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Labor and the Global Economy: Four Approaches to Transnational Labor Regulation

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LABOR AND THE GLOBAL ECONOMY: FOUR APPROACHES TO TRANSNATIONAL LABOR REGULATION†

*Katherine Van Wezel Stone**

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INTRODUCTION

Twenty-five years ago, Harvard University Economics Professor Raymond Vernon foresaw that increased international economic activity would create profound political problems. He warned that the imminent growth of multinational enterprises was a threat to national politics because "multinational enterprises are not easily subjected to national policy."¹ Professor Vernon further noted that the threat to national politics would come not only from multinational enterprises, but also from the shrinking of trade barriers and advancements in transportation and communications technologies. "These [changes] are likely to raise issues of sovereignty that may, in the end, dwarf the multinational enterprise problem."²

The globalization of the world economy has proceeded at a fast pace. World trade has displaced domestic trade as the engine of economic growth. Direct foreign investment by multinational corporations has increased dramatically in the past decade. The nations of the world are quickly aligning themselves into trading blocs. Telecommunication and computer technologies have made it easier for firms to engage in production, distribution, and marketing all over the world. Trade barriers are falling, foreign exchange restrictions are disappearing, and national borders are more permeable.

While these economic ramifications of the global economy can be measured, monitored, and described in quantitative terms, there is a more subtle and equally powerful *qualitative* change underway. In essence, the global economy is undermining the capacity of nation-states to regulate their own domestic economies.

A number of scholars have noted that the global economy diminishes the regulatory capability of the nation-state and thus calls into question the conventional views of sovereignty.³ The diminished regulatory

1. Raymond Vernon, *Future of the Multinational Enterprise*, in *THE INTERNATIONAL CORPORATION* 373, 396 (Charles P. Kindleberger ed., 1970).

2. *Id.* at 399-400.

3. See, e.g., Wolfgang Streeck & Philippe C. Schmitter, *From National Corporatism to Transnational Pluralism: Organized Interests in the Single European Market* 19 *POL. & Soc'y* 133, 149-50 (1991); Bob Jessop, *Changing Forms and Functions of the State in an Era of Globalization and Regionalization*, in *THE POLITICAL ECONOMY OF DIVERSITY: EVOLUTIONARY PERSPECTIVES ON ECONOMIC ORDER AND DISORDER* 102, 103-04 (Robert Delorme & Kurt Dopfer eds., 1994). See also Sol Picciotto, *The Regulatory Criss-Cross: Interaction Between Jurisdictions and Global Regulatory Networks*, in *REGULATORY COMPETITION AND COORDINATION: STRATEGIES AND DEBATES OF ECONOMIC REGULATION IN EUROPE AND THE USA* (William Bratton et al. eds., forthcoming 1996) (manuscript at 4-5, on file with *Michigan Journal of International Law*) [hereinafter *REGULATORY COMPETITION*].

capacity of the nation-state is the result of two distinct factors. First, within trading blocs, much domestic regulation is superseded by multi-lateral treaties and tribunals that have *de facto*, if not *de jure*, trumping power. Second, there is a practical limitation on the ability of one nation to regulate its domestic affairs in a world where labor and capital move freely across national borders. In such a world, legislation that is onerous to the business community — including most social welfare and worker protective legislation — tends to induce capital flight and to trigger a race-to-the-bottom.⁴ Thus, the nation-state is becoming increasingly powerless to play its historic role as protector of the health, safety, and welfare of its citizens.⁵

The inability of the nation-state to regulate effectively in the domestic sphere raises troubling social, distributional, and political concerns. For example, if domestic economies are no longer amenable to domestic regulation, one can expect an increase in inequality in the distribution of income, wealth, and power both within nations and between nations. Furthermore, in a world where domestic states have diminished ability to regulate their economies, the concepts of politics and sovereignty become problematic. As globalization proceeds and economic regulation is increasingly made by transnational bodies, important political questions arise. What economic power remains with the nation-state? What will be the role of domestic politics, social movements, and interest groups? In transnational tribunals and international agencies, who speaks for the nation and whose interests will be represented as the "national interest?" And, what is the source of political legitimacy of the disempowered or reconstructed nation-state?

This article examines the challenge to domestic labor regulation posed by the increasingly international economic and legal order. Part I analyzes the several ways in which increased global economic integration creates problems for labor. These problems include a decline in union bargaining power, a race-to-the-bottom in labor standards, and a weakening of labor's role as political actor. Part II identifies four approaches, or models, for transnational labor regulation that have emerged in the Western world in the past twenty years. These are: (1)

AND COORDINATION] (contrasting arguments for the diminished economic function of the nation-state with arguments for an on-going political function for the nation-state).

4. See *infra* parts I.A-B.

5. As Richard Barnet and Ronald Muller wrote, "[t]he structural transformation of the world economy through the globalization of Big Business is undermining the power of the nation-state to maintain economic and political stability within its territory." RICHARD J. BARNET & RONALD E. MULLER, *GLOBAL REACH: THE POWER OF THE MULTINATIONAL CORPORATIONS* 302 (1974).

preemptive legislation; (2) harmonization; (3) cross-border monitoring; and (4) extraterritorial jurisdiction. Part III explores the differences between the four models in terms of their respective abilities to solve the problems of transnational labor regulation in a global economy. I conclude that none of the four models can solve all the problems caused by globalization. Each one involves trade-offs between policy goals. Therefore, states need to consider the normative and distributional ramifications of each of the four models, and seek to develop another model which better addresses the problems of labor regulation in a global world.

I. THE PROBLEMS FOR LABOR REGULATION IN THE GLOBAL ECONOMY

Over the past thirty years, U.S. unions have seen an explosion of overseas runaway shops and multinational corporations shifting production overseas.⁶ Globalization hurts domestic labor movements in several respects: It diminishes labor's bargaining power vis-a-vis its employer, it creates a disincentive for labor to actively seek labor protective legislation, it leads to organizational fragmentation, and it causes atrophy of labor's political clout. Each of these dynamics will be elaborated below.

A. *The Decline of Union Bargaining Power*

Increased globalization of the world economy means increased capital mobility. For obvious reasons, corporations prefer to establish production facilities in countries with lower wage rates, lower labor standards and fewer labor rights. The resultant business flight to low wage areas, commonly referred to as the "runaway shop," has been a concern of Western labor movements for many decades.⁷

In the United States, the "runaway shop" phenomenon has long been a problem for the labor movement. United States' corporations began moving to the South in search of lower wages and lower unionization rates in the 1920s. In more recent years, corporate flight has been motivated by additional factors such as avoiding state worker compensation

6. Betty Southard Murphy, *Multinational Corporations and Free Coordinated Transnational Bargaining: An Alternative to Protectionism?*, 28 LAB. L.J. 619, 620-21 (1977).

7. See *Liggett Co. v. Lee*, 288 U.S. 517, 557-60 (1933) (Brandeis, J., dissenting) (noting the phenomenon of inter-jurisdictional competition for businesses that relocate to those states with the least onerous regulatory environments); See also David Charny, *Competition Among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the "Race to the Bottom" in the European Communities*, 32 HARV. INT'L L.J. 423, 430-31 (1991) (discussing interjurisdictional competition for incorporations).

systems, state unemployment insurance programs, and other labor protective programs. Indeed, states with few labor protective regulations often tout that fact in their advertisements to attract businesses from more heavily-regulated states.⁸

Companies that can freely and costlessly relocate to low-wage areas are unlikely to accede to union demands for higher wages or improved working conditions. Furthermore, unions, when faced with a credible threat of corporate relocation, revise their wage demands downward.⁹ As a result, the level of a union's bargaining power is a function of the ease by which companies can in fact relocate production to low wage areas. As business relocation costs go down and as relocation possibilities increase, union bargaining clout diminishes.

Global capital flight poses a particularly serious problem for unions in labor-management negotiations. At present, American labor law does not give unions the right to bargain about strategic-level corporate decisions such as whether to relocate across the border or whether to merge with a foreign corporation.¹⁰ And, firms that are involved in take-overs or mergers are not required to bring their collective bargaining obligations into the new corporate entity.¹¹ Consequently, firms that relocate from unionized high-wage areas to nonunion low-wage areas are free to exploit whatever wage differentials exist, and U.S. unions have few means to resist.

In a frictionless world, companies would exploit any wage and benefit differentials that existed around the globe, and unions would be forced to compete with low wage, nonunion workers all over the globe.¹² While we do not live in a frictionless world, transnational

8. BARRY BLUESTONE & BENNETT HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA* 84 (1982).

9. See, e.g., Michael J. McGuinness, *The Protection of Labor Rights in North America: A Commentary on the North American Agreement on Labor Cooperation*, 30 STAN. J. INT'L L. 579, 580-82 (1994) (reporting on numerous studies regarding industrial flight and the deterioration of industrial conditions); See generally Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty, and America's Eroding Industrial Base*, 81 GEO. L.J. 1757, 1763-82 (1993) (discussing impact of globalization and capital flight on U.S. workers).

10. Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 96-119 (1988) [hereinafter *Labor and the Corporate Structure*]. See also Katherine Van Wezel Stone, *Policing Employment Contracts Within the Nexus-of-Contracts Firm*, 43 U. TORONTO L.J. 353, 372-73 (1993) (discussing the inability of unions in the United States to protect their members from unfavorable corporate strategic decisions).

11. See Katherine Van Wezel Stone, *Employees as Stakeholders Under State Nonshareholder Constituency Statutes*, 21 STETSON L. REV. 45 (1991).

12. Within the European Community, low wage countries have opposed wage-equalizing regulations on the grounds that they should be able to benefit from their low-wage status. See Bernd Baron von Maydell, *The Impact of the EEC on Labor Law*, 68 CHI.-KENT L. REV. 1401, 1403 (1993).

runaway shops are occurring with increased frequency due to advances in communication technology, the increased quantity and velocity of world trade, and the growth of direct foreign investment and multinational corporations. In addition, the advent of trading blocs, free-trading zones, the World Trade Organization (WTO) and other "free trade" reforms are removing legal restrictions on capital's ability to flow to locations which generate the highest returns at the lowest factor costs. These transnational trade pacts and other "free trade" devices which facilitate the movement of business across national borders also diminish labor's bargaining power.

B. *The Race-to-the-Bottom Problem*

Not only does globalization undermine union bargaining power, it also undermines union efforts in the legislative arena. When corporations are free to relocate wherever they want, unions find themselves placed in a prisoner's dilemma.¹³ The more successful unions are in the political arena at obtaining legislative protections, the more likely businesses are to relocate to other areas. In that event, workers lose the very jobs which made the protections desirable in the first place. Furthermore, without jobs, workers are usually worse off than they were before the protections were obtained. This is the dilemma of labor regulation that globalization creates. It is the result of the "race-to-the-bottom" — the flight of capital to areas with lower regulatory standards.

Today labor unions face two different race-to-the-bottom dynamics. First, they confront a race in which multinational firms, searching for lower production costs, move production from high wage countries to low wage countries by means of capital flight and direct foreign investment. This concern, while not new for American unions, has intensified with increased globalization.

