

allow Yao to play for the Chinese National Team in the Asian Games, World Championships, and the Olympics on the condition that Yao would be available for the NBA season and any potential NBA playoffs.¹⁸ Fourth, the Rockets and Yao settled on a contract worth US\$ 17.8 million over four years.¹⁹

Despite Yao's successful transfer to the United States, his difficult experience underscored the heavy-handed nature of the Chinese sports bureaucracy, an institution characterized by a reluctance to fully embrace the concept of human rights in the context of sports globalization. Yao's experience highlights several key Chinese rules that prevent players from having the freedom to play basketball abroad with no strings attached. First, the "unwritten" rule stating that China will not allow its players to leave without an agreement to play for the National Team restricts the player's freedom to earn a livelihood according to his choice and abilities.²⁰ Second, a Chinese regulation requiring the player to remit half of his salary back to China prevents him from having complete freedom over his financial affairs.²¹ In light of the fact that China is likely to be a future source of NBA-quality basketball players, the current burdens imposed by the Chinese basketball bureaucracy on Chinese players seeking to play in the NBA should be alarming not only to players and NBA teams negotiating their release, but also to the NBA—a league seeking to be a worldwide leader in the globalization of basketball.²²

In recommending that the NBA should promote the right of a Chinese player to not have to remit more than half of his NBA salary to various

development package worth an undisclosed amount. Feng Lu, *Yao Transfer to Rockets Yet to Be Finalized*, CHINA DAILY, Aug. 1, 2002, 2002 WL 7169747. See also Jonathan Feigen, *Chinese Grasp Yao's Marketing in Big Way*, HOUSTON CHRON., Dec. 8, 2002, 2002 WL 103970689 (describing a Chinese sports marketing conference at which Houston Rockets' president, George Postolos, spoke).

¹⁸ *Rockets' GC Ignites Chinese Fireworks*, *supra* note 8.

¹⁹ Lutz, *supra* note 15. The fourth year is a team option. *Id.* Yao's contract actually reflects the maximum amount payable to the top selection in the 2002 NBA Draft as set forth by the NBA's "Rookie Scale" in the league's Collective Bargaining Agreement. NBA – NBPA Collective Bargaining Agreement, art. VIII & Ex. B, available at <http://www.nba.com/cba/cba.html> (last visited Jan. 1, 2004) [hereinafter Collective Bargaining Agreement].

²⁰ As a condition of the player's release, this unwritten rule effectively requires a player to agree to come back for international competitions when called upon. As Xin Lancheng, the director of the CBA, emphasized upon the announcement that Yao would be able to go to the NBA, "Yao is a member of the national team. No matter which league he plays for, he should perform his duties as a Chinese national player first." Feng Lu, *supra* note 9. See also Wang Jingyu, *CBA Suggests Written Agreement on National Duty for NBA Team to Get Yao Ming*, XINHUA NEWS AGENCY (China), June 24, 2002, 2002 WL 22620150. Simply put, according to his representative, Erik Zhang, "[t]he key [to Yao's release] was allowing Yao to play for the national team." Lutz, *supra* note 15.

²¹ The regulation requires members of National Teams working abroad to return half of their salary to China. See discussion *infra* Part V.A.2.

²² See, e.g., Jonathan Feigen, *Yao Goes to NBA Summit*, HOUSTON CHRON., Apr. 2, 2003, at 3.

Chinese government entities and play for the Chinese National Team in certain competitions as a way to secure his release, this Comment examines problems with current Chinese regulations governing the emigration of its basketball stars and assesses the benefits of a change in current Chinese basketball player transfer policy.

Part II of this Comment briefly explores the globalization of professional sports, examining how the globalization phenomenon protects the human rights of athletes. Part III examines the subservient role of Chinese athletes enmeshed in China's sports bureaucracy and how recent legal reforms in Chinese athletics have not improved the human rights situation for such athletes. Part IV traces the roots, popularity, and bureaucracy of basketball in China, from its humble beginnings to its role in promoting international Chinese glory. Part V analyzes the Chinese response to basketball globalization and China's reluctance to release its players to NBA teams. Part VI proposes a possible working agreement between the NBA and the CBA designed to facilitate the transfer of players and provide incentive for China to do so. Finally, Part VII highlights the long-term economic, competitive, and human rights advantages to the CBA, NBA, and individual players of easing current restrictions and adopting a new model of player transfer, and suggests that the PRC—via the CBA—should fully embrace reform in the age of basketball globalization.

II. GLOBALIZATION OF SPORTS

Yao Ming's quest to succeed on the U.S. professional sports stage is not an isolated desire among foreign athletes.²³ There has been a significant trend in the sports world toward globalization, a phenomenon that has allowed the world's top athletes to compete against each other on a regular basis and provided them with some of the very same individual freedoms found in the Universal Declaration of Human Rights.

A. *The Sports World Has Been a Focal Point of Globalization*

Although certain events, such as the Olympics, have always provided a forum for showcasing international athletic talent, the professional sports world has become a mixing pot of athletes from around the globe.²⁴ This has been especially evident in U.S. professional sports, where international

²³ See, e.g., Charles P. Pierce, *The Goodwill Games*, BOSTON GLOBE, Sept. 21, 2003, at 10.

²⁴ In the United States, this phenomenon became particularly noticeable in the 1990s and has continued into the twenty-first century.

players have begun filling up roster spots on professional basketball,²⁵ baseball,²⁶ and hockey²⁷ teams. Furthermore, the Professional Golf Association and Ladies Professional Golf Association have seen their share of globalization, as many of the top golfers on tour are foreign-born.²⁸

Though foreign athletic talent has poured in from all corners of the globe, there has been a noticeable trend in athletes coming from Asia to play sports in the United States.²⁹ Japanese and Korean baseball players are now more prevalent in the major leagues than ever before,³⁰ while Asian golfers

²⁵ As of October 28, 2003, there were seventy-three international players from thirty-four different countries and territories playing in the NBA. *International Players in the NBA*, at http://www.nba.com/players/international_player_directory.html (Oct. 28, 2003). See also Eisenberg, *supra* note 5 (noting that approximately 16% of NBA players during the 2002-2003 season were foreign-born—nearly a three-fold increase over a decade).

²⁶ At the beginning of the 2003 MLB season, 230 players on opening-day rosters were born outside the United States, representing 27.8% of the league's overall player pool, an increase from the previous season. Press Release, Major League Baseball, *Nearly 28 Percent of Major League Players Born Outside the U.S.* (Apr. 2, 2003), available at http://mlb.mlb.com/NASApp/mlb/mlb/news/mlb_search_archive.jsp. More impressively, 46.0% of minor leaguers were foreign-born. *Id.* Altogether, these international players represent thirty-two different countries. *Id.* See also Dave Sheinin, *Godzilla Wades In; Matsui is Latest, and Largest, in Line of Japanese Imports*, WASH. POST, Mar. 28, 2003, 2003 WL 17423882 (describing foreign-player statistics from the 2002 season). For more on baseball globalization, see William B. Gould IV, *Baseball and Globalization: The Game Played and Heard and Watched 'Round the World (With Apologies to Soccer and Bobby Thompson)*, 8 IND. J. GLOBAL LEGAL STUD. 85 (2000); Arturo J. Marciano & David P. Fidler, *The Globalization of Baseball: Major League Baseball and the Mistreatment of Latin American Baseball Talent*, 6 IND. J. GLOBAL LEGAL STUD. 511 (1999); Thomas R. Dominczyk, Note, *The New Melting Pot: As American Attitudes Toward Foreigners Continue to Decline, Athletes are Welcomed with Open Arms*, 8 SETON HALL J. SPORT L. 165, 183-94 (1998).

²⁷ The globalization of the National Hockey League ("NHL") has been linked to an influx of Europeans stemming from the collapse of the Soviet Union in 1989. See Larry Wigge, *New World Order: As the Olympics Have Shown, the Influx of Players from Across the Atlantic has Brought a Sea Change to the NHL Game*, SPORTING NEWS, Feb. 25, 2002, 2002 WL 12273025. By one count, 148 of 717 players in the NHL were from former communist countries, Jane McManus, *Chinese Athletes Bring Talent, Contract Complications to U.S.*, GANNETT NEWS SERVICE, July 26, 2002, 2002 WL 5259276, and 33% of NHL players were not from North America. Pierce, *supra* note 23.

²⁸ See Pete Iacobelli, *Votaw: International Players Boost LPGA*, AP ONLINE, May 7, 2003, 2003 WL 20008297 (discussing the influence of foreign-born players in the LPGA). In 2003, four of the top ten money leaders on the PGA Tour were foreign-born. *PGA Money Leaders*, at <http://sports.espn.go.com/golf/moneyLeaders?tour=pga> (last visited Jan. 1, 2004). At the same time, thirteen of the top twenty money leaders on the 2003 LPGA Tour—including ten of the top thirteen—were foreign-born. *LPGA Money Leaders*, at <http://sports.espn.go.com/golf/moneyLeaders?tour=lpga> (last visited Jan. 1, 2004).

²⁹ See Kaufman, *supra* note 2.

³⁰ Although the first Japanese baseball player to play in the major leagues was Masanori Murakami, who compiled a 5-1 record with nine saves for the San Francisco Giants in 1964, see Paul Finkelman, *Baseball and the Rule of Law*, 46 CLEV. ST. L. REV. 239, 256 n.86 (1998), the floodgates did not really open until the mid-1990s. Since Hideo Nomo's arrival from Japan in 1995, dozens of Japanese and Korean players have left their respective homelands to pursue careers in the American major leagues. See, e.g., Tim Noonan & Michael Kitchen, *Go West, Young Man*, TIME, Apr. 10, 2000, at 46. During the 2003 season, there were seventeen Asian players on major league rosters, including twelve from Japan, four from South Korea, and one from Taiwan. *Players*, at <http://proxy.espn.go.com/mlb/players> (last visited Jan. 1, 2004).

are having success on professional golf tours.³¹ Within the context of Asian athletic immigration, the sudden appearance of Wang Zhizhi, Mengke Bateer, and Yao Ming in the NBA comes as little surprise.

B. The Freedoms Enjoyed by Athletes in a Globalizing Sports World Parallel the Freedoms Protected by International Human Rights Law

The globalization of sports has provided athletes with greater opportunity and flexibility to pursue careers in professional sports. Even when players are under contract with a professional sports team in one country, bilateral agreements have been developed to work around contractual obligations and facilitate the athlete's transfer to another country's league.³² No longer beholden to a single team or country for the duration of their careers, most world-class athletes have the opportunity to play professionally in the United States if they are talented enough. Either by becoming a free agent³³ and signing directly with a team, participating in a professional sports draft, or qualifying directly for membership on a golf tour, talented foreign athletes have the opportunity to leave their homeland and seek employment in the United States as professional athletes.³⁴

³¹ Golfers such as Se Ri Pak, Shigeki Maryama, and K.J. Choi are putting Asian golfers on the map. See generally Jeff Shelman, *Changing Face of Golf: Tournament Illustrates Increased Presence and Success of Asian Players*, STAR TRIB. (Minneapolis – St. Paul), Aug. 15, 2002, 2002 WL 5380346; Tom Yantz, *On PGA Tour, Start of an Asian Invasion*, HARTFORD COURANT (Conn.), June 22, 2002, 2002 WL 4812249; Wanchai Rujawongsanti, *Asian Stars Making Their Mark*, BANGKOK POST, May 7, 2003, 2003 WL 17764896. During the 2003 season, four of the top six money leaders on the LPGA Tour were from Asia. *LPGA Money Leaders*, *supra* note 28.

³² A notable example of such an agreement is in professional baseball, where the Nippon Professional Baseball Organization of Japan (Japanese professional baseball) and Major League Baseball ("MLB") have devised a bilateral agreement referred to as the "posting system" to facilitate the transfer of players under contract between the two leagues. Japanese Professional Baseball Players Association, *United States – Japanese Player Contract Agreement*, at http://www.jpjba.net/convention/2001_e.pdf (last visited Jan. 1, 2004) [hereinafter Posting System]. See *infra* note 173.

³³ In professional sports, free agents have the ability to sign with any team willing to make them an offer or negotiate a contract. Thus, free agency represents a free-market system, for free agents can "shop" their talent to teams and can sign a contract based on their market value. See *Powell v. Nat'l Football League*, 930 F.2d 1293, 1305 n.3 (8th Cir. 1989) (Heaney, J., dissenting) (noting the ability of free-agent football players to "establish [their] worth in the open market").

