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SOCIAL POLICY HARMONIZATION AND WORKER RIGHTS IN THE EUROPEAN UNION: A MODEL FOR NORTH AMERICA?

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I. Introduction

On December 10, 1994, President Bill Clinton and the heads of state of most of the countries in the Western Hemisphere agreed to enter into negotiations for the formation of a hemisphere-wide free-trade agreement.[1] Plans are to include Chile in such an arrangement,[2]

[1] Bob Davis, *Clinton plans to Extend NAFTA to Chile, help Create Americas Free-Trade Pact*, WALL ST. J., Dec. 1, 1994, at A3.
[2] *Id.*

which would be an extension of the recently effective North American Free Trade Agreement (NAFTA).[3] NAFTA, which presently includes the United States, Canada and Mexico, provides for the elimination of tariffs and other forms of economic discrimination among the three countries of North America.[4] The inclusion of Chile, and eventually other countries in the hemisphere, would create the world's largest economic bloc.

The impetus behind NAFTA and its possible extension to the rest of the hemisphere can be traced to several sources.[5] One of the most important is the desire to maintain a degree of competitiveness in world trade in light of recent European economic unity.[6] This makes

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[3] North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289, 309 [hereinafter NAFTA].

[4] Although NAFTA is an executive agreement under United States law, under international law it has the status of a treaty as defined by the Vienna Convention on the Law of Treaties art. 2(a): "'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Vienna Convention on the Law of Treaties, May 23, 1969, art. 2(a), U.N. GAOR, at 2, U.N. Doc. A/Conf.39/27, 1155 U.N.T.S. 331, 333, 8 I.L.M. 678, 681 [hereinafter Vienna Convention].

NAFTA is a free trade area in General Agreement on Tariffs and Trade (GATT) parlance. Under Article XXIV of the GATT, a free trade area is defined as "a group of two or more customs territories in which the duties and other restrictive regulations of commerce . . . are eliminated on substantially all the trade between the constituent territories in products originating in such territories." Special Protocol Relating to Article XXIV of the General Agreement on Tariffs and Trade, Mar. 24, 1946, art. XXIV(8)(b), 62 Stat. 2013, 2015, 62 U.N.T.S. 56, 62, T.I.A.S. No. 1765, at 78. In order for NAFTA to be consistent with the GATT, and not in violation of the agreement's most favored nations provision, it would have to meet the definitional requirements of this provision. For free trade areas, the GATT does not require that members have a common external tariff, that is, the same tariff structure for all merchandise from countries not a part of the free trade area. As such the countries in a free trade area remain free to pursue their own trade policies with regard to other countries, while eliminating restrictive regulations of commerce and duties among themselves.

In addition to eliminating tariff barriers, other areas dealt with in the agreement are intellectual property, services, and investment.

See also North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

[5] Former Secretary of State and Treasury James Baker III outlined the following reasons among others for congressional approval of NAFTA in 1993. First, NAFTA will be an economic advantage for U.S. manufacturers, consumers, and workers by creating 200,000 new jobs and adding $30 billion to the economy. James Baker III, *NAFTA Fight Offers Competing Visions of U.S. International Role; Diplomacy: The Increasingly Venomous Debate Over the Free Trade Agreement Pits Traditional Internationalists Against Resurgent Isolationists*, L.A. TIMES, Oct. 17, 1993, at M2. It would also be an economic advantage to Mexico and help stem the tide of illegal immigration. *Id.* In addition, NAFTA would improve the political relations between the United States and Mexico—relations that have been marked by U.S. indifference and Mexican insecurity. *Id.*

[6] Charlotte Grimes, *NAFTA Era Gets Started With 1994; "Biggest Effect" Wipes Out Tariffs on Some U.S. Goods, Official Says*, ST. LOUIS POST-DISPATCH, Jan. 2, 1994, at 1A.

The term "European Community" or "Communities" is a shorthand reference to three communities of cooperation formed by several Western European states in the years following World War II, namely the European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Energy Community (EAEC). The EEC, the most important of the three, has often been referred to simply as the EC. As of the approval of the Maastricht Treaty (Treaty on European Union) the common market has been referred to as the European Union. For sake of consistency, the term "European

the North American Free Trade Agreement a competitive necessity in the minds of many on this side of the Atlantic.

Free trade has become a controversial notion in the area of labor. In general, the debate has been framed as pitting sides that are either for or against free trade. Nowhere in the debate has this dichotomous posturing been more acute than in the debate over NAFTA, and more of the same can be expected during the debate over the proposed hemispheric agreement. In the debate, both labor and business groups have staked out positions that may be regarded by the objective observer as unreasonable. Labor groups have come out against NAFTA arguing that it will cause job losses,[7] while business interests have generally favored NAFTA because of the potential increase in business.[8] More reflection on the various issues could lead to more

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Union" will be used from this point throughout this Article to refer to the common market in both the pre- and post-Maastricht periods. For the history of the development of the European Union, see *infra* part III.

[7] Various labor groups, including the AFL-CIO, have staked out a claim that free trade, particularly with Mexico, will cause job loss due to the importation of inexpensive merchandise made so by cheaper labor costs and the investment flight attracted to those same cheaper labor costs. *See Issues Relating to a Bilateral Free Trade Agreement With Mexico: Hearings Before the Subcomm. on Western Hemisphere and Peace Corp. Affairs of the Senate Comm. on Foreign Relations*, 102d Cong., 1st Sess. 64 (1991) (statement of Thomas R. Donahue, Secretary-Treasurer, AFL-CIO). Donahue argues that low wage competition and inadequate labor standards enforcement will encourage the flow of investment into Mexico at the expense of U.S. labor. On the other hand, economists Gary Hufbauer and Jeffrey Schott argue that the impact of NAFTA will be small, and that rising imports are likely to generate new high wage jobs in the U.S. economy. *See* JEFFREY J. SCHOTT & GARY CLYDE HUFBAUER, NORTH AMERICAN FREE TRADE, ISSUES AND RECOMMENDATIONS 127 (1992).

The results of internationalization in the textile industry are a prime example of cheaper foreign labor dislocating domestic workforces, but most of the dislocation occurred prior to NAFTA without the help of a free trade agreement. Despite the use of quotas under the Multifiber Agreement, Arrangement Regarding International Trade in Textiles, Dec. 20, 1973, 25 U.S.T. 1001, T.I.A.S. No. 7840, third world textile mills still import relatively inexpensive textile products to this country, often to the disadvantage of American workers in that industry. According to a representative of the International Ladies' Garment Workers Union, job losses have continued despite the Multifiber Arrangement. From 1979 to 1988, imports doubled while domestic production fell by about a third. *Presidential Vetoes Hit 3 Textile Import Bills*, ST. LOUIS POST-DISPATCH, Nov. 19, 1990, at 13.

A logical retort is that free trade may make a bad situation worse, opening the door even further to lower cost products and encouraging more job exportation on the part of U.S. manufacturers. Despite this argument, the base of the problem is not the notion of free trade but is instead the availability of less expensive foreign labor. Industries will seek to lower their production costs with or without the impetus of a free trade regime because of global competition. The cheaper product sells on international markets and a United States economic policy that does not seek opportunities to improve international competitiveness would be economically irresponsible.

[8] Business has generally heralded NAFTA, though some industries that are not positioned for international competition have been cautious. Free trade means more business, easier access to markets, and less expensive production costs, but lost in that enthusiasm is the moral question of whether domestic dislocation or foreign exploitation of labor is an acceptable sacrifice for greater market access. The arguments of labor are not based upon imaginary conclusions; free trade always causes some dislocation and the economic benefits of invigorated business activity on an international scale can be offset by economic malaise at home. Indeed, the argument by economists that free trade produces gains for the consumer may be a meaningless bromide if in fact the consumer, due to depressed wages or unemploy-

reasonable arguments that embrace the notion of free trade, but at the same time recognize the need to minimize damage to labor stability.

By combining the arguments of both sides, one is left with the inescapable conclusion that free trade is an important and useful economic regime which should be tailored to address the issue of labor dislocation. Free trade should not be a means of avoiding the costs of labor through exploitive and/or opportunistic forays into foreign labor markets. Certainly, free trade can permit access to factors such as labor that are less expensive due to supply and factor efficiency. This alone is not a problem to be addressed by this Article *if* imports are the result of more efficient production operations in Mexico competing with inefficient operations on formerly protected industries. However, to the extent that investment and job flight as well as cheap imports are the result of relaxed enforcement of labor or social standards in Mexico and certain sectors of U.S. industries are being attracted to inexpensive Mexican labor and lenient business regulatory enforcement, there is cause for concern. This latter phenomenon, known as social dumping,[9] concerns many NAFTA observers due to the relatively low levels of economic development in many Latin American states.

It is this author's position that it is not the role of business to self-regulate these opportunistic impulses, but instead, it is the proper role of governments embarking upon free trade regimes to place measures that ensure that the worst consequences of free trade policies do not

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ment, does not have the means of taking advantage of the bargains. For a general argument for free trade, see PAUL A. SAMUELSON, ECONOMICS 692-704 (9th ed. 1973).

[9] Social dumping has been defined as the condition under which companies invest where the wages and conditions are the cheapest, thereby forcing workers in countries with a higher standard of living to lower their standards and downgrade employment conditions to remain competitive with the foreign labor. Roger Blanpain, *1992 and Beyond: The Impact of the European Community on the Labor Law Systems of the Member Countries*, 11 COMP. LAB. L. J. 403, 404 (1990). Often, government policies specifically designed to keep wages and other costs low are required. *See* LOUKAS TSOUKALIS, THE NEW EUROPEAN ECONOMY: THE POLITICS AND ECONOMICS OF INTEGRATION 144-6 (1991). While arguing that certain regulatory steps and enforcement are needed to encourage government discipline in the social area, this Article distinguishes between the supply and demand induced comparative advantage that countries with ample labor supplies have (resulting in comparatively low wage rates), and the operation of government policies designed to keep labor costs low. Labor supply comparative advantage is not likely to be amenable to the kind of harmonization advanced in European circles inasmuch as the European Union has not attempted to quantify an optimal Union-wide wage scale.

While the countries of the European Union are generally viewed as fully industrialized and developed, significant disparities in labor costs do exist. For example, according to the European Commission, average labor costs in Portugal were approximately one-sixth of that of the Netherlands as of 1987. *See* TSOUKALIS, *supra* at 144-5 (referring to European Commission data). Other significant disparities exist between other countries in the Union, particularly when Spain and Greece are compared with the higher labor cost states of France, Germany, Belgium, Denmark, and Luxembourg. *Id.* These figures should be compared to the U.S.-Mexico disparity in industrial wages. According to the Bureau of Labor Statistics Mexican industrial hourly wages were approximately one-sixth that of U.S. industrial wages in 1989. SCHOTT & HUFBAUER, *supra* note 7, at 122. A 1991 report by the White House measured the disparity at one eleventh Mexico to U.S. in the industrial sector. *Id.*

come home to roost on domestic labor. While little serious study and planning has been accomplished in the area, this is a matter of particular concern for three reasons. First, the merger of three large economies with little governing structure is new and untested ground for the United States. Second, the North American economic integration will result in some economic dislocation. Third, NAFTA enters into force at full speed,[10] leaving little opportunity for studied assessment of the economic effects.[11]

A process of harmonization[12] is required to counteract the undesired competitive advantages among members of an integration agreement. In this hemisphere, an effective process of harmonization of labor policies is practically non-existent.[13] It may be possible to control these economic disadvantages through a uniform system of legal commitments, a legal regime, binding and enforceable upon states taking part in an integration process.

Such a legal regime is part of the total structure of European integration.[14] Though fraught with skepticism (or Euroscepticism), these efforts are a recognition that significant economic disparities exist within the Union, and that these disparities require uniform measures to prevent dislocation, or social dumping.

In North American integration, such a legal regime is at best uneven, and to a large extent an afterthought brought on by political necessity.[15] The potential for dislocation has been addressed largely by allusions to economic solutions. The economic solution to the potential social dumping problem has been offered as a harmonization or regulatory-free response to the social dumping problem.[16] President

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[10] NAFTA will be implemented at full speed with the exception of tariff elimination, which will be phased in over a fifteen year period. NAFTA, *supra* note 3, art 302(2), annex 302.2.