Second, the advent of free trade pacts and the lowering of trade barriers has created a new type of race-to-the-bottom problem for labor. Countries now have an incentive to compete for business by altering their domestic regulations in order to create a regulatory environment that business will find attractive. This problem has been termed "regula-

13. On the theory of the prisoner's dilemma, see Jon Elster, *Introduction*, in RATIONAL CHOICE 1, 8–9 (Jon Elster ed., 1986). On the application of the prisoner's dilemma paradox to regulatory choices, see Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1217–18 (1992) (discussing application of prisoner's dilemma analogy to competition between states to avoid environmental regulations).

tory competition.”¹⁴ Many scholars have discussed the possibility that regulatory competition will lead to the deregulation of banking practices and financial markets, the easing of environmental regulations, the weakening of product liability and other tort law rules, and the lowering of labor standards in the years ahead.¹⁵

Both strands of the “race-to-the-bottom” problem weaken labor in the political arena insofar as they create disincentives for labor to lobby for protective legislation. They thus serve to deprive labor of one important tool for worker betterment — legislative action. However, the second type of race-to-the-bottom, regulatory competition, is more problematic for labor than the conventional one. While the traditional race-to-the-bottom undermined labor’s incentive to seek legislative gains, regulatory competition undermines political support for existing American labor standards throughout the electorate. The threat of business flight creates interest groups that want to use low levels of labor regulation to attract business. This in turn could trigger a deregulatory spiral in which countries compete for business on the basis of their low labor standards. Domestically, this spiral would be deeply divisive within labor groups, setting organized workers against unorganized ones, workers with jobs against the unemployed, and all workers against both the poor and small businesses.

Recently, commentators have suggested that, at least within a single country, the existence of multiple jurisdictions with multiple regulatory frameworks does not necessarily create sub-optimal levels of regulation or otherwise impair public welfare.¹⁶ These commentators argue that there is no race-to-the-bottom problem, at least in the area of environmental regulation. They point out that when enacting environmental regulations, local governments make a tradeoff between environmental quality and tax revenues from businesses. The resultant level of regulation reflects the locality’s preferences between these two incommensu-

14. See generally Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 HARV. INT’L L.J. 47 (1993) (discussing the dynamics of regulatory competition in the area of unilateral U.S. disciplines and the multilateral GATT).

15. See, e.g., James D. Cox, *Rethinking U.S. Securities Laws in the Shadow of International Regulatory Competition*, 55 LAW & CONTEMP. PROBS., Autumn 1992, at 157.

16. See Revesz, *supra* note 13; N.Y.U. L. REV. 1210 (1992); Wallace E. Oates & Robert M. Schwab, *Economic Competition Among Jurisdictions: Efficiency Enhancing or Distortion Inducing?* 35 J. PUB. ECON. 333 (1988); William A. Fischel, *Fiscal and Environmental Considerations in the Location of Firms in Suburban Communities*, in FISCAL ZONING AND LAND USE CONTROLS 119 (Edwin S. Mills & Wallace E. Oates eds., 1975). See also Joel R. Paul, *Free Trade, Regulatory Competition, and the Autonomous Market Fallacy*, 1 COLUM. J. EUR. L. 29, 62 (1995) (arguing that regulatory competition has not operated in the European Community in the area of waste packing regulations).

rate goals. Thus, these theorists conclude, there is not a race-to-the-bottom problem, but rather a variety of policy mixes that are tailored to a particular locality's preferences. For these scholars, the existence of multiple jurisdictions and capital mobility fosters a desirable political forum for arriving at policy goals, rather than creating a prisoner's dilemma.¹⁷

This argument might hold true in the environmental area where the pro-environment groups and the pro-business groups are two different constituencies contending for their respective positions in a local policy-making forum. In such a context, one could describe the resultant level of regulation as a compromise that reflects the relative power of the two contending factions, a compromise that could be reached at a different point in a different locality where the two groups have different relative bargaining strengths. However, whatever the merits of this argument as applied to environmental regulation, it does not apply to labor regulation.¹⁸

Labor regulation involves a different type of prisoner's dilemma than that present in the area of environmental regulation.¹⁹ Unlike the environmental area, labor regulation does not involve two opposed parties, each of which is able to articulate and advocate its own separate interest in a policy arena. Rather, with labor regulation, the group that stands to benefit the most from regulation is also the group that has the most to lose from any resultant business flight caused by the regulation. Thus, in contrast to environmental regulations, the level of a locality's labor regulation is not a tradeoff between conflicting interest groups, each with its separate constituency, urging incommensurate policy goals. Instead, the likelihood of a labor standards race-to-the-bottom places labor in a Hobson's choice in which it cannot advocate the policies that would benefit it the most.

17. Revesz, *supra* note 13, at 1233-44 (arguing that interstate competition is not inconsistent with maximization of social welfare). See also Charny, *supra* note 7, at 437-38 (describing conditions under which a race-to-the-bottom in the field of corporate regulation will and will not occur).

18. Indeed, the theorists of environmental regulation expressly disavow any employment effects from the social choice between levels of environmental regulation. If employment effects are not only considered, but made central, then the analysis comes out quite differently. See Brian A. Langille, *Competing Conceptions of Regulatory Competition*, in REGULATORY COMPETITION AND COORDINATION, *supra* note 3 (manuscript at 10-13, on file with Michigan Journal of International Law).

19. On the prisoner's dilemma of labor regulation in the face of international trade, see Robert Howse & Michael J. Trebilcock, *The Fair Trade-Free Trade Debate: Trade, Labour and the Environment* 61 (Jan. 6, 1995) (unpublished manuscript, on file with Michigan Journal of International Law).

C. Organizational Fragmentation

One strategy employed by unions within the United States to diminish the possibility of runaway shops and race-to-the-bottom problems has been to advocate federal legislation that would equalize standards for particular labor issues.²⁰ For example, the rationale for the U.S. Congressional enactment of the Occupational Safety and Health Act in 1970 was to prevent firms from relocating in states with lower standards for occupational health and safety protection by promulgating national occupational safety and health standards and enforcement mechanisms.²¹ Another union strategy has been to organize workers in low wage states and attempt to bargain for equal labor standards between states. Operating under a single set of federal labor laws, unions in a single country such as the United States have often been able to promote wage parity and limit internal capital movement.

However, when corporations move beyond national boundaries, the countervailing pressures that work well within a single country operate weakly, if at all, in the global landscape. There is little prospect for obtaining supervening legislation to equalize labor standards, and very few prospects for cross-union cooperation. With the exception of Canada, U.S. unions have little experience organizing or jointly bargaining with unions in other countries or operating under foreign legal regimes.²² In addition, other countries have labor laws and collective bargaining systems that are quite different from the laws and collective bargaining systems of the United States. Consequently, it is difficult for U.S. unions to collaborate with unions in other countries in a way that jointly harnesses their economic weapons and furthers their joint bargaining goals.

American unions know that without cooperation across national lines, they are forced to compete with foreign unions to keep domestic businesses at home, to attract foreign businesses to the U.S., and to keep foreign workers from immigrating to U.S. soil. Yet they have had difficulty formulating an effective response to the problem of international runaway shops. They have advocated a grab-bag of policies

20. Marley S. Weiss, *The Impact of the European Community on Labor Law: Some American Comparisons*, 68 CHI.-KENT L. REV. 1427, 1439 (1993). See also Baron von Maydell, *supra* note 12, at 1411-17 (discussing EU low wage countries' opposition to wage-equalizing regulation).

21. Occupational Safety and Health Act, 29 U.S.C. § 651 et seq. (1988). See SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA* 85-90 (1992) (analyzing the policy justifications behind the Occupational Safety and Health Act).

22. Murphy, *supra* note 6, at 626.

including restrictions on immigration, opposition to trade agreements, changes in tax rules, and legal restrictions on multinational corporations.²³ At the same time, U.S. unions have sought to establish, or strengthen, cooperative relations with unions overseas, but such efforts are still in embryonic stages.²⁴ These somewhat contradictory impulses are in fact related — they represent efforts to limit global runaway shops which, in the current international and economic climate, seem inevitable.²⁵

D. *The Deterioration of Labor's Political Role*

A further problem caused by globalization is that labor's political power is weakened when the locus of labor regulation moves from a national to an international arena. National labor movements operate in the context of a particular regulatory environment. National and local legal regulations set labor standards and shape labor-management bargaining arrangements. Until now, these regulations have been determined at the level of national politics.

Accordingly, labor organizations have directed considerable efforts toward securing favorable national labor regulations. By uniting otherwise diverse labor groups around a common legislative agenda, unions in most Western countries have been able to organize at the national level and have become effective players in national politics. However, if the locus of labor regulation is shifted to transnational tribunals, there is little advantage for national labor movements to mobilize and press for gains through the domestic political process. If labor regulation is not determined at the level of the nation-state, national labor movements lose much of their political clout. And without political clout, labor's ability to maintain a regulatory regime which gives labor bargaining power in the economic realm would be seriously compromised.²⁶

More significantly, if labor ceases to be a voice in national politics, then the democratic nature of our government is also undermined. Social

23. *Id.* at 624–26.

24. See Sheldon Friedman, *The EC vs. NAFTA: Levelling Up vs. Social Dumping*, 68 CHI.-KENT L. REV. 1421 (1993) (comparing EC labor policy with NAFTA's silence).

25. The race-to-the bottom problem is not limited to the United States. Other high labor standard countries have also experienced capital movements to countries with lower labor standards — including recent movements of capital from Canada to the United States after the Canada-United States Free Trade Agreement of 1988. See generally Canada-United States Free Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851, 27 I.L.M. 281 (codified as amended in scattered sections of 19 U.S.C.) (entering into force Jan. 1, 1989).

26. On the role of legal rules in constituting bargaining power, see Stone, *Labor and the Corporate Structure*, *supra* note 10, at 85–86.

theorists dating back to Toqueville have recognized that a robust democracy requires that there be a plethora of voluntary organizations in which citizens can participate.²⁷ Voluntary organizations are the vehicle by which citizens' private concerns are shared and translated into public issues, issues which can then generate pressure for legislative or electoral action. Without voluntary organizations, it is virtually impossible in a modern democracy for groups to articulate shared concerns and bring their interests into the political arena.

The labor union, as a voluntary organization whose purpose is to promote the interest of its constituents, functions not merely as an economic workplace-based organization, but also as a political lobbying group and electoral block. Collectively, labor unions articulate the interests and public policy concerns of a large segment of the population. Without labor unions' continued presence in national politics, this segment would be silenced, and the democratic process would be diminished.²⁸

II. FOUR MODELS OF TRANSNATIONAL REGULATION

Given the many respects in which globalization represents a threat to domestic labor movements and labor regulatory regimes, most trade unionists and many labor relations professionals have viewed the rapid march of globalization with alarm. The question of whether the organized labor movements in the Western world can protect their gains in a global economy has been discussed, debated, and bemoaned at length over the past ten years. Despite a pervasive sense of gloom, there has been some optimistic speculation that alternative forms of labor regulation might emerge in the post-trading bloc world. For example, it is sometimes posited that transnational labor institutions will develop, and transnational labor standards will be adopted, that will replace a national labor regulatory regime with an international one. This scenario suggests that transnational labor standards will emerge, along with transnational labor movements to implement them and multilateral tribunals to enforce them, which will reproduce at the international level the protections labor currently enjoys domestically.

27. ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* (Henry Reeve trans., Schocken Books 1961) (1835). See generally ROBERT A. DAHL, *POLYARCHY* (1971); ROBERT A. DAHL, *WHO GOVERNS* (1961).

28. On the role of unionism on the democratic process, see Thomas C. Kohler, *Civic Virtue at Work: Unions as Seedbeds of the Civic Virtues*, 36 B.C. L. REV. 279, 300-02 (1995).

This view is not wholly fanciful — there are some developments in the European Union (EU) to support it — but it is a bit rosy-eyed.²⁹ It neglects the crucial questions of which regulations will prevail at the multilateral level and how they will be enforced.³⁰ The rosy-eyed view also ignores the fact that at present there are no serious cross-border labor organizations which can engage in multilateral bargaining.³¹ Furthermore, it avoids the problem of how multilateral agencies — agencies whose relationship to any particular political constituency is attenuated to begin with — will be persuaded to adopt protective labor regulations in the first place.³²

Rather than embark on an imaginary journey into possible forms of labor regulation in a post-trading bloc world, it makes sense to begin with an analysis of the types of transnational labor regulation that are emerging in fact. Examining developments in the EU and in the North American Free Trade Agreement (NAFTA), we can identify four distinct types or models of transnational labor regulation — each one possessing particular strengths and weaknesses and each one embodying a unique theory of the role of domestic labor regulation.