³⁴ Generally, foreign players come to American professional teams via free agency or through a league draft. Under MLB rules, while players residing legally in the United States and Canada must enter the amateur draft in order to sign an employment contract, players in other countries may sign with a team as a free agent. See Andrea Kupfer Schneider, *Baseball Diplomacy*, 12 MARQ. SPORTS L. REV. 473, 480 (2001). In other words, players may or may not be subject to the MLB draft depending on their residency.

On the other hand, players aspiring to play in the NBA are subject to the NBA draft. Collective Bargaining Agreement, *supra* note 19, art. X. A player that is drafted and does not sign a contract within a year following the draft can become a Rookie Free Agent. *Id.* Foreign players are eligible to be drafted in the calendar year of the player's twenty-second birthday (or in the NBA Draft prior to the calendar year of their twenty-second birthday if the player does not exercise intercollegiate basketball eligibility in the

The opportunity and individual freedom to seek out a professional sports career anywhere in the world represents a fundamental human right.³⁵ Among other freedoms, the Universal Declaration of Human Rights declares that everyone has “the right to leave any country, including his own, and to return to his country,”³⁶ “the right to . . . liberty,”³⁷ and that “[n]o one shall be subject to arbitrary . . . detention.”³⁸ The Declaration goes on to state that “[e]veryone has the right to work, [and] to free choice of employment.”³⁹ When taken together, these freedoms provide the basic context for viewing the rights of athletes in a globalizing sports world: athletes should have the ability to pursue their dreams as far as their talents will take them.⁴⁰

III. THE RIGHTS OF ATHLETES IN CHINA TAKE A BACKSEAT TO THE INTERESTS OF THE CHINESE GOVERNMENT

Unlike their fellow athletes in the United States, the rights of Chinese athletes are subservient to the state.⁴¹ Under the longtime ideology of the PRC, sports—and the athletes who play them—have been used as a way to win honor and international prestige for Beijing. Despite Chinese legal and political reforms that have made the country more receptive to the forces of

United States and expresses his desire to become eligible for the draft). *Id.* If the player is not selected in the NBA Draft held in the calendar year of his twenty-second birthday, he may become a Rookie Free Agent. *Id.* The draft rules apply to players that have contracts with other professional basketball teams. *Id.*

Unlike team-sport athletes who face contractual hurdles when attempting to go from one league to another, international golfers are independent athletes and earn their way onto the PGA or LPGA tours on the basis of skill alone. See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 665-66 (2001) (explaining the various ways a golfer can earn a spot on the PGA Tour). This is not to say, however, that a particularly skilled Chinese golfer would not experience reluctance from Chinese officials in being granted a visa to come to the United States. See *infra* note 102.

³⁵ The Universal Declaration of Human Rights spells out a number of freedoms, including the right to choose one’s own employment. Universal Declaration of Human Rights, art. 23(1), G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc A/810 (1948).

³⁶ *Id.* art. 13(2).

³⁷ *Id.* art. 3.

³⁸ *Id.* art. 9.

³⁹ *Id.* art. 23(1).

⁴⁰ This notion has been recognized by the International Basketball Federation “FIBA”—“the sole competent authority for men’s and women’s basketball throughout the world.” Federation Internationale de Basketball, General Statutes (2002), art. 1, available at <http://www.fiba.com> [hereinafter FIBA General Statutes]. The United States (under the guise of USA Basketball) has been a member of FIBA since 1934, while the People’s Republic of China has been a FIBA member since 1974. *Member Federations*, at <http://www.fiba.com> (last visited Jan. 1, 2004).

According to FIBA’s internal regulations, “[a]ny basketball player shall have the right to play basketball in any country in the world.” Federation Internationale de Basketball, Internal Regulations (Sept. 2002), § 4.1.1., available at <http://www.fiba.com> [hereinafter FIBA Internal Regulations].

⁴¹ See *infra* Part III.B.

globalization, athletes are still treated as property of the state.⁴² This fate is shared by Chinese basketball players.

A. *The Rights of Chinese Citizens Under Mao Zedong*

In China, the state dominates the lives of its citizenry. Since 1949, when China became a socialist country, the national government has not recognized many human rights, individual civil liberties, and political freedoms.⁴³ As one commentator has noted, "China emphasizes social and economic rights but views all rights as collectively based, concrete, non-universal, and subordinate to state sovereignty and state security."⁴⁴

Mao Zedong ruled China for much of the twentieth century under the backdrop of this socialist mantra.⁴⁵ Under Mao, individual civil and political rights were excluded "not only in theory but in practice."⁴⁶ Despite various constitutional reforms⁴⁷ that seemed to guarantee the freedom of speech, correspondence, press, assembly, association, demonstration, person, religious belief, and the right to appeal,⁴⁸ these rights were severely restricted in practice.⁴⁹ Other rights guaranteed by the Universal Declaration of Human Rights, including the freedom of movement and freedom from forced labor, "were neither constitutionally guaranteed nor exercised in practice in Maoist China."⁵⁰

B. *The Role of the Athlete in China is to Win Honor for Beijing*

China has tightly controlled and regulated its athletes with the goal of achieving glory on the international stage. Athletes are cultivated from an early age and trained in specialized sports schools.⁵¹ These sports schools

⁴² See *infra* note 54.

⁴³ Ann Kent, *Human Rights: The Changing Balance-Sheet, in CHINA IN THE NINETIES: CRISIS MANAGEMENT AND BEYOND* 64, 66-67 (David S.G. Goodman & Gerald Segal eds., 1991).

⁴⁴ *Id.* at 67.

⁴⁵ As leader of the Chinese Communist Party, Mao Zedong came to power in 1949, proclaiming the founding of the People's Republic of China. ALAN HUNTER & JOHN SEXTON, *CONTEMPORARY CHINA* 22 (1999). Mao ruled the PRC until his death in 1976. *Id.* at 30.

⁴⁶ Kent, *supra* note 43, at 67. Another commentator notes that under Mao, "duties were privileged over rights, especially duties to the state, civil society was extremely limited, and efforts at thought control were pervasive." RANDAL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* 80 (2002).

⁴⁷ Constitutions in socialist systems are frequently amended. PEERENBOOM, *supra* note 46, at 88. The PRC changed its constitution in 1954, 1975, 1978, and 1982. See *id.*

⁴⁸ Kent, *supra* note 43, at 68.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ SUSAN BROWNELL, *TRAINING THE BODY FOR CHINA* 58-59 (1995).

are organized in a pyramidal fashion: as the athletes develop, those with superior talent and skill move up to the next level of the hierarchical system.⁵² The ultimate goal of this pyramidal structure is to produce the best athletes for China's National Teams.⁵³

Due to the effort of the Chinese Government in training them, athletes and their bodies are beholden to the state.⁵⁴ Chinese athletes are legally obliged to "raise their athletic performance level and achieve excellent results in sports competitions so as to win honors for the country."⁵⁵ A Chinese athlete, therefore, tries to "win glory for Beijing."⁵⁶

C. *Modern Chinese Athletic Reforms*

For China, sports have provided an avenue for achieving political objectives. Under Mao, Beijing used mass exercise and training to ingrain socialist ideals into the Chinese population.⁵⁷ Similarly, China used "Ping Pong Diplomacy" in 1971 to improve bilateral relations with the United States.⁵⁸ In the wake of the PRC's unsuccessful bid for the 2000 Olympic Games in 1993 due to concerns over its human rights record,⁵⁹ China became motivated to reform laws governing its sports system in an effort to show the world that it was worthy of hosting the Olympic Games.⁶⁰

⁵² *Id.* at 59.

⁵³ *Id.*

⁵⁴ As one commentator has noted, "[a]n individual's body is not entirely his or her own but, rather, is subjected to demands and pressures that constantly challenge the notion of individual autonomy. The bodies of athletes belong to the nation in the sense that their bodies represent to the world the health of the Chinese population. The state cultivates them so that they will win glory for the nation. Their bodies also belong to the state, which controls their lives in minute ways . . ." *Id.* at 23.

Reflecting the Chinese socialist mentality, Li Furong, the deputy director of the State General Administration of Sports, has explained that "athletes should be purely patriotic. If not, they won't play to the utmost because they care too much about their personal interests." *Athletes are Backed to Play Overseas*, SHANGHAI DAILY, Mar. 12, 2003, available at 2003 WL 8598453.

⁵⁵ Law of the People's Republic of China on Physical Culture and Sports, art. 24 (1995), reprinted in THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, 1995, 315 (1996) [hereinafter Chinese Sports Law].

⁵⁶ BROWNELL, *supra* note 51, at 6.

⁵⁷ James A.R. Nafziger & Li Wei, *China's Sports Law*, 46 AM. J. COMP. L. 453, 457 (1998).

⁵⁸ *Id.* at 458; James A.R. Nafziger, *International Sports Law: A Replay of Characteristics and Trends*, 86 AM. J. INT'L L. 489, 496-97 (1992); Paul Mastrocola, Note, *The Lord of the Rings: The Role of Olympic Site Selection as a Weapon Against Human Rights Abuses: China's Bid for the 2000 Olympics*, 15 B.C. THIRD WORLD L.J. 141, 155 (1995).

⁵⁹ For a detailed account of China's bid for the 2000 Olympic Games, see Mastrocola, *supra* note 58, at 141.

⁶⁰ Nafziger & Wei, *supra* note 57, at 464-65. These reforms were among many China has adopted since the end of Maoist era. As one observer notes, after Mao, "[a]n era of reforms began, in which law has risen to greater prominence in the governance of Chinese society than ever before in Chinese history." STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 101 (1999). For more on the developing rule of law in the post-Mao era, see generally *id.*; PEERENBOOM, *supra* note 46.

Ultimately, China passed a comprehensive Sports Law in 1995.⁶¹ Although the law reflects traditional Chinese ideology and serves as an example of the state's control over sports in China, it contains features which hint that the PRC may be adopting western, market-oriented attitudes toward sports management: it cites commercialism as a core of sports reform, promotes private sports sponsorship and investment, and creates decentralized sports associations to manage and find external funding for leagues.⁶² Economic reforms such as these, along with the promise of future improvements in the arena of human rights and market-oriented economic development, led to Beijing being awarded the 2008 Olympic Games⁶³ and China's admission to the World Trade Organization in 2001.⁶⁴

While legal reforms in the PRC have harmonized certain Chinese practices with the practices of the western sports world, many legal reforms have not benefited its athletes. China's 1995 Sports Law does not identify rights for the individual athlete, prompting several commentators to note that it "serve[s] as a reminder that western principles of individualism and personal autonomy should not be taken for granted."⁶⁵ Indeed, Chinese athletes remain controlled by the state and subject to the whims of their teams and government.

IV. BASKETBALL IN CHINA

Over the past century, basketball has developed into one of the PRC's most popular sports.⁶⁶ As with most facets of life in the PRC, the

⁶¹ For a detailed discussion of this law, see Nafziger & Wei, *supra* note 57, at 453.

⁶² *Id.* at 467-69.

⁶³ The International Olympic Committee (IOC) selected Beijing as the host for the 2008 Olympic Games by a vote held on July 13, 2001. *E.g.*, Philip Hersh, *Beijing Savors Olympic Victory: IOC Makes Most of Role as International Player*, CHI. TRIB., July 14, 2001, at 1. For the IOC Evaluation Commission's report on Beijing's bid to the 2008 Olympic Games, see International Olympic Committee, *Report of the IOC Evaluation Commission for the Games of the XXIX Olympiad in 2008*, at http://multimedia.olympic.org/pdf/en_report_299.pdf (last visited Jan. 1, 2004).

⁶⁴ The World Trade Organization Ministerial Conference unanimously approved China's entry into the WTO on November 10, 2001. Press Release, WTO, WTO Ministerial Conference Approves China's Accession (Nov. 10, 2001), available at http://www.wto.org/english/news_e/pres01_e/pr252_e.htm. For additional information regarding the terms of China's accession into the WTO, see Press Release, WTO, WTO Successfully Concludes Negotiations on China's Entry (Sept. 17, 2001), available at http://www.wto.org/english/news_e/pres01_e/pr243_e.htm.

⁶⁵ Nafziger & Wei, *supra* note 57, at 454.

