

PERFORMANCE ENHANCEMENT: WHAT THE ISRAEL BASEBALL LEAGUE CAN LEARN FROM THE AGREEMENT BETWEEN MAJOR LEAGUE BASEBALL AND JAPAN

I. INTRODUCTION

The success of Japan's Nippon Professional Baseball League (NPB), the excitement surrounding the World Baseball Classic, and the popularity of the Little League World Series are only a few indications that America's pastime is becoming an international pastime.¹ The globalization of baseball has introduced the sport in some seemingly unlikely countries, including Italy, South Africa, and Israel.² In 2007, the Israel Baseball League (IBL) began its

1. See, e.g., ROBERT WHITING, *YOU GOTTA HAVE WA* 48-49 (Vintage Books, 1989) [hereinafter WHITING, *YOU GOTTA HAVE WA*] (delineating success, growth, and profitability of professional baseball in Japan); Michael Clarke, *History of the Little League World Series*, http://www.active.com/baseball/Articles/History_of_the_Little_League_World_Series.htm (last visited Oct. 24, 2008) (describing Little League World Series as "pre-eminent youth sport event in the country" with worldwide attention); Alan Schwarz, *World Cup Announcement Made*, May 10, 2005, <http://sports.espn.go.com/mlb/news/story?id=2057633> (discussing Major Leaguers' excitement to play in World Baseball Classic). Organizers of the World Baseball Classic originally invited 16 nations, with Cuba getting a conditional invitation. *Id.* Games were scheduled to be played in various countries including a Major League Baseball (MLB) stadium in the United States and a Nippon Professional Baseball (NPB) stadium in Japan. *Id.*

2. See William B. Gould IV, *Baseball and Globalization: The Game Played and Heard and Watched 'Round the World (With Apologies to Soccer and Bobby Thomson)*, 8 IND. J. GLOBAL LEGAL STUD. 85, 85 (2000) [hereinafter Gould, *Baseball and Globalization*] (noting Italy as unlikely country for baseball); Henri E. Cauvin, *Baseball Gets Serious in a New South Africa*, N.Y. TIMES, June 27, 2000, at A25 (describing baseball as unlikely sport in South Africa); Robert Daniel, *How do You Say 'Sacrifice Bunt' in Hebrew?*, June 8, 2007, <http://www.marketwatch.com/news/story/field-dreams-israel-baseball-league/story.aspx?guid={A7E349DC-E883-4912-B84D-0B633E549169}&dist=morenews> (explaining baseball's popularity challenging in soccer loving Israel). Although professional baseball is new to Israel, Hyman S. Baras, the father of the founder of the Israel Baseball League (IBL), argues that there are "references in the Bible that could lead one to deduce that...baseball dates back thousands of years." Hyman S. Baras, *Baseball in the Times of Our Forefathers*, <http://www.israelbaseballleague.com/baseballinIsrael/biblical/> (last visited Oct. 24,

inaugural season.³ Although the first season had several growing pains and the second season was almost cancelled, the IBL shows promise to develop into a high quality league, similar to Japan's professional baseball league.⁴ Early indications that Major League Baseball (MLB) may eventually pay close attention to the IBL include the signing of eight players from the IBL's first season to minor league contracts.⁵

This Note examines whether the MLB and IBL are likely to reach an agreement similar to that reached by the MLB and NPB for the exchange of players.⁶ Part II provides a historical background of the IBL, NPB, and MLB.⁷ Part III describes labor laws in Israel, Japan, and the United States.⁸ Part IV describes the agreement

2008).

3. Cf. Israel Baseball League, Description of the Israel Baseball League, <http://www.israelbaseballleague.com/about/description/> [hereinafter IBL Description] (last visited Oct. 24, 2008) (explaining IBL format for inaugural season).

4. See Ari Alexenberg, *Have Glove, Did Travel: My Journey to Israel to Play in the First Season of the Israel Baseball League*, Sept. 9, 2007, <http://www.israelnationalnews.com/Articles/Article.aspx/7393> (explaining "growing pains a small price to pay for bringing high caliber baseball to Israel"); Houston Chronicle, *League in Israel Gets Second At-Bat*, June 22, 2008, <http://www.chron.com/disp/story.mpl/sports/bb/5850258.html> (explaining IBL's tumultuous first season); Elli Wohlgelernter, *The Boychicks of Summer: How High Hopes for Israel Baseball Went Foul*, Aug. 8, 2007, <http://www.jewishjournal.com/home/preview.php?id=18108> (detailing numerous problems of league including inadequate skill, equipment, management, fields); Travis Zier, *Pitching in Israel was a Ball*, Sept. 27, 2007, http://www.jewishsf.com/content/2-0-/module/displaystory/story_id/33670/format/html/displaystory.html (arguing quality of play sometimes reached major league level despite imperfect first season). But see Joel Greenberg, *Israeli Baseball League Turns Sour for Holtzman*, Sept. 16, 2007, <http://chicagosports.chicagotribune.com/sports/baseball/cubs/cs-070916holtzman,1,1847970.story?coll=cs-cubs-headlines> (noting some involved in IBL believe talent level is low).

5. See Press Release, Israel Baseball League, Bergstrom Becomes First IBL Player to Sign U.S. Pro Contract (Aug. 30, 2007), http://www.israelbaseballleague.com/news/pressreleases/index.html?article_id=146 (detailing signing of first IBL player to MLB contract); Press Release, Israel Baseball League, IBL Player Signings with Pro Clubs (Feb. 20, 2008), http://www.israelbaseballleague.com/news/pressreleases/index.html?article_id=153 (detailing signing of eight IBL players to U.S. professional contracts).

6. See *infra* Parts II-V (analyzing agreement between MLB and IBL).

7. See *infra* Part II (discussing background information for IBL, MLB, NPB, and posting system).

8. See *infra* Part III (explaining relevant labor laws).

reached between the NPB and MLB.⁹ Part V will examine whether the IBL and MLB are likely to come up with a similar agreement.¹⁰ Finally, Part VI concludes that any agreement between the MLB and IBL will likely be modeled after the NPB/MLB agreement.¹¹

II. HISTORICAL BACKGROUND: AN OVERVIEW OF THE IBL, MLB AND NPB

A. Baseball in Israel and the IBL

Sports were not always welcomed in Israel because early Jews associated sports with cruelty and violence.¹² Today, however, sports are considered to be a big business and a large part of Israeli culture.¹³ Despite the popularity of sports in Israel, only two professional sporting leagues existed in Israel until the IBL was established and there is a "limited tradition of sporting success."¹⁴

Larry Baras, a Boston businessman, was inspired to start the

9. See *infra* Part IV (detailing agreement between MLB and NPB).

10. See *infra* Part V (analyzing likely agreement between MLB and IBL).

11. See *infra* Part VI (concluding MLB and IBL will reach similar agreement to NPB and MLB agreement with minor alterations).

12. See Simon Griver, *Sports in Israel*, June 1, 1999, http://www.mfa.gov.il/mfa/mfaarchive/1990_1999/1999/6/sports%20in%20israel (explaining Jewish disapproval of sports during third century BCE). During the third century BCE, when the Greeks ruled Israel, Jews rarely participated in the Olympics, viewing sports as violent and an alien concept. *Id.* Furthermore, participation in the Olympics meant offering gifts to the Greek God Hercules. *Id.*

13. Embassy of Israel, Sports, <http://www.israemb.org/US-Israel-Relations/sports.html> (last visited Oct. 24, 2008) (explaining importance of sports in Israel); Griver, *supra* note 12.

14. See SI.com, *Peer Juggles Army Duty with Stardom*, Sept. 19, 2007, [hereinafter *Peer Juggles Army Duty*] <http://www.covers.com/articles/articles.aspx?theArt=150019&t=0> (quoting Israeli sports commentator on Israel's modest success in sports); Griver, *supra* note 12 (discussing professional soccer and basketball leagues in Israel). One possible reason for the moderate success of athletes in Israel is that their training and competition is often interrupted by Israel's required military service. See *Peer Juggles Army Duty, supra* (explaining demands of military service on professional athletes). To alleviate the disruption in an athlete's life, if the athlete is declared an "outstanding athlete," he is allowed to serve his military duty on a more flexible schedule. *Id.* Israel has had recent sporting success, however, when Jonathan Erlich and Andy Ram became the first Israeli doubles team to win a tennis Grand Slam at the 2008 Australian Open. *Israel's Erlich & Ram Win Doubles Title*, Jan. 26, 2008, http://sports.timesofindia.indiatimes.com/Australian_Open_2008/Erlich_and_Ram_win_doubles_title/articleshow/2733541.cms.