A. Two European Approaches to Transnational Labor Regulation

Each of the member states of the European Union has its own legal history, customs, norms, and cultures that have shaped its system of labor rights. Each state has developed a large body of legal rules, statutes, regulations and procedures which establish employment standards for individual workers, including statutory minimum wages, unemployment and job training provisions, and so forth. In addition, each EU country has its own distinct legal and institutional structure of collective bargaining which differs markedly from each of the others.

29. See Streeck & Schmitter, *supra* note 3, at 152–53 (contrasting emerging Single European Community with Pre-existing European Welfare states).

30. See, e.g., Benjamin Rozwood & Andrew R. Walker, *Side Agreements, Sidesteps, and Sideshows: Protecting Labor from Free Trade in North America*, 34 HARV. INT'L L.J. 333, 342 (1993) (discussing difficulty of finding shared normative standards for employment protections between the United States and Mexico).

31. Baron von Maydell, *supra* note 12, at 1416, 1418–19. *But see* Friedman, *supra* note 24, at 1422 (discussing the emergence of European-wide trade union councils within particular corporations).

32. See Peter Ludlow, *The Maastricht Treaty and the Future of Europe*, WASHINGTON Q., Autumn 1992, at 119, 132 (discussing problem of legitimacy and democracy within the EU). See also Stephen Gill, *The Emerging World Order and European Change: The Political Economy of European Union*, in SOCIALIST REGISTER 1992 157, 166 (Ralph Miliband & Leo Panitch eds., 1992) (problem of lack of political legitimacy and democratic accountability in European integration).

For example, German labor laws provide for industry-wide unions which engage in industry-wide collective bargaining at the national-level. At the same time, German unions have the legal right to participate both on corporate boards of directors and in work councils at the workplace.³³ In France, there are several competing national unions in each industry, each of which engages in bargaining at both the national and local level, resulting in fragmented bargaining. There are no legally established co-determination rights but there are extensive protections for individual employment and for collective action.³⁴ In Great Britain, unions engage in collective bargaining but have no co-determination rights and relatively few legally enforceable rights of any sort.³⁵ Other countries have other union structures and legal regimes of collective bargaining, all of which give protection to some form of collective bargaining, but no two of which are identical. In addition, EU countries differ on the forum used to enforce collective labor rights: some have a system of labor courts to enforce collective labor rights, some rely on specialized administrative tribunals, and some on courts of general jurisdiction.

The EU addresses this plurality of regulation in two ways. One approach, known as preemptive legislation, includes treaty provisions and EU *règlements* that are directly applicable to citizens of the member states. These regulations set uniform rules for certain labor rights and have priority over conflicting national legislation. Thus, they are a form of unified transnational labor legislation.

The other approach is known as harmonization. Harmonization involves structured incentives and pressures created by the EU legal rules which induce the member states to bring their separate labor laws into conformity. Harmonization occurs directly, through EU Directives, and indirectly through collateral regulations. It is a strategy of regulation that is based both upon the short-term acceptance of differences in regulatory regimes and the assumption that, over time, these differences will fade and there will emerge one set of norms, rules and procedures.

33. See Clyde W. Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. COMP. L. 367 (1980). See also Lawrence S. Zakson, Note, *Worker Participation: Industrial Democracy and Managerial Prerogative in the Federal Republic of Germany, Sweden and the United States*, 8 HASTINGS INT'L & COMP. L. REV. 93, 114-26 (1984).

34. Xavier Blanc-Jouvan, *Worker Involvement in Management Decisions in France*, 58 TUL. L. REV. 1332, 1345-47 (1984). See generally MICHAEL DESPAX & JACQUES ROJOT, *LABOUR LAW AND INDUSTRIAL RELATIONS IN FRANCE* (1987).

35. LORD WEDDERBURN, *THE WORKER AND THE LAW* 343 (3d ed. 1986).

1. Preemptive Legislation

The European Economic Community Treaty (EEC Treaty) sets out specific provisions of supranational law in certain areas, and sets up structures for EU-wide regulation in other areas. There are very few specific provisions in the EEC Treaty that bear directly on labor law. The few labor provisions that do exist can be found in Title III, The Free Movement of Persons, Services, and Capital. Under Title III, there are provisions concerning the freedom of movement of employees, and provisions concerning the treatment of and social benefits for migrant workers.³⁶ There are also provisions concerning professional workers.³⁷ Elsewhere in the EEC Treaty there are provisions that mandate equal treatment between male and female workers.³⁸ However, these provisions state general principles, and have not, in themselves, given rise to enforceable rights.³⁹

The EEC Treaty also established a Social Fund, the goal of which is to provide vocational training and resettlement allowances for displaced workers, and to enable workers to be geographically and occupationally mobile.⁴⁰ The Social Fund does not give workers employment rights nor does it regulate labor conditions. It merely cushions the transition period for dislocated workers.

In addition to the principles of labor protection contained in the EEC Charter, the EU Council of Ministers has the power to enact specific labor regulations (*règlements*) that are consistent with the Charter.⁴¹ To date, the EU has promulgated very few *règlements* on labor matters.⁴² The few that have been published deal with migrant workers, occupational safety and health, and equality between men and women.⁴³

36. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] arts. 48-52.

37. EEC TREATY arts. 59-62.

38. EEC TREATY art. 119.

39. See Brian Bercusson, *Maastricht: A Fundamental Change in European Labour Law*, 23 INDUS. REL. J. 177, 178 (1992).

40. EEC TREATY arts. 123-128.

41. See Baron von Maydell, *supra* note 12, at 1406-07 (discussing legislative competence rules established by the EEC Treaty).

42. Weiss, *supra* note 20, at 1435-37.

43. Commission Regulation 1612/68 of October 15, 1968, 1968 J.O. (L 257) 2 (free movement of workers); Commission Regulation 1251/70 of June 29, 1970, 1970 J.O. (L 142) 24 (migrant workers' right to remain in Member State); Commission Regulation 1408/71 of June 14, 1971, 1971 J.O. (L 49) 2 (vesting and portability of pensions for migrant workers); Commission Regulation OJC 6271 of October 16, 1991 (establishing European Agency for Safety and Health). The issue of equal pay between men and women is specifically provided

In 1989, European lawmakers attempted to enact a Community Charter of Fundamental Social Rights of Workers (known as the "Social Charter"). The Social Charter contained a list of "Fundamental Social Rights of Workers," which included occupational health and safety protections, guarantees for the right to organize and bargain collectively, rights to adequate social welfare benefits, workplace consultation and participation rights, and protection for children, older workers, and the disabled.⁴⁴ Eleven of the twelve member states approved the Social Charter — all but the United Kingdom. As a result, the eleven states that ratified the Social Charter have treated it as a mandate for the European Commission to formulate directives for the protection of labor and the promotion of collective bargaining.⁴⁵

2. Harmonization

As discussed, the EEC Treaty makes it possible to unify some employment rights by means of multilateral *règlements*, but the Council of Ministers has not yet pursued this course of action. Rather, in most instances, the Council has attempted to encourage its member nations to "harmonize" their labor and employment laws. The goal of harmonization is to provide incentives for convergence, or what the EU scholars call "approximation," between collective bargaining systems.⁴⁶ Harmonization occurs in two ways: through EU Directive, and through indirect pressures imposed by regulation in other areas that have a collateral impact on labor matters.

(a) Direct Harmonization

An EU directive is a regulation enacted by the EU Council which the member states must then enact into their domestic legislation. There is a time period within which the member states are required to "transpose" the directive into their own domestic law.⁴⁷ Usually the directive sets minimum standards in a particular area which the member states must then "transpose" in ways that are consistent with their own distinct labor law system.

in the EEC TREATY, art. 119, and the courts have held that this provision is directly enforceable by EU citizens. See Case 43/75, *Defrenne v. Sabera*, 1976 E.C.R. 455, 2 C.M.L.R. 98 (1976). See generally Weiss, *supra* note 20, at 1436-37.

44. See Friedman, *supra* note 24, at 1423.

45. Bercusson, *supra* note 39, at 179.

46. Baron von Maydell, *supra* note 12, at 1409.

47. Weiss, *supra* note 21, at 1442.

There are presently EU Directives in effect in several areas of labor regulation. In 1975, the EU lawmakers adopted a directive on collective redundancies, also known as dismissals for economic reasons. This directive provided that firms who intend to implement a mass layoff must notify workers affected and confer with the worker representatives.⁴⁸ In 1977 a directive designed to protect workers faced with takeovers and other changes in the ownership of their firms was adopted.⁴⁹ The 1977 directive provides that employees of companies that were involved in a transfer of ownership of the entire company or a part thereof must have their preexisting contractual rights, including collective bargaining rights, honored by the new entity. A 1980 directive on insolvencies provided that firms must guarantee payment of workers' outstanding wage claims and benefits prior to the commencement of insolvency proceedings.⁵⁰

There have also been directives addressing workplace safety and health and equal treatment for women and men.⁵¹ In addition, the EU is considering several directives concerning part-time workers, service workers and temporary workers.⁵²

In 1992 at Maastricht, eleven of the twelve EU member states agreed to a Protocol on Social Policy.⁵³ In the negotiations leading up to the Maastricht Agreement, there were considerable pressures to enlarge the EEC Treaty's social policy provisions. Due to the United Kingdom's continued opposition, however, there was no unanimous agreement. Instead, provisions based on the previous Social Charter were annexed as a Social Agreement accepted by all except the UK, and these eleven member states were authorized by the Protocol on Social Policy to utilize the mechanisms of the EEC for the purposes of implementing

48. Council Directive 75/129, 1975 O.J. (L 48) 29. This directive was interpreted narrowly by the European Court in Case 284/83, *Dansk Metalarbejderforbund v. H. Nielson & Søn*, 1985 E.C.R. 553. See generally Weiss, *supra* note 20, at 1449-56 (comparing EC directive on mass layoffs with Workers Adjustment and Retraining Act (WARN) under American labor law).

49. Council Directive 77/187, 1977 O.J. (L 61) 26. See Case 324/86, *Foreningen AF Arbejdsledere v. Daddy's Dance Hall*, 1988 E.C.R. 739 (holding that an employee cannot waive the rights conferred by the mandatory provisions of Directive 77/187). See also Weiss, *supra* note 20 at 1457-59 (comparing transfer of ownership directive to successorship rights under American labor law).

50. Council Directive 80/987, 1980 O.J. (L 283) 23. See Weiss, *supra* note 20, at 1449 (comparing directive on insolvencies to workers rights under U.S. federal bankruptcy law).

51. See John T. Addison & Stanley Siebert, *Recent Developments in Social Policy in the New European Union*, 48 INDUS. & LAB. REL. REV. 5, 8-13 (1994) (tables showing passage of various Directives).

52. Bercusson, *supra* note 39, at 179-80.

53. *Id.* at 182.

that Agreement. This UK 'opt-out' means that the Social Policy proposals which the UK government is unwilling to accept may be agreed upon among the other member states and become binding on all except the UK.

The Maastricht Protocol, also known as the Social Agreement, made a number of changes in the manner in which labor directives are implemented.⁵⁴ Most significantly, it provided that labor directives can be implemented through collective bargaining agreements as well as through legislation and administrative regulation.⁵⁵ In addition, the 1992 Maastricht Protocol on Social Policy expanded the legislative capacity of the EU. It set out a series of issues on which the EU could legislate on the basis of majority voting, rather than unanimity which had previously been required.⁵⁶ These areas include health and safety protection, working conditions, workers' information and consultation rights, and equality between men and women.