⁶⁶ See generally Andrew Morris, "I Believe You Can Fly": Basketball Culture in Postsocialist China, in POPULAR CHINA: UNOFFICIAL CULTURE IN A GLOBALIZING SOCIETY 9 (Perry Link et al. eds., 2002).

government has sought to regulate and control basketball.⁶⁷ The laws and bureaucracies that have been created to organize and promote Chinese basketball also attempt to reinforce traditional notions about sports in the PRC: an individual athlete's role is to win honor for Beijing.⁶⁸

A. *A Brief History of Basketball in China*

Basketball is booming in China.⁶⁹ From its introduction by Christian missionaries at a YMCA in the northeastern city of Tianjin in the late 1890s,⁷⁰ basketball has flourished in China for over a century.⁷¹ With 300 million people out of a population of 1.3 billion having played the sport,⁷² basketball is one of the most popular sports in China.⁷³

A professional basketball league was launched in 1995 to foster competition and promote basketball in China.⁷⁴ The league has fourteen teams⁷⁵ and plays a four-month regular season beginning in late November or early December each year.⁷⁶ Although this league is funded entirely by

⁶⁷ The 1995 Sports Law's creation of individual sports associations, including the Chinese Basketball Association, to organize and carry out the activities of their respective sports is a clear example of government regulation of sports. See Chinese Sports Law, *supra* note 55, art. 36.

⁶⁸ See *id.* art. 24.

⁶⁹ See, e.g., MacMullan, *supra* note 3. According to one American teacher living in Tianjin, the birthplace of Chinese basketball, the outdoor basketball courts were always filled with enthusiastic Chinese players despite relatively high court admission fees. Interview with Allen F. Clendaniel, Foreign English Teacher, Nankai University, in Seattle, Wash. (Oct. 13, 2003). See also Michael A. Lev, *Basketball Has Been Played in China Since 1908, But Promotion by the NBA Has Caused the Sport to Grow Greatly in Recent Years*, CHI. TRIB., June 25, 2002, at 10 (noting the scarce availability of basketball courts in China due to the sport's tremendous popularity).

⁷⁰ See Morris, *supra* note 66, at 13; JOSEPH A. REAVES, TAKING IN A GAME 36 (2002).

⁷¹ Basketball had taken hold in urban centers and the schools by the 1920s; it was voted a "national pastime" in 1935. Morris, *supra* note 66, at 13. Basketball has been one of the most popular sports in China ever since. *Id.* Whereas pastimes like mah-jong and dancing were banned during the decade-long Cultural Revolution that began in 1966, the Red Army played basketball and the sport was enjoyed by Communist Party Chairman, Mao Zedong. Fatsis, et al., *supra* note 9.

⁷² Basketball has the highest participation rate of team sports. See Du Minghua, *CBA League Match Promotion Right Deal Inked in Beijing*, PEOPLE'S DAILY (China), Aug. 17, 2001, at http://english.peopledaily.com.cn/200108/17/eng20010817_77560.html; Fatsis, et al., *supra* note 9.

⁷³ According to one report, the National Basketball Association (NBA) has a 98% awareness among Chinese teenagers in major cities. Ian Whittell, *Rockets Poised to Propel Yao into Big League*, TIMES (London), June 12, 2002, at 39. Popularity and awareness of the sport has also been attributed to Nike, Inc., an American sporting goods company, which has built courts in China and has launched a high school league. *Id.*

⁷⁴ Xin Wei, *China Hoop League Launched*, CHINA DAILY, Nov. 29, 1995, at 83. The formal name of the league is the Hilton Chinese Men's Basketball First Division. However, the "Chinese Basketball Association" is universally used. Morris, *supra* note 66, at 33 n.12.

⁷⁵ See generally Eurobasket, *Chinese Basketball Main Page*, at <http://www.asia-basket.com/chn/d1.asp> (last visited Jan. 1, 2004).

⁷⁶ Cf. Huang Hui, *CBA League Starts Next Wednesday*, CHINA DAILY, Nov. 21, 1996, at 81.

international corporations,⁷⁷ the teams are managed by local sports bureaucracies under the State General Administration of Sports.⁷⁸

B. The Function of the Chinese Basketball Bureaucracy is to Regulate and Promote the Game of Basketball in China

The CBA is the main bureaucratic organ responsible for overseeing basketball.⁷⁹ This bureaucracy merely co-sponsors the league, but receives a profit from its operation.⁸⁰ In addition, the CBA handles all other basketball affairs in China.⁸¹ As a sports administration, the CBA's legal mandate is to "promote the development of undertakings of physical culture;" it is also charged with the "popularization and enhancement" of basketball and with "represent[ing] China in the corresponding international sports organizations."⁸² Furthermore, the CBA's desire is to prepare players for competition on the international stage.⁸³ The CBA is one of the departments of the State General Administration of Sports, a ministry-level government bureaucracy.⁸⁴ As mandated by the PRC's 1995 Sports Law, the CBA regulates and promotes basketball in China.

C. The Role of the Chinese Basketball Player is to Serve His Country

Like other Chinese athletes, basketball players are tightly controlled by the state throughout their careers.⁸⁵ As a child, a potential player's knuckles may be measured by the local administrative body to estimate his future adult height.⁸⁶ If the administrative body determines that he will be tall and have strong basketball skills, he is sent to a special sports school to

⁷⁷ The sponsors include companies such as Hilton, Budweiser, Ford, Nike, Spalding, and Motorola. See Morris, *supra* note 66, at 11; *Briefs*, CHINA DAILY, Nov. 16, 1996, at 71.

⁷⁸ Morris, *supra* note 66, at 11-12.

⁷⁹ *Id.* at 32 n.2.

⁸⁰ *Id.* at 14.

⁸¹ The CBA also runs Division B, another men's Chinese basketball league that serves as a quasi "minor league" to the First Division league, and a women's league known as the WCBA. *Id.* at 33 n.13.

⁸² Chinese Sports Law, *supra* note 55, arts. 36 & 40.

⁸³ According to the Chinese Basketball Association's Charter, the CBA's goal is to enhance the success of Chinese basketball at the international level by improving its players and grassroots development. SINA Sports, *Chinese Basketball Association By-Laws*, at <http://sports.sina.com.cn/bsgb/1594943.shtml> (last visited Jan. 1, 2004).

⁸⁴ See Jinshu Zhang, *The Yin and Yang of Sports Deals in China*, 21-SPG ENT. & SPORTS LAW 12 (2003).

⁸⁵ See Brook Larmer, *Boxed Out by Beijing: Hoop Dreams Meet Chinese Reality for a 7-foot-4 Star*, NEWSWEEK, Apr. 10, 2000, at 40 (describing how Chinese officials denied individual opportunities for Yao and Wang while they were playing in China).

⁸⁶ See Michael Murphy, *The Final Frontier*, HOUSTON CHRON., June 23, 2002, at 1.

learn basketball and develop into a basketball worker.⁸⁷ The top products of these schools may eventually become players on their local CBA team, and the best are selected for the Chinese National Team.⁸⁸ The mandate of these sports schools is to develop players for international prestige.⁸⁹ Having trained their players from when they were young boys, the local CBA teams, operated by the local sports administrations, naturally feel a sense of ownership of their players.⁹⁰

As a Chinese athlete, the basketball player is trained and obliged to put the welfare of the team and of the nation before himself.⁹¹ He is strictly trained and educated about morality, discipline, patriotism, collectivism, and socialism.⁹² Having been trained in government sports schools, he is taught that his achievements belong to the state.⁹³ The state has therefore tried to reduce the basketball player's sense of individuality as much as possible. Indeed, when the CBA first began, individual statistics for scoring and rebounding were not kept.⁹⁴ Chinese basketball players serve their team and

⁸⁷ See Jackie MacMullan, *It's Still a Restricted Area in Some Ways: Stacked with Raw Talent, System Needs Fine-Tuning*, BOSTON GLOBE, Feb. 25, 2003, at F1. Yao Ming enrolled in one of these sports schools at the age of nine. Barbara Barker, *Larger than Life*, NEWSDAY, Feb. 9, 2003, at B14.

⁸⁸ See *supra* Part III.B. For a detailed explanation of the pyramidal structure of the Chinese sports training system, see BROWNELL, *supra* note 51, at 59.

⁸⁹ Fatsis, et al., *supra* note 9.

⁹⁰ The deputy general manager of the Shanghai Sharks, Li Yaomin, noted the fundamental difference between Chinese athletes trained under the government-sponsored system and their American counterparts: "Chinese athletes are different from those in the U.S. American athletes are free." Craig S. Smith and Mike Wise, *Eying N.B.A., China Will Make Athletes Pay*, N.Y. TIMES, Apr. 25, 2002, at A1. See also Brook Larmer, *Basketball Diplomacy: The U.S. and China Don't Just Bicker Over Spy Planes. They've got Another Tricky Relationship*, NEWSWEEK INT'L, Apr. 30, 2001, at 12.

The sense of state ownership of a player's rights extends to the National Team's view of its players. Yao Ming, an endorser of Pepsi products, sued Coca-Cola to prevent the company from using his image on products. See, e.g., *Basketball's Yao Ming Sues Coke for a Yuan*, WALL ST. J., May 27, 2003, at B4. Coca-Cola, under a sponsorship agreement with the CBA that allowed it to use images of National Team members on its products, produced bottles featuring the image of Yao and two other members of the Chinese National Team. *Id.*; *China's Sporting Industry Remains in Cradle*, BUS. DAILY, June 4, 2003, available at 2003 WL 18928048. Yao dropped his lawsuit when Coca-Cola issued a public apology in China and agreed to stop using his image. *Pouring Out an Apology: Coca-Cola Settles Suit with Yao Ming over Use of His Picture*, HOUSTON CHRON., Oct. 18, 2003, at 2.

⁹¹ Yao Ming's training reinforced the Chinese athlete's role as an ambassador for the government. When questioned upon arriving in Houston to play with the Rockets, Yao reportedly said, "I hope I am a good textbook. . . . It seems to me I am here to do more than play basketball. . . . [I]n China, there is a lot of emphasis on collective honor and the honor of the entire country." Tom Weir, *China's 7-5 Yao Extends NBA's Reach*, USA TODAY, Oct. 29, 2002, at A.01.

⁹² Chinese Sports Law, *supra* note 55, art. 27.

⁹³ Mark O'Neill, *Basketball Star Faces Tough Battle in Untested Arena*, S. CHINA MORNING POST, May 26, 2003, at 4.

⁹⁴ Cal Fussman, *Hidden Dragon: Yao Ming, A 7-6, 20-Year-Old from China, Might be the Future of the NBA*, CHI. SUN-TIMES, Dec. 17, 2000, at 112. At the same time, the slam dunk, an act which highlights individual ability, is culturally discouraged. See *id.* (describing Yao Ming's reluctance to dunk in America because "[i]t's not the Chinese way"). However, the tide may be turning on this cultural norm. One observer has noted that individual achievement and imagination have become important for the basketball-

serve to win honors for the country. As one observer has noted, basketball “clearly remains a cornerstone of the PRC’s march toward international sporting glory.”⁹⁵

V. THE CHINESE RESPONSE TO BASKETBALL GLOBALIZATION

International sporting events are no longer the sole forums to showcase a nation’s athletic talents. As professional sports have globalized and the U.S. NBA⁹⁶ has grown in popularity, the league has become the elite international stage upon which nations showcase their basketball talent.⁹⁷ As players from all over the world look to the NBA as the pinnacle of basketball, NBA teams send scouts to all corners of the globe looking for new foreign talent.⁹⁸ This phenomenon has begun to pierce the “Great Wall of China”⁹⁹ due to basketball’s popularity in China and the corresponding development of talented Chinese players.

Because of the Chinese basketball bureaucracy, however, playing basketball in the United States has been difficult and fraught with negative consequences for Chinese players.¹⁰⁰ While China has eventually allowed its athletes to go abroad, it has not relinquished complete control of these players, demonstrating a reluctance to accept an important reality of sports globalization: China’s international sporting glory can be achieved through an individual Chinese athlete’s performance on the NBA stage just as easily as it can be gained through the Chinese National Team’s success in an international competition.¹⁰¹ The emerging demand for Chinese players in the NBA and the Chinese policies aimed at protecting the interests of Chinese basketball have nevertheless collided at the doorstep of basketball globalization, jeopardizing the ability of future basketball talents to freely leave China.

playing Chinese youth: “[t]he individual’ is a central concept in Chinese basketball culture today, and one that its Chinese subjects wear well.” Morris, *supra* note 66, at 20.

⁹⁵ Morris, *supra* note 66, at 13.

⁹⁶ The NBA actually has one Canadian team, the Toronto Raptors. See *Toronto Raptors*, at <http://www.nba.com/raptors> (last visited on Jan. 1, 2004).

⁹⁷ The NBA’s global dominance is breathtaking. The worldwide appetite for the league is evidenced by the fact that NBA games are broadcast in 212 different countries and territories and the league earns US\$ 430 million annually from NBA merchandise sold outside the United States. Eisenberg, *supra* note 5.