[11] *Id.*

[12] Harmonization is the process by which national laws of several states are made similar. GEORGE BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 430 (1993). The Treaty of Rome, the European Union's "constitution," authorizes directives "for the approximation" of member state laws or administrative acts. *Id.*; EEC Treaty art. 100 (as amended 1992). This process requires a member state to enact legislation or to promulgate administrative rules that are similar to Union directives, thereby harmonizing their laws with the laws of other member states. While the term "approximation" is used in the treaty, the process is generally referred to as "harmonization." *Id.*

[13] *See infra* parts VI.B and VII.

[14] *See infra* part V.

[15] *See generally infra* parts VI.A, B and VII.

[16] This strategy notwithstanding, the United States Congress has recognized the negative impact that the poor labor conditions can have on the economic welfare of this country and the need to enforce, albeit unilaterally, social rights through trade policy. Accordingly, in the 1984 amendment to legislation covering the General System of Preferences (GSP), Congress added to the list of countries prohibited from being designated a GSP country any country that "has not taken or is not taking steps to afford internationally recognized worker rights to workers in the country . . . ." Trade and Tariff Act of 1984, Pub. L. 98-573, 98 Stat. 2948, 3019 (1984).

"Internationally recognized worker rights" is referred to in the legislation as: the right of association; the right to organize and bargain collectively; a prohibition on the use of any

George Bush's response to Congress' concerns about the impact of NAFTA on U.S. labor followed this approach.[17] Unabated, the economic process alone could cause a convergence of social standards by the raising of standards in low cost/standards states and the lowering of those standards in high cost/standards states.[18]

To avoid the capital flight and competitive advantage brought on by disparate labor standards among the three NAFTA countries, rules mandating minimum labor standards are necessary, and such rules must go beyond the system of de jure examination of each country's standards currently being put in place under the North American Agreement on Labor Cooperation (NAALC).[19] Under the European system, individuals can challenge Member State policies and laws regarding labor conditions covered by EU-wide legislation in the national courts as fora of first instance, and, under procedures allowing for interim decisions, before the European Court of Justice.[20] Such a

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form of forced or compulsory labor; a minimum age for the employment of children; acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. *Id.*

As a justification for the restriction, the Ways and Means Committee reasoned:

> [T]he committee is concerned that the lack of basic rights for workers in many LDCs is a powerful inducement for capital flight and overseas production by U.S. industries. The tremendous disparity in labor rights between many American workers and the absence of those rights for workers in many developing countries is a growing factor in the competitive decline of many of our basic industries.

H.R. REP. NO. 1090, 98th Cong., 2d Sess. 11 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5101, 5111.

17 President George Bush, *Response to Issues Raised in Connection with the Negotiations of a North American Free Trade Agreement, in* STAFF OF HOUSE COMM. ON WAYS AND MEANS, 102D CONG. 1ST SESS., EXCHANGE OF LETTERS ON ISSUES CONCERNING THE NEGOTIATIONS OF A NORTH AMERICAN FREE TRADE AGREEMENT (Comm. Print 1991) [hereinafter *Response*].

18 This has not occurred in the EU despite the intuitive appeal of the economic prediction. This is possibly because of the European social system that seeks to regulate such effects. However, economic theory suggests that harmonization would occur via market competition, but that the competition would tend to drive social factors of the trade partners downward toward the level of the less economically advanced trade partner. THEODORE HITIRIS, EUROPEAN COMMUNITY ECONOMICS 253 (2d ed. 1991). This is confirmed by the Heckscher-Ohlin model of trade as well as the trade theory offered by economist Robert Mundell. Together, the theories indicate that with trade, free or otherwise, the price of wages tends to bid up in low wage countries, and bid down in higher factor countries. Robert J. Flanagan, *European Wage Equalization Since the Treaty of Rome, in* LABOR AND AN INTEGRATED EUROPE 167, 170 (Ulman, Eichengreen, and Dickens eds., 1993).

19 North American Agreement on Labor Cooperation Between the United States of America, the Government of Canada and the Government of the United Mexican States—Final Draft, Sept. 3, 1993, 32 I.L.M. 1502 [hereinafter NAALC].

The Clinton Administration held up approval of NAFTA to allow time for the negotiators to negotiate this supplemental agreement for labor. *See generally infra* sec. VI. The agreement, however, is mostly procedural, and does not significantly deal with the substance of labor protection. *See infra* parts VII.C. and D. The supplemental agreement requires free trade partners to enforce their own laws, and to ensure that certain due process-like protections are made available to national labor sectors. NAALC, *supra* at 1504, art. 5. Failure to enforce national labor laws, or to provide for due process protections would be judged by dispute settlement panels. *Id.* at 1509, Part Five. *See generally infra* parts VI-VIII.

20 *See infra* parts IV-V.

system is not currently in place or even contemplated in this hemisphere.

It is the *process* of European harmonization that is most instructive, and not necessarily specific legislation issued by Union bodies on the subject of social policy.[21] Laws in the areas of social policy (dealing with labor dislocation) were gradually developed over the EU's history.[22] This suggests that a deliberately gradual legal development may be called for in North America. Room for such development exists in NAFTA, despite its implementation in its present form by the three member nations. Those areas of cooperation requiring uniformity, particularly social or labor policy, could benefit from both amending the present Agreement or the more recently concluded NAALC, and from the development of procedures and case practice within the various trinational implementing bodies set up to administer the Agreement. The time is right for such reform with the pending Chilean negotiations. The expansion of NAFTA from a trilateral to a multilateral trade body mandates such an approach.

This Article will trace the development of European Community law in the area of social dumping—an area of utmost concern with

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21 *See generally infra* part V.

22 The success of the EU thus far must be measured in terms of those years in which the free trade and investment aspects of integration were the sole foci of the process, and not in terms of what it has failed to accomplish during the tumultuous years since the fall of the Berlin Wall, an event that lead to economic management difficulties that have made further integration difficult. This success came gradually. Nonetheless, EU leadership appears to believe that success in this area was both quick and deliberate. Jacques Delors, the Commission president, has pressed for quick progress in the direction of economic union as called for in the Treaty for European Union (Maastricht Treaty). That treaty calls for a common monetary and economic policy among the Member States, a move which would eventually result in a common European currency. Treaty on European Union, Feb. 7, 1992, 31 I.L.M. 247, 267. Despite two monetary crises since the signing of the treaty and ratification scares in several countries, Delors has called for a "new initiative" to speed up progress in implementing the Maastricht Treaty directives. While meeting the treaty's deadlines is not bad policy, when Delors claims that the EU strategy of "small steps forward" had reached its limits, he appears not to recognize the proven success of gradualism in EU legal development. That the ambitious goals of Maastricht might be best achieved by a bit more introspection and a little less haste is demonstrated by recent history. *See* David Gardener, *Delors Issues Maastricht Warning*, FIN. TIMES (London), Aug. 31, 1993, at 16.

In addition, the EU has proceeded to expand and align itself with non-EU countries such as the nations of the European Free Trade Association (EFTA), and to engage in negotiations with several countries of the former Eastern Bloc. Many of the social standards that will be discussed in this Article have been incorporated in the association agreements. *See, e.g.*, Europe Agreement Establishing an Association Between the European Communities and Their Member States and the Republic of Hungary, 1993 O.J. (L 347) 2, 23. That agreement requires cooperation between the parties in social and economic development in the following areas:

> improving the level of protection of the health and safety of workers, taking as a reference the level of protection existing in the Community; upgrading job-finding, vocational training and career-advice services in Hungary, providing back-up measures and promoting local development to assist industrial restructuring; adapting the Hungarian social security system to the new economic and social situation.

Id.

regard to economic integration. It will also examine the European legal regime in these areas and its effects. The Article will also examine the dynamics of social policy within North America and suggest ways of alleviating existing problem areas as well as problem areas likely to arise as a result of expansion using the European process as a guide.

II. The Potential for Social Dumping under Economic Integration

A. The Political Economy of Economic Integration

The likelihood of social dumping increases as the economic ties between the social dumper and the recipient become closer.[23] As economies become closer and more interdependent, countries become more sensitive to their partners' economic weaknesses, and such weaknesses can be a problem for sectors of the stronger economy because of the market and labor access available between the two countries. A free trade and investment arrangement between two countries is one which involves such a close economic relationship.

Theoretically, economic integration involves give and take. Like trade in general, countries taking part must be prepared to give up those economic advantages associated with protected markets in exchange for access to other markets. Those favoring integration believe that larger market access increases the general welfare by opening up economic opportunities, and by placing competitive pressures on firms to become more efficient in their production, thus lowering prices to consumers and improving quality.[24] While the theory has common sense appeal, in practice, balancing the give with the take is risky business. Countries are never identical, either culturally or economically. The exchange for access to wider markets may bring with it access to the socioeconomic problems of a trade partner.

However, not all competition winners in a given integration are guilty of dumping their socioeconomic problems. The problem addressed here occurs where there is an appreciable difference in labor costs and regulation—where the cost of doing business in the lower wage, minimal regulation state is either an enticement for investment flight from the higher wage or regulated state, or where the labor cost

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[23] *See* BELA BALASSA, THE THEORY OF ECONOMIC INTEGRATION 92-96 (1961) (discussing capital mobility).

[24] Two theories of trade produce this conclusion. First, there is the theory of comparative advantage that suggests that nations will trade in those goods the production of which they are most efficient. CHARLES P. KINDLEBERGER, INTERNATIONAL ECONOMICS 17-21, 27, 33 (5th ed. 1973). Then there is the theory suggesting that trading blocks create trade opportunities (trade creating), though admittedly with some trade diversion. JACOB VINER, THE CUSTOMS UNION ISSUE 44 (1950), referenced in C. O'Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why NAFTA Turned into a Battle*, 28 GEO. WASH. J. INT'L L. AND ECON. 1, 56 (1994). Trade creation suggests that there will be more opportunities for efficient operations to excel, and more incentives for operations to increase relative efficiencies when considered within the context of the comparative advantage theory.

savings are passed on to foreign consumers, causing competitive problems for local industries. In either case, labor can suffer. In the former, investment flight can cause unemployment, and in the latter, cheap products from a lower wage state may cause local businesses to decrease their labor force, and lower wages and benefits.[25]

Governments traditionally have sought to protect their native businesses from such a fate.[26] However, the problem with government protection is that it has a tendency to protect against legitimate and fair competition also.[27] The fact that free trade causes local businesses to be vulnerable to international competition is something that is grappled with in negotiations for economic integration agreements.[28] To deal with the problem, and to gain the benefits of free trade, the EU has committed itself to harmonizing labor standards in the areas of wages, work-week, and other factors that are included in labor costs in order to overcome the social dumping phenomenon.[29] In addition,

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[25] *Response*, *supra* note 17. For an analysis of the *Response*, see Craig L. Jackson, *The President's Report to Congress on the Likely Effects of NAFTA on U.S. Labor—An Examination*, 1 CURRENTS 47 (1991).

The President's Response makes the important point that there is another way of looking at free trade within the context of fears of social dumping. Levels of development and wage structure, to borrow one point from the *Response*, may work against a low wage state, as that structure can only support low levels of production. *Response*, *supra* note 17. The capital and technology intensive production remains with the high wage state, not to mention the fact that the latter state is likely to have a productivity advantage. *Id.*

[26] For a discussion of the policy considerations that influence international trade, see JOHN H. JACKSON, THE WORLD TRADING SYSTEM, LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 1-26 (1989).

[27] To some, whether foreign trade is fair and legitimate is not an important inquiry. According to this view, what matters is how well the domestic economy can withstand the foreign competition; hence protection is a legitimate function of government.

[28] JACKSON, *supra* note 25.