IBL after attending a minor league game in Brockton, Massachusetts.¹⁵ He established a league consisting of six teams with players from all over the world.¹⁶ The talent in the league varied widely, with some commenting that none of the players could even reach semipro in the United States while others described the level of play as “sometimes approach[ing] major league standards.”¹⁷ Baras expressed hope that the league rosters would eventually have more Israelis on them when he stated:

[a]s Israel grows more accustomed to the sport, we expect to see a greater percentage of Israeli athletes on the rosters. For now, we want to field strong, competitive teams that will attract international notice, and position

15. Daniel, *supra* note 2 (discussing Baras’ idea for league as combination of desire to help Israel and personal inspiration). Baras was partially inspired by the family atmosphere he observed at a minor league game in Brockton, Massachusetts. *Id.* Although one goal of the league was to do something positive for Israel, Baras also admits that the league is a business and he hopes to make a profit. *See id.* (explaining league is “for-profit enterprise”). To help establish the league, Baras recruited several high profile sporting figures to form the board of advisors. Jerry Crasnick, *Pro Baseball Coming to Israel*, Aug. 29, 2006, <http://sports.espn.go.com/espn/print?id=2565248&type=story> (listing members of the board of advisors). The board includes Dan Duquette, former manager of the Red Sox as the director of player development, Smith College economics professor and sports economist Andrew Zimbalist, and Marshall Glickman, former Portland Trail Blazers President. *Id.* Daniel Kurtzer, former U.S. Ambassador to Israel, serves as the league commissioner. *Id.* Additionally, Gil Breiman, a partner at Burns & Levinson, is an advisor to the league. Press Release, Burns & Levinson LLP, Israel Baseball League Swings Into Action This Weekend (June 22, 2007) *available at*, <http://www.burnslev.com/press/news-releases.asp?display=detail&id=79>. Breiman’s position as advisor is particularly helpful to the league because of his international experience and Burns & Levinson’s experience in representing minor league baseball teams. *Id.*

16. IBL Description, *supra* note 3. Players from the United States, Canada, Venezuela, the Dominican Republic, Australia, Europe, and Israel participated in the first season of the IBL. *Id.* To improve the league, the IBL announced that for the second season, the Petach Tikva Pioneers would move to Jerusalem and assume the name, the Jerusalem Lions. Press Release, Israel Baseball League, IBL Adds Jerusalem Franchise for 2008 Season (Nov. 11, 2007) http://israelbaseballleague.com/news/pressreleases/index.html?article_id=149 [hereinafter IBL Adds Jerusalem Franchise]. The league explained that “one giant omission [in the league] was obvious to many fans. There was no Jerusalem team.” *Id.* One factor that contributed to the relocation was the large number of American tourists that visit Jerusalem each year. *See id.* (describing Jerusalem as hotbed of baseball activity partially because of American tourists). Another change the league made for the second season was decreasing the number of teams. *See* Houston Chronicle, *supra* note 4. The second season will have a shorter season and four teams instead of six teams. *Id.*

17. *See* Greenberg, *supra* note 4 (noting some characterized IBL level of play below U.S. high school level); Zier, *supra* note 4 (explaining range of talent in league sometimes reaching professional level).

the nation to be a participant in the World Baseball Classic one day.¹⁸

Although there is a history of baseball in Israel dating back to 1927, baseball is not a popular sport in Israeli culture, making Israel an unlikely place to establish a professional league.¹⁹ Baseball's lack of popularity was an initial problem that Baras addressed.²⁰ This lack of interest is partly because of baseball's slow pace and intricate rules.²¹ To facilitate a faster paced game, IBL games are only seven innings, and instead of extra innings, ties are decided by a home run derby.²²

Another reason baseball is not a popular sport in Israel is that only a small number of Israelis play the game.²³ Currently, only

18. Israel Insider, *Jewish Major Leaguers Introduce First Israel Baseball League*, Feb. 26, 2007, <http://web.israelinsider.com/Articles/Culture/10792.htm>. The IBL's goal is to increase the number of Israeli players in the league to twenty five percent by 2012. See IBL Description, *supra* note 3 (detailing hopes for development of the league). The IBL plans to meet this goal by increasing "the level of play throughout the country." *Id.*

19. See Press Release, Jewish National Fund, Project: Baseball Bringing America's Pastime to Israel (Mar. 14, 2006) [hereinafter Jewish National Fund], http://www.jnf.org/site/PageServer?pagename=PR_Israelbaseball_2006 (explaining on July 4, 1927 governess of orphanage tried to teach boys to play baseball to no avail); *Businessman Aims to Have Israel in 2009 WBC*, June 5, 2006, <http://newsgroups.derkeiler.com/Archive/Soc/soc.culture.israel/2006-06/msg00104.html> [hereinafter *Businessman Aims to Have Israel in 2009 WBC*] (explaining professional Israeli league surprising because of lack of talent, small fan base, and minimal resources).

20. See *Businessman Aims to Have Israel in 2009 WBC*, *supra* note 19 (explaining unpopularity of baseball in Israel). Project Baseball is a joint initiative between the IBL and the Jewish National Fund which seeks to improve the baseball fields in Israel. Press Release, Jewish National Fund, *supra* note 19. The lack of baseball fields coupled with the relatively small number of young Israelis who play baseball are part of the reason that the sport lacks popularity in Israel. See *id.* (explaining mission of Project Baseball to increase popularity through greater participation in baseball). This lack of popularity almost prevented the league from having a second season. See Houston Chronicle, *supra* note 4.

21. See *Businessman Aims to Have Israel in 2009 WBC*, *supra* note 19 (explaining lack of popularity of baseball due to pace and confusing rules); see also Crasnick, *supra* note 15 (describing Israelis' lack of understanding of baseball).

22. IBL Description, *supra* note 3. Ties are allowed, however, in Japanese professional baseball. James B. Dworkin & Gregory S. Jelf, *Labor Relations in Japanese Baseball*, in *BASEBALL ECONOMICS* 201, 201 (John Fixel et al. eds., 1996). In the NPB's Pacific League, a tie is recorded if there is an even score after four hours of play or twelve innings and in the Central League there is a fifteen inning limit on games. *Id.*

23. See *Businessman Aims to Have Israel in 2009 WBC*, *supra* note 19 (noting only about 2,000 people play baseball in Israel). Despite the lack of popularity of baseball in Israel, at least one commentator suggested there will be "no shortage of

about 2,000 people play baseball in Israel.²⁴ Even Israelis who want to play the game rarely have a chance because of inadequate playing fields, equipment, and facilities.²⁵ As a result, the IBL and the Jewish National Fund are partnering to “dot Israel’s landscape with community baseball fields and provide a place for every Israeli to enjoy the sport.”²⁶

The first season of the IBL was a success but it was not without problems and challenges.²⁷ Throughout the first season there were several safety concerns.²⁸ For example, one field sloped upward, had a light pole in the middle of the outfield, and had no warning track.²⁹ Still another field, which was not completed until two weeks into the season, had glass and rusty metal scattered throughout the field.³⁰ Additionally, teams often lacked proper equipment, such as batting cages.³¹ One player suffered a near fatal, season ending injury when he was struck in the head by a ball during batting practice.³²

In addition to field and equipment problems, the IBL faced financial problems.³³ Early in the season players threatened to strike after their paychecks were smaller than expected.³⁴ Furthermore, IBL players began to push for a players’ union because of frequently late paychecks and worries about the league’s financial condition.³⁵

potential talent” because cut minor leaguers from the United States will seek to play in the IBL. Daniel *supra* note 2.

24. *Businessman Aims to Have Israel in 2009 WBC*, *supra* note 19.

25. *See id.* (explaining reasons few people play baseball in Israel).

26. *See* Jewish National Fund, *supra* note 19 (explaining efforts to increase popularity of baseball in Israel).

27. *See* Greenberg, *supra* note 4 (stating league “generally a success” but had many problems in inaugural season).

28. *See* Wohlgelernter, *supra* note 4 (detailing safety problems such as dangerous fields and lack of proper safety equipment).

29. *Id.*

30. *See id.* (detailing dangerous playing fields).

31. *Id.*

32. *Id.*

33. *See id.* (explaining problems with paychecks and running out of equipment). Additionally, serious financial problems almost prevented the second season of the league. *See* Houston Chronicle, *supra* note 4 (reporting league’s return after financial difficulties and “tumultuous inaugural campaign”). Financial problems, such as lawsuits against a league, pose problems to the viability of the league itself. Timothy W. Smith, *Pro Football; Calm in the Eye of the N.F.L. Storm*, N.Y. TIMES, Nov. 17, 1991, at B17.

34. Wohlgelernter, *supra* note 4. At least one player indicated that he feared being sent home mid-season. *See* Daniel, *supra* note 2 (detailing one player’s insecurities about finishing first season).

35. Wohlgelernter, *supra* note 4.

Finally, after running out of balls midway through the season, the league ordered players that they could no longer hand out balls to fans because of the expense.³⁶

B. Major League Baseball

Baseball is America's pastime.³⁷ The MLB, the U.S.' professional baseball league, was established in 1903, although organized baseball dates back to 1842.³⁸ Economist Michael Hauptert explains "baseball players began their labor history as amateurs whose skills quickly became highly demanded."³⁹ Run by a commissioner charged with governing the game, the MLB consists of two leagues, the American League, which has fourteen teams, and the National League, which has sixteen teams.⁴⁰

The diversity of MLB players reflects the globalization of baseball.⁴¹ In 2000, twenty-six percent of all MLB players were foreign-born.⁴² Furthermore, in the 2007 World Series between the Boston Red Sox and Colorado Rockies, sixteen of the players on the teams' combined rosters were born outside the United States.⁴³

36. *Id.*

37. See Gould, *Baseball and Globalization*, *supra* note 2, at 85 (explaining America's pastime becoming globalized).

38. See BENJAMIN G. RADER, *BASEBALL, A HISTORY OF AMERICA'S GAME* 81 (1992) (explaining professional baseball known today established in 1903); Michael Hauptert, *The Economic History of Major League Baseball*, Dec. 3, 2007, <http://eh.net/encyclopedia/article/hauptert.mlb> (outlining origins of baseball in United States). Although the modern MLB was not formed until 1903, in 1869 the Cincinnati Red Stockings became the first professional team with all salaried players. *Id.* Even before the Red Stockings, however, some baseball teams paid their most valuable players. *Id.*

39. Hauptert, *supra* note 38.

40. See Major League Baseball, <http://www.mlb.com/team/index.jsp> (last visited Oct. 24, 2008) (listing MLB teams).

41. See Gould, *Baseball and Globalization*, *supra* note 2, at 86 (describing international aspect of baseball reflected on team rosters).