⁹⁸ See *id.*

⁹⁹ I use this term metaphorically to describe the Chinese basketball bureaucracy’s traditional unwillingness to make its players available to the West.

¹⁰⁰ These players include Yao Ming, Wang Zhizhi, Mengke Bateer, and Ma Jian.

¹⁰¹ According to Steven W. Lewis, an expert on Asia at Rice University and a consultant to the Houston Rockets, Yao has “incredible political symbolism . . . the ability of Chinese to go out and compete in the world.” Fatsis et al., *supra* note 9.

A. *Chinese Regulations Controlling Chinese Athletes*

To its credit, China has recently allowed Yao Ming, Wang Zhizhi, and Mengke Bateer to leave the country, despite Chinese emigration laws that prevent the departure of people that could “cause a major loss to national interests.”¹⁰² Chinese basketball officials have even been supportive of the players’ transfers to the NBA, expressing a forward-thinking attitude about the positive effect basketball globalization may have on the development of Chinese basketball.¹⁰³

Nevertheless, China’s policies demonstrate a lingering reluctance to allow basketball player emigration. First, due to its concern about not having its top players available for international competitions, the CBA has been unwilling to let players depart without some assurance that the player will return for certain international events.¹⁰⁴ Furthermore, the Chinese government has recently imposed a new tax in the amount of half of the player’s American salary as a way to offset potential league financial losses

¹⁰² It is quite conceivable that a top Chinese basketball player could be prevented from legally leaving the country. Under Chinese law, Chinese citizens may enter or leave the country with valid passports and do not need visas. Law of the People’s Republic of China on the Control of the Exit and Entry of Citizens, art. 2 (1985), reprinted in THE LAWS OF THE PEOPLE’S REPUBLIC OF CHINA, 1983—1986, 197 (1987) [hereinafter Chinese Emigration Law]. When Chinese citizens desire to leave the country for private purposes, they must apply to their local security organ and approval must be granted except in certain circumstances. *Id.* art. 5. Thus, the law sets up a fairly simple process for citizens desiring to go abroad—they apply to a local government agency and their application is approved unless they fall under a (presumably) narrow class of exceptions.

However, one of these exceptions poses a potential roadblock to the star Chinese athlete wishing to go abroad for “private purposes.” Article 8 of this law prevents defendants in criminal cases and criminal suspects, people involved in unresolved civil cases, convicted persons serving their sentences, and people undergoing rehabilitation through labor from going abroad. *Id.* arts. 8(1)-(4).

In addition to this narrow class of people, “[a]pproval to exit the country shall not be granted to . . . persons whose exit from the country will, in the opinion of the competent department of the State Council, be harmful to state security or cause a major loss to national interests.” *Id.* art. 8(5). This provision—sweeping in its scope—seemingly gives the Chinese government the unilateral authority to prevent a citizen from legally going to another country when there is potential for a “major loss to national interests.” The regulation thus gives the power to the Chinese government to legally block the foreign travel of any basketball player whose absence would deal a blow to the national interest.

¹⁰³ In supporting its athletes’ ambitions to play in foreign leagues, Li Furong, the deputy director of the State General Administration of Sports, has said that “[i]f our athletes can play in the developed countries, it will be very helpful for their development as well as help improve the country’s overall competitiveness, particularly in weak events such as basketball and soccer.” *Athletes are Backed to Play Overseas*, *supra* note 54. See also John P. Lopez & Jonathan Feigen, *Rockets’ Tall Order Gets Easier*, HOUSTON CHRON., June 12, 2002, at 1; Lopez, *supra* note 13; *Coach Li Says It’s Time to Go to NBA*, PEOPLE’S DAILY (China), Mar. 16, 2001, at http://english.peopledaily.com.cn/200103/13/eng20010313_64897.html.

¹⁰⁴ The CBA’s secretary general, Xin Lancheng, expressed this concern by saying that “[w]e want to make sure that Yao will be available to play with the national team when he is needed in the future.” Wang Jingyu, *supra* note 20.

associated with the disappearance of marquee players.¹⁰⁵ In this way, the Chinese basketball bureaucracy has followed the individual players to the United States, exerting tremendous leverage over them and preventing their complete individual and financial freedom.

1. Chinese Basketball Players' National Team Obligations

With official government policy fixated on the idea that top basketball players are primarily supposed to play for the Chinese National Team in international competitions, it is not surprising that the Chinese government is reluctant to give up daily control of its players. As a condition of release, the PRC requires that Chinese players honor national obligations, including playing for the National Team when called to do so.¹⁰⁶ There is no written rule mandating this type of agreement; it is merely an unwritten rule¹⁰⁷ that the Chinese could apparently enforce through the International Basketball Federation ("FIBA").¹⁰⁸ Thus, the player must agree to this commitment—a condition evidenced by the "love of the game provision" in Yao's NBA contract, which recognizes China's right to summon the player back from the United States for international competitions.¹⁰⁹ FIBA regulations oblige the NBA team to honor the arrangement.¹¹⁰ If the player does not heed the

¹⁰⁵ Gregory Dole, *Great Haul; Chinese Defend Heavy Taxes on Pro Exports*, WASH. TIMES, May 17, 2002, at C01.

¹⁰⁶ This requirement is evidenced by the situations of Yao Ming, Wang Zhizhi, and Mengke Bateer. See *infra* Parts V.B.2-3.

¹⁰⁷ According to Erik Zhang, Yao Ming's cousin and representative during the negotiations to get Yao released from the Shanghai Sharks, "China does not have any written regulation stipulating a player must obey the call up of a player – it's just an unwritten rule." E-mail from Erik Zhang to Dustin Lane (Apr. 5, 2003, 00:14:52 PST) (on file with author). See also *supra* note 20.

¹⁰⁸ FIBA gives national federations the right to summon their players once they have gone abroad. Under the regulations, any team that signs a contract with a player is "obliged" to release that player when he is "summoned" by his national federation to play for his National Team in an official FIBA competition. FIBA Internal Regulations, *supra* note 40, § 4.4.3.1.1. Failure by a team to release the player in this circumstance can result in fines ranging from US\$ 25,000 to US\$ 75,000. *Id.* § 4.4.3.4.2. A player's refusal to play for his National Team when summoned subjects him to a possible suspension. *Id.* §§ 4.4.3.1.2 & 4.4.3.4.1.

¹⁰⁹ According to Yao's agent, Eric Zhang, the "love of the game" provision "ensures Yao's commitment as a national team player to serve his country whenever called upon." *Report: Yao, Rockets Agree to Contract*, ORLANDO SENTINEL, Oct. 10, 2002, at D3.

¹¹⁰ See *supra* note 108. USA Basketball, an official member of FIBA since 1934, see *supra* note 40, is an organization actually composed of different American associations, including the NBA. *USA Basketball Today*, at <http://www.usabasketball.com/general/index.html> (last visited Jan. 1, 2004). The NBA was added in 1989 when FIBA changed its rules to allow professional basketball players to play in international competitions. *Id.* See also *Constitution of USA Basketball*, arts. III-IV, XIV, at <http://www.usabasketball.com/rules/constitution.html> (Nov. 17, 2000).

Even if the NBA did not technically have to honor the arrangement, Wang Zhizhi's situation suggests that NBA teams may opt to punish the player as a way to not sour a working relationship with the CBA. When Wang failed to return to China to practice with the Chinese National Team in the summer of

Chinese government's wishes, he may be removed from the National Team entirely and lose his job in the NBA.¹¹¹ While all countries with players in the NBA have the right to recall their players for international competitions under FIBA regulations, China appears to be the only country to actually require its players to play for the National Team during the NBA season.¹¹²

2. *Salary Taxation*

In addition to enforcing the recall rule, the CBA has imposed a tax that restricts players' financial freedom.¹¹³ Once a Chinese basketball player goes abroad, the Chinese government will claim half of his foreign-earned income.¹¹⁴ Under CBA regulations, half the income earned by athletes of national sports teams is distributed among different administrative bodies.¹¹⁵ First, the CBA is entitled to thirty percent of the player's U.S. salary. Second, the player's local province, region, or municipality receives ten percent. Finally, the State General Sports Administration is paid ten percent.¹¹⁶ The player is left with the remaining half. In other words, the player must remit half of his foreign income to various PRC government entities.¹¹⁷ The rule apparently applies to all income earned abroad,

2002, the Dallas Mavericks left him off its summer league roster and chose not to re-sign him as a way to protect its business relationship with the CBA. See Dwain Price, *Mavs, Wang, Say 'Bye: Cuban Won't Match Offer by Clippers*, FORT WORTH STAR-TELEGRAM, Oct. 17, 2002, at 1. As Mavericks coach Don Nelson explained, "One of the main reasons that we didn't match [another team's contract] offer is because we gave our word to the Chinese Basketball Association and to the country of China that Wang would always go back in the summer so he can always play for his country. . . . When he broke that promise, he not only broke the promise to them, but he also broke the promise to us that he would go back." *Id.*

¹¹¹ See *supra* text accompanying note 110.

¹¹² China's use of its recall liberties has affected Wang Zhizhi and Mengke Bateer, see *infra* Part V.B.2-3, as well as Yao Ming, see *supra* Part I.

¹¹³ Dole, *supra* note 105.

¹¹⁴ *Id.*

¹¹⁵ Despite extensive research by the author, an official translation of the regulation could not be obtained. However, numerous reports in Chinese and U.S. media referred to the new regulation and its application to Yao. One Chinese report quoted portions of the government regulation as follows: "[The income earned by athletes] of national sports teams . . . from major games and commercialized games will be distributed in principle in the following ways: The athletes, coaches, and other relevant personnel will get 50 percent; the relevant association's reward fund and development fund 30 percent; the province (region, municipality) where the athletes and coaches reside 10 percent; and the State Sports General Administration (SSGA) 10 percent." *Basketball Star Yao Ming Stirs Awe in U.S., Controversy Back Home*, CHINA ONLINE, May 2, 2002, available at 2002 WL 10273783.

¹¹⁶ Thus, under this system, of Yao Ming's four-year contract worth US\$ 17.8 million, he would pay US\$ 5.34 million to the CBA (30% of US\$ 17.8 million), US\$ 1.78 million to Shanghai's Sports Commission (10% of US\$ 17.8 million), and US\$ 1.78 million to the State General Sports Administration (10% of Yao's four year contract).

¹¹⁷ The substantial amount of such a remittance to the Chinese government has precedent. The arrangement applied to Zheng Haizia when she played in the WNBA in 1997. *Basketball Star Yao Ming*

including money earned from endorsement deals and the player's salary from his NBA team.¹¹⁸

Perhaps not coincidentally, this regulation was implemented on April 5, 2002,¹¹⁹ slightly more than two weeks before the announcement that Yao Ming would be allowed to play in the NBA.¹²⁰ Aimed at capturing Yao's earning potential in the United States, the regulation was intended to offset the economic loss to the CBA caused by Yao's departure.¹²¹

B. Chinese Players That Have Gone to the United States

Chinese players have not been able to travel freely to the United States due to the Chinese basketball bureaucracy. Long before Yao Ming's sensitive negotiations made headlines,¹²² other talented Chinese players struggled to successfully make it to the United States to play basketball.¹²³ The situations of Ma Jian, Wang Zhizhi, and Mengke Bateer demonstrate that transferring a Chinese basketball player from China to the NBA has been met with reluctance by Chinese officials and has had consequences for the players' careers.

1. Ma Jian

In the 1990s, Ma Jian's case first hinted at the Chinese government's resistance towards allowing its basketball players to leave China to play abroad. Ma—a talented six-foot seven-inch guard—wanted to go to the United States as early as 1988 after being offered a scholarship to play college basketball at UCLA.¹²⁴ He had to apply to the Chinese State Sports Commission,¹²⁵ however, for permission to leave.¹²⁶ Despite his promises to rejoin the National Team for the Olympics and major international

Stirs Awe in U.S., Controversy Back Home, *supra* note 115. The PRC also applied it to table tennis players that played abroad. Fatsis, et al., *supra* note 9.

¹¹⁸ Martin Fackler, *Yao Reaches Deal with Chinese Club*, AP ONLINE, June 22, 2002, 2002 WL 23161615.

¹¹⁹ *Basketball Chief Defends Rule on Yao's NBA Salaries*, XINHUA NEWS AGENCY (China), April 29, 2002, available at 2002 WL 20236698.

¹²⁰ Shortly after Yao led his Shanghai Sharks to the CBA championship, it was reported on April 22, 2002, that Yao would be allowed to go to the NBA. Feng Lu, *supra* note 9.

¹²¹ Dole, *supra* note 105.

¹²² See *supra* Part I.