[29] Consider TSOUKALIS, *supra* note 9, at 144-6. Although the term "social dumping" is often used to describe this phenomenon, Tsoukalis argues that the term, to the extent it implies governmentally sanctioned unfair competition, is a misnomer. In the area of wages in particular, Tsoukalis points out that low wages reflect lower labor productivity than higher wage levels, and because efforts to compress labor costs by governments have repeatedly been unsuccessful, Tsoukalis argues that social dumping fears are generally misplaced. *Id.*

There are two things wrong with Tsoukalis' analysis. Tsoukalis relies on liberal social/political conditions for his thesis that governmental compression of wages seldom work. As will be noted later in this Article, some argue that liberal social conditions are not the norm globally. *See infra* parts VI.D and VII.D.2 (discussing Mexican labor policies and criticism of government practice in Mexico). Furthermore, to be seen is the vitality of labor unions in a liberal society when pitted against mobile capital. *See infra* part II.B (labor policies in Canada, a liberal society, alleged to be at least partly responsible for relocation from Canada to the United States, also a liberal society, as a result of the Canada-U.S. Free Trade Agreement). The European Union only indirectly seeks to regulate wages by ensuring that the attributes of a liberal social order, particularly with regard to collective bargaining, remain a feature of European social life. *See* TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 118 (as amended 1992) (providing that the European Commission shall promote, among other things, the right of collective bargaining); Communication from the Commission Concerning its Action Programme Relating to the Implementation of the Community Charter of Basic Social Rights for Workers, COM(89)568 final at 14 [hereinafter 1989 Social Action Program] (where the European Commission expressed its view that Member States should take action to ensure a guaranteed equitable wage). *See generally infra* part

such efforts help industries and their workers adjust to the often inevitable dislocation caused by economic integration. This is accomplished by leveling the playing field of competition in two ways. First, harmonization removes some of the incentives for relocation to low cost states which causes local job loss.[30] Secondly, harmonization removes artificial comparative advantages brought on by government policies, evidenced in low production cost, that can result in lower prices for subsequently exported goods—prices that can damage the competitiveness of industries in an importing state.[31]

B. Social Dumping—Some Canadian Observations

It is too early to assess the effects of NAFTA on U.S. labor. Data soon will be available assessing the early effects on the embryonic accord, but that data likely will reflect only initial returns. It also will be subject to debate as proponents and opponents analyze the numbers and assess the damages and/or benefits of the Agreement. Some indication of what may be expected is available in the Canadian experience with free trade via the Canada-U.S. Free Trade Agreement (FTA),[32] the predecessor of NAFTA. This accord has been in effect for seven years, and, while the FTA, like NAFTA, allows for full free trade to be phased in over a period of years, some reliable data is available on the effect of free trade on labor as well as the impact of capital mobility.

The FTA scenario is one in which Canadian operations are af-

V.C.3. The second flaw in Tsoukalis' analysis is that although wages are a big chunk of labor costs, they are not the only costs, and Tsoukalis does not provide the same analysis as regards other costs of labor besides wages. Indeed he cannot because social security, protection against redundancies, health and safety all can be regulated or deregulated by governments without the economic unpredictability occasioned in the wage area. TSOUKALIS, *supra* note 9, at 144-6.

Thus, the social dumping theory has received increased support due to the entry to the EC of Spain, Portugal, and Greece, whose social standards are quite below that of other Member States and the potential for globalization of business strategies. PAUL TEAGUE, THE EUROPEAN COMMUNITY: THE SOCIAL DIMENSION 79 (1989). Furthermore, the international community as a whole has recognized the phenomenon and attempted to regulate social dumping on a multilateral basis. See the Havana Charter, the charter of the failed International Trade Organization:

> all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit . . . [u]nfair labour conditions, particularly in production for export, create difficulties in international trade, and accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.

Havana Charter for the International Trade Organization, art. 7, at 7, U.N. Doc. E/Conf. 2/78 (1948), *reprinted in* CLAIR WILCOX, A CHARTER FOR WORLD TRADE 227-327 (1949).

[30] Tsoukalis acknowledges that in a free market system with capital freely mobile, the lower cost labor markets will attract capital and industry, thus making the notion of harmonized labor standards somewhat appealing. TSOUKALIS, *supra* note 9, at 144-6.

[31] *See supra* note 18 and accompanying text.

[32] Canada-United States Free Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281 (1988), *reprinted in* H.R. DOC. NO. 216, 100th Cong., 2d Sess. 1 (1988) [hereinafter FTA].

fected by U.S. commerce, causing plant closures and some job loss. One report indicated that tariff cuts were responsible for increased competition in the food processing and furniture industries.[33] These industries were among the first subjected to the tariff cutting policy of the FTA.[34] The tariff cuts resulted in some firms merging with foreign operations, and others shutting down and relocating to the United States.[35] As early as 1989, fifty-seven firms in the food processing industry had either gone into bankruptcy or shifted operations south to the United States. In the furniture industry, the report claims that 4700 jobs were eliminated as U.S. exports to Canada increased forty percent.[36]

Whatever the reasons for the job losses, many Canadians regard lower social standards in the United States as a major, if not the main, cause of job loss in other industries.[37] For example, "right to work" policies of several southern U.S. states as well as lack of regulatory protection have been blamed for Canadian job losses estimated at about 400,000 as of 1993.[38] The main source of the Canadian job losses may be U.S. firms that have moved their Canadian operations south of the border.[39] The position of the Canadian government under former Prime Minister Brian Mulroney was that job losses were the result of the worldwide recession.[40] However, in the first three years of the FTA, Canadian trade surpluses with the United States dropped considerably, meaning that more imports were flowing into Canada from the United States than exports leaving Canada.[41] This statistic alone does not implicate the social standards in the United States, but when combined with the significant job loss during this period (due to the reces-

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[33] *Free Trade Said to Hit Hardest at Three High-Tariff Industries*, TORONTO STAR, Nov. 19, 1991, at C6 (referencing study by Charles Barret of the Conference Board of Canada).

[34] *See* FTA, *supra* note 32.

[35] *Id.; see also Free Trade Said to Hit Hardest at Three High-Tariff Industries*, TORONTO STAR, Nov. 19, 1991, at C6.

[36] *Id.; see also Free Trade Said to Hit Hardest at Three High-Tariff Industries*, TORONTO STAR, Nov. 19, 1991, at C6.

[37] Bruce Campbell, a research fellow with the Canadian Centre for Policy Alternatives in Ottawa has stated that "[o]nce [free trade] formally entrenched that there was no such thing as a distinct Canadian market, that was the green light for companies to move out." *Free Trade Job Losses Are North Carolina's Gain*, TORONTO STAR, June 6, 1993, at F3. Canadian Labor Congress president Bob White has also stated that free trade's effect on Canada's manufacturing sector has been far greater than even its worst opponents expected. *Id.*

[38] *Id.* The term "right to work" refers to laws that eliminate the need to join a union to work at a particular place of business. According to the article, firm policies such as low wages, and health and safety benefits lower than Canada's are the result of such laws, as well as the apparent hostility to union organizing in some "right to work" states. Canadian union membership is estimated to be 38% as of 1993 and union membership in a right to work state such as North Carolina at 4.8%.

[39] *Id.* The reason for such movement lies in the fact that under the FTA, firms need not operate in Canada to enjoy access to that market due the elimination of tariffs. That fact combined with lower labor cost makes the move to the U.S. more attractive.

[40] *Id.*

[41] Alistair Dow, *I No Longer Praise Free Trade But Don't Come to Bury It*, TORONTO STAR, Feb. 1, 1992, at C2.

sion or otherwise), Canadian fears that something more is at work than greater U.S. efficiency can be understood.

Yet the FTA did not directly address this issue nor attempt to calm the fears whether or not they are well-founded. If Canadian workers' fortunes during the first years of the FTA could be attributed to social disparities, a process of social harmonization could have worked to their advantage. Those attributes of U.S. social policy that may have led to firm relocation and job flight from Canada could have been subject to some binational scrutiny in the hope that certain disparities could be recognized and dealt with within a system of harmonization. As is the case in the European Union, where unit wage costs for the bulk of Member nations is similar,[42] Canada and the United States are two countries that are not very different in terms of standards of living and labor costs.[43]

III. The European Union Model of Economic Integration—a Brief History

Part of the reason for the success of the EU has to do with the history of the Western European countries that form the economic union. Despite two major wars in this century, there has been a sense that some sort of European unity was inevitable. The carnage of the Second World War confirmed that the treaty system that dominated western foreign policy prior to the First World War had failed.[44] Efforts at reform of the international system found incarnation in the United Nations and several international organizations. Although these international organizations, due to the nature of world politics at the time, were certainly Europe-centered, European leaders felt a need for specific unity to deal with the specific growth and development needs of non-Communist Europe.[45] From the very beginning of what is now the EU there was a consensus among national leaders and constituents that the devastation caused by World War II could be avoided by an economic alliance that would help rebuild the economies of Western Europe and link the nations in such a way that war would not be a viable option.[46] As a result, the EU was envisioned as a common market or common trading area.[47] Eventually, the concept of a single

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[42] TSOUKALIS, *supra* note 9, at 145 (referencing data from the European Commission and noting that although significant disparities do exist at the margins, unit labor costs in France, The Netherlands, Germany, the United Kingdom, and Belgium and Ireland are quite similar).

[43] Comments of Don Turner, Assistant to the Director, Chicago Federation of Labor, *Round Table Discussion: The North American Free Trade Agreement: In Whose Best Interest?*, 12 J. INT. L. BUS. 536, 556 (1992).

[44] BERMANN ET AL., *supra* note 12, at 3-11.

[45] *See id.*

[46] *Id.*

[47] *Id.*

economic entity not merely limited to trade emerged.[48]

The European Communities evolved from the European Coal and Steel Community (ECSC), established in 1951, which in turn grew out of efforts between France and West Germany to cooperatively pool and regulate their coal and steel production.[49] This plan, named the Schuman Plan after France's Foreign Minister at the time, was designed with the aim of "creating conditions that would make war in the future not merely improbable, but impossible."[50] The project expanded to the ECSC with the signing of the Treaty of Paris on April 18, 1951.[51]

The same motivations produced further efforts at integration among the countries of Western Europe, and a European Defense Community and a European Political Community were immediately attempted.[52] Since European integration was also a response to the Cold War, the thaw in East-West relations resulting from the Korean armistice and the death of Stalin caused interest in these projects to wane.[53] Both efforts were dropped as being inappropriate at that stage of post-war development.[54]

Indeed, the original idea behind the ECSC, that political and defense integration beyond mere intergovernmental cooperation must be preceded by economic integration, caught on.[55] Integration came to be viewed as a harmonization of laws, policies, and the creation of a supranational law-making structure.[56] This idea took root in 1955 when the foreign ministers of several Western European countries agreed to begin negotiations toward the development of an integrated economic entity.[57] The result was the 1956 Spaak report,[58] in which a community of strong institutions for making and implementing law in the area of economic policy was proposed.[59] The Treaty Establishing the European Economic Community (Treaty of Rome or EEC Treaty) was signed the following year by Belgium, France, Luxembourg, Italy, the Netherlands, and West Germany.[60]

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48 *Id.*

49 *Id.* at 5.

50 Anthony J. Davis, *Canada's Constitutional Crisis After Meech Lake: Setting a New Course for a European Union?*, 18 SYRACUSE J. INT'L L. & COM. 223, 247 (1992).

51 TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY [ECSC TREATY].

52 BERMANN ET AL., *supra* note 12, at 51.

53 *Id.*

54 *Id.*

55 *Id.*

56 *See id.* at 7.

57 *Id.*

58 David J. Gerber, *The Transformation of European Community Competition Law?*, 35 HARV. INT'L L.J. 97, 147 n.17 (1994) (referencing the Report of the Heads of Delegations to the Ministers of Foreign Affairs presented to the Intergovernmental Committee established by the Messina Conference (Spaak Report), Apr. 21, 1956).

59 *Id.*

60 EEC TREATY; *see* BERMANN ET AL., *supra* note 12, at 7. Eventually joining the Union were Great Britain (1973), Greece (1981), Denmark (1973), Spain (1986), Portugal (1986), and Ireland (1973) Austria (1995), Finland (1995), Sweden (1995).

The European Union was to have fully implemented the prescriptions of the Single European Act (SEA), passed by the European Parliament in 1986, by January 1, 1993.[61] The SEA is an effort to revitalize the economic union aspirations of the 1958 Treaty of Rome, which created the EU.[62] In addition, the EU and several other European Countries which comprise the European Free Trade Association (EFTA)[63] have formed an economic association called the European Economic Area (EEA).[64] The EEA, which serves as a preliminary step toward full membership of the EFTA countries in the EU, encompasses an economic market of 376 million people.[65] Finally, the Europeans have extended the concept of economic integration to that of economic union with the signing and subsequent acceptance of the Maastricht treaty by each Member State.[66]

The basic economic idea behind the European Union was the formation of a single economic market that would be regulated by transnational rules of law. In essence, the single economic market was to center upon the so-called four freedoms: the freedom of movement of persons,[67] goods,[68] services,[69] and capital.[70] These and other economic goals of the Union were designed to facilitate economic intercourse among the Member States absent any international restraints.[71] In essence, the Union would act much like a single nation on commercial matters. Crucial to this vision was a process of harmonization, of which social harmonization would be key.