42. *Id.* at 87. When the MLB references the high number of international players in the league it includes in those numbers Puerto Rican players. Alex Glashauser, *A Global Enterprise*, in *COURTING THE YANKEES* 361, 362 (Ettie Ward ed., 2003). Players from Puerto Rico, however, "are subject to the amateur draft of United States residents." See *id.* (explaining inconsistency in MLB treatment of Puerto Rican players). Canadian players are also subject to the amateur draft in the United States. See Arturo J. Marcano & David P. Fidler, *Worldwide Draft*, <http://baseballguru.com/articles/analysismarcano01.html> (last visited Oct. 24, 2008) (comparing centralization in recruitment from some countries to decentralization of Latin American recruitment).

43. See Jason Beck, *Spanning the Globe for a World Champ: A Record*

MLB teams have recruited global talent in several ways.⁴⁴ Many teams have assigned scouts to foreign countries.⁴⁵ Seeing the success of their foreign scouts, many teams have also established baseball academies in various countries where young local residents could play and MLB teams could scout.⁴⁶ For example, the New York Yankees run a teenage baseball academy in the Dominican Republic, giving them an advantage in signing young talented players from the academy.⁴⁷ Additionally, a global draft has been proposed to centralize the international recruiting process.⁴⁸

While many player transactions occur within the league, there are several MLB clubs that maintain informal relations with Japanese teams.⁴⁹ For example, the Boston Red Sox have a working relationship with Japan's Pacific League Chiba Lotte Marines, while the New York Yankees have an alliance with the Yomiuri Giants.⁵⁰

Number of Foreign-Born Players Set for Fall Classic, Oct. 23, 2007, http://mlb.mlb.com/news/article.jsp?ymd=20071023&content_id=2279713&vkey=ps2007news&fext=.jsp&c_id=mlb&partnered=rss_mlb (describing international feel of 2007 World Series).

44. See, e.g., Joanna M. Shepherd & George B. Shepherd, *U.S. Labor Market Regulation and the Export of Employment: Major League Baseball Replaces African-Americans with Latins*, http://hubcap.clemson.edu/~sauerr/seminar_papers/BBPAPER_joanna3.pdf (last visited Oct. 24, 2008) (describing various international recruiting techniques); Glashausser, *supra* note 42, at 361-62 (explaining Yankees' academies in Latin America); Alex McPhillips, *Sox, Chiba Lotte Marines Form Alliance*, July 4, 2007, http://boston.redsox.mlb.com/news/article.jsp?ymd=20070704&content_id=2066742&vkey=news_bos&fext=.jsp&c_id=bos (highlighting how Marines will help Red Sox scout Japanese players).

45. See Shepherd & Shepherd, *supra* note 44, at 9 (explaining teams moved scouts to Latin America after MLB implemented domestic draft); Robert Whiting, *Is MLB Destroying Japan's National Pastime?*, JAPAN TIMES, Apr. 2007, reprinted in ASIAN BASEBALL COMMITTEE J., July 2007, at 8 [hereinafter Whiting, *Is MLB Destroying Japan's National Pastime?*] (noting Japan's high school and professional ballparks crowded with MLB scouts). One reason teams concentrate their efforts abroad is that often times teams can pay an international player less upon signing. Shepherd & Shepherd, *supra* note 44, at 7 n.12.

46. Shepherd & Shepherd, *supra* note 44, at 8.

47. See Glashausser, *supra* note 42, at 361 (explaining Yankees' success in recruiting talent from Latin America).

48. See Marcano & Fidler, *supra* note 42 (analyzing proposed worldwide draft).

49. See Tom Van Riper, *Making Baseball's Imports Cheaper*, FORBES, Aug. 31, 2007, http://www.forbes.com/sportsbusiness/2007/08/30/baseball-japan-red-sox-biz-sports-cx_tvr_0831redsox.html (stating many MLB teams have inactive agreements with Japanese teams).

50. See Glashausser, *supra* note 42, at 377; Nick Cafardo, *Japan Market May Come in Handy for Sox*, THE BOSTON GLOBE, Nov. 6, 2007, at D5. The Chiba

The Red Sox's recent alliance with the Marines will allow the teams to trade scouting reports, front office personnel, coaching staff, and possibly even allow players from the Red Sox's minor league teams to go to Japan.⁵¹

The MLB is an oligopoly of professional baseball teams and currently faces no competition from other leagues.⁵² Before the MLB was established, however, there were rival leagues that competed for players.⁵³ Even after the establishment of the MLB in 1903, there were instances of competition.⁵⁴ In 1912, the Federal League was established and successfully raided players from MLB rosters by not recognizing the MLB's reserve clause.⁵⁵ In 1946, the

Lotte Marines are managed by former New York Mets manager Bobby Valentine. *Id.* In 1997, prior to their alliance with the Red Sox, the Chiba Lotte Marines had a "working agreement" with the San Diego Padres which gave the Padres exclusive rights to Marines players. Glashausser, *supra* note 42, at 375.

51. See *Red Sox Form Alliance with Japan's Chiba Lotte Marines*, USA TODAY, July 4, 2007, http://www.usatoday.com/sports/baseball/2007-07-04-804660087_x.htm (noting possible result of alliance will be minor leaguers playing for Marines); McPhillips, *supra* note 44. The alliance between the Red Sox and the Marines is a three year alliance. *Japan's Marines Complete Red Sox Tie-Up* (July 4, 2007)

http://www.boston.com/sports/baseball/articles/2007/07/04/japans_marines_complete_red_sox_tie_up/. Red Sox officials explained that the partnership is intended to be an active one, unlike many current partnerships of MLB teams with Japanese counterparts. See McPhillips, *supra* note 44 (distinguishing current agreement from other mere formality agreements). Furthermore, the officials claimed a goal of the alliance was to make baseball stronger in both Japan and the United States while also developing baseball in China. *Id.* One problem with working relationships, however, is that because there are fewer NPB teams than MLB teams a select few MLB teams can capitalize on their relationship with Japanese teams, to the displeasure of other teams. See William B. Gould IV, *Globalization in Collective Bargaining, Baseball, and Matsuzaka: Labor and Antitrust Law on the Diamond*, 28 COMP. LAB. L. & POL'Y J. 283, 292 (2007) [hereinafter Gould, *Globalization in Collective Bargaining*] (explaining MLB teams displeasure with working agreements). Gould argues that the posting system is necessary to give "access for all MLB clubs to Japanese players." *Id.* at 291-92 (describing posting system between United States and Japan).

52. See Hauptert, *supra* note 38 (describing characteristics of MLB).

53. See *id.* (explaining minor league threatened National League). The Western League, a minor league, rivaled the Existing National League. *Id.* In 1900, the Western League was renamed the American League and in 1903 it merged with the National League forming the current MLB. *Id.*

54. See *id.* (outlining Federal League's and Mexican League's threat to MLB).

55. See *id.* (describing Federal League's raid of MLB rosters). The Federal League dissolved after only two seasons when some Federal League owners were allowed to purchase existing MLB franchises. *Id.* The owner of the Federal League's Baltimore team did not have such opportunity however, and sued the MLB for violation of antitrust laws. *Fed. Baseball Club of Baltimore v. Nat'l*

Mexican League was established and the MLB saw players renegotiate with their current teams or jump to Mexico for better contracts.⁵⁶

C. Japanese Baseball

Baseball is a very important part of Japanese society.⁵⁷ The Japanese professional baseball league, NPB, has twelve teams; each owned by an industrial corporation.⁵⁸ Similar to how MLB teams acquire players, players in the NPB are drafted from high school, college, and amateur leagues.⁵⁹ Unlike the frequent movement of MLB players from team to team, however, Japanese players have little opportunity to change teams unless traded.⁶⁰ To become a free

League of Prof'l Baseball Clubs, 259 U.S. 200, 207 (1922). The Supreme Court, however, held that baseball was not interstate commerce and, therefore, was not subject to antitrust laws. *See id.* at 208-09 (holding personal effort not interstate commerce). In a subsequent case, the Supreme Court held that baseball is "engaged in interstate commerce" but is still exempt from antitrust laws because of the unique position it occupies. *Flood v. Kuhn*, 407 U.S. 258, 282 (1972). In 1998, however, Congress passed a statute that ended baseball's antitrust exemption. *Curt Flood Act*, 15 U.S.C. § 26b (2000) (originally enacted Oct., 1998).