Article 2(6) of the Social Agreement makes it clear that most collective labor rights are excluded from majority voting. It states that "the provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs."⁵⁷ Thus, unanimous voting was retained for directives in the areas of job security, representation, and collective defense of workers' interests.⁵⁸

To date, the EU has not attempted to legislate or harmonize in the field of collective bargaining law.⁵⁹ It has, however, attempted to legislate works councils. In September 1994, the first Directive was issued under the Social Agreement, providing for the establishment of European Works Councils or other consultative procedures by all European multinational enterprises.⁶⁰ These are workplace-based organizations established for the purpose of consultation and sharing information, not for purposes of providing worker representation. A number of multina-

54. For a thorough discussion of the Maastricht Protocol, see ROGER BLANPAIN, *LABOUR LAW AND INDUSTRIAL RELATIONS OF THE EUROPEAN UNION: MAASTRICHT AND BEYOND* 31-54 (1992).

55. Bercusson, *supra* note 39, at 181-84. This change increases the role of collective bargaining within the EC, yet it also creates the possibility that the protections contained in certain directives can be bargained away.

56. *Id.* at 182-83; Weiss, *supra* note 20, at 1431-32.

57. Bercusson, *supra* note 39, at 183.

58. Blanpain, *supra* note 54, at 39-40.

59. Baron von Maydell, *supra* note 12, at 1416. Brian Bercusson has noted that the implementation of community labor law through collective bargaining has attained recognition in the EU, and may lead to future EU directives regarding collective bargaining. See Bercusson, *supra* note 39, at 181-82.

60. Council Directive 94/45, 1994 O.J. (L 254) 64.

tionals have moved to set up such Works Councils, and although it is not legally binding on the UK, some have included their UK workers in the arrangements.⁶¹

EU directives have force only to the extent that they are implemented by the member states. As a consequence, the actual meaning of the directives can vary greatly between states. However, in *Francovich v. Italy*, a landmark decision in 1991, the European Court of Justice ruled that a member country could be held liable to an individual worker for restitution if it failed to enact a labor protection directive.⁶² In that case, two Italian workers sued the Italian government for failing to implement the 1980 Directive concerning worker protection in the event of an employer's insolvency. The Court ruled that it is "inherent in the Treaty system" that the member states are liable to individuals who are damaged by the state's failure to implement directives.⁶³ This decision will give added enforcement power to the directives, and may lead to a uniform interpretation of the precise rights and protections contained in them. If that happens, the directives will come to resemble the preemptive legislation of the *règlements* discussed above.

(b) Indirect Harmonization

In addition to harmonization by means of EU labor directives, the EU can harmonize labor regulation indirectly by means of regulations and directives in other areas of law. For example, labor policy is implicated by regulations and directives in the area of corporate law. The EU has a long-standing draft directive on the structure of stock corporations and a proposal for a European-wide stock corporation. However, the proposals have not yet been enacted, due largely to disagreement about the proper role of labor in the structure of the corporation. Some member states have extensive codetermination rights for workers built into their current laws on corporate structures, while some states do not. The EU states have not been able to agree whether or not to include codetermination rights in the EU directive on corporate structure, so the directive has not yet been adopted.⁶⁴ However, if any directive on corporate structure were adopted, it would have a profound effect on labor's participation rights in all EU nations.⁶⁵

61. Robert Taylor, *Entering Into A New Direction*, FIN. TIMES, Apr. 10, 1995, at 11.

62. Joined Cases C-6/90 and C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. I-5357, 67 C.M.L.R. 66 (1993). But see *id.* at I-5414 (discussing qualifications of the right to damages).

63. *Id.* at I-5414, 67 C.M.L.R. at 114.

64. Baron von Maydell, *supra* note 12, at 1414-15; Murphy, *supra* note 6, at 627-28. See also Weiss, *supra* note 20, at 1461-62.

65. Streeck & Schmitter, *supra* note 3, at 152.

Similarly, any EU directive on insolvency could have a significant impact on labor. For example, French insolvency law has, as one of its primary objectives, the preservation of workers' jobs. Under French bankruptcy law, this objective has a higher priority than the protection of stockholders.⁶⁶ If this principle is carried over into a European-wide bankruptcy code, it could give labor unions substantial participation rights in bankruptcy proceedings and a greater role in the structure of their firms.⁶⁷

3. Observations about the European Approaches

As we have seen, the EU has utilized *règlements* and directives to set minimum standards in some areas of employment regulation, but it has not attempted to harmonize collective labor regulations. The different approaches toward individual employment regulation and collective labor regulation is understandable in the context of European labor relations systems. Prior to European integration, each EU country had its own legislation establishing a bundle of minimal terms for employment contracts — terms such as minimum wage rates, old age assistance, maximum hours, occupational health and safety protection, health insurance, disability provisions, or job security protection. Frequently these employment standards were similar in structure but differed in their quantitative dimension, such as the precise amount of the minimum wage or the total sum paid for a particular disability. Because the differences between countries' labor standards were quantitative rather than qualitative, it has been possible to devise a single set of minimal terms which all member countries are required to adopt. Once a unified set of minimal terms is mandated, each country can adjust its own terms upward or downward to comply with the mandate. No vested interests are disrupted, no labor leaders lose their constituencies, no labor lawyers lose the value of their expertise, and no individual workers lose their jobs. Thus it has been feasible to develop transnational labor standards for individual labor rights within the EU, and to make them mandatory by means of EU-level legislation.

However, when it comes to transnational regulation of collective labor relations, neither harmonization nor preemptive legislation is likely to be a simple expedient. In the area of collective bargaining, each country's own institutions, customs, and labor relations practices have given rise to labor organizations, employer organizations, and labor

66. See CHRISTOPHER LIVIDAS, *WINDING-UP OF INSOLVENT COMPANIES IN ENGLAND AND FRANCE* 281–82 (1983).

67. Cf. Stone, *Labor and the Corporate Structure*, *supra* note 10, at 160 (on participation rights for labor under U.S. bankruptcy code).

relations professionals who have a vested stake in the continuation of their own national system. Each country's incumbent labor relations personae, whether they represent a management, labor or neutral perspective, can be expected to resist efforts at transformations that threaten their own particular niche, role, or expertise. They will resist any transnational regulation that attempts to supersede those local regulations, even one that would benefit their own country's labor movement generally. Hence, for collective labor rights, both harmonization and preemption may be slow to develop.⁶⁸

B. Two North American Approaches to Transnational Labor Regulation

In North America, there has been no attempt to harmonize collective bargaining systems or to unify labor standards, but there has nevertheless been an expansion of transnational labor regulation. This has occurred in two ways: (1) The North American Free Trade Agreement's (NAFTA's) mechanisms for cross-border monitoring and enforcement of labor standards; and (2) extraterritorial application of U.S. labor law. Both North American models of transnational labor regulation create mechanisms through which the labor laws of one country are applied to citizens or corporations located in another country.

The North American models of transnational labor regulation differ from the European ones in that the cross-border application of labor laws in the North American models is neither cumulative nor on-going. Rather, the two North American models provide a means by which citizens of one country are given rights or obligations under another country's labor laws on a one-time, single-use basis. NAFTA's cross-border monitoring and enforcement permits one country to enforce another country's labor laws in a multilateral tribunal. Extraterritorial jurisdiction permits one country to enforce its own labor laws against another country in its own tribunal. Neither model involves changing the labor laws of any country. In contrast to the two European models discussed above, the two North American models do not attempt to integrate the separate systems of domestic labor regulation. Rather, they embody an approach to transnational regulation that can be termed the *interpenetration* of two legal systems, the temporary incursion of one distinct and autonomous system of regulation into a separate one. The

68. On the difficulties of developing a unified position within the EC, see Lowell Turner, *Beyond National Unionism?*, in *THE SHIFTING BOUNDARIES OF LABOR POLITICS* (Richard Locke & Kathleen Thelen eds., forthcoming 1995) (manuscript at 11-12, on file with *Michigan Journal of International Law*). See also Peter Lange, *The Politics of the Social Dimension*, in *EURO-POLITICS: INSTITUTES AND POLICYMAKING IN THE "NEW" EUROPEAN COMMUNITY* 225 (Albert M. Sbragia ed., 1992).

North American models do not aim to facilitate convergence and ultimate unification of regulatory systems, as is the goal of the European models of labor regulation. Instead, the North American models permit temporary, limited-purpose forays by participants of one system into the affairs of another.

1. Cross-Border Monitoring and Enforcement

The NAFTA was signed by the heads of state of Mexico, Canada, and the United States in 1992, and ratified by the respective national legislatures in 1993. Many of its provisions became effective in January 1994. The initial goal of the treaty is to eliminate friction in the mobility of capital and goods between Mexico, Canada, and the United States.⁶⁹ NAFTA's ultimate goal is to create a trans-American free trade bloc.

In August 1993, before NAFTA was submitted to the U.S. Congress for approval, President Clinton negotiated a side accord on labor cooperation, known as the North American Agreement on Labor Cooperation ("NAFTA Labor Side Agreement"),⁷⁰ in an effort to address concerns raised by organized labor that NAFTA would cause massive job loss.⁷¹ The groups that advocated a NAFTA Labor Side Agreement hoped it would lead to equal and fair labor standards throughout the trading bloc.⁷²

The NAFTA Labor Side Agreement that was negotiated did not imitate the European models of transnational labor regulation. It does not seek to equalize or establish a minimum floor of labor standards or labor rights.⁷³ Unlike the power that the EU Commission has to enact labor-related *règlements* and directives under the EEC Treaty, the agencies established by the NAFTA Labor Side Agreement have no authority over the actual labor standards of the member countries. Neither does

69. North American Free Trade Agreement, Dec. 17, 1992, pmbl., 32 I.L.M. 289, 297.

70. North American Agreement on Labor Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, H.R. Doc. No. 160, 103d Cong., 1st Sess. 48, 32 I.L.M. 1502 (1993) [hereinafter NAFTA Labor Side Agreement].

71. For a detailed chronology and analysis of organized labor's opposition to NAFTA, see Jefferson Cowie, *The Search for a Transnational Labor Discourse for a North American Economy: A Critical Review of U.S. Labor's Campaign Against NAFTA* (1994) (Working Paper #13, Duke-University of North Carolina Program in Latin American Studies).

72. Rozwood & Walker, *supra* note 30, at 335. See also Morley Gunderson, *Labor Adjustment Under NAFTA: Canadian Issues*, 4 N. AM. OUTLOOK 3, 11-13 (discussing the Canadian labor movement's concerns regarding NAFTA).

73. See Jefferson Cowie & John D. French, *NAFTA's Labor Side Accord: A Textual Analysis*, 9 LATIN AM. LAB. NEWS 5 (1993-94) (Center for Labor Research and Studies of Fla. Int'l University).

the NAFTA Labor Side Agreement attempt to harmonize collective bargaining regulation so as to bring labor conditions between countries into parity. To the contrary, the NAFTA Side Agreement states that no country is required to alter its labor standards in any way.⁷⁴ The NAFTA Labor Side Agreement merely addresses the enforcement of each country's existing labor laws.

The only discussion of substantive labor protections in the NAFTA Labor Side Agreement is contained in Article I, which notes that one of the objectives of the Side Agreement is to "promote, to the maximum extent possible, the labor principles set out in Annex 1."⁷⁵ Annex 1 establishes guiding principles that each country should promote *in its own way* the ideals of (1) protecting the right to organize, bargain and strike; (2) prohibiting forced labor, child labor, sub-minimal wages, and employment discrimination; and (3) promoting equal pay for equal work, occupational safety and health, and equal treatment for migrant workers.⁷⁶ These "labor principles" are stated in a general way, as aspirations rather than as enforceable obligations.