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[61] The SEA was to be fully implemented by December 31, 1992. Presently, implementation is nearly complete, but has lagged in the area of free flow of persons, largely as a result of delays on the part of the British, Irish, and Danish governments. Michael Mann, *Nation States in Europe and other Continents: Diversifying, Developing, Not Dying*, 122 DAEDELUS 115 (1993).

[62] *See* Isabelle Martin, *Environment Panel: The Limitations to the Implementation of a Uniform Environmental Policy in the European Union*, 9 CONN. J. INT'L L. 675, 676-677 (1994).

[63] The European Free Trade Association includes Iceland, Liechtenstein, Norway, and Switzerland. As of January 1, 1995, Austria, Finland, and Sweden, formerly of the EFTA, joined the European Union.

[64] The EEA went into effect on January 1, 1994. For the text of the agreement see [1992] 1 Common Market Law Reports 921 (1992).

[65] *Accord on Europe Market*, N.Y. TIMES, Feb. 15, 1992, at 50.

[66] 31 I.L.M. 253. The Maastricht Treaty (Treaty on European Union) went into effect in November 1993.

[67] EEC TREATY arts. 48-58.

[68] *Id.* at arts. 9-37.

[69] *Id.* at arts. 59-66.

[70] *Id.* at arts. 67-73.

[71] Other principles of the Union included in the Treaty of Rome are a common agricultural policy, Right of Establishment, and common rules regarding freedom of transport. EEC TREATY arts. 38-47, 52-58, 74-84.

IV. EU Constitutional Processes and the Potential for Social Harmonization

A. Institutions

Given the difficulty of forging an all-encompassing political identity out of numerous sovereign states, the governing institutions of the EU represent a remarkable attempt at supranational governance. As currently constituted, the EU governance structure is composed of the Council, the Commission, the Parliament, and the European Court of Justice (ECJ).[72] The Council is the head of the structure, and is composed of representatives of each of the member nations.[73] When general questions are to be considered, the Council is made up of the foreign ministers of the member states.[74] When specialized topics relating to specific fields of ministerial expertise are to be discussed, the Council is made up of the relevant cabinet members concerned.[75]

The Council is the principal legislative body of the EU, but it cannot exercise its law-making power except upon a proposal by the Commission.[76] Its task, broadly set out in the Treaty of Rome, is to "ensure that the objectives set out in this treaty are attained . . . ."[77] In doing so, its powers are somewhat limited since it cannot pass legislation, except as proposed by the Commission.

The power of the Parliament has expanded significantly since the Maastricht Treaty became effective. While it remains the least powerful of the bodies, it is now involved in governance matters including the approval of legislation and the input of information into the legislative process.[78] Parliament now can initiate the legislative process by requesting legislative proposals from the Commission on matters that it considers appropriate for implementing the treaty,[79] and can oversee investigations of maladministration within the Union bureaucracy.[80]

The Commission is composed of seventeen members who, though appointed by the Member States, are independent actors. It acts on an agenda developed by the Council, and proposes legislation which in turn may be adopted by the Council in the form of regulations, directives, or decisions.[81] The law-making mechanism of the directive, under which all social policy legislation has been developed to date, is

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[72] BERMANN ET AL., *supra* note 12, at 50-73.

[73] EEC TREATY art. 146.

[74] BERMANN ET AL., *supra* note 12, at 51.

[75] *Id.* For example, on issues concerning the Common Agricultural Policy, decisions by the Council would be made by the various agriculture ministers. *Id.*

[76] *Id.*

[77] EEC TREATY art. 145.

[78] *Id.* at art. 189-189c.

[79] *Id.* at art. 138.

[80] *Id.* at art. 138e.

[81] *Id.* at art. 189.

intended to be implemented by Member States by the enactment of national legislation.[82] The Treaty of Rome gives the Council the authority to "issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment of the Common Market."[83] Such national legislation must meet the specific requirements of the directive, though the means of implementation is left up to the Member States.[84] In the case of worker rights, Member States are free to provide greater protection than required by the directive.[85]

However, the power of the Council to issue directives would be of no importance without adequate judicial enforcement. The European Court of Justice (ECJ) is important to the functioning of the Union, especially in the area of harmonization by directive in two ways. First, the Commission or Member States may bring an action before the Court, alleging the failure of a Member State to fulfill the obligations of the Treaty, and in those matters the Court has original jurisdiction.[86] This includes the failure of a Member State to enact legislation implementing a directive.[87]

The second, and most important jurisdictional grant for present purposes is Article 177 of the Treaty of Rome. Article 177 gives the ECJ the power to make preliminary rulings on interpretation of Union laws at the request of any court of a Member State.[88] Through this process, individuals can utilize Member State courts to petition the ECJ regarding matters of EU competence and have such issues heard by the ECJ. It also provides a means by which individuals can assert rights they may have under a directive where Member State law is either nonexistent or incompatible.

The doctrine that makes this assertion of rights possible is the direct effect doctrine. The doctrine, akin to the doctrine of self-execution of international obligations in domestic law, provides that rights accorded in Union legislation are immediately applicable to individuals.[89] The doctrine is clear as it relates to regulations, but more complex with regard to directives. According to Article 189 of the Treaty of Rome, Member States have control over methods of implementation of directives.[90] However, under Article 177 of the treaty, an indi-

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[82] *Id.* at art. 100.

[83] *Id.*

[84] *Id.*

[85] *Id.* at art. 118a(2).

[86] *Id.* at art. 169 (Commission) & art 170 (Member States).

[87] *Id.* The obligation to enact legislation consistent with a directive is found at Article 100. *See also* supra note 12 (describing harmonization).

[88] EEC TREATY art. 177.

[89] J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2413 (1991).

[90] Article 189 states that "[a] directive shall be binding, as to the result to be achieved upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." EEC TREATY art. 189.

vidual may complain before a national court that a Member State has deprived that individual of rights that would be recognized under a particular community law.[91] As the ECJ stated in a landmark case:

> [i]t would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned . . . It is necessary to examine, in every case, whether the nature, general scheme and wording of the provision in question are capable of having direct effects on the relations between Member States and individuals.[92]

Under the procedure utilized in that case, intermediate Member State courts may, and courts of last resort must, under Article 177, bring matters involving interpretation of Community mandated obligations before the ECJ.[93] This includes directives to the extent that the directives impose a binding obligation on the Member States to enact implementing legislation.[94]

This process is useful where it is the Member State government that is involved in a practice inconsistent with a directive. Where a private entity is in violation of a directive, the direct-effect doctrine is considerably less powerful. The ECJ has held that the treaty's obligation with regard to directives applies only to the obligation to implement on the part of the Member States.[95] Individuals can obtain relief where private rights accorded by directive are violated by private parties as a result of some infirmity in national law or enforcement.[96]

Not only does the Treaty of Rome articulate policy goals of the economic union, but it also provides an intricate governance structure much like that of a nation-state. As such it can be understood as a constitutional document as much as it is an economic treaty. Indeed, much of EU governance can be analyzed using principles of nation-state governance as is discussed in the following section.

B. Constitutional Design

The Treaty of Rome is a far more ambitious undertaking than

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91 *See* Weiler, *supra* note 89, at 2413.

92 Case 41/74, Van Duyn v. Home Office, 1974 ECR 1337, 1338, [1975] 1 C.M.L.R. 1. The concept of direct effect would apply only to those directives "capable of having direct effects" on individuals. Because social policy legislation applies to individual rights, directives in this area have been treated as having direct effect.

93 EEC TREATY art. 177.

94 *Id.* at art. 189.

95 Case 152/84, Marshall v. Southampton and South-West Hampshire Area Health Authority, 1986 E.C.R. 723, [1986] 1 C.M.L.R. 688.

96 Specifically, the power of review is the power of the ECJ to oversee Member State compliance with directives. As such, there is no horizontal effect of EU directives to the extent that they create rights against individuals. However, as a practical matter, national courts do have to ensure that appropriate remedies, as reviewed by the ECJ, are available for the enforcement of private rights that may have been violated by private parties. BERMANN ET AL., *supra* note 12, at 181.

NAFTA.[97] Despite its name, the Treaty is largely regarded as a constitutional document.[98] Two features of the EU legal culture support this notion. The first is the doctrine of direct-effect,[99] and the other is the doctrine of supremacy.[100] Several decisions of the ECJ have deemed EU laws to be superior to the laws of the Member States.[101] Together, the doctrines have the effect of turning the Treaty of Rome into a constitutional document. The result of the two doctrines is largely to remove the international flavor of the legal system among the EU nations.

Because international law tends to develop more slowly than domestic (or in this case, domestic-like) law,[102] the normal impulse would be to assume that EU law is a fast developing body as it attempts to develop along quasi-federal lines. But, in the areas discussed in this Article, such speed is not apparent.[103] Whereas systemically the EU has come to resemble (at a very embryonic level) a classic federal state by the partial removal of sovereignty of Member States in areas of EU competence, there remains the political element of lawmaking.[104] Although law is made, and that law is self-executing and superior to Member State law, the decision-making process that precedes the passing of legislation remains in the hands of sovereign Member States and not elected representatives from governmental units as in a federal

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97 NAFTA is based upon a traditional model of economic integration under which states agree to certain economic behavior and the sanction for breach is termination of benefits under the agreement. *See* Vienna Convention, *supra* note 4, at art. 60, § 1 ("A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part"). Under this model, each party is responsible to other parties for the promised obligations. Under traditional international law, standing to claim breach of an obligation is limited to state parties. JOSEPH SWEENEY ET AL., CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 573 n.75 (3d ed. 1973). Each state may provide its own citizens with access to national courts to litigate rights made available to them under an agreement, but standing within state courts for individuals to address issues under an international agreement is subject to state constitutional laws. *See* Foster & Elam v. Neilson, 27 U.S. (2 Pet.) 253 (1829). *See generally* MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 72-6 (1988). The NAFTA model is very international in nature. The obligations are limited and they are owed to the states themselves. Even the NAALC, discussed later in this Article, stops short of specific requirements and individual redress.

98 Weiler, *supra* note 89, at 2413.

99 *See supra* note 89 and accompanying text.

100 Weiler, *supra* note 89, at 2414-15.

101 Case 6/64, Costa v. Ente Nazionale Per L'Energia Elettrica, 1964 ECR 585; Case 106/77, Amministraxione Delle Finanze Dello Stato V. Simmenthal S.p.A, 1978 ECR 629; Case c-213/89, The Queen v. Secretary of State for Transport *ex parte* Factortame Ltd., 1990 ECR I-2433.

102 International law is slow to develop because of the systemic problems associated with the concept of sovereignty.

103 At best, legal development within the Union can be said to have been gradual. As will be shown in the next section, despite the "constitutional" impetus for the protection of social rights, it has taken from the beginning of the EU to the present to come up with a near comprehensive plan for dealing with social policy matters on a Union-wide basis, and even now, with the virtual abstention of the United Kingdom. *See infra* part V.

104 Weiler, *supra* note 89, at 2430.

system.[105]

Professor Weiler characterizes the state of EU governance as a juxtaposition of what he terms Exit and Voice. Drawing from another work, Weiler summarizes his thesis as follows:

> Exit is the mechanism of organizational abandonment in the face of unsatisfactory performance. Voice is the mechanism of intraorganizational correction and recuperation. Crudely put, a stronger "outlet" Voice reduces pressure on the Exit option and can lead to more sophisticated processes of self-correction. By contrast, the closure of Exit leads to demands for enhanced Voice.[106]

Member States have the option of pulling out of the EU, but the constitutional direction forecloses selective exit—if a Member State applies EU law in some areas, then it must apply it in all areas where EU law is competent.[107] Because EU laws are the supreme law of the land and may be applied directly, there is, and must be, enhanced Voice as a political counterweight to the foreclosure of selective exit.[108] This Voice is the mechanism under which much legal development in the EU has been gradual, though progressive and relentless.[109] Through a political process highlighted by both sovereignty and quasi-federalism, legal development remains international in pace, but federal in the ultimate goal of governance.