56. Hauptert, *supra* note 38. Players who accepted offers from the Mexican League regretted it and tried to head back to the MLB when the Mexican League failed to issue the first scheduled paychecks. *See id.* (describing the problems with the under-funded Mexican League). Players returning to the MLB, however, found that the Commissioner had blacklisted them from the league. *Id.* One player who left for Mexico was Danny Gardella, who was suspended by the MLB Commissioner upon his return. *Id.*; Gould, *Baseball and Globalization*, *supra* note 2, at 91. Gardella sued the MLB for violating antitrust laws, but the parties reached a settlement before the court had a chance to find the MLB in violation. *Id.* at 91-93.

57. *See* WHITING, YOU GOTTA HAVE WA, *supra* note 1, at 27-29 (explaining importance of baseball in Japan). Japanese baseball, however, has become Americanized throughout the years. *See* Dworkin & Jelf, *supra* note 22, at 210 (explaining trend of Americanization in baseball).

58. Mako Sasaki, *Foreign Exchange Rate: The Structure of Japanese Baseball and How Players Move to Major League Baseball*, 22 ENT. & SPORTS LAW. 18, 18 (2004) (detailing professional baseball in Japan). Each of the twelve Japanese professional teams also has their own farm teams. *Id.* In contrast to the corporate ownership of Japanese teams, MLB teams are often owned by wealthy individuals as a hobby. Hauptert, *supra* note 38. Some MLB teams however, are owned by conglomerates. *Id.*

59. Sasaki, *supra* note 58, at 19.

60. *See id.* (comparing Japanese reserve system to MLB player movement); Andrew Zimbalist, *Competitive Balance in Major League Baseball*, THE MILKEN INST. REV., First Quarter 2001, at 56 (noting because players move so frequently "team dynasties seem[] to be gone forever"); ESPN.com, *A-Rod Stands by Union's*

agent in Japan, a player must play nine seasons, and remain on the active roster for at least 150 days for each of those nine seasons.⁶¹ In addition to stringent free agency requirements, there are other disadvantages for a player declaring free agency.⁶² For example, players who declare free agency are limited to the salary they were making the year before they declared, and they can receive no more than fifty percent of their last signing bonus.⁶³ Additionally, teams are not always willing to negotiate with free agents.⁶⁴

Japanese baseball players organized a players' union, Japan Professional Baseball Players Association (JPBPA), in response to strong team ownership that suppresses the interest of the individual players.⁶⁵ The JPBPA is weak in comparison to its U.S. counterpart.⁶⁶ This is partially because Japanese players recognize the importance of "wa," or social harmony, a doctrine that requires the interest of the team to be put ahead of the individual players' interest.⁶⁷ Nevertheless, the JPBPA is still a fundamental part of

Stance, Dec. 18, 2003, <http://sports.espn.go.com/mlb/news/story?id=1688755> (excerpting player's union supports player mobility); ESPN.com, *Home-Field Proposal to be Voted on Today*, Jan. 16, 2003, <http://sports.espn.go.com/espn/print?id=1493375&type=news> (noting baseball's "increased player mobility").

61. Sasaki, *supra* note 58, at 19. Once a player has declared free agency, he must wait another three years before he is eligible for free agency status again. *Id.*

62. *Id.*

63. *Id.* If a free agent decides to stay with his current team, however, there is no limit to his signing bonus. *Id.*

64. *Id.* at 20.

65. Elliot Z. Stein, Note, *Coming to America: Protecting Japanese Baseball Players Who Want to Play in the Major Leagues*, 13 CARDOZO J. INT'L & COMP. L. 261, 268 (2005).

66. Sasaki, *supra* note 58, at 20; Stein, *supra* note 65, at 268; Casey Duncan, Note, *Stealing Signs: Is Professional Baseball's United States-Japanese Player Contract Agreement Enough to Avoid Another "Baseball War"?*, 13 MINN. J. GLOBAL TRADE 87, 92 (2004) (stating not until 1985 that Japanese players gained right to strike).

67. See Stein, *supra* note 65, at 268 (explaining cultural influence on weak Japanese player's union). Even though "wa," or social harmony, is not an American doctrine, at least one baseball legal scholar has suggested that such an ideal is essential in an industry like baseball where management and labor are dependent on each other to produce successful "entertainment packages." See Roger I. Abrams, *Partnership Bargaining in Baseball*, in LEGAL ISSUES IN PROFESSIONAL BASEBALL 37, 51 (Lewis Kurlantzick ed., 2005) [hereinafter Abrams, *Partnership Bargaining in Baseball*] (explaining negotiations must not diminish interest of opposing party if baseball is to have continued success). This mentality in Japanese baseball is in stark contrast to MLB players' mentality, who often express dissatisfaction with their team and seek to be traded to another team, often one with a better chance of winning. See ESPN.com, *Tejada Unhappy With*

Japanese baseball.⁶⁸ The union not only helped secure the free agency system for the players, but it is also acknowledged the problems that the current agreement between the MLB and NPB poses for Japanese players.⁶⁹ The union, however, did not strike for the first time until 2004 and because Japanese players have been modest in their use of bargaining power, they have been slower to acquire higher salaries.⁷⁰

Many have questioned the future of Japanese baseball because Japanese players want to play in the MLB, and several high profile names in Japanese baseball recently signed to MLB teams.⁷¹ Many have expressed concern that the movement of Japanese players to the United States is causing the NPB to become a “feeder league” to the MLB, similar to minor league teams in the United States.⁷² Others

O's, Seeking 'Change of Scenery', Dec. 9, 2005, <http://sports.espn.go.com/mlb/news/story?id=2252946> (noting Tejada's desire to play with a team that has a better chance of winning); Ken Rosenthal, *Everyone's Invited to the Parity Party, Revenue Sharing is Working, Just Ask the Indians*, Sept. 28, 2005, <http://nbcsports.msnbc.com/id/9519544/> (explaining high payroll teams are often the ones in playoff contention).

68. See Stein, *supra* note 65, at 269 (declaring JPBPA eventually became important to Japanese game).

69. Sasaki, *supra* note 58, at 20; Stein, *supra* note 65, at 269.

70. Robert Whiting, *NPB Players in Need of Strong Union Like MLBPA, Vision to Prosper Like MLB*, JAPAN TIMES, Apr. 2007, reprinted in ASIAN BASEBALL COMMITTEE J., July 2007, at 16 [hereinafter Whiting, *NPB Players in Need of Strong Union Like MLBPA*]; Dworkin & Jelf, *supra* note 22, at 202. Whiting explains that although the union historically “lacked the power and solidarity of the MLBPA,” when two Japanese teams merged the public was so outraged that the union was forced to take action and strike. Whiting, *NPB Players in Need of Strong Union Like MLBPA, supra*. The strike however, was limited to a walkout on one weekend and the union “profusely apologized for the interruption and provided compensatory free autograph and baseball clinic sessions.” *Id.*

71. See Chris Isidore, *Influx of Japanese Baseball Players Could Help U.S. Majors, Hurt Japan*, CNN MONEY (Jan. 22, 2002), http://money.cnn.com/2002/01/22/news/column_sportsbiz/ (arguing posting system allows MLB to deprive Japan of stars); Whiting, *Is MLB Destroying Japan's National Pastime?*, *supra* note 45, at 8 (arguing high profile players leaving Japan harms Japanese baseball despite short term profits). Japanese stars such as Hideki Matsui, Ichiro Suzuki, and Daisuke Matsuzaka were all stars in Japan, but now play for MLB teams. *Id.* There are several reasons why Japanese players leave the NPB for the MLB, including the prestige of the league. See Duncan, *supra* note 66, at 118 (arguing NPB players mainly leave Japan for prestige of MLB). One analyst argues that it is natural for Japanese players to want to challenge themselves in the MLB. See Whiting, *Is MLB Destroying Japan's National Pastime?*, *supra* note 45, at 8 (arguing MLB poses greater challenge as world's most competitive league).

72. Isidore, *supra* note 71 (recognizing Japanese teams as “losers” in MLB trades because of lower attendance and profits).

have argued that the export of Japanese players does not threaten the Japanese league and that interest in Japanese baseball remains strong in spite of stars leaving for the MLB.⁷³ Furthermore, at least one baseball commentator has suggested that the increasing weakness of Japanese baseball is due in part to the NPB's philosophy of having as few non-Japanese players as possible and even a desire to have all Japanese professional teams.⁷⁴

III. LABOR LAWS IN THE UNITED STATES, ISRAEL, AND JAPAN

A. Labor Law in the United States, with a Focus on Labor Relations in the MLB.

In 1935, Congress passed the Wagner Act, allowing workers to organize, unionize, and collectively bargain.⁷⁵ Congress' intention was to allow workers to form unions so that they could realistically bargain with management for better wages and working conditions.⁷⁶ Currently, if there is a collective bargaining agreement in place and one party wishes to change the terms of the agreement, it must notify the other party of its desire to negotiate.⁷⁷ Neither party is allowed to unilaterally change a collective bargaining agreement, nor are strikes permitted before a mandatory sixty day notice period or the expiration of the contract.⁷⁸ Finally, both employers and employees are under an obligation to bargain in good faith.⁷⁹

Although a baseball union is probably not the type of union that Congress envisioned when it passed the Wagner Act, MLB players

73. See Whiting, *NPB Players in Need of Strong Union Like MLBPA*, *supra* note 70, at 16 (arguing interest in baseball in Japan too strong for league to ever die out).