While the NAFTA Labor Side Agreement sets no substantive employment standards, it does provide procedures to ensure that the signatory states enforce their own labor laws. However, the procedures do not apply to all the labor laws of the states. The NAFTA Labor Side Agreement's procedures only apply to the enforcement of a country's labor laws pertaining to occupational health and safety, child labor, and minimum wages.⁷⁷ Notwithstanding whether the laws of each country are weak or strong, the NAFTA Labor Side Agreement provides that in those three areas, the laws should be enforced. Consequently, the procedures for labor law enforcement in the NAFTA Labor Side Agreement do not attempt to create unified labor standards, even in the areas to which they pertain.

The NAFTA cross-border enforcement procedures provide that when one country believes that another country is failing to enforce its labor laws in the three areas covered — safety, child labor, and minimum wages — that country can bring a complaint to the Commission for Labor Cooperation ("the Commission").⁷⁸ The Commission, consisting of a Secretariat and the labor minister of each member state, will then

74. NAFTA Labor Side Agreement, *supra* note 70, art. 2, H.R. Doc. 160 at 51, 32 I.L.M. at 1503.

75. *Id.* art. 1(b), at 50, 32 I.L.M. at 1503.

76. *Id.* annex 1, at 80-82, 32 I.L.M. at 1515-16.

77. *Id.* arts. 4-5, 49, at 52, 76-78, 32 I.L.M. at 1503-04, 1513-14.

78. *Id.* arts. 8-14, at 54-60, 32 I.L.M. at 1504-07 (describing makeup and function of council).

attempt to resolve the dispute through consultation and cooperation.⁷⁹ Each of the three signatory states must establish a National Administrative Office (NAO) to provide information to the Commission.⁸⁰ If the dispute is not resolved through consultation by the Commission, one of the three states may request that an Evaluation Committee of Experts (ECE) be convened.⁸¹ The ECE is comprised of three members selected by the Council.⁸² Its task is two-fold: (1) it considers whether there has been a pattern or practice of nonenforcement of the relevant labor standard, so long as the labor standard is health and safety-related or otherwise within the three covered areas; and (2) it determines whether the labor standard is "covered by mutually recognized labor laws."⁸³ The ECE has 120 days to issue a preliminary report⁸⁴ and another 60 days to make a final report.⁸⁵

After the final report is issued, the two countries not targeted by the report may request further consultations on the issue of whether there has been a persistent pattern of nonenforcement by the third country.⁸⁶ If accord is still not reached, any country may request a special session of the Council to resolve the dispute.⁸⁷ If the dispute is still not resolved within another 60 days, any country may make a written request for arbitration.⁸⁸ An arbitration is held if two-thirds of the Council members vote affirmatively to send the dispute to arbitration.⁸⁹ Under the Side Agreement, a five member arbitration panel has a maximum of 240 days to submit its final report.⁹⁰

The cross-border enforcement procedures are clearly drawn-out and cumbersome. In addition, they are laced with qualifiers and exceptions.

79. *Id.* arts. 20–26, at 62–65, 32 I.L.M. at 1507–09. For a detailed description of the NAFTA Labor Side Agreement's enforcement procedures, see McGuinness, *supra* note 9, at 582–87; Cowie & French, *supra* note 73 (discussing NAFTA Labor Side Agreement's provisions on enforcement); Gilles Trudeau & Guylaine Vallee, *Economic Integration and Labour Policy in Canada*, in REGIONAL INTEGRATION AND INDUSTRIAL RELATIONS IN NORTH AMERICA (Maria L. Cook & Harry C. Katz eds., 1994).

80. NAFTA Labor Side Agreement, *supra* note 70, arts. 15–16, H.R. Doc. 160 at 60–61, 32 I.L.M. at 1507.

81. *Id.* art. 23, at 63, 32 I.L.M. at 1508.

82. *Id.* art. 24, at 63–64, 32 I.L.M. at 1508.

83. *Id.* annex 23, at 83, 32 I.L.M. at 1516.

84. *Id.* art. 25, at 64–65, 32 I.L.M. at 1508–09.

85. *Id.* art. 26, at 65, 32 I.L.M. at 1509.

86. *Id.* art. 27(1), at 65–66, 32 I.L.M. at 1509.

87. *Id.* art. 28, at 66–67, 32 I.L.M. at 1509.

88. *Id.* art. 29(1), at 67, 32 I.L.M. at 1509.

89. *Id.*

90. *Id.* art. 36–37, at 70–71, 32 I.L.M. at 1511.

For example, the enforcement procedure calls for sanctions only upon a finding that the party has engaged in a "*persistent* pattern of failure . . . to *effectively* enforce its occupational safety and health, child labor, or minimum wage technical labor standards"⁹¹ The terms "*persistent*" pattern of failure, or a lack of "*effective*" enforcement, are vague.⁹² In addition, Article 49 carves out an enormous exception to the cross-border enforcement procedure. Article 49 states that a party does not fail to effectively enforce its labor laws if its action or inaction either:

(a) reflects a reasonable exercise of the agency's or the official's discretion with respect to investigatory, prosecutorial, regulatory or compliance matters; or

(b) results from *bona fide* decisions to allocate resources to enforcement in respect of other labor matters determined to have higher priorities. . . .⁹³

There is almost no instance, at least under U.S. labor law, in which government failure to enforce a labor law cannot be characterized so as to fall within one of these exceptions. The exceptions found in Article 49 provide a legal excuse for almost all nonenforcement. In light of these broad exceptions, it is difficult to imagine any situation in which the agreement's procedures for obtaining labor law enforcement would apply.

While the NAFTA Labor Side Agreement's enforcement procedures appear to be limited to complaints involving nonenforcement of laws regarding occupational health and safety, child labor, and minimum wages, some union groups have argued that they have a broader applicability. In February 1994, two U.S. unions filed complaints concerning alleged violations of the right to organize unions. The Teamsters Union and the International Union of Electrical Workers complained that General Electric Corporation and Honeywell, Inc., respectively, violated the NAFTA Labor Side Agreement's protection of free association and union organizing contained in Annex I by firing workers for organizing activities in their Mexican subsidiaries. In April, the U.S. National Administrative Office (NAO), the agency in the U.S. that determines

91. *Id.* art. 36(2)(b), at 70, 32 I.L.M. at 1511 (emphasis added). Sanctions can take the form of monetary fines or trade sanctions such as the imposition of import duties on the violator's goods.

92. Article 49 defines "*persistent pattern*" as a sustained or recurring pattern of practice. See *id.* art. 49, at 76-78, 32 I.L.M. at 1513-14.

93. *Id.* at 77, 32 I.L.M. at 1513.

whether to bring complaints under the NAFTA Labor Side Agreement, agreed to review the charges.⁹⁴ While the NAO could have used this case to give a broad interpretation to Annex I of the NAFTA Labor Side Agreement, it decided against that course. Instead, on October 13, 1994, the NAO said it had found no evidence that Mexico had failed to enforce its labor laws and dismissed the complaints.⁹⁵

As currently drafted and interpreted, the NAFTA Labor Side Agreement will not equalize labor standards within North America, nor will it harmonize or bring consistency to the vastly different collective bargaining systems that exist within North America.⁹⁶ At best, the NAFTA Labor Side Agreement might lead to more vigorous enforcement of each country's own pre-existing labor laws in some limited areas.

2. Extraterritorial Jurisdiction

Another North American model of transnational labor regulation is the application of domestic labor regulation extraterritorially. From a United States standpoint, this means applying U.S. labor law to labor disputes that occur beyond U.S. boundaries, or to parties who are not U.S. citizens. Extraterritorial jurisdiction is becoming an increasingly important feature of American labor law. It is a trend that can be seen in all three branches of government. U.S. courts are beginning to interpret some of the labor relations statutes in ways that give them extraterritorial reach; Congress has recently amended two major labor law statutes so as to make them expressly extraterritorial; and the Executive Branch has begun to condition trading privileges for foreign countries on compliance with American labor standards.

(a) Case Law on Extraterritorial Jurisdiction

It is often stated in labor cases that American law does not apply extraterritorially.⁹⁷ The no-extraterritoriality maxim was first expressed in a nonlabor case decided in 1909. In *American Banana Co. v. United Fruit Co.*,⁹⁸ the Supreme Court stated that courts should presume that the jurisdiction of American statutes was restricted to American territo-

94. See 145 Lab. Rel. Rep. (BNA) 493 (Apr. 25, 1994). For a text of the complaints, see *In re Honeywell, Inc.*, 390 Lab. L. Rep. (CCH) 9499 (Mar. 4, 1994). See also McGuinness, *supra* note 9, at 587-90.

95. 197 Daily Labor Reporter (BNA) AA-1 (Oct. 14, 1994).

96. See Rozwood & Walker, *supra* note 30, at 345-47.

97. *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

98. 213 U.S. 347 (1909).

ry.⁹⁹ In 1925, the Supreme Court applied the no-extraterritorial jurisdiction presumption to a labor case for the first time.¹⁰⁰ The case, *New York Central Ry. v. Chisholm*,¹⁰¹ arose under the Federal Employers' Liability Act (FELA) — a workers compensation statute for the railroads. The Court held that the FELA did not apply to U.S. citizens working for U.S. railroads who were injured in Canada.¹⁰²

In 1949, in *Foley Bros., Inc. v. Filardo*,¹⁰³ the United States Supreme Court again invoked the no-extraterritoriality presumption and refused to apply the federal eight-hour law to U.S. construction workers hired by a U.S. corporation to perform construction work on projects in foreign countries.¹⁰⁴ The *Foley* Court explained the presumption against extraterritoriality as a rule of construction. It noted that while Congress had the authority to enforce its laws beyond the territorial boundary of the United States, that intent must be expressly indicated in the legislation itself. Since Congress ordinarily is concerned only with domestic conditions, the Court ruled that in the absence of clear language by Congress to the contrary, it will presume that legislation is not extraterritorial.¹⁰⁵

In the decades after *Foley Bros.*, the Supreme Court and lower federal courts have applied the presumption against extraterritorial jurisdiction to preclude the application of many federal labor laws to workers outside U.S. territory, including minimum wage laws,¹⁰⁶ collective bargaining laws,¹⁰⁷ the Age Discrimination Act,¹⁰⁸ and the labor protective provisions of the Interstate Commerce Act.¹⁰⁹ In these cases,

99. *Id.* at 355–57 (no jurisdiction for alleged Sherman Act violations that occurred in Costa Rica and Panama).

100. There were 19th century applications of this principle in cases involving slavery, which were arguably "labor cases." See Note, *Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest and Transnational Norms*, 103 HARV. L. REV. 1273, 1287 (1990) [hereinafter *Constructing the State Extraterritorially*].

101. 268 U.S. 29 (1925).

102. *Id.* at 32. For a discussion and critique of 19th century cases involving extraterritorial jurisdiction issues in cases involving slavery, see *Constructing the State Extraterritorially*, *supra* note 100, at 1287–89.

103. 336 U.S. 281 (1949).

104. *Id.* at 285.

105. *Id.*

106. See, e.g., *Cruz v. Chesapeake Shipping*, 932 F.2d 218, 224 (3d Cir. 1991).

107. See *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 22 (1963) (National Labor Relations Act (NLRA) does not apply extraterritorially); *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957). See also *Air Line Dispatchers Assn. v. National Mediation Bd.*, 189 F.2d 685, 690 (D.C. Cir. 1951) (no extraterritorial jurisdiction for the Railway Labor Act).