The EU governance structure covers a wide variety of economic arrangements among the sovereign Member States. Yet that governance structure provides for "voice" on the part of the Member States.

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[105] This point is crucial. Under a federal system as in the United States, elected representatives make decisions that are not subject to formal review of veto by the governing bodies of the jurisdictions that they represent. Senators in the United States do not seek authorization from state legislatures for positions taken or votes. Under the European system, final decisions on legislation are made by the Council acting on behalf of the governments of the member states. *Id.*

[106] Weiler, *supra* note 89, at 2411 (referencing A. HIRSCHMAN, EXIT VOICE AND LOYALTY—RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES 19 (1970)).

[107] *The ERM and Maastricht: Text of Statement by EC Monetary Committee*, FIN. TIMES, Sept. 18, 1992. Presumably, countries can negotiate an "opt-out" arrangement with regard to certain aspects of the Union regime. The United Kingdom negotiated and obtained an opt-out from the Social Chapter of the Maastricht Agreement, which effectively exempts it from social policy legislation passed under that agreement. Of course, this arrangement flies in the face of the "voice" and "exit" thesis and has been the subject of intense debate within the Union since the arrangement was agreed to. *Id.*

[108] Weiler, *supra* note 89, at 2426-27. Weiler suggests that as EU law became more definitive and imposing upon member states, becoming what he calls "Hard Law," the reaction of the Member States was to at least gain control over the process of lawmaking: "Because Community norms in terms of substance were important, and because they were by then situated in a context that did not allow selective application, control of the creation of the norm itself was the only possible solution for individual states." *Id.* at 2427.

[109] The dynamics of enhanced "voice" allowed the Member States to control the pace, but not reality of legal development. Because Member States, operating through the Council, have political realities of their own to deal with in terms of accountability to their own electorates, development cannot help but be gradual. *Id.* at 2427, 2447. But development continues because, as Weiler posits, Member States control the governance of the Union and see development of legal norms to their advantage, in large part because their enhanced, power, or "voice." *Id.* at 2449.

This voice serves as a means by which the Member States may maintain control over the governmental apparatus. As a result, any diminution of autonomy of the Member States under the Treaty is subject to close Member State scrutiny, and the Member States may decline any such moves.[110]

V. European Union Social Policy—Implementation of Harmonized Policies

A. *Introduction*

The history of social policy in the European Union dates back to the Treaty of Rome. Development of the social policy has been in stages, and the extent of each stage of development has met with some controversy. In this section, laws that were designed to address the social dumping phenomenon in each of the stages will be analyzed.

The Treaty of Rome at Article 117 makes clear that affirmative action on the part of the EU, through its Member States, is required to harmonize social standards in addition to the economic effects brought on by the institution of common market principles.[111] EU action has been designed to promote "gradual upward leveling" in low cost/standard states without harming the standards in the higher cost/standard states.[112] However, the task is no simple one. The Member States, for reasons of policy, institutional norms, and ideology, have priorities that are different from each other, making the process of harmonization a difficult one.[113]

B. *Early Developments in the Area of Worker Rights*

The Treaty of Rome set out principles that were to be achieved by

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[110] Weiler's description of the Union's governing structure may be applicable to reform of NAFTA. Because there is a lack of adequate institutional tools to deal with economic problems that can arise in the area of labor, there is certainly nothing to lose by the active consideration of reform as the Agreement is implemented over the next few years. Basic agreement on general rules in the area of labor policy, complemented by a structure of review and sanction that can be accessed by individuals and assurances that legal concerns will predominate the enforcement of these rules over diplomatic and political concerns, may be accomplished with only a minimal loss of autonomy. From a practical standpoint, because NAFTA consists of only three parties, maintaining control of a governing apparatus in the labor area should not be a problem.

[111] This treaty states:

> Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained. They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonization of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action.

EEC TREATY art. 117.

[112] Marley S. Weiss, *Impact of the European Community on Labor law: Some American Comparisons*, 68 CHI.-KENT L. REV. 1427, 1466 (1993).

[113] HITIRIS, *supra* note 18, at 252.

the EC, and legislation pursuant to the 1974 Social Action Program[114] laid the groundwork for future EC activity in the area.[115] The earlier efforts are important because they set the stage for the EC's approach of not relying solely upon market mechanisms for the development of desirable outcomes in the area of worker rights.

1. Social Policy under the Treaty of Rome

The treaty includes several important provisions concerning principles of worker rights, many of which require implementing legislation to be effective. Article 6 and Article 48 prohibit discrimination on the grounds of nationality in order to accommodate the worker markets of diverse nationality spawned by European integration.[116] In addition, Article 48 protects the right to accept offers of employment anywhere within the Union and the right to live, move about, and to remain in the territory of a Member State after having been employed in that state.[117] Article 49, which provides for Council action by a qualified majority,[118] calls for the gradual implementation of a harmonization scheme to eliminate differences in work conditions that might otherwise discourage worker mobility.[119] Consistent with the theme of enhancing mobility, Article 51 requires the Council to adopt such measures in the field of social security as are necessary to provide freedom of movement for migrant workers.[120]

Title III of the treaty is entitled Social Policy and is a more direct framework for dealing with social issues.[121] With the exception of the

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[114] Resolution of the Council of 21 January 1974 Concerning a Social Action Programme, 1974 O.J. (C 13) 1 [hereinafter 1974 Social Action Program].

[115] Roger J. Goebel, *Employee Rights in the European Community: A Panorama From the 1974 Social Action Program to the Social Charter of 1989*, 17 HASTINGS INT'L & COMP. L. REV. 1, 40 (1993).

[116] EEC TREATY art. 7, 48. Article 7 bars discrimination generally within the competence of the treaty. *Id.* at art. 7. More directly, Article 48 prohibits discrimination against workers "as regards employment, remuneration and other conditions of work and employment." *Id.* at art. 48, ¶ 2.

Anti-discrimination laws involve costs—namely the cost of liability for noncompliance. As is often complained of in the United States, more regulation costs more to business. These costs to business should be equalized across national borders once the principle in the treaty is turned into legislation.

[117] EEC TREATY art. 48. Paragraph 4 notes that the article does not apply to public service.

[118] For a discussion of the qualified majority controversy under the Single European Act, see *infra* part V.C.3.

[119] EEC TREATY art. 49.

[120] *Id.* at art. 51; *see also* Dr. Bernd Baron von Maydell, *The Impact of the EEC on Labor Law*, 68 CHI-KENT L. REV. 1401, 1407 (1993).

[121] Title III, entitled "Social Policy," is the main part of the treaty dealing with social policy matters. EEC TREATY tit. III (as amended 1987). It includes articles addressing employment (art. 118), collective bargaining and labor relations with management (arts. 118, 118b), working conditions (arts. 117, 118), vocational training (art. 118), social security (arts. 118, 121), occupational safety and health (arts. 118, 118a), union organizing (art. 118), gender discrimination in the workplace (art. 119), and paid holidays (art. 120). In addition,

provision providing for equal gender rights at Article 119,[122] Title III takes a "cooperative" approach. It establishes a general agreement among the Member States to work toward improving living standards for workers in the following areas: employment, labor law and working conditions; basic and advanced vocational training; social security; prevention of occupational accidents and diseases; occupational hygiene; the right of association and collective bargaining;[123] and the maintainance of "the existing equivalence between paid holiday schemes."[124] In addition, the title provides for the creation of a resource fund, the European Social Fund, to assist Member States in providing programs to assist workers in obtaining retraining and resettlement assistance and to provide other social policy benefits.[125] The Treaty's language is vague, however, since only "cooperation" was required.[126]

2. *Worker Legislation through 1986*

Compelled by the obvious and predictable lack of progress in the social sphere, the EU heads of state issued a communique recognizing the equal importance of social policy to economic and monetary policy at their Paris meeting in 1972.[127] Out of that recognition, the Commission issued the 1974 Social Action Program.[128] The Program stated, "the Commission believes that there are certain guidelines which, in the interest both of social progress and the equalization of competitive conditions should be recognized as basic objectives throughout the Community."[129]

The Social Action Program of 1974 focused upon three broad

Articles 123-128 provide for the establishment of the European Social Fund which is designed to aid Member States in assisting workers to adjust to economic dislocation. *Id.*

[122] Article 119 of Title III, dealing with equal rights for men and women reads in part:

> Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work . . . . Equal pay without discrimination based on sex means: (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement; (b) that pay for work at time rates shall be the same for the same job.

EEC TREATY art. 119.

[123] *Id.* at art. 118. The treaty does not speak in detail with regard to the right of association and collective bargaining. This probably has to do with the fact that labor unionization is such an established part of industrial society in Western Europe that entreaties to harmonize Member State laws are unnecessary.

[124] *Id.* at art. 120.

[125] *Id.* at art. 123.

[126] Title III had little bite until section 118a was added as part of the amending process under the Single European Act. The treaty as it existed before the Single European Act amendments, did not specifically require implementation through Council directives, except in the area of equal rights for men and women. *Id.* at art. 118a.

[127] Lammy Betten, *Prospects for a Social Policy of the European Community and its Impact on the Functioning of the European Social Charter, in* THE FUTURE OF EUROPEAN SOCIAL POLICY 108 (L. Betten ed., 1989) (citing Communique of the Meeting, E.C. Bull. 4173, at 5).

[128] *Id.*

[129] 1974 Social Action Program, *supra* note 114, at 18.

principles: full and better employment, improvement in living and working conditions, and worker participation in the economic decisions of employers.[130] From these basic principles, the Social Action Program spelled out a number of specific goals that the Commission hoped to realize through legislation. Among them were: legislation to provide or to protect freedom of movement of workers,[131] vocational training,[132] equalization of wages and working conditions,[133] equality of men and women in the workplace,[134] job safety,[135] worker representation on company boards,[136] worker information on company policies and actions,[137] and job security in situations of firm instability or takeover.[138]

A slightly less ambitious legislative agenda was eventually passed. Legislation included directives providing for the harmonization of Member State laws in the following areas: rights of workers during layoffs, transfers of undertakings, and insolvencies; protection of workers in the area of equal opportunity; and seven directives relating to health and safety.[139]

a. Worker Information and Consultation

Directives requiring worker information and consultation in circumstances of reorganization covered collective redundancies (layoffs),[140] and transfers of undertakings (takeovers and mergers).[141] The directives required that employers notify national authorities of layoffs at least thirty days prior to the worker dismissals, and that firms seriously consider worker suggestions to deal with the circumstances from which redundancies, takeovers, and mergers may arise.[142]

The transferor and transferee of a business must inform worker representatives of the reason for the transfer and the legal, economic and social implications of the transfer for the employees.[143] In addi-

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130 *Id.* at 15.
131 *Id.* at 16.
132 *Id.* at 15.
133 *Id.* at 16.
134 *Id.* at 18.
135 *Id.*
136 *Id.* at 19.
137 *Id.*
138 *Id.*
139 *See infra* notes 140-41 and accompanying text.
140 Council Directive 75/129 on the Approximation of the Laws of Member States Relating to Collective Redundancies, art. 4, 1975 O.J. (L 48) 29.
141 Council Directive 77/187 on the Approximation of the Laws of the Member States relating to Safeguarding Employee Rights in the Event of Transfer of Undertakings, Businesses, or Parts of Businesses, art. 6, 1977 O.J. (L 61) 26, as amended by Council Directive 92/56, 1992 O.J. (L 311) 40.
142 Council Directive 75/129, *supra* note 140, § 2, art. 4 (30 days notice); *id.* § 2, art. 2 (consultations); Council Directive 77/187, *supra* note 141, § 3, art. 6.
143 *Id.* The legislation on its face does not evidence an intention to involve workers in the formulation of company plans as to mergers, and other transfers of undertakings, and

tion, employers contemplating collective redundancies are to consult with workers' representatives with a view to reaching agreement or avoiding or reducing the number laid off, and to supply reasons for the layoffs.[144]

Inasmuch as the goal of the Union is to create an internal market among the Member States, harmonization of the requirements for corporate reorganization and other corporate policy changes that effect workers appears to be a logical step toward total integration. By mandating uniformity, no single Member State is at an advantage or disadvantage in attracting firms seeking to relocate. The information and consultation scheme envisioned by the 1975, 1977, and the recently passed EC corporation legislation[145] are consistent with this agenda.

b. Employment Safeguards

The 1977 Council Directive dealing with transfers of undertakings generally protects the contractual status of the employee and protects the employee from detrimental change due to alterations in business circumstances.[146] Specifically, the directive requires that Member

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other company policies. In practice, this aspect of the legislation is borne out by a study conducted by the European Foundation for the Improvement of Living and Working Conditions. The study found little evidence that workers were taking part in decisions, or being consulted for consideration in decisions involving new technologies, mergers etc. Teun Jaspers, *Desirability of European Legislation in Particular Areas of Social Policy, in* THE FUTURE OF EUROPEAN SOCIAL POLICY 75 (L. Betten ed., 1989). As Jaspers puts it, member state legislation is lagging. *Id.* Only at the implementation stage are workers' representatives consulted generally, and then presumably to discuss *how* as opposed to *whether*. *Id.* The main question is whether such an intimate involvement in company activities on the part of workers was the purpose of the legislation in the first place. Directive 77/187 appears designed only to facilitate worker adjustment company policies that might effect their employment. Council Directive 77/187, *supra* note 141.