74. See Whiting, *Is MLB Destroying Japan's National Pastime?*, *supra* note 45, at 9 (arguing NPB problems of their own making). Whiting argues, that in addition to the desire to maintain "pure" all-Japanese teams" corporate team owners treat their teams as nothing more than a marketing tool and, instead of focusing on how to win games, they focus on how to increase profits. *Id.*

75. BRUCE FELDACKER, *LABOR GUIDE TO LABOR LAW* 3 (4th ed. 2000) (outlining what Wagner Act established). The Wagner Act's official title is the National Labor Relations Act. *Id.*

76. Abrams, *Partnership Bargaining in Baseball*, *supra* note 67, at 39 (explaining Congress' hopes in passing Wagner Act).

77. See Feldacker, *supra* note 75, at 201 (explaining negotiation process under collective bargaining agreement).

78. See *id.* (outlining restrictions on parties who wish to negotiate).

79. See *id.* at 203 (detailing good faith requirement).

are part of an extremely powerful union.⁸⁰ The Major League Baseball Players Association (MLBPA) was formed in 1965.⁸¹ Marvin Miller, former economist for the United Steelworkers of America, organized the union.⁸² In 1968, the MLBPA became the first union in professional sports to negotiate a collective bargaining agreement.⁸³ The initial agreement raised baseball's minimum salary and in 1970, players gained the right to arbitrate grievances.⁸⁴ The current collective bargaining agreement will expire on December 11, 2011.⁸⁵

Although collective bargaining relationships in baseball are in many respects similar to collective bargaining in other industries, collective bargaining in baseball is unique in that the wages of individual employees are not selected by negotiations.⁸⁶ The negotiations between owners and the MLBPA merely set a minimum salary and benefits.⁸⁷ After the salary floor is set, an individual

80. See Abrams, *supra* note 67, at 40 (stating unionization of wealthy professional athletes seems absurd to fans); Judge Stephen Adler, *Further Reasons for the NLRB's Inability to Guarantee American Workers the Freedom to Organize and Bargain Collectively: Comment on Autonomous and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 261, 263 (2005) (discussing American judges mostly have upper-middle class outlook and not outlook of working people who form unions).

81. Major League Baseball Players Association, *History of the Major League Baseball Players Association*, <http://mlbplayers.mlb.com/pa/info/history.jsp> [hereinafter *History of MLBPA*] (last visited Oct. 24, 2008). Prior to the formation of the Major League Baseball Player Association (MLBPA), the players had tried unsuccessfully to form a union on four different occasions. *Id.* Players formed the first union, the Brotherhood of Professional Baseball Players, in 1885. *Id.* Other early unions included, The Players' Protective Association, in 1900, the Fraternity of Professional Baseball Players of America, in 1912, and the American Baseball Guild, in 1946. *Id.* The MLBPA assists players with employment related grievances and by assuring that playing conditions are safe. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* The initial collective bargaining agreement raised the minimum player salary to \$10,000 from \$6,000, which had been the minimum for the previous twenty years. *Id.* The right to arbitrate meant that a player was entitled to have an independent arbitrator from outside the MLB decide disputes between players and owners. Major League Baseball Players Association, *Frequently Asked Questions*, <http://mlbplayers.mlb.com/pa/info/faq.jsp> [hereinafter *MLBPA FAQ*] (last visited Oct. 24, 2008).

85. *MLBPA FAQ*, *supra* note 84.

86. Abrams, *Partnership Bargaining in Baseball*, *supra* note 67, at 43 (explaining difference between entertainment industry's collective bargaining and other industries).

87. *Id.*

player must rely on his agent to negotiate his salary with his team.⁸⁸ Consequently, there are two important contracts that control working conditions for players: the first is the collective bargaining agreement, the second is the player's individual contract with his team.⁸⁹

Negotiations between the MLB players and management have always been somewhat hostile.⁹⁰ Strikes in the MLB occur frequently compared to strikes in other industries.⁹¹ Since 1966, there have been five strikes and three lockouts.⁹²

88. *Id.* Players relying on their agents to negotiate salaries were severely hindered by baseball's reserve system. *See id.* The reserve system meant that a player could only negotiate with the team who had him on their reserve list. *See* ROGER I. ABRAMS, LEGAL BASES: BASEBALL AND THE LAW 45-46, 118 (1998) [hereinafter ABRAMS, LEGAL BASES] (describing baseball's reserve system). This meant that the player had no choice but to accept their team's offer because they could not negotiate with another team. *Id.* If unsatisfied with their team's offer, their only alternative was to stop playing professional baseball. Abrams, *Partnership Bargaining in Baseball*, *supra* note 67, at 43 (detailing players' inability to obtain higher salary because of reserve system). After negotiations in the mid 1970's, however, the reserve system was discontinued and baseball adopted a free market system of competitive bidding. *See* ABRAMS, LEGAL BASES *supra*, at 132-33 (explaining bidding system).

89. *See* ABRAMS, LEGAL BASES, *supra* note 88, at 37 (explaining importance of each type of baseball contract).

90. *See* Abrams, *Partnership Bargaining in Baseball*, *supra* note 67, at 38 (declaring baseball management does not work constructively with player representatives).

91. *See* Gould, *Globalization in Collective Bargaining*, *supra* note 51, at 284 (stating strikes and lockouts frequent in sports); Abrams, *Partnership Bargaining in Baseball*, *supra* note 67, at 37 (explaining other industries successfully renegotiate employment terms without work stoppage). The most recent strike in baseball was in 1994 and it almost proved fatal to the game. Mechelle Voepel, *Strike? Someone Stop the Madness*, June 14, 2002, http://espn.go.com/wnba/columns/voepel_020614/1394769.html (explaining devastating effect 1994 strike had on baseball including loss of fans). One possible reason for the frequent strikes in baseball is that players gain a bargaining advantage when they threaten to strike during negotiations. ABRAMS, LEGAL BASES, *supra* note 88, at 84-85.

92. MLBPA FAQ, *supra* note 84. The five strikes occurred in 1972, 1980, 1981, 1985, and 1994-1995. *Id.* The three lockouts occurred in 1973, 1976, and 1990. *Id.* A lockout is when the employer refuses to use the employees for available work. *See* ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 482 (2d ed. 2004). Lockouts are not illegal per se, but if they are used to punish employees for joining a union or if the employer uses them to avoid their duty to bargain, they may be illegal. *See id.*

B. Labor Law in Israel

Labor law in Israel developed after Israel became an independent state in 1948.⁹³ Labor unions are popular in Israel with membership at more than seventy percent of employees.⁹⁴ The dominant labor organization in Israel is the Histadrut.⁹⁵ Established in 1920, the Histadrut is a centralized labor organization with established regional and local unions.⁹⁶ The Histadrut represents workers in industries throughout the economy, in both the private and public sectors.⁹⁷

In addition to the Histadrut, another unique aspect of Israeli labor law is legislation establishing “protection laws,” which give employees certain minimum rights.⁹⁸ These minimum rights guarantee that any collective bargaining agreement will only confer additional rights beyond those already established by law.⁹⁹ The Collective Agreements Law, passed in 1957, is the Israeli law that regulates collective bargaining agreements.¹⁰⁰

93. See MENACHEM GOLDBERG, *LABOUR LAW IN ISRAEL* 8 (1982) [hereinafter GOLDBERG, *LABOUR LAW IN ISRAEL*] (explaining only few protective laws existed before Israel’s statehood); THE LAW OF ISRAEL: GENERAL SURVEYS 3 (Itzhak Zamir & Sylviane Colombo eds., 1995) (stating Israel established as Jewish and democratic state in 1948). Israeli law has been influenced by the Turks and the British, both of whom ruled Israel before it became an independent state. See Zvi Caspi, *Introduction to the Legal System*, in ISRAELI BUSINESS LAW: AN ESSENTIAL GUIDE 9, 9 (Alon Kaplan ed., 1999) (explaining history of Israeli legal system). Despite the Turks’ early influence on Israeli law, remnants of Turkish law have mostly disappeared. *Id.* Jewish law, however, helped shape Israeli law and continues to do so. See GOLDBERG, *LABOUR LAW IN ISRAEL*, *supra*, at 7 (arguing Bible’s teachings have influenced labor law around the world). But because labor law developed after the independence of Israel, the influence of British and Turkish law on labor law in Israel is minimal. See *id.* at 8 (explaining few protective laws only labor legislation before Israel became state).

94. Menachem Goldberg, *Securing Employment, Conditions of Employment and Dismissal*, in ISRAELI BUSINESS LAW: AN ESSENTIAL GUIDE 115, 115 [hereinafter Goldberg, *Securing Employment*] (Alon Kaplan ed., 1999).

95. JEROME LEFKOWITZ, *PUBLIC EMPLOYEE UNIONISM IN ISRAEL* 3 (1971). The word “Histadrut” means “organization” in Hebrew. *Id.*

96. *Id.* at 4.

97. See Goldberg, *Securing Employment*, *supra* note 94, at 115 (explaining function of Histadrut).

98. See *id.* One right that all Israeli employees have is that their employers must provide a safe working environment. Work Safety Ordinance, 5730-1970, ¶ 49(b) (Israel) available at <http://www.tamas.gov.il/NR/rdonlyres/3691992C-19F5-426C-9AED-FB06AC32E3E3/0/32.pdf>.

99. See Goldberg, *Securing Employment*, *supra* note 94, at 115 (explaining collective agreements give rights exceeding established law).