108. See *Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985).

109. *Van Blaricom v. Burlington N. R.R.*, 17 F.3d 1224 (9th Cir. 1994).

the courts relied on the *Foley Bros.* rationale that Congress was presumed to have been concerned primarily with domestic problems when it legislated. They treated the no-extraterritoriality presumption as a rule of construction regarding Congressional intent.

While the presumption against extraterritorial jurisdiction remained firm for a long time in labor cases, there were departures in commercial law cases almost from the outset. In 1911, barely two years after the *American Banana Co.* decision, the Supreme Court applied the Sherman Act to an agreement made in England to monopolize U.S. tobacco imports and exports in the *United States v. American Tobacco Co.* case.¹¹⁰ In 1927, the Court applied the Sherman Act to American companies who conspired to conduct a monopoly wholly in Mexico in *United States v. Sisal Sales Corp.*¹¹¹ It justified its result by reasoning that the monopoly would have direct effects within the United States.¹¹² In *Sisal Sales Corp.*, the Court avoided overruling *American Banana Co.* by narrowly interpreting "extraterritorial" so as to exclude from its definition those deliberate acts by conspirators that "brought about forbidden results within the United States."¹¹³

In 1945, Judge Learned Hand of the Second Circuit articulated a new principle for extraterritorial jurisdiction. In *U.S. v. Aluminum Co. of America*,¹¹⁴ he held that the Sherman Act applied to a group of non-U.S. nationals who allegedly formed a conspiracy to control a product market, even though the acts occurred outside the United States and there was no domestic conduct on which to base jurisdiction.¹¹⁵ Judge Hand argued that there was jurisdiction under the Sherman Act when a defendant outside the territorial United States had acted with the intent of producing an effect inside the U.S. or had taken actions which, in fact, produced a domestic effect.¹¹⁶ This new principle of jurisdiction based on domestic intent or effect led to vastly expanded use of extraterritorial jurisdiction, particularly in the areas of antitrust, securities, and trademark laws.¹¹⁷

110. 221 U.S. 106, 184 (1911).

111. 274 U.S. 268 (1927).

112. *Id.* at 276.

113. *Id.* See generally Jonathan Turley, "When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality, 84 Nw. U. L. REV. 598, 608-13 (1990); Michael F. Beausang, Jr., *The Extraterritorial Jurisdiction of the Sherman Act*, 70 DICK. L. REV. 187, 189-90 (1966).

114. 148 F.2d 416 (2d Cir. 1945).

115. *Id.* at 443.

116. *Id.*

117. See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (extraterritorial application of Sherman Act); *Continental Ore Co. v. Union Carbide & Carbon*

In 1993, the Supreme Court expanded the extraterritorial reach of the Sherman Antitrust Act still further. In *Hartford Fire Ins. Co. v. California*,¹¹⁸ the Court applied the Act to conduct which occurred exclusively in England and which was lawful under British law. The defendants, U.S. and foreign insurers and reinsurers, were accused of agreeing to boycott certain U.S. insurers in order to force them to change the terms of the coverage they were offering to their customers. The foreign defendants, together with the British government as *amicus curiae*, argued that the conduct was perfectly legal under British law, and that to apply the Sherman Act to such conduct would disrupt a comprehensive regulatory scheme of the insurance and reinsurance market which the British Parliament had established.¹¹⁹ The Supreme Court rejected this argument, finding that there was no actual conflict between U.S. law and British law. Rather, the Court stated that neither the Sherman Act nor the British law required the defendants to engage in conduct that violated the other country's laws. It held that the defendants could only engage in conduct which was lawful under both sets of legal rules.¹²⁰ *Hartford Fire Ins. Co.* made it clear that the Court will place few, if any, limits on the extraterritorial application of the U.S. antitrust laws.¹²¹

Despite the steady expansion of extraterritorial jurisdiction in commercial law cases, courts refused to apply extraterritorial jurisdiction in labor cases for a long time.¹²² However, in recent years, the rationale for finding no-extraterritorial jurisdiction has shifted away from the *American Banana Co.* presumption approach toward an international law/comity approach. For example, in *ILA v. Ariadne Shipping Co.*,¹²³ a

Corp., 370 U.S. 690 (1962) (extraterritorial application of Sherman Act); *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952) (trademark claim under Lanham Act applied extraterritorially); *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968) (extraterritorial jurisdiction for Securities Exchange Act cases).

118. 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993).

119. *Id.* at 2910, 125 L.Ed.2d at 640.

120. *Id.* at 2910-11, 125 L.Ed.2d at 640-41.

121. After *Hartford Fire Ins. Co.*, the only limitation on the extraterritorial reach of the Sherman Act, and other commercial laws by analogy, is Congressional intent. However, as Professor Lea Brilmeyer has shown, Congressional intent in this area is a legal fiction in which intent is often imputed on the basis of unstated judicial policy preferences. See Lea Brilmeyer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, LAW & CONTEMP. PROBS., Summer 1987, at 11, 35.

122. Turley, *supra* note 113, at 617-18. See also Jonathan Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 B.U. L. REV. 339 (1990) (discussing employment discrimination statutes which have proven controversial for courts in resolving extraterritorial claims).

123. 397 U.S. 195 (1970).

1970 maritime labor case, the Supreme Court held that the NLRB had jurisdiction over a U.S. union's picketing of a foreign ship which employed foreign and U.S. longshore workers. In reaching its result, the Court distinguished a long line of maritime labor cases where the no-extraterritorial jurisdiction presumption had been applied. The Court reasoned that the picketing in *ILA v. Ariadne* dealt with the wages paid to American workers and hence did not seek to interfere with the labor relations of a foreign vessel.¹²⁴

In 1991, the Supreme Court explicitly adopted an international law/comity approach to extraterritorial jurisdiction in the case of *E.E.O.C. v. Arabian American Oil Co. ["Aaramco"]*.¹²⁵ There the Court refused to apply Title VII of the Equal Employment Opportunity Act to a U.S. citizen working for a U.S. firm in Saudi Arabia. In explaining its conclusion, the *Aaramco* Court did not speak of the implied or express territorial reach of the legislation. Indeed, Title VII contains both statutory language and legislative history which manifest a Congressional intent that the statute be applied to extraterritorial conduct.¹²⁶ Rather, the Court justified its result solely on the basis of international law principles. The Court said it should not interpret a statute in a way that causes a conflict with the laws of another nation. Thus, it found no jurisdiction.

As the Court's view of the territorial reach of labor legislation has expanded since the 1970s, the National Labor Relations Board's (NLRB's) notion of the territorial reach of its own jurisdiction has also expanded. In 1975, the NLRB applied the National Labor Relations Act (NLRA)¹²⁷ extraterritorially to an American corporation that had discriminated against an American employee who worked at the company's Canadian facility. The employee was fired for attempting to unionize the company's Canadian location.¹²⁸ The NLRB used a center-of-gravity analysis to determine that it had jurisdiction. It found that a number of factors indicated that the employee's job, while physically in Canada, was actually governed by policies set in the United States.¹²⁹ This approach directly contradicted the Supreme Court's approach in *New York Central Ry. and Foley Bros.*

In 1977, the NLRB reversed its longstanding policy of declining to assert jurisdiction over the commercial activities of foreign governments

124. 397 U.S. at 198-201.

125. 499 U.S. 244 (1991).

126. 499 U.S. at 266-67 (Marshall, J., dissenting).

127. 29 U.S.C. §§ 151-169 (1988).

128. *Freeport Transp., Inc.*, 220 N.L.R.B. 833 (1975).

129. *Id.* at 833.

and their agencies operating within the United States.¹³⁰ In 1979, the NLRB ruled that the NLRA applied to a U.S. ship operating within Brazil.¹³¹ The Board found that because the ship carried a U.S. flag, it was, for legal purposes, U.S. territory to which the laws of the United States could be applied.¹³² All of these developments signalled an expansion of the NLRB's view of the statutory and discretionary scope of its extraterritorial jurisdiction.

In the past few years, the circumstances in which courts and the Labor Board have applied the NLRA extraterritorially have expanded significantly. The Second Circuit has held that the Railway Labor Act has extraterritorial application in a case in which a U.S. union bargained with a U.S. carrier over working conditions on foreign soil.¹³³ There are presently two cases pending for review by the full NLRB which involve the issue of the NLRA's application to employees working overseas. In both cases, the administrative law judge applied the statute extraterritorially and the case is before the NLRB on appeal.¹³⁴ In two recent cases, federal appellate courts have applied the NLRA to extraterritorial conduct. In 1992, the Eleventh Circuit applied the secondary boycott prohibitions to an American union that had requested Japanese unions to exert economic pressure against their own Japanese employer.¹³⁵ In doing so, the Court rejected the union's argument that there was no extraterritorial application of the NLRA. It held that union conduct which had the "intent and effect" of gaining an advantage in a labor dispute in the U.S. was within the reach of the statute.¹³⁶ The court went on to reinterpret the presumption against extraterritoriality as "a presumption that Congress intended to avoid 'clashes between our laws and those of other nations which could result in international discord.'"¹³⁷

130. *State Bank of India*, 229 N.L.R.B. 838 (1977). *See also* *The North American Soccer League*, 236 N.L.R.B. 1317, 1322-25 (1978) (Bd. Member Murphy, dissenting in part) (arguing that Board should include Canadian soccer players in bargaining unit of North American Soccer League).

131. *Alcoa Marine Corp.*, 240 N.L.R.B. 1265 (1979).

132. *Id.*

133. *Local 553 v. Eastern Air lines*, 695 F.2d 668 (2d Cir. 1983); *contra* *Independent Union of Flight Attendants v. Pan Am. World Airways, Inc.*, 132 L.R.R.M. (BNA) 2520 (N.D. Cal. 1989) (holding that the Railway Labor Act did not apply to foreign-based employees).

134. *Avco Corp. and International Union*, 313 N.L.R.B. 1357 (1994); *Computer Science Raytheon and I.B.E.W.*, Case No. 12-RC-7612.

135. *Dowd v. International Longshoremens' Ass'n*, 975 F.2d 779 (11th Cir. 1992).

136. *Id.* at 788.

137. *Id.* at 789 (quoting *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)).

In 1994, the Fifth Circuit held that the NLRB had jurisdiction over unfair labor practice charges filed by U.S. nationals who were employed on a U.S. vessel that was operating indefinitely in Hong Kong.¹³⁸ In *N.L.R.B. v. Dredge Operators*, the Fifth Circuit affirmed the NLRB's assertion of jurisdiction to hear an unfair labor practice charge asserted against a shipping corporation. The shipping corporation required the shipper-employer to bargain with the union elected to represent the ship's crew. The ship was a U.S. flag vessel, but at the time of the relevant acts, it operated exclusively in Hong Kong. The Fifth Circuit held the NLRB had statutory jurisdiction because the ship was a U.S. flag ship, and thus was American territory. Therefore, the court said that the application of the NLRA was not extraterritorial.¹³⁹ The court rejected the argument that the NLRB should not exercise discretionary jurisdiction on grounds of international comity, finding that there was no actual conflict between application of the NLRA and the requirements of Hong Kong law.¹⁴⁰

The no-extraterritorial principle has not evaporated in labor law, but its rationale has changed. For example, the Second Circuit recently refused to uphold a jurisdictional claim arising under Section 301 of the Labor Management Relations Act brought by foreign workers against their employer, a foreign subsidiary of a U.S. corporation, in *Labor Union of Pico Korea, Ltd. v. Pico Prods., Inc.*¹⁴¹ However, in explaining its decision, the Court relied on an international law or comity rationale. It said that to construe Section 301 to "enforce collective bargaining agreements between foreign workers and foreign corporations doing work in foreign countries"¹⁴² would lead to "embarrassment in foreign affairs."¹⁴³

All of these case law developments indicate that there has been a change in the attitudes of courts and agencies about the scope of jurisdiction to U.S. labor laws. These changes are consistent with similar changes occurring in the legislative and executive branches of government.