Originally the European Commission sought legislation mandating worker participation in policymaking at the firm level. The principle went beyond notions of worker information and consultation, and specified that workers actually take part in decision making involving firm policies. The latter approach proved too controversial for legislation to be adopted. Two proposals were put forward by the Commission in the 1970s that would have formalized worker roles in company decisions. The so-called Fifth Directive would have served to establish formal participation structures. Commission Proposal for a Fifth Directive on the Structure of Societes Anonymes, 1972 O.J. (C 131) 49. The directive has not been passed. *See* TEAGUE, *supra* note 29, at 58.

Recently legislation for a European Works Council in Community-scale undertakings has been passed. Council Directive 94/45 on the Establishment of a European Works Council or a Procedure in Community-Scale Undertakings and Community-Scale Groups of Undertakings for the Purposes of Informing and Consulting Employees, 1994 O.J. (L 254) 64. This legislation is limited to firms incorporated under Community law (EC corporations) and is more extensive than present Council Directives governing worker information and consultation. *See id.*

144 Council Directive 75/129, *supra* note 140, at art. 4. The directive requires that employers consult the workers' representatives in sufficient time with a view toward seeking an agreement as to measures envisaged in relation to the workers, particularly with regard to avoiding or reducing the number of workers laid off or as a result of changes in the firm. *Id.* art. 2.

145 *See supra* note 143.

146 Council Directive 77/187, *supra* note 141, art. 3.

States pass legislation requiring transferees to respect the contractual rights and obligations of employees, as those rights existed on the date of transfer, for a period of no less than one year.[147] Transfers may not be the grounds for dismissal.[148]

In addition, the 1980 Council Directive requires Member State legislation protecting the remuneration and benefits of employees of insolvent firms under collective bargaining or other contractual agreements.[149] Under the directive, state legislation would require that workers be guaranteed their wages owed either at the time of firm insolvency or the date of dismissal occasioned by the insolvency.[150]

c. Health and Safety

Prior to the Single European Act (SEA), some rather specific though not all encompassing legislation in the health and safety field was enacted. The directives dealt with such issues as protection against certain chemical and biological agents,[151] certain specific physical dangers,[152] and major accident hazards.[153] More specific Community-wide measures went into force following the SEA.[154] While these meas-

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147 *Id.*

148 The impact of this provision is curious. Article 4 prohibits the dismissal of employees on the sole grounds of the transfer. However, that Article also states: "The provision shall not stand in the way of dismissals that may take place for economic, technical or organizational reasons entailing changes in the workforce." Council Directive 77/187, *supra* note 141, art. 4. Interpretations of the Directive by the ECJ include a determination that the Directive applies in cases in which a business is discontinued, and restarted under new ownership, even where employees are previously dismissed following the initial discontinuance of the business. Case 324/86, Foreningen af Arbejdsledere i Danmark v. Daddy's Dance Hall, 1988 E.C.R. 739. The ECJ also found that even though an employer is released from liability to employees in the case of a transfer of business (though Member States may provide for joint transferor/transferee liability), an employer/transferor is liable for obligations to employees where business is transferred back to transferor because of a breach of transferee's obligations in the transfer agreement. Cases 144/87 and 145/87, Berg v. Besselsen, 1988 E.C.R. 2559.

149 Council Directive 80/987 on the Approximation of the Laws of the Member States Relating to the Protection of Employees in the Event of the Insolvency of Their Employer, 1980 O.J.(L 283) 23, as amended by Council Directive 87/164, 1987 O.J. (L 66) 11.

150 *Id.*

151 Council Directive 78/610 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States on the Protection of the Health of Workers Exposed to Vinyl Chloride Monomer, 1978 O.J. (L 197) 12; Council Directive 80/1107 on the Protection of Workers from the Risks Related to Chemical, Physical and Biological Agents at Work, Council Directive, 1980 O.J. (L 327) 8, as amended by Council Directive 88/642, 1988 O.J. (L 356) 74; Council Directive 82/605 on the Protection of Workers from the Risks Related to Exposure to Metallic Lead and its Ionic Compounds at Work, 1982 O.J. (L 247) 12; Council Directive 83/477 on the Protection of Workers from the Risks Related to Exposure to Asbestos at Work, 1983 O.J. (L 263) 25.

152 Council Directive 86/188 on the Protection of Workers from the Risks Related to Exposure to Noise at Work, 1986 O.J. (L 137) 28; Council Directive 88/364 on the Protection of Workers by the Banning of Certain Agents and Activities at Work, 1988 O.J. (L 179) 44.

153 Council Directive 82/501 on the Major-Accident Hazards of Certain Industrial Activities, 1982 O.J. (L 230) 1, as amended by Council Directive 87/216, 1987 O.J. (L 85) 36.

154 *See infra* parts V.C.1 and 2.

ures do not meet the potential for workplace safety legislation, they do require the attention of employers and the attendant costs.

d. Equal Opportunity

Article 119 of the Treaty of Rome, which deals with equal treatment of men and women in employment, is perhaps the most definite of the treaty's social policy provisions. Accordingly, the legislation flowing from that provision is the more encompassing.

The legislative scheme requires Member States to harmonize their laws to ensure equal pay for the same or equal work,[155] to guarantee equal treatment regarding working conditions,[156] to secure equal treatment in agricultural and self employed activities,[157] and to assure equal treatment in matters of social security.[158] In addition to requiring the same pay for the same position without sex based discrimination, the equal pay directive also requires that positions be subject to equal remuneration if they are those to which "equal value is attributed."[159] That directive has been interpreted by the ECJ as applying to those practices that have the effect of disfavoring one sex where no justification for objective reasons unrelated to gender is apparent.[160] While the equal treatment directive has been interpreted as prohibiting discrimination against women because of the financial consequences to an employer as a result of possible pregnancy,[161] the

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[155] Council Directive 75/117 on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women, 1975 O.J. (L 45) 19.

[156] Council Directive 76/207 on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion and Working Conditions, 1976 O.J. (L 39) 40.

[157] Council Directive 86/613 on the Application of the Principle of Equal Treatment Between Men and Women Engaged in an Activity, Including Agriculture in a Self-Employed Capacity, and on the Protection of Self-Employed Women During Pregnancy and Motherhood, 1986 O.J. (L 359) 56.

[158] Council Directive 86/378 on the Implementation of the Principle of Equal Treatment for Men and Women in Occupational Social Security Schemes, 1986 O.J. (L 225) 40.

[159] Council Directive 75/117, *supra* note 155. Similar standards have been proposed in the United States. *See* Equal Pay Act, 29 U.S.C. § 206(d) (1988).

[160] Case 171/88, Ingrid Rinner-Kuhn v. FWW Spezial-Gebaudereinigung GmbH & Co. KG, 1989 E.C.R. 2743. The ECJ considered a provision of a German statute that provided that an employer continue to pay a worker, unable to work due to unfitness, for up to six weeks. *Id.* However, this provision did not apply to employees who worked less than 10 hours a week or 45 hours a month. *Id.* The ECJ held this exception to have a disproportionate impact on women which resulted in a practice of discrimination contrary to Article 119 of the EEC Treaty and Council Directive 75/117. *Id.* Any disproportionate impact in terms of wages would require justification. *Id.*

[161] Case C-177/88, Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV Centrum) Plus, 1990 E.C.R. 3941. In this case, a woman applied for a position as a training center instructor. *Id.* Despite having been evaluated as the most suitable candidate for the position, the defendant declined to hire her on the basis of her pregnancy, claiming that it would not be reimbursed for maternity benefits by its insurance carrier. *Id.* The ECJ held that:

> it follows . . . that an employer is in direct contravention of the principle of equal treatment . . . if he refuses to enter into a contract of employment with a

directive explicitly excepts protection on the basis of the condition of pregnancy.[162] Also excepted are those activities for which, due to their nature, the sex of the worker is a determining factor.[163]

C. *Recent Developments in Worker Rights*

1. *Social Policy under the Single European Act*

The signing of the Single European Act (SEA) amended the Treaty of Rome and significantly impacted social policy. Article 118a was added to deal specifically with health and safety of workers within the working environment.[164] A new voting procedure was included also. This has had a profound effect on social policy within the Union because the new voting procedure has been interpreted as including at least the health and safety component of worker rights in the qualified majority decision-making format applicable to most matters under the SEA amendments to the Treaty of Rome.[165]

The passing of the SEA coincided with a revival of efforts to articulate a broader social policy. When Jacques Delors became president of the European Commission, "[the Commission] was determined to restart the mechanism of European integration, which included resolving the deadlock on social policy matters."[166] Delors apparently saw social dumping as a threat to effective economic integration, and viewed harmonization as the necessary means to this end.[167]

> female candidate whom he considers to be suitable for the job where such refusal is based on the possible adverse consequences for him of employing a pregnant woman, owing to rules on unfitness for work . . . .

Id.

[162] Council Directive 76/207, *supra* note 156, art. 2(3).

[163] *Id.* art. 2(2). Under Title VII jurisprudence in the United States, the concept is called "bona fide occupational qualification."

[164] "Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonization of conditions in this area, while maintaining the improvements made." EEC TREATY art. 118a, ¶ 1.

[165] Donald C. Dowling, Jr., *Worker Rights in the Post-1992 European Communities: What "Social Europe" Means to United States-Based Multinational Employers*, 11 NORTHWESTERN J. INTL. L. BUS. 593 (1991).

Originally under the treaty, matters dealing with the approximation of Member State laws in a given area had to be approved unanimously. EEC TREATY art. 100. The SEA changed the approximation rule to allow for qualified or weighted voting. *Id.* art. 100a, ¶ 1. However, specifically excluded were matters affecting "rights and interests of employed persons." *Id.* art. 100a, ¶ 2. Article 100A, however, applied the qualified majority rule to health and safety matters. *Id.* art. 100a, ¶ 3.

The interpretation that this change allows for the non-unanimous approval of health and safety standards in the workplace has met with significant controversy. Dowling, *supra*, at 593. The United Kingdom has based its decision not to take part in social policy initiatives under the more recent Maastricht Accord because it believes that its general opposition to expanded social policy legislative initiatives would serve as a veto of any proposed legislation under its more conservative (or plain) reading of 118a. *See Britain Signals EU Climbdown*, FIN. TIMES (London) Mar. 15, 1994, at 1; *see also infra* part V.C.3.

[166] TEAGUE, *supra* note 29, at 68.

[167] The Charter states: "Whereas the completion of the internal market must favour the approximation of improvements in living and working conditions, as well as economic and

2. *The Community Charter on the Fundamental Social Rights of Workers*

The result of Delors' initiative was the Community Charter of the Fundamental Social Rights of Workers.[168] The Charter was essentially a proposition or statement of general direction, not a "social constitution" as some had hoped.[169]

The twelve basic rights listed in the Charter are: freedom of movement; freedom of employment and the right to fair remuneration; right to improved living and working conditions; right to adequate social security; freedom of association and collective bargaining; right to vocational training regardless of nationality; right to equal pay for men and women; right to information, consultation, and participation with regard to company decisions; right to health protection and safety at the workplace; protection of children and adolescents; protection of elderly persons; and the protection of disabled persons.[170] Because there is no constitutional basis for such a charter,[171] the instrument had no binding effect. It served merely as a statement of intention and a general blueprint for further Community legislation.