100. See *id.* at 116-17 (explaining function of Collective Agreements Law).

Additionally, Israeli employees have the right to strike.¹⁰¹ The right to strike is not granted by the constitution or a specific law but instead is considered a natural right.¹⁰² According to Israeli law, a declaration must be made by the “organisation of employees which represents the majority of employees involved in the dispute, and if there exists no such organisation of workers – the representative body chosen by the majority of those workers, either for any matter or for the specific labour dispute.”¹⁰³ Strikes, however, are rare in the private sector.¹⁰⁴

C. Labor Law in Japan

Japanese labor law is similar to U.S. labor law.¹⁰⁵ Unionism in Japan, however, is different from the U.S.’ system of industrial unions.¹⁰⁶ Japan has an enterprise union system, which means unions are not formed for specific trades but rather unions are formed within companies.¹⁰⁷ Furthermore, a company may have multiple unions, and employees are not required to designate one union as their exclusive representative.¹⁰⁸

The enterprise union system means that most collective bargaining takes place within a company, rather than industry

101. See GOLDBERG, *LABOUR LAW IN ISRAEL*, *supra* note 93, at 118 (outlining right to strike as basic right).

102. See *id.* (explaining right to strike as natural right).

103. *Id.* at 123 (explaining Article 3 of Labour Disputes Law).

104. See *id.* at 9 (contrasting small number of strikes in private sector to frequent strikes in public sector).

105. See Jon S. Greenwood, *What Major League Baseball Can Learn from Its International Counterparts: Building a Model Collective Bargaining Agreement for Major League Baseball*, 29 GEO. WASH. J. INT’L L. & ECON. 259, 266 (1995) (explaining U.S. occupation of Japan after World War influenced Japanese labor law); see also Takashi Araki, *Changing Employment Practices, Corporate Governance, and the Role of Labor Law in Japan*, 28 COMP. LAB. L. & POL’Y J. 251, 259 (2007) (stating Japanese labor law influenced by German and American law); Kenneth G. Dau-Schmidt, *Labor Law and Industrial Peace: A Comparative Analysis of the United States, the United Kingdom, Germany, and Japan Under the Bargaining Model*, 8 TUL. J. INT’L & COMP. L. 117, 142 (2000) (explaining WWII aftermath influenced labor union formation in Japan).

106. Araki, *supra* note 105, at 259 (noting Japan’s union system as enterprise based).

107. *Id.* at 259-60 (explaining difference between unions in United States, and Japan); see also Greenwood, *supra* note 105, at 268 (contrasting U.S. craft unions to Japanese company unions).

108. Dau-Schmidt, *supra* note 105, at 144 (explaining lack of exclusive representation in Japan because employees can designate multiple unions as their representative).

wide.¹⁰⁹ When collective bargaining takes place, employers have an obligation to bargain in good faith but there is no corresponding duty for employee unions to bargain in good faith.¹¹⁰ Despite the lack of a good faith obligation on employees, Japanese labor relations are shaped within the ideal that employees will work for the company that hires them for life.¹¹¹ Finally, Japanese employees have the right to strike but rarely do.¹¹²

IV. THE POSTING SYSTEM: MLB'S AND NPB'S AGREEMENT FOR THE EXCHANGE OF PLAYERS

Currently, player transfer between the NPB and MLB is governed by the United States-Japanese Player Contract Agreement, more commonly known as the posting system.¹¹³ Under the posting system, if an MLB team wishes to obtain a Japanese player who is under contract, they must notify the MLB Commissioner.¹¹⁴ The Commissioner must then contact the Japanese Commissioner, who will contact the Japanese team that the player is currently under contract with.¹¹⁵ If that team consents to making the player available and the NPB Commissioner determines the bid is adequate, the team will notify their commissioner who will in turn notify the MLB Commissioner.¹¹⁶ After determining that the player is available, the

109. Araki, *supra* note 105, at 260.

110. Dau-Schmidt, *supra* note 105, at 144.

111. See Brent Copeland, *Country Spotlight: Japan*, 13 INT'L HR J. 8, Fall 2004 (explaining "Japanese labor unions have historically worked in fairly close cooperation with management"); Dau-Schmidt, *supra* note 105, at 143 (explaining ideal of life long commitment shapes industrial relations).

112. See Dau-Schmidt, *supra* note 105, at 131-32 (demonstrating days lost to strike in Japan less than in United States, Germany, and United Kingdom).

113. Duncan, *supra* note 66, at 87. The current posting system was negotiated by the MLB and NPB without union involvement from either league. Gould, *Globalization in Collective Bargaining*, *supra* note 51, at 290.

114. Sasaki, *supra* note 58, at 20.

115. *Id.*

116. *Id.* When the Commissioner notifies MLB teams of a player's availability he is "posting" them, hence the agreement is called the "posting system." *Id.* One reason for the approval mechanism, which allows the NPB to reject an inadequate bid, is to protect the NPB as a league. See Gould, *Globalization in Collective Bargaining*, *supra* note 51, at 292 (discussing desire for adequate compensation for its players). Having the NPB commissioner approve the bids however, does not completely alleviate the concern of the NPB becoming a farm league to the MLB. See *id.* at 293 (explaining Japanese players still leaving for MLB). One possible solution is requiring MLB teams to exchange players with NPB teams in addition to cash compensation. Duncan, *supra* note 66,

MLB Commissioner notifies all MLB teams, who then have an opportunity to submit a bid to the MLB Commissioner if they wish to negotiate with the NPB player.¹¹⁷ The MLB Commissioner will choose the highest bidder, who wins the exclusive right to negotiate with the Japanese player.¹¹⁸ The winning bidder does not get to negotiate with the player, however, if the Japanese team does not find the high bid to be sufficient compensation.¹¹⁹ The player and the winning MLB team then have thirty days to negotiate a contract.¹²⁰ A player's only option is to decline to negotiate if he does not want to play for the MLB team who had the highest bid.¹²¹ If a contract is not reached within thirty days, the player must remain in his league and wait until the following year to participate in the posting system again.¹²²

MLB teams have paid extraordinary amounts of money under the posting system to win negotiation rights with Japanese players.¹²³

at 121.

117. See Gould, *Globalization in Collective Bargaining supra* note 51, at 291 (describing posting system procedures). Under the bidding system MLB teams do not know who else has bid, nor do they know the amount of any of the other bids. See Duncan, *supra* note 66, at 115 (explaining bidding process). This blind bidding system means that a team who wins the bidding process may not be able to afford the player because they spent a disproportionate amount of money on the bid. See *id.* at 116 (analyzing posting system). Another potential problem with the bidding system is that a wealthy team may try to outbid their competitors simply to block them from obtaining the right to negotiate with players. See *id.* (critiquing bidding system).

118. Sasaki, *supra* note 58, at 20 (describing bidding process).

119. *Id.*

120. *Id.*

121. See Stein, *supra* note 65, at 264-69 (explaining problems with lack of players' choice in MLB team they negotiate with). Player satisfaction is important and Japanese players may have particular reasons why they may want to play for a specific MLB team including playoff contention or that the franchise is located in a city with a high Japanese-American population. See *id.* at 264-66, 273 (explaining players' concerns in choosing MLB team); Tejada *Unhappy with O's, Seeking 'Change of Scenery,' supra* note 67 (noting player's desire to play for winning team). Also, teams who are in playoff contention consistently are often teams with the highest payrolls. Rosenthal, *supra* note 67 (outlining successful teams often highest payroll teams using Yankees as example).

122. Sasaki, *supra* note 58, at 20 (explaining player cannot be posted until following year if initial negotiations fail); Stein, *supra* note 65, at 263-64 (explaining if MLB team does not sign Japanese player he cannot be posted again until November 1). Also, if an agreement is not reached within the thirty days, then the MLB team is under no obligation to pay the bidding price to the Japanese team. Sasaki, *supra* note 58, at 20.

123. See Whiting, *Is MLB Destroying Japan's National Pastime?, supra* note 45, at 8 (stating Red Sox spent \$103 million to sign Daisuke Matsukaza); Robert

Japanese teams have realized large profits from these high bids.¹²⁴ Therefore, Japanese owners have little incentive to change the posting system because it is so lucrative.¹²⁵

V. ANALYSIS

A. Why a Working Agreement Between the MLB and IBL Will Be Necessary

As the level of talent rises in the IBL, MLB teams will inevitably pay attention to IBL players.¹²⁶ MLB teams are in a constant search for talent and because foreign talent is often cheaper than domestic talent, the IBL seems to be a natural place for scouting.¹²⁷ There are several ways that MLB teams could acquire talent from the IBL; they could either send scouts to Israel to document players worthy of attention, or they could arrange working agreements with IBL teams, much like the working agreements MLB teams currently have with Japanese teams.¹²⁸ Baras, however, is a businessman and the league was more than a project to help Israel: it was also a profit making venture.¹²⁹ The IBL would suffer greatly, both financially and in popularity, if its top talent left for the MLB.¹³⁰ Therefore, it is in Baras' best interest to either restrict players from leaving the league, or to make the IBL more desirable to play in so

Whiting, *Foreign Managers Change Face of Japanese Game*, JAPAN TIMES, Apr. 2007, reprinted in ASIAN BASEBALL COMMITTEE J., July 2007, at 12 [hereinafter *Foreign Managers Change Face of Japanese Game*] (stating Red Sox paid record amount, fifty-one million, to negotiate). The Yankees also paid a large sum to negotiate with a player when they paid twenty-five million to negotiate with pitcher Kei Igawa. *Id.*

124. See *Foreign Managers Change Face of Japanese Game*, *supra* note 123, at 12 (stating posting system is lucrative).

125. See *id.* (reasoning Japanese owners have little incentive to change current profitable system).

126. See *supra* note 5 and accompanying text (noting MLB already signed IBL player after first season).

127. See *supra* note 45 and accompanying text (explaining foreign labor often cheaper).

128. See *supra* note 45 (noting MLB teams use of scouts in foreign countries); *supra* notes 49-51 and accompanying text (explaining MLB teams' working agreements with Japanese teams).