138. *N.L.R.B. v. Dredge Operators, Inc.*, 19 F.3d 206 (5th Cir. 1994).

139. *Id.* at 211.

140. *Id.* at 213-14.

141. 968 F.2d 191 (2d Cir. 1992).

142. *Id.* at 195.

143. *Id.* (quoting *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19 (1963)).

(b) Extraterritorial Provisions in Labor Legislation

On two occasions in the past ten years, Congress expressly provided for extraterritorial application of certain U.S. labor laws. It amended the Age Discrimination in Employment Act in 1984,¹⁴⁴ and the Civil Rights Act in 1991,¹⁴⁵ making both statutes applicable to U.S. corporations employing U.S. workers and operating overseas.¹⁴⁶ Each of these amendments was enacted in response to Supreme Court rulings to the contrary,¹⁴⁷ and both involve anti-discrimination laws. In addition, the Americans with Disabilities Act of 1990 is coextensive in its extraterritorial application with the Civil Rights Act of 1991, so that it also applies to American corporations operating overseas.¹⁴⁸

In 1992 Congress considered a bill that would make the National Labor Relations Act apply to all U.S. companies and their subsidiaries operating in any country that is a signatory to a Free Trade Agreement. The provision was attached to the ill-fated Workplace Democracy Act of 1992, which was stalled in the House Education and Labor Committee.¹⁴⁹ However, these legislative developments demonstrate a legislative willingness to apply some U.S. labor laws extraterritorially — a willingness which may soon be extended to other U.S. laws.

(c) Extraterritorial Application of U.S. Labor Law Through Trade Pacts

In addition to recent judicial and Congressional efforts to make U.S. labor law extraterritorial, and apply it as such, there have been similar developments from the Executive Branch. Prior to NAFTA, several U.S. trade laws contained provisions which permitted the Executive Branch

144. Older Americans Amendments of 1984, Pub. L. No. 98-459, 98 Stat. 1767 (1984) (codified as amended at 29 U.S.C. § 630(f) (1988)).

145. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 2000e(f) (Supp. III 1991)).

146. See generally Joy Cherian, *Enforcement of American Workers' Rights Abroad*, 43 LAB. L.J. 563, 563-64 (1992) (discussing these amendments).

147. See Pfeiffer v. Wm. Wrigley Jr. Co., 755 F.2d 544 (7th Cir. 1984). See generally Derek G. Barella, *Checking the "Trigger-Happy" Congress: The Extraterritorial Extension of Federal Employment Laws Requires Prudence*, 69 IND. L.J. 889, 899-903 (1994) (discussing the court cases that prompted amendments to the Age Discrimination in Employment Act and the Civil Rights Act); James M. Zimmerman, *Extraterritorial Application of Federal Labor Laws: Congress' Flawed Extension of the ADEA*, 21 CORNELL INT'L L.J. 103, 115-18 (1988) (discussing the amendment to the Age Discrimination in Employment Act).

148. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12213 (Supp. III 1991)).

149. Barella, *supra* note 147, at 899-900.

to withhold trade privileges with other countries that did not give their workers certain basic protections, including protection for the right to organize. Of these laws, the most notable were the 1983 Caribbean Basin Initiative (CBI), the 1984 Amendments to the Generalized System of Preferences (GSP), the Omnibus Trade Act of 1988, and the Overseas Private Investment Corporation Act of 1985.¹⁵⁰ All of these acts gave the Executive Branch the power to apply U.S. labor laws extraterritorially by importing their norms into trade decisions. These provisions have been utilized from time to time by U.S. Presidents and by other executive agencies that regulate trade. For example, in 1987, President Reagan, acting pursuant to the 1984 amendments to the GSP, denied trade preferences to Nicaragua, Paraguay, and Romania on the basis of their alleged labor rights violations.¹⁵¹

III. COMPARING AND EVALUATING THE FOUR MODELS

Part II identified and described the four models of transnational labor regulation that have emerged in recent years. The four models can be compared along two dimensions. First, the two European models of transnational labor regulation are *integrative*, seeking to unify labor norms and labor standards. In comparison, the two North American models are *interpenetrative*, seeking to enforce cross-border norms on a one-time, situation-specific basis. Second, the models can be distinguished according to their respective implementation requirements. Two of the models — preemptive legislation and cross-border enforcement — are *multilateral* in the sense that they rely for their implementation on actions by several countries jointly implementing a particular labor standard. Neither preemptive legislation nor cross-border enforcement can occur unless two or more nations decide to apply a particular labor regulation. In contrast, the other two models — harmonization and

150. For a description of each of these measures and others that preceded them, see Steve Charnovitz, *The Influence of International Labour Standards on the World Trading Regime: A Historical Overview*, 125 INT'L LAB. REV. 565 (1987) [hereinafter *Influence of International Labor Standards*]; Steven Charnovitz, *Fair Labor Standards and International Trade*, 20 J. OF WORLD TRADE L. 61 (1986). See also Thomas R. Howard, Note, *Free Trade Between the United States and Mexico: Minimizing the Adverse Effects on American Workers*, 18 WM. MITCHELL L. REV. 507, 518–22 (1992) (discussing U.S. initiatives to link labor conditions to trade); Cowie & French, *supra* note 73, at 16–19; Ian C. Ballon, *The Implications of Making the Denial of Internationally Recognized Worker Rights Actionable Under Section 301 of the Trade Act of 1974*, 28 VA. J. INT'L L. 73 (1988).

151. Charnovitz, *Influence of International Labor Standards*, *supra* note 150, at 573–74. In 1987, the Overseas Private Investment Corporation also withdrew insurance coverage from projects in Nicaragua, Paraguay, Romania, and Ethiopia for their failure to adopt internationally recognized worker rights. *Id.*

extraterritorial jurisdiction — are *unilateral* in the sense that they can be implemented by the unilateral action of one country. Extraterritorial jurisdiction is the ultimate unilateral form of transnational regulation; it is one country imposing its own, unilaterally-devised domestic labor standards on another country. Harmonization is also unilateral in its implementation — it requires that each country alter its own domestic laws in order to “approximate” the laws of other nations.¹⁵²

Using these two dimensions of comparison, the four models can be arranged in the following four-part box:

FOUR MODELS OF TRANSNATIONAL LABOR REGULATION		
	multilateral implementation	unilateral implementation
integrative approaches	preemptive legislation	harmonization
interpenetration approaches	cross-border enforcement	extraterritorial jurisdiction

Seeing the dimensions of similarity and difference makes it possible to evaluate the four models and to develop criteria to help decide which one to advocate.

To approach the policy question, however, it is necessary to consider the objectives of transnational labor regulation. Part I described the various problems that globalization causes for labor: the weakening of labor's bargaining power; the potential for a labor standards race-to-the-bottom; regulatory competition; the potential for organizational fragmentation due to an inability to organize on an international basis; and the deterioration of labor's role in national and international political life. This section explores how the different models of transnational labor regulation discussed in detail in Part II address each of those problems. In addition, this section addresses several other goals that are often posited for transnational labor regulation, goals such as raising labor standards, increasing trade by eliminating regulatory barriers to trade,

152. While harmonization assumes that a country will act unilaterally when it revises its labor laws to conform to another set of legal norms, one could argue that harmonization is multilateral in that a multilateral agency sets the norms and imposes the sanctions and incentives for a country to harmonize in the first place. However, within the context of a multilaterally-established harmonization directive, harmonization is unilateral because it requires each member state to act unilaterally in devising and revising its domestic regulations.

and promoting international cooperation. The latter two differ from the other goals discussed in that they aim to benefit nonlabor groups — business, consumers, citizens, and so forth. These additional goals must factor into any policy conclusion about desirable modes of labor regulation.

As we shall see, each of the models promotes different goals, and some models are impediments to the attainment of other goals. Indeed, there is no ideal model that can achieve all of the goals of transnational labor regulation.

A. Preemptive Legislation

The model of regulation that is most likely to limit runaway shops, prevent labor standards races-to-the-bottom and discourage regulatory competition is the one that is most effective at setting uniform labor standards across national boundaries. Uniformity in labor standards would prevent the phenomenon of regulation-shopping, in which corporations move to the least restrictive regulatory environment. Uniformity would also eliminate union fears that by advocating protective legislation, they are contributing to capital flight and costing union members their jobs. Where uniformity in labor regulation cannot be achieved for either political or pragmatic reasons, an alternative is to adopt regulations that set a floor of rights, such as a minimum wage or minimum safety standards, above which parties can further negotiate. If the floor of labor rights is high enough, it will also have a deterrent effect on runaway shops and races-to-the-bottom, although not as powerful a deterrent as uniform labor standards.

In theory, uniformity can be achieved most effectively through the EU model of preemptive legislation since the very purpose of this model is to set uniform employment standards. To the extent that the EU Commission has the power to set rules and enforce regulations for labor standards in its member countries, it minimizes the possibility of a labor standards race-to-the-bottom.

In addition to setting uniform standards directly, the EU could legislate rules that would encourage the development of transnational unions which could then bargain for uniform transnational labor standards. That is, preemptive legislation has the potential of creating a uniform set of legal regulations to facilitate cross-border collective bargaining. This would make it more feasible for unions to organize and coordinate bargaining strategies on a transnational basis. Accordingly, preemptive legislation is a strategy that could prevent organizational fragmentation and counteract the weakening of labor's bargaining power that globalization initially creates.

A further strength of the preemptive legislation model is that it furthers the goal of encouraging international cooperation. Indeed, both of the European integrative approaches have as their goal not merely integration, but actual unification of regulatory regimes. These approaches carry the prospect of developing, over time, shared norms and collaborative means by which to implement those norms. Furthermore, the integrative models are part of an economic strategy that has a political goal — to achieve the unification of Europe into a single political, juridical and economic unit. Thus, the preemptive legislation model, as well as the harmonization model, is likely to foster international cooperation and interdependency that will make overt international aggression between EU members less likely.

The limitations on the preemptive legislation model are primarily practical ones. The model requires multilateral action for its implementation, and it is extremely difficult to gain the necessary consensus to actually set labor standards. To date, the European Commission has only utilized its legislative power to set labor standards on a few issues, and it has not attempted to set any uniform rules governing collective bargaining, strikes, and other forms of collective action. Indeed, most observers predict that the EU is unlikely to attempt any preemptive legislative, or even harmonization, in the area of unionism or collective bargaining in the foreseeable future. Therefore, while the preemptive legislation model could theoretically eliminate barriers to trade by equalizing labor standards and labor rights, in practice it is not likely to do so in the near future. And, without a uniform framework of legal rules to govern collective bargaining, the preemptive legislation model cannot prevent organizational fragmentation or the weakening of labor's bargaining power that globalization entails.

There is a further drawback to the preemptive legislation model. Both integrative models are well suited to further the goals of international cooperation, world peace, and the establishment of a floor of labor standards, but they are not necessarily the models that will provide the *highest* labor standards or the *best* legal protection for workers. The integrative models rely on consensus between nations, so that there is a tendency for least common denominator regulations to emerge. This is the phenomenon of "harmonization downward" that has been widely discussed amongst scholars in the European Community.¹⁵³ The dynamic of harmonization downward was apparent in 1989 when the EU nations

153. See, e.g., Streeck & Schmitter, *supra* note 3, at 152; Manfred McDowell, *NAFTA and the EC Social Dimension*, 20 LAB. STUD. J. 30, 40–47. See also Charny, *supra* note 7, at 451–52 (arguing that harmonization leads to levelling downward of disclosure requirements in corporate law).

could not enact the Social Charter due to the objections of Great Britain. It is a dynamic that could, under an integrative model of labor regulation, lead to the triumph of the weakest regulatory regime.