¹²³ These players include Ma Jian, Wang Zhizhi, and Mengke Bateer.

¹²⁴ Peter Hessler, *China Blocks Hoopsters Eyeing the NBA: Unable to Leave, Stars Find Themselves in a Control Game*, BOSTON GLOBE, Aug. 20, 2000, at A6.

¹²⁵ This bureaucracy was the predecessor to the State General Administration of Sports.

¹²⁶ Hessler, *supra* note 124.

competitions, Ma's application was denied.¹²⁷ Ma later used personal connections to apply for a passport in 1991. He snuck away in order to take the SAT while playing with the Chinese National Team in the Philippines.¹²⁸ Ma eventually left for the United States to play college basketball after the 1992 Barcelona Olympics.¹²⁹ When he tried out with the Los Angeles Clippers in 1995 and 1996, however, he was the last player cut from the preseason tryouts both seasons.¹³⁰

When Ma returned to China, his attempts to join the NBA without the permission of the Chinese government proved costly. Ma was kicked off the Chinese National Team and was not allowed to play in the 2000 Olympics.¹³¹ Ma attributed his suspension to retaliatory actions by the Chinese basketball bureaucracy because of his exposure to western values.¹³² In addition to being banned from the National Team, Ma also faced a major obstacle when negotiating a ten-day contract with the Dallas Mavericks in 1998. Although the team had extended the offer to Ma, he had to turn it down because his Chinese team¹³³ threatened to void his five-year contract.¹³⁴ Despite Ma's viable opportunity to realize his NBA dream, the pervasive reluctance among Chinese officials to effectuate his transfer quashed his athletic ambitions. Ma missed his opportunity in the NBA¹³⁵ and has been serving the final years of his playing career as a controversial journeyman in the CBA.¹³⁶

2. Wang Zhizhi

Like Ma Jian, Wang Zhizhi also faced major hurdles imposed by the Chinese government in his quest to play in the NBA. Wang Zhizhi, a Chinese army officer, was a seven-foot one-inch star center for the Bayi

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ There is some dispute as to whether or not his departure was authorized by Chinese authorities. Compare *id.* with Tim Noonan, *Hoop Dreams, Chinese-Style: America's Pro Basketball Teams are Jumping at the Prospect of Signing a Few of China's Highly Skilled—and Very Tall—Players*, TIME INT'L, Sept. 20, 1999, at 50. Ma played at Utah Valley State College for a year and then transferred to Utah where he accepted a scholarship and played for two years. Hessler, *supra* note 124.

¹³⁰ Hessler, *supra* note 124.

¹³¹ *Id.* See also Hannah Beech, *Just Can't Get a Good Outside Shot*, TIME INT'L, Oct. 23, 2000, at 61 (describing the fate of China's 2000 Olympics team without Ma Jian's presence).

¹³² According to Ma, the "[Chinese national team] coach says I don't want to be controlled. It's because I've been overseas and have heard different opinions." Hessler, *supra* note 124.

¹³³ Ma had been playing for the Beijing Aoshen in the CBA since his return to China in 1997. *Id.*

¹³⁴ Marc Stein, *Mavericks Update*, DALLAS MORNING NEWS, at 7B.

¹³⁵ Despite his age, Ma still believes that he can play in the NBA and yearns for another shot. Allen Abel, *The Man Who Would Be Ming*, SPORTS ILLUS., Jan. 27, 2003, at 63.

¹³⁶ MacMullan, *supra* note 87.

Rockets, a team owned by the People's Liberation Army ("PLA").¹³⁷ When he was drafted by the Dallas Mavericks in the second round of the 1999 NBA Draft, Wang's PLA bosses refused to let him leave and forced him to play for the Bayi Rockets for another two seasons.¹³⁸ Although PLA officials were insulted that an NBA team dared to draft their star player without first obtaining permission, several goodwill trips by Dallas officials built a greater sense of trust between the parties.¹³⁹ Finally, with diplomatic¹⁴⁰ and financial¹⁴¹ incentives, the PLA relented and agreed to release Wang to sign with the Mavericks after two years of difficult negotiations.¹⁴²

His conditional release turned on his commitment to return to the PRC to play for the National Team in international competitions.¹⁴³ Although Wang made his debut for the Mavericks on April 5, 2001,¹⁴⁴ he fulfilled his obligations, returning to China after the 2000-2001 NBA season to play in the East Asian Games, the Asian Championships, and the 21st Universiade.¹⁴⁵ As a result, Wang missed the Mavericks' summer training camp, the NBA pre-season, and first month of the 2001-2002 NBA season.¹⁴⁶

Wang soon realized that because the stringent obligations of playing for the Chinese National Team prevented him from participating in NBA summer training camps, his opportunity to improve as an NBA player was limited.¹⁴⁷ After finishing the 2001-2002 NBA season with the Mavericks,

¹³⁷ Feng Lu, *supra* note 4.

¹³⁸ Larmer, *supra* note 90. Wang was a valuable member of a successful Bayi Rockets team and led them to six consecutive championships. *See, e.g., id.*

¹³⁹ *Id.*

¹⁴⁰ Some observers have speculated that the PLA finally released Wang for diplomatic reasons. *See Wang Leaping Forward into American Culture*, HOUSTON CHRON., May 5, 2002, at 1; Larmer, *supra* note 90. At the time, China was bidding to bring the 2008 Olympics to Beijing, and releasing Wang to the United States would give it another opportunity to promote its bid. *Id.* Furthermore, Chinese officials may have realized that exposing Wang to NBA competition would improve China's prospects in international competitions. *Id.*

¹⁴¹ The Dallas Mavericks agreed to pay US\$ 350,000 to the Bayi Rockets as partial compensation. *See, e.g.,* McManus, *supra* note 27.

¹⁴² *See generally*, Larmer, *supra* note 90; *Wang Leaping Forward into American Culture*, *supra* note 140. Wang also needed permission to from the CBA before going to the United States. McManus, *supra* note 27.

¹⁴³ Paul Duggan, *The Chinese Maverick: 7-foot-1 Army Officer Wang Is the First to Play in NBA*, WASH. POST, Apr. 6, 2001, at D01.

¹⁴⁴ Wang had signed a two-year contract just prior to his debut. *Id.* During his debut, Wang scored six points and grabbed three rebounds in eight minutes of play. *Id.*

¹⁴⁵ Feng Lu, *supra* note 4.

¹⁴⁶ *See* Art Garcia, *Clipper Comes Full Circle to Dallas*, FORT WORTH STAR-TELEGRAM, Dec. 10, 2002, at 1.

¹⁴⁷ *Id.*; *Wang Skipping Worlds*, HOUSTON CHRON., Aug. 28, 2002, at 5.

Wang failed to meet two CBA-imposed deadlines to return to China and practice with the National Team in order to prepare for the World Championships.¹⁴⁸ Since the World Championships were being played in the United States in the summer of 2002, Wang thought it would be best to practice in a NBA summer league and then rejoin the Chinese National Team when it came to the U.S. for competition.¹⁴⁹ Although this defiance upset CBA officials, the CBA promised not to punish Wang for his delay.¹⁵⁰ Wang, however, was kicked off the National Team.¹⁵¹ He subsequently refused to sign a contract with the CBA to play in the Asian Games as his only way to rejoin the National Team because doing so would have required him to miss the NBA preseason in October.¹⁵² Thus, Wang lost his spot on the National Team and was not re-signed by the Mavericks. Although he was not able to play for his National Team, Wang was able to practice in America and eventually signed a contract with the L.A. Clippers for the 2002-2003 season.¹⁵³

3. *Mengke Bateer*

Mengke Bateer, the second of China's "Walking Great Wall" to make it to the NBA, also had obligations to meet with the Chinese National Team. Mengke played in two pre-season games with the Denver Nuggets before having to go back to China to fulfill National Team commitments.¹⁵⁴ These

¹⁴⁸ *Mav's Wang a No-Show in China*, HOUSTON CHRON., June 7, 2002, at 4. Wang reportedly asked the CBA for permission to stay in the United States to train in the NBA summer league, but was denied. *Wang Zhizhi Required to Join National Team*, XINHUA NEWS AGENCY (China), Aug. 21, 2002, available at 2002 WL 24702261.

¹⁴⁹ *Mav's Wang a No-Show in China*, *supra* note 148. The CBA and Dallas Mavericks had an agreement requiring Wang to return to China after the season. See *Price supra* note 110. Wang's failure to return to China also upset the Mavericks—a team which did not want to appear to be condoning Wang's behavior. See *id.*; Garcia *supra* note 146.

¹⁵⁰ The CBA notified Wang by letter in August that he would not be punished if he returned immediately. *Wang Zhizhi Required to Join National Team*, *supra* note 148. The CBA also took the opportunity to downplay rumors that Wang would not be allowed to play again in the NBA were he to return to China. *Id.*

¹⁵¹ Garcia, *supra* note 146.

¹⁵² *Wang Skipping Worlds*, *supra* note 147.

¹⁵³ Garcia, *supra* note 146. Wang, however, was still a back-up, appearing in only half of the Clippers' games in 2002-2003 and averaging only ten minutes of playing time per game. *Wang Zhizhi*, at http://www.nba.com/playerfile/zhizhi_wang/index.html (last visited Jan. 1, 2004).

Wang's relationship with the Chinese government remains thorny. Having not been able to return to China due to his relationship with the PLA, Wang recently saw his parents for the first time in two years when the Clippers opened the 2003-2004 season in Japan against the Seattle SuperSonics. Jerry Crowe, *Clipper Report: Unlike His Teammates, Wang Benefits From Trip*, L.A. TIMES, Nov. 5, 2003, at D6.

¹⁵⁴ Pat Rooney, *Things Looking up for Nuggets' Evans; Interim Coach has High Hopes for Lineup with 6-11 Bateer, McDyess*, ROCKY MOUNTAIN NEWS, Feb. 27, 2002, 2002 WL 9093918.

obligations prevented him from playing in the NBA sooner.¹⁵⁵ He was eventually released by the Beijing Ducks and signed by the Nuggets in February of 2002.¹⁵⁶ Although he made his NBA debut later that month,¹⁵⁷ Bateer has still not managed to become an impact player in the NBA,¹⁵⁸ possibly because he must continue fulfilling his obligations with the National Team.¹⁵⁹

C. *The Potential for Future Chinese Players in the NBA*

The emigration of Yao Ming, Wang Zhizhi, and Mengke Bateer to the NBA represents the beginning of Chinese influence in the NBA. As China's basketball culture has developed and its players have improved, many NBA scouts and organizations have realized that China—with its 1.3 billion people—has enormous potential to produce some NBA-quality players, especially as Yao Ming's success in the NBA increases the popularity and profile of basketball for the Chinese.¹⁶⁰ Indeed, China is considered to be the last great frontier of basketball player talent—a place with untapped potential for future NBA players.¹⁶¹ As a result, there are numerous NBA scouts in China searching for NBA-quality talent.¹⁶² With more Chinese basketball players being discovered by scouts¹⁶³ and more Chinese youth picking up basketballs, the NBA will undoubtedly face the prospect of

¹⁵⁵ Wang Zhizhi Bridges Chinese Basketball with the World, PEOPLE'S DAILY (China), Dec. 19, 2001, at http://english.peopledaily.com.cn/200112/19/eng20011219_87023.shtml.

¹⁵⁶ Rooney, *supra* note 154.

¹⁵⁷ Mengke Bateer became the second Chinese player in the NBA when he clocked fourteen minutes for the Nuggets in a game against the Golden State Warriors on February 27, 2002. See, e.g., Marc J. Spears, *Nuggets Can't Keep Pace with Warriors*, DENVER POST, Feb. 28, 2002, 2002 WL 6561749.

¹⁵⁸ Bateer played in only twelve of the San Antonio Spurs' eighty-two games during the 2002-2003 season, logging a total of just forty-six minutes—two minutes short of a full NBA game. Mengke Bateer, at http://www.nba.com/playerfile/mengke_bateer/index.html (last visited Jan. 1, 2004). Bateer signed a two-year contract with the Toronto Raptors in July 2003. *Toronto Raptors Sign Mengke Bateer*, AP ONLINE, July 17, 2003, 2003 WL 59743394.

¹⁵⁹ Bateer spent the summer of 2003 playing with the Chinese National Team in the Asian Championships, missing the beginning of the Toronto Raptors' training camp. Dave Feschuk, *Shaqi Chan Comes to Camp*, TORONTO STAR, Oct. 7, 2003, at E10.