129. See *supra* note 15 (noting Baras' various reasons for starting IBL).

130. See *supra* notes 71-72 and accompanying text (articulating concern that NPB players leaving for MLB hurts Japanese league).

that players do not try to leave.¹³¹

The IBL would suffer more than the NPB has by an exodus of talented players.¹³² The two leagues would suffer different impacts not only because the IBL is new, but also because of the difference in baseball cultures in Japan and Israel.¹³³ There is a strong interest surrounding baseball in Japan.¹³⁴ Therefore, while it has been suggested that the movement of players from the NPB to the MLB hurts the Japanese league, the interest in baseball in Japan is great enough that the league will not likely die out completely.¹³⁵ However, there is not a corresponding interest in Israel surrounding baseball.¹³⁶ The IBL would not likely survive many of their talented players leaving for the MLB in a manner similar to the NPB, which is able to sustain the export of their superstars.¹³⁷ Additionally, baseball does not have strong roots in Israeli society like the strong roots it has in Japanese society.¹³⁸ Baseball is not played widely in amateur or youth leagues in Israel because the sport lacks a strong history.¹³⁹ Furthermore, Israel is not producing enough high quality players to sustain a league while exporting talent to the MLB because of the lack of amateur and youth leagues.¹⁴⁰ An agreement similar to the posting system could help alleviate these concerns by closely regulating how players leave the league.¹⁴¹

Another reason why an agreement may be necessary between

131. *See supra* note 15 (explaining business aspect of IBL); *supra* notes 71-72 and accompanying text (outlining concern of NPB players leaving for MLB hurts Japanese league).

132. *See supra* note 17 and accompanying text (explaining wide range of talent in IBL); *supra* note 73 and accompanying text (arguing healthy interest in Japanese baseball in spite of stars leaving for MLB).

133. *See supra* notes 14, 19 and accompanying text (documenting lack of strong baseball history in Israel).

134. *See supra* notes 71-74 and accompanying text (arguing baseball's popularity in Japan allows NPB to survive despite players leaving for MLB).

135. *Supra* notes 71-74 and accompanying text.

136. *See supra* notes 19-20 and accompanying text (explaining lack of popularity in Israeli baseball).

137. *See supra* notes 71-74 and accompanying text (arguing baseball's popularity in Japan allows league to survive despite players leaving for MLB).

138. *Supra* notes 17, 19-20 and accompanying text; *supra* notes 71-74 and accompanying text.

139. *See supra* notes 19-20 and accompanying text (explaining baseball not played widely in Israel).

140. *See supra* notes 17, 19-20 and accompanying text (explaining wide range of talent in IBL and lack of amateur baseball in Israel).

141. *See supra* notes 117-19 and accompanying text (explaining NPB team's required satisfaction with bid before allowing MLB to contract with player).

the two leagues is that there are fewer IBL teams than MLB teams.¹⁴² Without an agreement between the two leagues, a select group of MLB teams would be able to negotiate working agreements with IBL teams to get exclusive rights to their players.¹⁴³ If MLB teams that have working agreements start to realize tangible benefits of such agreements, it will inevitably cause those MLB teams without an agreement to pressure the MLB Commissioner to solve the inequality.¹⁴⁴ The Commissioner's solution would likely be a system similar to the posting system because it allows all MLB teams a chance to bid for the rights to negotiate with Japanese players.¹⁴⁵

Finally, in the unlikely event that the IBL starts to compete for MLB players, the MLB will seek to have an agreement between the two leagues.¹⁴⁶ This is unlikely because the MLB is the premier baseball league in the world, with more money, talent, history, and leverage than any other league.¹⁴⁷ Nevertheless, if the MLB feels threatened by the IBL, an agreement will be necessary much like an agreement was needed when the MLB began to threaten the NPB.¹⁴⁸

B. The Importance of a Strong Players' Union in the IBL

The agreement between the MLB and NPB was negotiated without union involvement from either league.¹⁴⁹ This lack of involvement from the players' union is possibly why the agreement focuses more on the satisfaction and compensation of Japanese teams

142. *See supra* notes 16, 40 and accompanying text (detailing size of MLB, IBL). There are thirty MLB teams and six IBL teams, which means that only six MLB teams could have working agreements with IBL teams. *Supra* notes 16, 40, 51 and accompanying text.

143. *See supra* note 51 (arguing without agreement between league certain MLB teams may have working agreements while excluding other teams).

144. *See supra* note 51 (explaining access to Japanese players by certain clubs will lead to displeasure of other MLB clubs).

145. *See supra* note 51 (arguing agreement necessary to accomplish "access for all MLB clubs to Japanese players").

146. *See supra* note 52 and accompanying text (noting MLB has no current competition); *supra* notes 54-56 and accompanying text (explaining MLB threatened by other leagues and responded by suspending players who left MLB).

147. *See supra* note 71 and accompanying text (arguing prestige draws NPB players to MLB).

148. *See supra* notes 54-55 and accompanying text (explaining MLB's need to protect itself from competing leagues); *supra* notes 113-14 and accompanying text (explaining posting system protects NPB teams from MLB teams directly contacting players under contract).

149. *Supra* note 113.

rather than on the individual player's satisfaction.¹⁵⁰ One recurring criticism of the current posting agreement is that Japanese players have no say in what team they are traded to.¹⁵¹ The players must negotiate with the MLB team who had the highest bid or they are forced to sit out for a year.¹⁵² Had there been a strong Japanese union, however, the agreement may have had a provision that allowed the Japanese player to have a say in what MLB team he wanted to negotiate with.¹⁵³

Another important reason for the IBL to have a strong players' union is that it may help increase the willingness of players to play and stay in the IBL while decreasing the comparative attractiveness of the MLB.¹⁵⁴ While it may always be natural for a player to want to challenge himself at the highest level of baseball, if playing conditions are of high quality and the pay is competitive, the IBL will become more than a league consisting of players who want one last shot to play professional baseball.¹⁵⁵ Better playing conditions and higher pay, however, are hard to achieve without a strong union to bargain on the players' behalfs.¹⁵⁶

In addition to overall satisfaction, a strong players' union can help prevent potentially crippling lawsuits against the IBL by preventing conditions that could cause a player to sue the league.¹⁵⁷ Lawsuits against the league would not only hurt the viability of the league financially but financial instability would also discourage players and fans.¹⁵⁸ For example, in the IBL's first season, the first player paychecks were late, giving rise to a potential breach of

150. *See supra* note 113 (noting lack of union involvement); *supra* notes 116, 121 and accompanying text (explaining NPB team must approve of transfer but player has no say).

151. *See supra* notes 113-21 and accompanying text (outlining Japanese agreement which offers Japanese players no choice of MLB teams).

152. *See supra* notes 120-22 and accompanying text (explaining lack of choice in NPB players' negotiating).

153. *See supra* note 113 (noting lack of union involvement).

154. *See supra* notes 80, 83-84 and accompanying text (explaining powerful MLB players' union achieved raises in minimum salary and increased benefits).

155. *See supra* note 71 (arguing Japanese players naturally want to challenge themselves in MLB).

156. *See supra* notes 80, 83-84 and accompanying text (noting benefits of strong players' union).

157. *See supra* notes 80, 83-84 and accompanying text (noting benefits of strong players' union).

158. *See* Smith, *supra* note 33 (explaining how league instability and lawsuits discourage loyal fans).

contract action.¹⁵⁹ It also caused the players to threaten a strike, a move that would have probably been fatal to the league.¹⁶⁰ Furthermore, the league lacked proper safety equipment because of limited funding.¹⁶¹ Had the lack of safety equipment resulted in an accident, the injured player could have sued the league because under Israeli law an employer must provide a safe working environment for their employees.¹⁶² A players' union could preemptively negotiate issues such as a workable pay schedule and demand safe playing conditions on the players' behalves.¹⁶³

A strong players' union in the IBL is more likely than a strong players' union in the NPB.¹⁶⁴ The NPB did not have a players' union until late in its existence, while IBL players discussed the need for a union in the first season.¹⁶⁵ This difference is probably because of the difference in cultural attitudes toward unions.¹⁶⁶ Unions are an integral part of Israel's culture, with most workers belonging to a union.¹⁶⁷ Japanese workers, on the other hand, place more emphasis on company loyalty and as a result unions are less popular, and when formed, they are often weak.¹⁶⁸

Although a players' union seems necessary, forming a players'

159. *See supra* notes 34-36 and accompanying text (describing problems with paychecks upset IBL players).

160. *See supra* notes 33-34 (noting paychecks as early league problem); *supra* note 91 (explaining fans negative reaction to MLB strike and MLB's failure to fully recover).