There is yet another problem with the model of preemptive legislation. One of the most important goals of transnational labor regulation is to preserve a role for labor in political life and to preserve labor's political clout.¹⁵⁴ The preemptive legislation model diminishes the role of labor unions in politics by taking issues of labor relations out of the reach of the national political processes and placing them in multilateral agencies.¹⁵⁵ Preemptive legislation by definition moves labor legislation from the national political arena into a multilateral arena. At present, unions exist in nation-specific environments; they are not major players in transnational decision-making bodies. In the EU Commission, votes are cast by country, not by political party or constituency-based group. Yet national unions are rarely powerful enough in their home countries to be empowered to speak for the country's national interest in an international policy-making setting. As a result, under preemptive legislation, the influence of national unions becomes diluted and mediated.¹⁵⁶

B. Harmonization

The harmonization model of transnational labor regulation is similar to preemptive legislation in most respects. That is, it fosters uniformity in labor standards, thus counteracting labor standards races-to-the-bottom. It also establishes a floor of labor standards and fosters international labor cooperation.

There are, however, some differences in the ability of the two integrative models to achieve the policy goals discussed above. First, harmonization, unlike preemptive legislation, relies on unilateral action by each member country. This feature makes it highly unlikely that directives on labor standards will be implemented in the same way in all the EU countries. To the contrary, harmonization permits a wide range of variation as to the appropriate way to implement directives. Thus, harmonization is less likely to create uniformity in labor regulations than

154. See *supra* part I.D.

155. This has sometimes been called the "democratic deficit" in the European Community. See Gill, *supra* note 32, at 166; McDowell, *supra* note 153, at 45. See also ROGER BLANPAIN, *LABOUR LAW AND INDUSTRIAL RELATIONS OF THE EUROPEAN COMMUNITY* 25 (1991).

156. For a thoughtful description of the role of interest groups in EC policy-making, see Michael J. Georges, *Interest Intermediation in the EC After Maastricht*, Paper Delivered at Conference on The Political Economy of the New Europe held at Cornell University (Nov. 13-14, 1992) (on file with *Michigan Journal of International Law*).

will preemptive legislation. To the extent that uniformity in regulation is desirable as an antidote to labor standards races-to-the-bottom, harmonization is less effective than preemptive legislation.

Harmonization can, however, establish a floor of rights. But in doing so, it shares with preemptive legislation the potential problem of setting a least common denominator floor, and thus of levelling downward.

Harmonization has several advantages over the other models as well. First, harmonization relies on unilateral action for implementation after shared norms are articulated in the form of directives. From a practical vantage point, this suggests that as difficult as it may be to enact labor directives at the transnational level due to the difficulties of reaching international consensus, it might be easier to reach consensus when countries know they will retain autonomy at the implementation stage. Indeed, the fact that the EU has many more directives than *règlements* on labor issues bears out this insight.

Second, harmonization is a model of labor regulation that secures a larger role for labor in national politics than does preemptive legislation. As with preemptive legislation, harmonization directives require that legal norms be set multilaterally, so the role of domestic labor unions in the norm-setting process is diminished. However, unlike preemptive legislation, harmonization requires legislation to be enacted at the domestic level to implement the directives. It thus presumes that labor regulations will be debated, adopted, and interpreted at the level of the nation-state. Consequently, harmonization will enable, indeed require, unions to continue their efforts to influence lawmakers and other decision-makers at the national level.

Another possible advantage of harmonization over preemptive legislation is that it is possibly more conducive to international peace and cooperation. Harmonization sets in motion a process by which countries bring their regulatory frameworks into consistency with one another. It does not involve the external imposition of regulations, but it does provide structured incentives for nations to alter their regulations in a consistent way. Given the emphasis on internal change of a country's regulations, harmonization may be a process that engenders less conflict, opposition, and backlash than preemptive legislation.

C. Cross-Border Monitoring

As discussed, the NAFTA model of cross-border monitoring and enforcement has little to contribute to the goal of establishing uniform labor standards or a floor of labor rights. The NAFTA Labor Side Agreement's cross-border enforcement model does not seek to raise or

equalize labor standards. To the contrary, it provides disincentives for member states to legislate labor protections because each state can be sanctioned for not enforcing its own labor regulations. Furthermore, because NAFTA removes trade barriers without providing uniformity in labor regulation, each country stands to lose business if it imposes a higher level of regulation than do other countries. Therefore, cross-border monitoring encourages races-to-the-bottom and regulatory competition, resulting in the lowering of labor standards.¹⁵⁷

While labor is interested in finding a framework for transnational labor regulation that eliminates or minimizes the possibility of labor standards races-to-the-bottom, there are other groups who contend that such races-to-the-bottom are not a problem from a policy-making perspective. Many free-traders argue that efforts to limit races-to-the-bottom are disguised protectionism. They argue that permitting firms to relocate in the lowest labor standards environment is desirable because it increases trade and creates more efficient utilization of global resources, which in turn fosters greater global wealth.¹⁵⁸

If the goal of transnational labor regulation is to increase trade and eliminate labor regulations that act as barriers to trade, then one would select a model of labor regulation that minimizes regulation, lowers labor standards, and discourages regulatory uniformity. Thus, in furtherance of this policy goal, one would choose the NAFTA model of cross-border enforcement and monitoring. But if one wanted to protect labor standards, one would have to select a different model.

D. *Extraterritorial Jurisdiction*

The other North American model of labor regulation is extraterritorial jurisdiction of national law. This model, in contrast to cross-border monitoring, can promote regulatory uniformity. Extraterritorial jurisdiction is the application of one country's labor laws to other countries. This method of achieving uniform labor standards requires only unilateral action, making it relatively easy to implement. However, extraterritorial application of domestic law unifies labor standards on a piecemeal basis. Under it, some particular U.S. labor laws are applied to some other countries, but there is no systematic application or enforcement of an entire regulatory regime. It is a model that cannot create uniformity in all facets of employment regulation and, therefore, it has only limited ability to deter labor standards races-to-the-bottom or regulatory competition.

157. Cowie & French, *supra* note 73, at 5-6, 20.

158. See Howse and Trebilcock, *supra* note 19, at 54-59.

Extraterritorial jurisdiction, like cross-border monitoring, is not integrative in its aspirations, and thus will not contribute to the formulation of shared norms and uniform standards between nations. In addition, the extraterritorial jurisdiction model is detrimental to the goal of international peace and cooperation. To the contrary, the exercise of extraterritorial jurisdiction by U.S. courts and Congress is likely to create tensions in the international arena and could potentially destabilize international relations.¹⁵⁹ The ability of a nation-state to legislate and execute laws governing its own citizens is viewed as an indelible mark of sovereignty. Nations react with intense hostility when their citizens and activities within their own borders are made the subject of investigation and sanction by a foreign nation applying foreign rules and procedures. Extraterritorial jurisdiction is thus a model that is already producing international discord and is likely to produce more.¹⁶⁰

Extraterritorial application of U.S. law in the commercial law area has been a particular source of controversy in recent years.¹⁶¹ Some countries have enacted blocking legislation designed to prevent the application of U.S. law within their territories.¹⁶² There is no reason to assume that extraterritorial application of U.S. labor law will be greeted any more favorably by the international community.

Despite its dangers, however, extraterritorial jurisdiction has some powerful virtues to recommend it. If the goal of transnational labor regulation is to provide the best protection for labor, rather than to encourage international cooperation, then extraterritorial jurisdiction might be the most effective approach. Under this approach, one country simply imposes its domestic labor laws on another country without having to achieve multilateral consensus. As a result, extraterritorial jurisdiction is a model that has great potential for raising labor standards in other countries. However, this can occur only if the country imposing its labor regulations has relatively higher labor standards and a well developed system of labor rights in the first place. If the labor protections of the country exercising such extraterritorial jurisdiction are weak, this model will not protect workers domestically or transnationally.

159. See Barella, *supra* note 147, at 918 (urging Congress to use treaties rather than extraterritorial application of labor law to achieve labor standards goals).

160. See, e.g., Cherian, *supra* note 146, at 564 (Commissioner of E.E.O.C. reports that American companies complain that extraterritorial jurisdiction of U.S. employment laws renders them uncompetitive).

161. See Brilmeyer, *supra* note 121, at 11 (noting hostility of other countries to extraterritorial application of Sherman Antitrust Act); Zimmerman, *supra* note 148, at 120-25 (describing international reactions to extraterritorial application of U.S. laws).

162. Zimmerman, *supra* note 147, at 120-21; Carl A. Cira, Jr., *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 STAN. J. INT'L L. 247, 253 (1982).

There is a stronger argument in favor of extraterritorial jurisdiction. Both North American interpenetration models retain a central role for domestic governments to set domestic labor standards. Both cross-border monitoring and extraterritorial jurisdiction are models in which labor regulations are enacted domestically and enforced by domestic legal processes. Rather than eradicate the role of domestic legislatures and courts, the interpenetration models reinforce them. Therefore they also retain a much greater role for labor unions to influence labor standards by means of the domestic political process than do either of the integrative approaches. For this reason, the interpenetration models are less disruptive of existing organizations, constituencies, vested interests, and power relations than are the European ones. With cross-border monitoring, the beneficial effect of preserving labor's role in domestic politics is offset by the destructive impact on labor of the transnational race-to-the-bottom that the model encourages. If the goal is to preserve unionism as a vital element in our democracy, one would select extraterritorial jurisdiction.

SUMMARY AND CONCLUSION

Part III described four models of transnational labor regulation that exist in the Western world today, and assessed the ability of each of the four models to address the problems that globalization causes for labor. It is evident that each of the four models of transnational labor regulation has different strengths and different weaknesses in relation to each of the possible goals of transnational labor regulation. To choose between the models, it is necessary to set priorities between goals, as no existing model can achieve them all.

For example, preemptive legislation has the capacity to create uniformity of labor regulation, eliminate races-to-the-bottom, and promote international cooperation. But the price of adopting this model is to relocate the locus of labor regulation from a national to transnational fora, thereby diminishing labor's role in politics. Unless some mechanism is established at the EU level to reintroduce labor as a player, with the ability to articulate its interests separately from each nation's own "national interest," the preemptive legislation model could lead to the gradual fragmentation, disorganization, and disintegration of organized labor throughout Europe.

At the other extreme, extraterritorial jurisdiction retains a strong role for labor in domestic politics, and it has the potential to provide uniform labor standards, at least in some areas. However, the primary price of this model is escalation of international tensions and the potential for international conflict.

NAFTA, which imposes no substantive cross-border labor regulations, comes close to a no-regulation regime. Accordingly, this model solves none of the problems that globalization poses for labor.

Harmonization could be the perfect mid-point — providing some uniformity while retaining some role for domestic politics. However, it could also be an unstable equilibrium, threatening to tip over into preemptive legislation if the directives become powerful mandates, and to a no-regulation regime if the directives permit evasion and opting-out.

To conclude, none of the existing models can satisfy all objectives for transnational labor regulations. And, there is no neutral policy-science that can make these hard choices. However, by recognizing the limitations of each model and the trade-offs they pose, it might be possible to imagine a new model of transnational labor regulation, one that draws from the strengths of each model and that avoids the problems that inhere in each one. Such a new form of transnational labor regulation would be a first step toward ensuring that the emerging global economy is fair, equitable and inclusive of all its citizens.