¹⁶⁰ See Dave D'Alessandro, *Yao's Impact Reaches Beyond NBA and USA*, STAR-LEDGER (Newark, N.J.), Dec. 27, 2002, 2002 WL 104595980; Geoffrey York, *Yao's Rise Enraptures Homeland*, GLOBE & MAIL (Toronto), at S3; MacMullan, *supra* note 3.

¹⁶¹ See Murphy, *supra* note 86.

¹⁶² See, e.g., Kaufman, *supra* note 2.

¹⁶³ NBA scouts have already identified a number of talented Chinese teenagers that may have futures in the NBA ahead of them. See Brook Larmer, *The Next Yao Ming?*, TIME, Sept. 8, 2003, 2003 WL 58582489. In addition, one NBA scout claimed to have found twenty seven-footers between the ages of thirteen and seventeen while on a recruiting trip in northern China. Murphy, *supra* note 86.

dealing with Chinese officials again to help the next Yao Ming fulfill the dream of playing professional basketball in the United States.

If the past is any indication of the future, however, Chinese players desiring to play in the NBA will be subject to the onerous policies of a Chinese basketball bureaucracy unwilling to relinquish complete control of its athletes.¹⁶⁴

VI. AN ALTERNATIVE FRAMEWORK FOR ATHLETE TRANSFER

Although China is concerned about the short-term negative impacts of basketball globalization, including the potential loss of revenue when China's top players go abroad¹⁶⁵ and a reduced ability to field a competitive National Team,¹⁶⁶ both the NBA and China should be interested in long-term outcomes. The NBA should not condone or condemn current Chinese policies, but should instead collaborate with China to craft a bilateral agreement that would facilitate the transfer of Chinese basketball players to the United States as a new strategy for China's future basketball success.

A. *The NBA Must Change Its Business Outlook to Encourage a Change in Chinese Policies*

As long as NBA teams actively deal and contract with Chinese officials to bring basketball players to the United States within the Chinese

¹⁶⁴ The CBA again demonstrated its reluctance to let a player go to the NBA when Xue Yuyang was drafted in the 2003 NBA Draft. Drafted fifty-seventh overall by the Dallas Mavericks and subsequently traded to the Denver Nuggets, the CBA blocked his move, stating that Xue needed to "train with the national team, play in international competitions, build up experience, improve his skills and strengthen himself physically for the grueling competition of the NBA. . . . When the conditions are ripe, the Chinese Basketball Association will support him to go play in the NBA." *China Says Xue Not Ready for NBA*, HOUSTON CHRON., June 29, 2003, 2002 WL 57424686.

¹⁶⁵ Initial reports suggested that CBA sponsors may lose interest in supporting the Chinese league with the loss of China's big-name players to the NBA. Dole, *supra* note 105. Furthermore, in the season following Yao's departure, the Shanghai Sharks experienced a 15% drop in average game attendance. *No Bite with Big Man Gone*, SHANGHAI DAILY (China), Apr. 2, 2003, 2003 WL 8598952. Similar drops in home attendance were reported after the losses of Mengke Bateer and Wang Zhizhi. Feng Lu, *CBA Bothered by Star Drainage*, CHINA DAILY, Apr. 8, 2002, 2002 WL 7168024.

Concern that the loss of key players will drain the local league's fan base and jeopardize its success is shared in Japan, where many citizens and baseball officials fear that the loss of top Japanese baseball players to the major leagues will irreparably harm Japanese baseball. See Price, *supra* note 110; Jim Caple, *Get Out the Rice and the Sashimi, Grandma! Exodus Good for U.S., Not So Good for Japan*, SEATTLE POST-INTELLIGENCER, Mar. 30, 2001, 2001 WL 3556278; Michael Farber, *Rising Son*, SPORTS ILLUS., Dec. 4, 2000, 2000 WL 24234918.

¹⁶⁶ Simply put, Chinese officials fear that if their top players go to the NBA and are exposed to the American way of life, the players will not come back. MacMullan, *supra* note 3. Their suspicions were further fueled by Wang Zhizhi's refusal to return to China at the end of the 2002 season. *Id.*

framework, the PRC has no incentive for change. There will be future negotiations between NBA teams and Chinese officials because the NBA scouts are likely to recruit future Chinese prospects. So far, NBA teams have demonstrated a willingness to work within the rules set by the Chinese.¹⁶⁷ NBA coaches have even made comments that seem to value a working business relationship with the Chinese over a player's right to play basketball in the United States.¹⁶⁸ Furthermore, NBA officials have expressed a laissez-faire attitude toward the payments a Chinese player must make to his home country.¹⁶⁹ An NBA team's willingness to work within the current Chinese framework legitimizes the current Chinese policies, amounts to tacit approval of them, and promotes and perpetuates these harmful regulations.¹⁷⁰

¹⁶⁷ The Dallas Mavericks and the Houston Rockets are two prime examples of NBA teams that worked within the Chinese framework to secure the release of their Chinese draft pick. Considering that the Chinese basketball bureaucracy ultimately had to agree to the release of the player, and thus held all the cards in the negotiations, the NBA teams were left with little option but to acquiesce to the Chinese recall requirement in order to get their player into the NBA.

¹⁶⁸ See Price *supra* note 110 and accompanying text.

¹⁶⁹ Ian Thomsen, *Not-So-Fine China: Given His Deficiencies and the Demands of His Handlers*, Yao Ming is a Risky Proposition, SPORTS ILLUS., May 13, 2002, 2002 WL 8253820. Referring to the salary taxation issue, the NBA's deputy commissioner, Russ Granik, said, "[f]rom our end, that's something that would be between him and the government." Smith & Wise, *supra* note 90.

¹⁷⁰ One could perhaps argue that contracts recognizing the Chinese government's right to recall or funnel money to the Chinese government are voidable under U.S. contract law. Although freedom of contract—the policy favoring the ability of parties to control the terms of their bargain—is a bedrock principle of U.S. contract law, *see, e.g.*, Merten v. Nathan, 321 N.W.2d 173, 177 (Wis. 1982), the freedom to contract can be trumped when the subject matter of the contract violates public policy and thus cannot legally be enforced. FREDERICK A. WHITNEY, LAW OF CONTRACTS §§ 60, 62 (5th ed. 1953). *See also* ARTHUR L. CORBIN, COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACTS §§ 1374-76, 1382 (1962). Thus, if the public policy issues raised by these Chinese basketball player contracts are so problematic so as to outweigh the freedom of contract, then these contracts might be unenforceable.

Some might posit that these contracts are void for public policy on the grounds that China should not be able to validly recall its players. After all, recognizing the right of the Chinese to force its players to come back and play for the National Team could be akin to recognizing a form of involuntary servitude. While the existence of the Thirteenth Amendment to the United States Constitution makes clear that involuntary servitude is against U.S. public policy, U.S. CONST. amend. XIII, § 1, U.S. courts have upheld negative injunctions—thus preventing a person from working for a competing employer—where a person's talents are unique. *See* Flood v. Kuhn, 407 U.S. 258 (1972) (reaffirming Major League Baseball's anti-trust exemption). In addition, because USA Basketball is a part of FIBA and FIBA regulations authorize the recall of players, China's willingness to exercise such a clause should not be considered unacceptable by U.S. or international norms. Thus, it would appear that contracts which recognize the right to recall would be valid to the extent that it would prevent a player from playing in the NBA during the time he was "recalled."

In addition, U.S. public policy would not seem to prevent the enforcement of an NBA player contract which funnels money to various Chinese government entities. The salary paid to the Chinese NBA player is taxed by the Chinese government. Even the U.S. Supreme Court has recognized that the government has the ability to tax its citizens on the basis of worldwide income. *Cook v. Tait*, 265 U.S. 47, 56 (1926). Thus, American basketball players living abroad and playing for foreign teams pay U.S. income taxes. *See* William H. Baker, *The Tax Significance of Place of Residence for Professional Athletes*, 1 MARQ. SPORTS L.J. 1, 32-34 (1990). While it may be unappetizing to some that NBA teams are indirectly

B. *A Bilateral Agreement Between the NBA and the CBA*

Instead of continuing down its current path and tacitly approving Chinese policies, the NBA should propose a working agreement to facilitate player transfer between China and the United States.¹⁷¹ FIBA regulations explicitly envision such an arrangement.¹⁷² Such a bilateral agreement would be similar to that between the Nippon Professional Baseball Organization of Japan (Japanese professional baseball) and Major League Baseball, where players under contract may transfer from one league to another by going through a posting system.¹⁷³

funneling millions to Chinese bureaucracies, such an arrangement does not violate U.S. public policy—a government has the right to tax its citizens.

¹⁷¹ CBA teams may have foreign players on their rosters, and according to one recent count, there are currently thirty-seven Americans playing basketball in the CBA. Eurobasket, *Import Players in China*, at <http://www.asia-basket.com/chn/imports.asp> (last visited Jan. 1, 2004). Furthermore, Chinese teams have been keenly interested in getting good Americans as replacements for lost Chinese stars. For example, the Shanghai Sharks wanted to get several NBA bench players as compensation for losing Yao Ming. Dole, *supra* note 13. For a good account of life as an American playing in the CBA, see Abel, *supra* note 135.

¹⁷² “National federations may establish bilateral agreements regarding the transfer of players between clubs of the two countries involved, with provisions to regulate such transfers to the satisfaction of all concerned.” FIBA Internal Regulations, *supra* note 40, § 4.4.5.

¹⁷³ Posting System, *supra* note 32. See also Gould, *supra* note 26 (discussing the history of the posting system).

Although the Japanese have a tremendous baseball heritage and take pride in their sport, see generally ROBERT WHITING, *YOU GOTTA HAVE WA* (1989) (discussing the history of professional baseball in Japan), many Japanese players have become irresistibly drawn to the competition and exposure of the American major leagues. Because Japanese players can become free agents after nine seasons in Japan, see, e.g., *Ex-Tigers Valdes, Cruz Help Dragons Rout Hanshin*, DAILY YOMIURI (Japan), Mar. 18, 2003, 2003 WL 5136402 (reporting that a recent proposal by the Japanese Professional Baseball Players’ Association to lower that requirement to seven years was denied), some star Japanese players bolted for the major leagues upon free agency, leaving their Japanese teams with nothing in return. The posting system was designed to mitigate a Japanese team’s financial loss while facilitating a player’s transfer between Japanese baseball and Major League Baseball. See S.L. Price, *The Ichiro Paradox; No Power, No Personality, Yet with No Peer, the Mariners’ Ichiro Suzuki May be the Greatest Player to Come Out of Japan and the Worst Thing to Happen to Japanese Baseball*, SPORTS ILLUS., July 8, 2002, 2002 WL 8254058. It also served to eliminate the exclusivity of “working agreements” that had developed between major league teams and Japanese teams. Gould, *supra* note 26; Farber, *supra* note 165.

Under the new system, when a Japanese player under contract wants to play baseball in the American major leagues, his team has the option of “posting” him, thus making him available to all MLB teams. Posting System, *supra* note 32. If major league teams are interested in signing the player, they have the opportunity to submit blind monetary bids to the Commissioner of Major League Baseball. *Id.* Assuming that the Japanese team finds the winning bid an acceptable amount of compensation, the MLB team that submitted the highest bid wins an exclusive thirty-day right to negotiate and sign the Japanese player. *Id.* If the player signs with the MLB team, then the team’s initial winning bid serves as financial compensation to the Japanese club losing its player. *Id.*

As of the posting season ending March 1, 2003, two star Japanese players—Ichiro Suzuki and Kazuhisa Ishii—have come to the United States via this method. In November, 2000, the Seattle Mariners paid US\$ 13.125 million for the right to negotiate and sign Suzuki, see Farber, *supra* note 165, and in January, 2002, the Los Angeles Dodgers bid US\$ 11.26 million to obtain the right to sign Ishii. Mike DiGiovanna, *Dodgers and Ishii Strike Deal*, L.A. TIMES, Feb. 8, 2002, 2002 WL 2452343.

A good working agreement could clarify issues relating to compensation for a Chinese team losing its player and a player's responsibility with his National Team. As a precondition to such a working agreement, however, the PRC should repeal its current taxation rule. This working agreement would essentially shift the burden of compensation to the NBA team, rather than forcing the player to pay for his own release through annual payments of more than half his NBA salary.

To streamline negotiations over a player's release and relieve the player of long-term financial liability, such a working agreement could establish the type of monetary and non-monetary compensation due to the CBA and the player's Chinese team upon release of a player. This NBA-CBA agreement could identify a number of ways that a NBA club could assist a Chinese team including, but not limited to, marketing strategies, grassroots basketball development plans, and basketball schools and camps. A Chinese club offering to release its player to the NBA could submit a proposal to the NBA asking for help with certain items from the list.¹⁷⁴ Any NBA team looking to draft that player would then know what kind of non-monetary assistance it would be expected to provide in exchange for the player's release.