3. *1989 Social Action Program*

A more specific, though equally extra-constitutional document was the 1989 Social Action Program.[172] That document bridged the gap between the Charter and subsequent efforts to pass legislation. The European Commission's 1989 Social Action Program[173] elaborated upon the rights in the already written, though not yet passed Charter.[174]

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social cohesion within the European Community while avoiding distortions of competition . . . " which implicates harmonization. Community Charter of the Fundamental Social Rights of Workers, 1989 L.J. (C 323) pmbl. [hereinafter Charter].

168 *Id.*

169 JOHN GRAHL & PAUL TEAGUE, 1992—THE BIG MARKET: THE FUTURE OF THE EUROPEAN COMMUNITY 212 (1990).

170 Charter, *supra* note 167, tit. I. The Charter's provisions providing for protection of children and adolescents, elderly persons, and disabled persons, the right to information, consultation, and participation are not specifically stated in the Treaty of Rome. *See* EEC TREATY. As noted, directives in the area of information and consultation (though not necessarily participation) have been issued by the Council for non-EC corporations. For a discussion of on regulations regarding EC corporations, see note 143, *infra.* Participation in firm policies by workers is indeed a new spin on the prior interpretations of the Treaty, if the controversy over the Fifth Directive is any guide. *See supra* note 143.

171 The Treaty of Rome provides that the Council and the Commission may "make regulations, issue directives, take decisions, make recommendations or deliver opinions." EEC TREATY art. 189, ¶ 1. There is no provision for a "charter" within the treaty. *See id.*

172 1989 Social Action Program, *supra* note 29. The Social Action Program was issued by the European Commission on November 29, 1989. Whereas the Charter was a general statement of principles, the Social Action Program was a plan of action which detailed legislative initiatives to be proposed by the Commission. *See infra* part V.C.3.

173 1989 Social Action program, *supra* note 29.

174 Dowling, *supra* note 165, at 591.

The 1989 Social Action Program, like the 1974 program, spelled out the legislative initia-

The 1989 Social Action Program is an ambitious fifty-four page statement of goals and initiatives that tracks the rights enunciated in the Charter.[175] The Action Program calls for legislation or efforts short of legislation in several areas, including the following: directives or regulations protecting the right of fair remuneration of temporary and part-time employees;[176] governing working time arrangements;[177] freedom of movement;[178] the establishment of rules for the provision of information, consultation and participation in European scale undertakings;[179] the study and possibility of future directives on the issue of equity sharing for workers;[180] directives protecting pregnant women at work;[181] extensive health and safety measures in the form of directives;[182] and various efforts at cooperation and legislation protecting the rights of the youth,[183] elderly persons,[184] and persons with disabilities in the workplace.[185] Collective bargaining matters were limited to efforts to forge cooperation, as no directives or other legislation were proposed.[186]

Interestingly enough, the Commission did not take the opportunity to thoroughly tackle remuneration issues. Although the Charter itself provides that workers shall be entitled to an "equitable wage . . . sufficient to enable them to have a decent standard of living,"[187] the Commission notes in the 1989 Social Action Program that "in matters of employment and remuneration, responsibility and, therefore, initiative, lie mainly with the Member States and the two sides of industry according to national practices, legislation and agreements."[188] The

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tives that the Commission would take subject to Council approval. *See* 1989 Social Action Program, *supra* note 29, at 3. Under the constitutional scheme of the Treaty of Rome, any directive approved by the European Council will become law, binding upon the Member States and enforceable in national courts as well as the European Court of Justice. *Id.* at 593.

175 *See* 1989 Social Action Program, *supra* note 29.

176 *Id.* at 14.

177 *Id.* at 18.

178 *Id.* at 21.

179 *Id.* at 32-3.

180 *Id.* at 36-8.

181 *Id.* at 44-49.

182 *Id.* at 44.

183 *Id.* at 50.

184 *Id.* at 52.

185 *Id.* at 54.

186 *Id.* at 29.

187 The Charter states that "[a]ll employment shall be fairly remunerated" and adds further that:

> (i) workers shall be assured of an equitable wage, i.e. a wage sufficient to enable them to have a decent standard of living; (ii) workers subject to terms of employment other than an open-ended full-time contract shall benefit from an equitable reference wage; (iii) wages may be withheld, seized or transferred only in accordance with national law; such provisions should entail measures enabling the worker concerned to continue to enjoy the necessary means of subsistence for him or herself and his or her family.

Charter, *supra* note 167, tit. I, ¶ 5.

188 1989 Social Action Program, *supra* note 29, at 14.

Commission opted instead to express its view that Member States should take action to ensure a guaranteed equitable wage.[189]

4. *Maastricht Treaty Social Policy*

The 1989 Social Action Program served as the foundation of an even more ambitious program of social action which was appended to the Maastricht Agreement (Treaty on European Union) as a protocol to the Treaty of Rome. The Agreement on Social Policy (also known as the Social Chapter) which went into effect with the final ratification of the Maastricht Treaty, covers the same ground as the 1989 Social Action Program.[190] Only one directive addressing labor issues has been passed under the auspices of the protocol and it dealt with Community scale undertaking (firms incorporated under Community-wide law).[191]

Presently efforts are underway in Brussels to reconsider the agreement allowing the United Kingdom to "opt-out" of social legislation passed under the Social Chapter protocol to the Maastricht Treaty.[192] In July 1994, the Commission indicated a strong preference for unanimous implementation of the Social Chapter among all EU members.[193] This statement of policy preference alarmed Eurosceptics in the Conservative Party government of the United Kingdom.[194] The United Kingdom has continued to resist such changes to the original understanding.[195]

D. Conclusion

Overall, the European approach to social policy has been to put the matter on the front burners of Union discussion. Despite the reality of controversy, the Union has laid a foundation, albeit uneven at places, that acknowledges the need for leveling in the social field.

The notion that disparities among countries with regard to the costs of labor competition within a single market is repeatedly acknowl-

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189 *Id.* As of this writing no further action has been taken, and considering the scope of the 1989 Social Action Program, progress has been limited. However, the Union has passed a general directive in the area of health and safety in the workplace, passed almost simultaneously with the approval of the 1989 Social Action Program, which presently serves as the foundation for more specific legislation in the area. Council Directive 89/391 on the Introduction of Measures to Encourage Improvements in the Safety and Health of Workers at Work, 1989 O.J. (L 183) 1.

190 Agreement on Social Policy Concluded Between the Member States of the European Community with the Exception of the United Kingdom of Great Britain and Northern Ireland, Dec. 10, 1991, 31 I.L.M. 247, 358 [hereinafter Agreement on Social Policy].

191 Council Directive 94/45, *supra* note 143.

192 *Portillo sets Britain on Course for New Clash with Europe*, THE TIMES (London), July 28, 1994.

193 David Goodhart, *Brussels Treads Water on Labour Policy*, FIN. TIMES, July 28, 1994, at 2.

194 *Portillo sets Britain on Course for New Clash with Europe*, *supra* note 192.

195 *Id.*

edged by the Commission,[196] even though the social dumping thesis has its detractors.[197] However, virtually all serious discussion of international trade includes recognizing the comparative advantages that some countries have over others in terms of labor costs.[198] Europe, with its disparities in wage levels,[199] has such a situation of comparative advantages and that situation will likely intensify as the Union expands to include the former Eastern Bloc. Out of that recognition, the Commission issued the 1974 Social Action Program to insure that such advantages were not the product of interventionist policies.[200]

VI. Social Policy under the North American System

A. Introduction

Unlike the social policy legislation of the European Union, the rules "governing" labor standards under NAFTA, by virtue of the North American Agreement on Labor Cooperation (NAALC), are more procedural and generally not intrusive into the domestic law of the three Parties.[201] While the standards of the EU must generally be followed by all Member States, the NAALC's approach is to require each party to enforce its own labor laws, because it is a treaty in the true sense and not a constitutional document.[202]

Nonetheless, the NAALC is far better than what was contemplated when the parties initially finished their business in 1992. Under NAFTA, labor concerns were not addressed.[203] To the extent that the social dumping thesis received any attention, it was limited to a report

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196 The Commission stated in the 1974 Social Action Program that it "believes that there are certain guidelines which, in the interest both of social progress and the equalization of competitive conditions should be recognized as basic objectives throughout the Community." 1974 Social Action Program, *supra* note 114, at 18.

197 *See* TSOUKALIS, *supra* note 9, at 144-6.

198 *See generally* KINDLEBERGER, *supra* note 24, at 17-34.

199 *See supra* note 9.

200 If the notion of government intervention to positively affect social standards in an economic integration raises red flags to some, then perhaps too much emphasis is placed on the social welfare attributes of a uniform social policy. Indeed, the principle of harmonization could have appeal in areas other than that of social policy—possibly by providing predictability and standardization for business operations. In addition, the advantage to business of capitalizing upon countries' comparative advantages is not as great as the stability that uniformity can provide in an economic integration. If this is true, reliance on economic harmonization (which could result in leveling down in higher social standard states) seems haphazard. However, in North America, the emphasis remains on the hope that economic forces will provide the stability needed for competitive economic integration.

201 *See infra* part VI.B.

202 Affirming full respect for each Party's constitution and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.

NAALC, *supra* note 19, art. 2.

203 The NAFTA addresses trade in goods, technical barriers to trade, investment, intellectual property, and administrative and institutional provisions. NAFTA, *supra* note 3.

sent from President Bush to Congress prior to the 1991 vote on fast track legislation.[204] The report dealt essentially with the reasons why social dumping would not be a significant factor in North American integration. Those reasons included: the inability of the Mexican economy to absorb enough transborder economic activity to create a negative effect on American business and labor; the relative productivities of the U.S. and Mexican labor markets; and the conclusions of several studies that projected net increases in U.S. jobs over the medium term.[205] Any dislocation that did occur, it was argued, would be managed by retraining programs currently on the books in this country.[206]

Suspicions of the effect that NAFTA would have on labor remained despite the Bush Administration's efforts to put the best face on the potential social dumping problem.[207] The perceived threat to labor was the subject of then-candidate Bill Clinton's call for a reconvening of the negotiations to produce a document that would set a framework for specifically dealing with labor concerns.[208] Upon Clinton's taking office, negotiations were reconvened to deal with labor as well as environmental concerns,[209] and NAFTA Supplemental Agreements were submitted to Congress along with the main treaty in the fall of 1993.[210]

The inclusion of Chile in NAFTA raises the issue of labor protections again. Whether to include a labor supplemental agreement in the overall package is already a source of controversy, with congressional Republicans pledging support for the inclusion of Chile on the condition that a labor supplemental agreement not be included in the package.[211] Meanwhile, Congressman Richard Gephardt, leader of the House Democrats, has strongly urged that the President "ensure that our policies are not simply viewed by the public as promoting the interests of multinational corporations at the expense of our workers" and that workers' rights not be treated as "back-seat issues."[212] The Administration has indicated that it will press Congress to allow it to

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204 *Response, supra* note 17.

205 *Id.* For a general discussion and critique of these points, see Jackson, *supra* note 25, at 51-52.

206 27 Weekly Comp. Pres. Doc. 546, sec. 3 (May 1, 1991).

207 Typical of the apprehension concerning NAFTA as well as worker adjustment programs expressed following President Bush's report are those of Congressman Donald J. Pease of Ohio. *See* Flash: President Explains to Blue-Collar Worker Why There's Nothing to Fear in a United States Mexico FTA, 102d Cong. 1st Sess., 137 Cong. Rec. E4156 (1991).

208 Stuart Auerbach, *Mexico's President Hedges on Trade Pact Deals*, WASH. POST, Oct. 10, 1992, at C1.

209 Clyde H. Farnsworth, *3 Nations Disagree On Trade*, N.Y. TIMES, May 22, 1993, at A6.

210 Carol Byrne, *NAFTA: Treaty Nears the Final Showdown*, STAR TRIBUNE, Nov. 7, 1993, at 14A.

211 *The Price of 'Fast-Track,'* FIN. TIMES, Dec. 14, 1994 at 5.