161. *See supra* notes 28-32 and accompanying text (outlining dangerous playing fields and lack of batting cages).

162. *See supra* note 32 and accompanying text (detailing player's near death experience after hit by baseball); *supra* note 98 and accompanying text (explaining Israeli law requires safe workplace).

163. *See supra* note 81 (explaining MLBPA assists players by ensuring safe playing conditions).

164. *See supra* notes 66-67 and accompanying text (explaining slow development of Japanese baseball union); *supra* note 94 and accompanying text (noting popularity of unions in Israel); *supra* note 35 and accompanying text (noting IBL players started to form union in first season).

165. *See supra* note 35 and accompanying text (detailing early formation of IBL union); *supra* notes 65-70 and accompanying text (describing reasons for late formation of Japanese baseball union).

166. *See supra* note 94 and accompanying text (explaining popularity of unions in Israel); *supra* note 111 (noting historical peace of unions and employers in Japan).

167. *See supra* note 94 and accompanying text (stating significant union memberships among Israeli employees).

168. *See supra* note 112 and accompanying text (observing Japanese strikes result in less work delay than other world powers).

union may not be easy in a new league filled with players who just want a chance to play professional baseball.¹⁶⁹ Despite the strong tradition of unions in Israel, players may still fear their job security will be threatened if they work too hard to form a union.¹⁷⁰ Players may not be willing to risk their professional careers when they know that there are other players who would be willing to take their spot.¹⁷¹

The right to strike is fundamental to Israeli labor law.¹⁷² Strikes in Japan, however, are not as frequent.¹⁷³ The fundamental right to strike coupled with a strong players' union will make it more likely that the IBL players will utilize a strike earlier in the formation of the league than occurred in the NPB.¹⁷⁴ The use of the strike will give IBL players greater bargaining power, and as a result, players may be able to achieve more favorable terms in an agreement between the IBL and MLB.¹⁷⁵

C. How an Agreement Between the IBL and MLB Will Compare to the Agreement Between the NPB and MLB

To prevent the IBL from becoming a feeder league to the MLB, any agreement between the MLB and IBL must have a provision that requires approval from either the IBL Commissioner or the IBL team before a trade is finalized.¹⁷⁶ This approval mechanism would be similar to the Japanese posting system which allows the player's NPB team to decide whether the bids are high enough to compensate

169. *See supra* notes 23, 81 (explaining strong players' union necessary to achieve players' goals).

170. *See supra* notes 34-35 and accompanying text (indicating at least one player had concern about union formation and going home midseason).

171. *See supra* note 23 (noting "no shortage of potential talent" as cut minor leaguers seek to play in IBL).

172. *See supra* note 101 and accompanying text (explaining importance of strikes in Israeli labor relations).

173. *See supra* note 112 and accompanying text (noting infrequency of strikes in Japan).

174. *See supra* notes 101-02 (noting Israel's fundamental right to strike); *supra* note 34 (indicating players willing to strike in first season).

175. *See supra* note 70 and accompanying text (explaining Japanese players slower to acquire higher salaries because of modest use of bargaining power); *supra* note 91 (discussing strengths of players' ability to threaten strike during negotiations).

176. *See supra* note 116 (arguing approval provisions in NPB/MLB agreement in place to protect quality of players in NPB).

for the loss of talent from their team and the league.¹⁷⁷ An approval mechanism itself, however, will not be enough to prevent MLB teams from paying exorbitant amounts of money for the select star players of the league.¹⁷⁸ Therefore, a restriction on the number of IBL players that can leave for the MLB in a given year may be necessary.¹⁷⁹ If MLB teams want more players than the agreement provides for, then a possible provision in the agreement would allow more players to leave the IBL for the MLB only if the MLB in exchange sends players to the IBL.¹⁸⁰ It would be unlikely that current MLB players would be willing to go to the IBL, making such a provision meaningless, however, there may be minor league players who would be willing to go to the IBL.¹⁸¹ If there were minor league players willing to travel to the IBL, because of the disparity in playing levels between the two leagues, such an exchange might allow the IBL to sustain a high enough playing level to maintain the league.¹⁸²

A problem with the current posting system that would continue if the IBL and MLB were to reach a similar agreement is that MLB teams that cannot afford to pay for negotiating rights in addition to a contract for a star Japanese player will find themselves in the same position should there be a posting system for the IBL.¹⁸³ One way to solve this problem is to cap the dollar amount of bids.¹⁸⁴ A cap on bids, however, may not adequately compensate the IBL for the loss of their players.¹⁸⁵

177. *See supra* text accompanying note 119 (explaining NPB team's right to refuse highest bid).

178. *See supra* note 116 and accompanying text (noting NPB Commissioner approval not enough to stop MLB teams from raiding top Japanese talent); *supra* notes 119, 123 and accompanying text (explaining MLB teams pay high prices with existing approval mechanism).

179. *See supra* notes 116, 123 and accompanying text (explaining MLB's ability to take players from NPB).

180. *See supra* note 116 (noting player for player exchange as possible way to compensate Japanese teams).

181. *See supra* note 23 (detailing cut minor leaguers possible willingness to play in IBL); *supra* note 71 (noting prestige of MLB).

182. *See supra* note 17 and accompanying text (explaining wide range of talent in IBL); *supra* note 51 and accompanying text (explaining Red Sox working agreement which allows minor leaguers to go to Japan).

183. *See supra* notes 117-18 and accompanying text (explaining current posting often precludes low payroll MLB teams).

184. *See supra* note 117 (noting current posting system hurts low payroll MLB teams).

185. *See supra* notes 116, 124-25 and accompanying text (stating

The IBL was established by an American and modeled after American baseball with slight tweaks in the game to make it attractive to the Israeli market.¹⁸⁶ The Japanese league, despite similarities with its American counterpart, has much stronger roots in society.¹⁸⁷ Over the years, the NPB has incorporated American aspects of the game such as free agency and salary arbitration, but because the IBL was originally modeled after the MLB, no such Americanizing of the IBL is likely.¹⁸⁸ Player movement from the IBL to the MLB may be more like player movement from team to team because of the lack of independence of the IBL.¹⁸⁹

Another likely difference in any agreement between the IBL and MLB is that negotiations will probably include the players' unions from both leagues.¹⁹⁰ This inclusion may help alleviate concerns that the IBL could end up with the current Japanese posting system, which gives players no say in what MLB team they play for.¹⁹¹ Allowing IBL players to first "post" which MLB teams they would be willing to negotiate with is one possible solution that would allow players to have more say in negotiations.¹⁹² This is important for player satisfaction because a player may only want to play for a team that they believe will be in playoff contention.¹⁹³ Furthermore, like many Japanese players, Israeli IBL players may wish to play on teams in cities with a large Jewish population.¹⁹⁴ One potential problem with allowing IBL players to specify which teams they want to negotiate with, however, is that it may lead to leaving out lower payroll teams, similar to the current Japanese

compensatory nature of Japanese posting system good for team owners).

186. *See supra* notes 15, 22 and accompanying text (explaining how Baras changed IBL to make it more attractive in Israel).

187. *See supra* notes 22, 57 and accompanying text (explaining importance of baseball in Japanese society).

188. *See supra* notes 15, 22, 57 (explaining Americanization of Japanese baseball league).

189. *See supra* notes 15, 22 and accompanying text (explaining origins of IBL based on MLB).

190. *See supra* note 113 (explaining lack of union involvement in Japanese agreement).

191. *See supra* note 121 and accompanying text (noting potential problems when Japanese player disagrees with trade to particular MLB team).

192. *See supra* note 121 and accompanying text (explaining failure of Japanese posting system to allow for player input in trades).

193. *See supra* note 121 (noting importance of player satisfaction and player's desire to play for winning team).

194. *See supra* note 121 (arguing Japanese players may prefer MLB team with strong Japanese-American culture over highest bidding team).

posting system which often excludes teams who cannot afford to bid high.¹⁹⁵ This problem is likely because the most popular teams and the teams with the best playoff chances are often those with the highest payrolls.¹⁹⁶

VI. CONCLUSION

The Israel Baseball League has the potential to become a high-quality professional baseball league.¹⁹⁷ If the league continues to develop, MLB teams may start paying close attention to IBL players in an effort to sign them.¹⁹⁸ As more and more IBL players leave for the MLB, an agreement between the MLB and IBL will be necessary for several reasons.¹⁹⁹ Any agreement, however, will differ substantially in a few areas from the current agreement between the MLB and NPB.²⁰⁰ Labor unions in Israel are more prevalent than unions in Japan and, as a result, it is likely that any agreement reached between the MLB and IBL will have more union involvement, causing the agreement to focus more on the rights of individual players.²⁰¹

Jennifer M. Recht

195. *See supra* note 121 (illustrating players' desire to play for winning team and noting successful teams often highest payroll teams); *supra* note 117 (explaining wealthy MLB teams can outbid smaller payroll teams in posting system).

196. *See supra* note 121 (noting Yankees spend significant money attempting to secure playoff contention).

197. *See supra* note 5 and accompanying text (noting IBL players being signed to MLB teams).

198. *See supra* part I (detailing how MLB teams recruit global talent).

199. *See supra* part IV (explaining circumstances necessitating agreement).

200. *See supra* part IV (addressing ways agreement will differ).

201. *See supra* part IV (arguing agreement between IBL and MLB will differ from MLB/NPB agreement).