In addition, the working agreement could outline a sliding compensation scale for the Chinese team and the CBA that could at least include the US\$ 350,000 fee currently allowed under NBA rules.¹⁷⁵ The compensation fee could increase in proportion to how high the player is

The posting system, however, has been criticized in that it may help to drain Japanese baseball of star players, Japanese teams will rush to sell-off their players, players should not be sold to the highest MLB bidder—a prospect that widens the gap between financially well-to-do teams and cash-strapped teams, and posting does not give the player the right to freely choose his own team. See Jim Allen, *Ishii Flies the Nest*, DAILY YOMIURI (Japan), Jan. 10, 2002, available at <http://www2.gol.com/users/jallen/column/20020110.html>. The posting system nevertheless gives a Japanese player under contract the opportunity to seek out a career in the major leagues before fulfilling his nine-year Japanese playing requirement.

¹⁷⁴ Thus, when the Shanghai Sharks were prepared to release Yao Ming, they would have been able to specify the type of non-monetary compensation they would like to have received from an NBA club drafting Yao. This notification would have added candor to the negotiations and caused less confusion and complexity in the process.

¹⁷⁵ Although US\$ 350,000 is the current amount authorized under the NBA's Collective Bargaining Agreement for the purpose of "securing the right to enter into a Player Contract with a foreign player," see Collective Bargaining Agreement, *supra* note 19, art. VII, § 3(e)(1), there is no reason why the NBA and National Basketball Players' Association could not increase this amount when the Collective Bargaining Agreement is up for renegotiation in 2004. The US\$ 350,000 amount is technically an exclusion under the NBA's salary cap. Collective Bargaining Agreement, *supra* note 19, art. VII, § 3(e)(2). Nevertheless, US\$ 350,000 does not seem to be a large enough exclusion to compensate foreign teams for their NBA-bound players—especially when teams in Major League Baseball are allowed to spend millions buying the rights to star Japanese players under the posting system. See *supra* note 173 and accompanying text.

chosen in the draft.¹⁷⁶ In theory, then, the higher the Chinese player was drafted, the more compensation would be due to the Chinese team and the CBA for releasing him.¹⁷⁷ Such a working agreement would provide more security for NBA teams and enhance the predictability of compensation costs to a player's Chinese team in exchange for his release.¹⁷⁸ To the extent that compensation under this system falls below compensation under the current system of player taxation, the NBA could perhaps set up a fund from revenues generated by officially licensed merchandise of star Chinese players and funnel it into China's basketball program.¹⁷⁹

In addition, any such working agreement should detail the expectations of the Chinese player vis-à-vis the Chinese National Team. If the Chinese player voluntarily consents to being part of the National Team, then a working agreement could provide a list of tournaments and competitions which the CBA, the player, and his NBA club could agree upon. This agreement could then be incorporated into the player's contract. The transfer process could then be significantly streamlined and the bureaucratic hurdles, confusion, and uncertainty that plagued the transfers of Yao and Wang reduced.¹⁸⁰ Like the cooperation exhibited between Japanese professional baseball and Major League Baseball, a bilateral agreement

¹⁷⁶ Such an arrangement might proportionally mirror the current Rookie Scale. Under the Collective Bargaining Agreement, draft picks are paid in accordance with a set scale corresponding to the order in which they were selected. See Collective Bargaining Agreement, *supra* note 19, Ex. B. For example, the top overall pick makes more than the second pick, while the second pick makes more than the third pick. *Id.* Were such a financial compensation schedule ever to occur, the fee would have to be approved in the Collective Bargaining Agreement.

¹⁷⁷ This system would necessarily be different from the baseball "posting" system because MLB teams do not draft players from professional leagues and are free to "bid" on posted players. Posting System, *supra* note 32, at 3. However, in the NBA, players come into the league via the draft. Collective Bargaining Agreement, *supra* note 19, art. X.

¹⁷⁸ Because Yao Ming's situation was unique in that he was the center of Houston's attention from the outset and the Rockets did not have to worry about any other team drafting Yao ahead of them, the Rockets and the CBA could work out deals beforehand to provide some draft day assurances. Even then, since he had not yet been released, drafting Yao was a risky proposition: had he not been released, the Rockets would have wasted a top pick and jeopardized the future of their franchise. Drafting a Chinese player midway through the first round would be a risky proposition for a team that did not have the opportunity to negotiate with Chinese officials beforehand and would have no idea if the player could successfully be transferred. See Friess, *supra* note 9.

¹⁷⁹ Under the NBA's Collective Bargaining Agreement, the league's salary cap for a season is fixed as a percentage of projected leaguewide "Basketball Related Income." Collective Bargaining Agreement, *supra* note 19, art. VII, § 2. "Basketball Related Income" is a term used broadly to encompass most revenues generated by the NBA and its teams. *Id.* art. VII, § 1(a).

¹⁸⁰ In the aftermath of the announcement that Yao would be made available for the 2002 NBA draft, several NBA executives reportedly expressed concern about China's insistence on the right to recall, worrying that Yao would not be available at critical points during the off-season workout schedule and during the regular season. Thomsen, *supra* note 169.

between the CBA and the NBA would be a step in the right direction for sports globalization.¹⁸¹

VII. CHINA SHOULD EASE ITS BASKETBALL PLAYER EMIGRATION RESTRICTIONS TO IMPROVE THE ECONOMIC, COMPETITIVE, AND SOCIAL ASPECTS OF BASKETBALL

There are long-term economic, competitive, and social incentives for China to liberalize its policy toward basketball player transfer. Although China has allowed the transfer of its top players to the United States, China's adjustment to basketball globalization has been awkward, reflecting an ideology that athletes serve, foremost, at the disposal of the state. Yet, in the age of sports globalization, a nation's interests can be served by having its players shine on a world stage. Certainly, collaborating with the NBA to craft a bilateral agreement to govern player transfer would serve the best interests of all parties in the long run and be far more efficient than the current deal-by-deal negotiations. China should thus liberalize its policies with regard to basketball player emigration and become a full-fledged partner in basketball globalization.

A. *China, Its Players, and the NBA Will Gain Economically by Liberalizing Player Transfer*

The PRC, individual players, and the NBA stand to gain economically by allowing greater freedom in player transfer.¹⁸² Greater exposure of Chinese players on the NBA stage would provide increased marketing opportunities in China for U.S. companies looking to advertise to a new fan base. Such an arrangement would increase television and advertising

¹⁸¹ In addition, to improve human rights in the context of basketball globalization, the NBA and USA Basketball should consider advocating more fundamental reforms to FIBA. Because FIBA rules give countries the absolute right to claim their players for international competitions, FIBA Internal Regulations, *supra* note 40, § 4.4.3.1.1, and the player and his foreign team are exposed to punishment if the player does not want to play for his home country and ignores the summons, *see id.* § 4.4.3.4.1., the regulations can force a player to play against his will.

It would make more sense from the standpoint of international human rights standards to allow the player to choose whether or not he will be subject to FIBA's recall provision. A patriotic player would be able to play for his home country, but an individual would not be obliged to do so. Such an arrangement would strike an appropriate balance between protecting the player's home federation's interests and the player's individual liberty. In addition, this change would be more consistent with FIBA's stated policy that "[a]ny basketball player shall have the right to play basketball in any country in the world." *Id.* § 4.1.1.

To reform FIBA's internal regulations, a proposal must be adopted by FIBA's Central Board. FIBA General Statutes, *supra* note 40, art. 21(k).

¹⁸² *See MacMullan, supra* note 3.

revenue and provide a new source of wealth for China.¹⁸³ The influx of American marketing money would likely be significant. Moreover, money from product sales and marketing could be funneled directly into China's basketball program.¹⁸⁴ Furthermore, a Chinese youth population inspired by the NBA could develop basketball at the grassroots level in China,¹⁸⁵ leading to a more competitive and vibrant CBA, which in turn would be likely to attract more ticket-buying fans, marketing deals, and sponsorships.¹⁸⁶

Chinese players would also benefit economically from relaxing or eliminating current restrictions.¹⁸⁷ The Chinese player in the NBA would be able to both keep what he actually earned and fully profit from any endorsement deals. In the case of Yao, whose lifetime worth from endorsements has been estimated as high as one billion dollars by some basketball insiders, that amount is staggering.¹⁸⁸ Without having to share a

¹⁸³ Sports marketing in China is still in its infancy. Frederik Balfour, *Game Plan B; Sponsors Find Sports Marketing in China is No Slam Dunk*, BUS. WEEK, Sept. 15, 2003, 2003 WL 62195556.

¹⁸⁴ Some analysts have suggested that professional sports teams in China should sell broadcast rights for games to China Central Television at a much higher rate as a way to increase revenue. Alkman Granitsas & Ben Dolven, *Show Me the Money*, FAR E. ECON. REV., Apr. 11, 2002, 2002 WL-FEER 5169810.

¹⁸⁵ See Lev, *supra* note 69.

¹⁸⁶ Competitive development on the basketball court would serve to increase the marketability of the CBA and nurture the ensuing positive financial trend. See, e.g., Minghua, *supra* note 72. According to Wei Jizhong, the executive director of the 2008 Olympic Games, "[b]asketball will attract a number of foreign companies into the Chinese market." MacMullan, *supra* note 3. Despite the lack of big name stars, the CBA reportedly cited a rise in league sponsorships during the 2002-2003 season. *Sharks Bank on Recruits*, SHANGHAI DAILY (China), Dec. 7, 2002, 2002 WL 105069270.

¹⁸⁷ For the Chinese player being denied the opportunity to come to the NBA, the financial impact of playing under a CBA contract in China versus playing under an NBA contract in the United States can be measured in the millions. On average, Chinese players make only US\$ 12,500 per year playing professional basketball in China. Granitsas & Dolven, *supra* note 184. Some of the best Chinese players make only US\$ 20,000 a year, while their foreign counterparts in the Chinese professional league make US\$ 80,000 to US\$ 100,000 annually. MacMullan, *supra* note 87. Yao Ming, the best Chinese player to have played in the league, reportedly made US \$80,000 during his final season. O'Neill, *supra* note 93. By comparison to these relatively modest Chinese salaries, NBA rookies can fetch contracts worth millions over a multi-year period. Collective Bargaining Agreement, *supra* note 19, Ex. B.

¹⁸⁸ Dole, *supra* note 105. On the initiative of Erik Zhang, Yao's business-student cousin, "Team Yao"—a small group of sports and financial advisers—was assembled to plan and oversee Yao's financial ventures. Josh Tyrangiel & Perry Bacon, *The Center of Attention*, TIME, Feb. 10, 2003, 2003 WL 7739830. The group commissioned a class of graduate students at the University of Chicago Graduate School of Business to develop a strategy to maximize Yao's potential in the endorsement arena—especially in light of the opening Chinese markets. *Id.* Having figured out a strategy for community relations, media exposure and marketing opportunities, the class submitted a 500-page plan to Zhang in December, 2002. See *id.*; David Barron, *Houston Rockets Hope Chinese Player will Broaden Pool of Fans*, KNIGHT-RIDDER TRIB. BUS. NEWS, Nov. 3, 2002, 2002 WL 102379684.

With an annual income from endorsements already estimated at between four and ten million, Yao has signed advertisement deals with companies such as Apple, Visa, Gatorade, China Unicom, and Sorrent. See, e.g., Jack McCallum, *Sky Rocket*, SPORTS ILLUS., Feb. 10, 2003, 2003 WL 8586281. In October 2003, Yao inked a deal with Reebok for a reported US\$ 75 million over ten years. Elliott Teaford, *Yao Switches From Nike to Reebok*, L.A. TIMES, Oct. 24, 2003, 2003 WL 2443536.

portion of his salary from endorsement deals, Yao would be entitled to more of his earnings and be able to use such earnings as he sees fit,¹⁸⁹ including, perhaps, philanthropic contributions to basketball development in China and the United States.¹⁹⁰

Both the NBA and its teams would also gain financially from a reduction in current Chinese player restrictions to the extent such reduction would lead to a greater influx of Chinese players in the league. Chinese interest in the NBA would undoubtedly increase if there were more Chinese players in the NBA for Chinese fans to cheer. During the 2001-2002 NBA season (the year prior to Yao's arrival), NBA games broadcast in China averaged six million viewers per night.¹⁹¹ During the 2002-2003 NBA season, NBA games not involving Yao averaged twelve to thirteen million viewers per game, while NBA games involving Yao averaged fifteen to eighteen million viewers.¹⁹² The NBA opened an office in Beijing in 2002 to capitalize on this expanding market.¹⁹³ Furthermore, the NBA started a Chinese NBA Hoop magazine that has more than 100,000 subscribers, launched a Chinese website, and plans to have more than 100 retail stores in China by the time the Olympics come to Beijing in 2008.¹⁹⁴ More Chinese players in the NBA would only create more revenue-generating opportunities for the league.¹⁹⁵ Finally, more Chinese players in the NBA would increase the fan base and ticket revenue for NBA teams, particularly those teams in cities with large Asian communities.¹⁹⁶ Allowing Chinese players to freely come to America and play basketball on the NBA's high

¹⁸⁹ Mark O'Neill, *Basketball Hero Yao Must Share His Wealth*, S. CHINA MORNING POST, Jan. 5, 2003, 2003 WL 2324546.

¹⁹⁰ Yao has expressed intent to support Chinese or American charities involving children. See Barron, *supra* note 188. Like Michael Jordan's "Flight Schools," see *Michael Jordan Flight Schools*, at <http://mjflightschool.com> (last visited Jan. 1, 2004), Yao could perhaps finance basketball camps in China and support other youth programs to help the development of the game.

¹⁹¹ MacMullan, *supra* note 3.

¹⁹² While the NBA was already popular in China prior to Yao's arrival in the United States, his story and success generated additional interest in the sport and brought the NBA additional Chinese fans. *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ From the NBA's perspective, China is merely the newest market in an expanding global marketing strategy. Eisenberg, *supra* note 5.

¹⁹⁶ With the addition of Yao Ming, the Houston Rockets' average home attendance went up by seventeen percent and he turned out to be a major draw on the road as well: Houston went from eighteenth in the league in road attendance to fifth—improving from 16,552 fans per game to 17,919 fans per game. *2002-2003 Houston Rockets Postseason and Draft Guide*, 6-7 (2003), available at http://www.nba.com/media/rockets/0203postseason_guide1-27.pdf (last visited Jan. 1, 2004). Like Ichiro Suzuki's ability to bring new Japanese fans to the ballpark during his rookie season, Yao's arrival in the United States has been met with an increased presence of Asian fans at Rockets' games. Jayda Evans, *Ming Dynasty: No. 1 Draft Pick Yao Carries Load for Rockets*, SEATTLE TIMES, Nov. 29, 2002, at E1.

profile global stage would therefore be economically beneficial from the Chinese, individual player, and NBA perspectives.

B. Chinese Basketball, Chinese Players, and the NBA Will Become More Competitive by Liberalizing Transfer Policies

Allowing Chinese players to freely play in the NBA would also improve the competitiveness of Chinese basketball and its individual players.¹⁹⁷ The CBA's level of competition is stagnant, with little opportunity for players to develop their skills.¹⁹⁸ As with any athletic competition, individual athletes improve their skills when they compete against better players. With more opportunity for Chinese players to play in America, whether at the professional or collegiate level, the level of competition of Chinese basketball will increase all around.¹⁹⁹ In essence, allowing Chinese players to freely travel to America to play basketball will increase the individual skill-level of players. With a more skilled player pool from which to select a National Team, China's prospects in international events will undoubtedly increase.²⁰⁰

From the individual player's perspective, having the opportunity to play against NBA-level competition all the time, as opposed to just during the season, would have advantages. There would be an opportunity to develop as a player by improving one's skills against the rest of the NBA.

¹⁹⁷ To the extent which Chinese receptiveness to basketball globalization can improve coaching at all levels of competitive basketball in the PRC, the game will surely improve its competitiveness. See MacMullan, *supra* note 87.

¹⁹⁸ *Id.* Chinese professional teams have been compared to "midlevel Division I college" teams in the United States. Kaufman, *supra* note 2.

¹⁹⁹ As Ma Jian, the first Chinese player to play collegiate basketball in the United States, said, "By allowing the best people to go overseas, you're training people who can then come back and use that knowledge to help develop younger players." Beech, *supra* note 131. This sentiment was shared by Li Yao-min, the general manager of the Shanghai Sharks: "[A]fter Yao Ming joins the NBA I'm sure he'll learn many useful things. It will push Chinese basketball and even the whole world's game if he plays in the NBA." Lev, *supra* note 69.

²⁰⁰ When FIBA first amended its rules to allow professionals to play in the Olympics and other international competitions, the U.S. dominated. The 1992 "Dream Team," led by legendary NBA stars such as Michael Jordan, "Magic" Johnson, and Larry Bird, decimated competition during the Barcelona Olympics, winning games by an average of 43.8 points and capturing the gold medal. *Games of the XXVth Olympiad -- 1992*, at http://www.usabasketball.com/history/moly_1992.html (last visited Jan. 1, 2004). However, as the 1990s saw an increase of international players in the NBA—the most competitive league in the world—these international players improved their skills and brought them to international competitions. Although the United States still won gold in the 1996 and 2000 Olympics, see *Olympic Medal Winners*, at http://www.olympic.org/uk/athletes/results/search_r_uk.asp (last visited Jan. 1, 2004), the Americans finished a disappointing sixth in the 2002 World Championships. Yugoslavia, with NBA stars Peja Stojakovic, Vlade Divac, Vladimir Radmanovic, Marko Jaric & Pedrag Drobnjak won the championship, beating Argentina in the gold medal game. See *Yugoslavia Claims Second World Title: Bodiroga's 27 Lead Way to Repeat Gold*, HOUSTON CHRON., Sept. 9, 2002, 2002 WL 23221991.

Because Wang Zhizhi, Mengke Bateer, and Yao Ming were forced to miss NBA training camps and exhibition seasons, their skills were not as well-developed as they could have been had they been playing with the NBA team the entire year.²⁰¹ When Wang failed to report to China after the 2002 NBA season, and instead played in a NBA summer league, he improved and signed with the L.A. Clippers for a three-year contract worth six million dollars.²⁰²

The NBA as a league would also have much to gain in terms of competition by having more talented Chinese basketball players join its ranks. The influx of players to the NBA from across the globe has improved the overall talent and competitiveness of the league.²⁰³ To the extent that Chinese basketball players can contribute to the evolution of basketball competitiveness, the NBA will improve as a forum for showcasing the game.

C. *Liberalizing Chinese Basketball Transfer Policies Will Be a Positive Development From a Human Rights Standpoint*

Finally, and perhaps most importantly, eliminating barriers for Chinese players to freely play basketball in America would be a significant step from a human rights standpoint. It is no secret that China has been the subject of much criticism regarding its human rights practices.²⁰⁴ Considering that China has recently been admitted into the World Trade Organization and will be hosting the Olympic Games in 2008, China has a tremendous opportunity to demonstrate to the world community that it is

²⁰¹ Houston Rockets' President, George Postolos, has expressed how critical NBA training camps, summer workouts, and the preseason are for Yao Ming's development as an NBA player. Jackie MacMullan, *The Tao of Yao: Hard Work, Respect, Fun are Guiding Principles of Rockets Phenomenon*, BOSTON GLOBE, Feb. 24, 2003, 2003 WL 3381631. Furthermore, Wang Zhizhi always felt that he was behind in his development because he was not allowed to stay in the United States for the NBA training camps. Garcia, *supra* note 146.

²⁰² Wang's desire to improve his skill was a motivating factor in his decision to stay in the United States during the summer of 2002. See Mark Murphy, *NBA Notes*, BOSTON HERALD, Oct. 20, 2002, 2002 WL 4089681. Had Wang heeded his government's wishes and played in China during the summer of 2002, he may not have been able to demonstrate his talent to NBA teams and may not have been able to sign a new NBA contract.

²⁰³ See Eisenberg, *supra* note 5 (explaining how foreign players have brought basketball fundamentals and skills back to the game).

²⁰⁴ China's pattern of human rights abuses, particularly the 1989 Tiananmen Square Massacre, has been cited as a reason China was not awarded the 2000 Olympic Games. Nafziger & Wei, *supra* note 57, at 464. The PRC has repeatedly been criticized by international human rights watchdog agencies, including Human Rights Watch and Amnesty International. See *China Human Rights Update*, Human Rights Watch, at <http://www.hrw.org/campaigns/china-99/china-update.htm> (Feb. 2000); *China: Amnesty International's Human Rights Concern*, at <http://www.amnestyusa.org/countries/china/index.do> (last visited Jan. 1, 2004).

implementing human rights reforms.²⁰⁵ Although the freedom to play basketball is an unlikely forum for fundamental changes with respect to human rights, the freedom to contract with a team in another country, play basketball, and earn wages unfettered by government control would be indicative of positive steps by the PRC.²⁰⁶

Were China to eliminate its restrictions, players would have much to gain from an individual rights standpoint as well. Playing for the National Team would no longer be a forced commitment, but would be an option and an honor for the player. Because players would likely want to play for the National Team out of pure patriotism, however, this may not even have an adverse impact on the Chinese National Team.²⁰⁷ Nevertheless, players should have the option to play or refuse; international standards suggest that they should have that right.²⁰⁸ In addition, players would be free from having to remit over half of their earnings back to China. In other words, they would be able to realize their earning potential and experience new levels of financial independence.

Finally, if China were to eliminate its onerous basketball transfer requirements, NBA teams could be confident knowing that they could keep their players and not have to relinquish them at the end of each season. Furthermore, teams would not have to worry about dealing with potential human rights violations every time they agreed to recognize a provision requiring the player to return home for international competitions. This type of business dealing would be far more consistent with the NBA's desire to be an example of successful modern globalization.

China, Chinese basketball players, and the NBA may therefore have much to gain in the long run if the PRC were to ease its transfer policies and facilitate the movement of Chinese basketball players to the United States.

²⁰⁵ Further reforms bringing China in line with the globalization of basketball would continue to undermine arguments from the international community that China abuses basic human rights. But as long as the CBA continues to deny opportunities in the United States for its players, *see supra* note 164 and accompanying text, China's commitment to the concept of human rights will be criticized.

²⁰⁶ To this end, granting "free agency" status to its players should be an ultimate goal for the CBA and would help the Chinese sports system modernize according to market principles and fundamental human rights. Such a reform would drastically alter the landscape for professional basketball in China and provide players individual rights they have never been able to experience before. Even in the NBA, the concept of free agency is relatively young; the system was instituted in 1976. *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 957 (2d Cir. 1987) (noting that free agency was instituted as part of the settlement agreement in *Robertson v. Nat'l Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975)). Furthermore, unrestricted free agency only came into being in 1988. *See NBPA Timeline*, National Basketball Players Association, at <http://www.nbpa.com/aboutus/history.html> (last visited Jan. 1, 2004).

²⁰⁷ Yao Ming has expressed patriotic sentiments and appears to genuinely want to play for China's National Team. *See, e.g., Yao Ming Wants Clipper's Wang Zhizhi on National Team*, AGENCE FR.-PRESSE, Apr. 25, 2003, 2003 WL 2788424.

²⁰⁸ *See supra* Part II.B.

China would experience economic growth by becoming a partner in basketball globalization with the NBA, enjoy future success on the international stage due to the Chinese youth population's obsession with current Chinese players in the NBA, and have a chance to show the world that it is improving its human rights practices. The Chinese players would be able to fully profit from their own market worth, develop better skills by playing against the best competition in the world, and have the freedom to play basketball in the United States without being obliged to play for the home team. Finally, the NBA and individual NBA teams would share in the profit created by an enlarged and enthusiastic Chinese fan base, become more competitive through the influx of talented Chinese athletes, and be a leader in promoting the rights of athletes to play as far as their skills can take them. With clear economic, competitive, and human rights benefits for China, the individual player, and the NBA team, the elimination of the current restrictions on Chinese basketball player transfer makes sense.

VIII. CONCLUSION

Although China has allowed some of its players to go abroad, demonstrating its willingness to accept some reform, China's policies are still out of step with the globalizing sports world. The saga to bring Chinese superstar Yao Ming to the United States demonstrated how unwilling China is to freely give up its basketball talent. As basketball in China further develops, there will inevitably be more Chinese players looking to bring their game to the NBA. Thus, the NBA and China stand at a crossroads in deciding how to deal with future players that want to play in the United States. Currently, the willingness of NBA teams to overlook China's restrictive policies sends the message to China that its policies are tolerable. The NBA should instead attempt to work with China on reforms, stressing that it is in China's long-term best interests to allow players to go abroad without restriction. If and when China reforms its policies, some child living in China today, picking up a basketball for the first time and aspiring to play like Yao Ming, may get the chance to go to the NBA. And when he does, he will be free—free to play basketball.