212 *Id.*

include labor negotiations in its talks with Chile.[213]

B. *Social Policy without Harmonization—the North American Agreement for Labor Cooperation*

The six part NAALC addresses four main areas: Obligations; Commission for Labor Cooperation; Cooperative Consultations and Evaluations; and Dispute Resolution.[214] Under the section on Obligations, the parties are required to ensure that its labor standards are protected through effective action and private recourse by administrative or judicial means.[215] The remaining focus is on implementation and recourse of the Parties to cooperative or quasi-judicial mechanisms to complain of failures of other Parties to fulfill their labor obligations under the Agreement.[216]

The NAALC provides for a framework under which Parties to the agreement may address concerns about another parties' implementation of its labor laws.[217] Indeed, the NAALC specifically recognizes "the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations . . . ."[218] Yet the preamble of the document states that NAFTA was created to "protect, enhance, and enforce basic workers' rights."[219] These basic worker rights are listed in Annex I of the NAALC, but there is no mechanism for enforcing these standards.[220]

The NAALC sets up a mechanism to ensure that Parties actually enforce what labor laws they have, but the mechanism is a set of administrative and quasi-judicial procedures that have limited enforcement clout.[221] Procedures will have to be written and case law developed before it will be clear just how effective the provisions of the NAALC are in enforcement. Most of the document's effectiveness in addressing social dumping will lie primarily in the effectiveness of national laws, particularly those of Mexico, in ensuring decent wages, workplace environment, and worker rights. This enforcement mechanism is problematic because of the absence of any effective trinational redress procedure for individuals affected by a Party's labor policies.[222]

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213 *U.S. to Press Congress This Year Over Labor, Environment, Kantor Says*, 12 INT'L TRADE REP. (BNA) 293 (1995).

214 NAALC, *supra* note 19, pts. 2-6.

215 *Id.* arts. 3-4.

216 *Id.* pts. 3-5.

217 Individual standing is not provided for under the arbitral provisions of the NAALC. *See infra* part VI.B.

218 NAALC, *supra* note 19, art. 2.

219 *Id.* pmbl.

220 *Id.* annex 1.

221 After an attenuated process of negotiation, consultation, arbitral hearings, and proposals for solution, if a country continues to refuse to abide by a determination of arbitral panels, a monetary assessment, or fine of not more than 20 million dollars may be assessed. *See infra* part VI.B. (detailed discussion of the resolution and consultation processes).

222 Effectively, the only way that a private individual could get an issue heard by the

The obligations of the Parties are to have in place the necessary monitoring and enforcement mechanism to ensure compliance with national laws.[223] Parties are obliged to see that their citizens "with a legally recognized interest" have access to disinterested administrative and judicial bodies for the enforcement of local labor laws.[224] Procedurally, due process must be guaranteed including the right to public hearings and reasonable time periods for adjudication.[225] Remedies are to be made available that will "ensure the enforcement of . . . labor rights,"[226] and the remedies may be equitable, legal, and criminal, though the Agreement does not prescribe a set mix of remedies.[227]

The agreement provides for a "Commission for Labor Cooperation," comprised of a Council made up of the labor ministers of the Parties.[228] The Council's role is to oversee the implementation of the agreement through a variety of administrative tasks, to promote cooperation between Parties, and to collect data.[229] The Agreement also provides for a Secretariat which is to serve as support for the Council.[230]

National Administrative Offices (NAOs) are to be established by each of the parties to serve as liaisons between the governments and the Secretariat.[231] In addition, Parties may establish national advisory committees composed of representatives from labor and business, and governmental committees, made of representatives from various levels of government, to advise on implementation.[232]

Consultations are viewed by the agreement as an initial means of working out disputes between the parties.[233] The NAOs of each country may request consultations,[234] or consultations may be had on the ministerial level.[235] Failing resolution at the ministerial level, an evalu-

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procedure outlined in the next section would be to bring the matter before a "study group" known as a national administrative office, one of which is set up in each of the countries. However, an individual would have to have the matter brought before an NAO in a country other than his/her own because the NAOs are set up to provide communications based upon public communications involving labor law matters in the territory of another Party. *See* NAALC, *supra* note 19, art. 167. Trinational arbitral panels may only be convened at the request of a Party to the agreement, and are not specifically linked by the agreement to the information function of the NAOs. *See id.* arts. 28-29. In other words, absent political pressure, there is no formal way in which an individual can set in motion a process that would result in trinational review.

223 *Id.* art. 3.
224 *Id.* art. 4, ¶ 1.
225 *Id.* art. 5.
226 *Id.* art. 5, ¶ 5.
227 *Id.* art. 5, ¶ 5.
228 *Id.* art. 9, ¶ 1.
229 *Id.* art. 10.
230 *Id.* art. 8, ¶ 2.
231 *Id.* art. 16.
232 *Id.* art. 17.
233 *Id.* art. 21.
234 *Id.*
235 *Id.* art. 22.

ation committee of experts (ECE) may be convened.[236] However, an ECE may not be convened to evaluate non-trade related matters or matters that are not "mutually recognized labor laws."[237] The latter term is defined in the document as "laws of both a requesting Party and the Party whose laws were the subject of ministerial consultations under Article 22 that address the same general subject matter in a manner that provides enforceable rights, protections or standards."[238] The apparent purpose of this limitation is to remove from the ambit of consultations those labor protections that a Party requesting resolution does not include in its own body of laws.[239] Presumably, a Party offering more protection than a Party seeking consultation will not have its practices reviewed because of some failure to fully enforce those protections.

The consultative mechanism does not preclude resort to more dynamic enforcement procedures. Part Five of the agreement covers dispute resolution.[240] Under that part's provisions, following the completion of an ECE report, a Party may seek further consultations regarding whether there has been what is referred to as "persistent pattern of failure" of another Party to enforce the standards evaluated in the report.[241] If the parties fail to resolve the matter, the agreement's dispute resolution procedures may be instituted.[242]

Initially, the Council is mandated to take the first action through consultation,[243] study, mediation, conciliation and the like.[244] It may make recommendations designed to assist the parties in a resolution of the dispute.[245] The Council also may refer the matter back to the Parties so that they may pursue resolution under other agreements,[246] including GATT, the International Labor Organization, or other multilateral agreements to which the Parties belong. However, if the matter is more properly handled under the present Agreement, and the Council has been unable to broker a settlement, it will be referred to an arbitral panel.[247]

The arbitral panels will take submissions and hear arguments per-

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236 *Id.* art. 23.

237 *Id.* art. 23, ¶ 3.

238 *Id.* art. 49.

239 Article 49 defines "mutually recognized labor laws" as "laws of both a requesting Party and the Party whose laws were the subject of ministerial consultations under Article 22 that address the same general subject matter in a manner the provides enforceable rights, protections or standards." NAALC, *supra* note 19, art. 49.

240 *Id.* pt. 5.

241 *Id.* art. 27, ¶ 1. "Persistent pattern" is defined as "a sustained or recurring pattern of practice." *Id.* art. 49, ¶ 1.

242 *Id.* art. 28, ¶ 1.

243 *Id.* art. 27, ¶ 1.

244 *See generally id.* art. 28.

245 *Id.*

246 *Id.* art. 28, ¶ 5.

247 *Id.*

taining to the controversial matter and issue a final report.[248] If the panel determines that there is a persistent pattern of failure by the Party complained of to enforce its labor laws in the areas of occupational safety and health or child labor and minimum wages that are mutually recognized by both Parties,[249] several scenarios are possible. The Parties may agree on an action plan consistent with the determinations of the panel.[250] If the Parties choose not to agree, or fail to agree on such a plan, or if the Parties disagree over whether the plan is being implemented, the panel may be reconvened for further resolution.[251] Where the parties have not agreed on an action plan, the panel may either approve or establish an action plan, and, if warranted, impose a monetary enforcement assessment which may not exceed twenty million dollars.[252] If the panel decides that an action plan has not been fully implemented, it will impose a monetary enforcement assessment, as well as require that the action plan be fully implemented.[253] If a Party fails to pay a monetary enforcement assessment within 180 days after imposition, or has repeatedly refused to implement fully an action plan, the complaining Party may suspend NAFTA benefits in an amount no greater than the monetary enforcement assessment.[254] These suspension of benefits are subject to review by the panel.[255]

As stated, the NAALC is heavily oriented toward procedural safeguards that require enforcement of national labor laws and protections. The NAALC mentions certain non-specific "goals" rather than exacting formulae and defined standards. The real essence of the NAFTA program for labor is in the labor laws of the Parties, and particularly, in the labor laws of Mexico.

C. Labor Protections under Mexican Law

Mexican labor laws are addressed briefly in this Article for two reasons. First, they are the focal point of the controversy surrounding NAFTA. Second, since Mexico is a developing country, it has a standard of living significantly below that of the United States and Canada. Mexican labor laws provide a reasonable foundation for the protection of worker rights. However, because of relaxed enforcement of labor laws, a political[256] and resource[257] problem, coupled with the eco-

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248 *Id.* art. 36.

249 *Id.* art. 29, ¶ 1.

250 *Id.* art. 38.

251 *Id.* art. 39.

252 *Id.* art. 39, ¶ 5.

253 *Id.* art. 39, ¶ 6.

254 *Id.* art. 41.

255 The penalty would result in the offending party being denied the advantages of free entry of its goods into the customs territory of other Parties to an amount no greater than the monetary assessment. *Id.* art. 41, ¶ 5.

256 Ann M. Bartow, Comment, *The Rights of Workers in Mexico*, 11 COMP. LAB. L. 182, 192 (1990).

nomic conditions in Mexico producing high rates of unemployment and underemployment,[258] the social dumping thesis suggests that Mexico would be able to export its labor standards to its more developed trade partners. Whether reform of Mexican labor practices and enforcement of its laws without significant economic improvement would prevent social dumping is a matter of speculation. However, this Article argues that such reform, inspired by international enforcement, could go a long way in ameliorating the likely social dumping effect on the U.S. labor market.

Mexican labor laws have been described as more protective of workers' rights than U.S. labor laws.[259] The foundation of Mexican workers' rights law is the Mexican Constitution, which provides generally that "[e]very person is entitled to suitable work that is socially useful. Toward this end, the creation of jobs and social organization for labor shall be promoted in conformance with the law."[260] Implementation and further elaboration is accomplished primarily through the Federal Labor Act of 1970.[261] Mexico is also a signatory to and has ratified seventy-three international labor treaties under the auspices of the International Labor Organization.[262]

The Mexican labor law encompasses a variety of protections. Outlined in the Mexican Constitution are: freedom of association and collective bargaining, the right to strike, minimum wages, employment of women and children, occupational safety and health in the workplace, and compensation and hours of work.[263] Probably the most important is the right of freedom of association which forms the basis for the right to organize labor unions.[264] In Mexico, a union can be established with a minimum of twenty workers,[265] and such associations must be formed for "study, advancement, and defense of their respective interests."[266] Workers may also form associations (coalitions) that

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257 SCHOTT & HUFBAUER, *supra* note 7, at 119.

258 Stephen Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 LAW & POL'Y INT'L BUS 391, 431-32 (1993) (citing DAN LA BOTZ, MASK OF DEMOCRACY: LABOR SUPPRESSION IN MEXICO TODAY 20 (1992)). The referenced study states that unemployment in Mexico at the beginning of this decade was close to 25% and underemployment rates significantly higher than unemployment.

259 *Id.* at 430.

260 MEX. CONST. art. 123.

261 Susanna Peters, Comment, *Labor Law for the Maquiladoras: Choosing Between Workers' Rights and Foreign Investment*, 11 COMP. LAB. L. 226, 235 (1990).

262 U.S. DEPT. OF LAB. AND SECRETARIA DEL TRABAJO Y PREVISION SOCIAL, A COMPARISON OF LABOR LAW IN THE UNITED STATES AND MEXICO: AN OVERVIEW 5 (1992) [hereinafter COMPARISON].

263 MEX. CONST. art. 123.

264 *Id.* art. 123, ¶ A, § XVI. The right to form unions is not guaranteed to federal workers under the Constitution, but they may "associate" for the protection of their interests, and may strike after meeting certain notice requirements. Bartow, *supra* note 256, at 187.

265 COMPARISON, *supra* note 262, at 12 (citing Federal Labor Law, art. 364).

266 *Id.* at 11 (citing Federal Labor Law, art. 356).

do not meet these requirements.[267] Mexican law allows for "closed shop" agreements as part of collective bargaining.[268] While no one may be forced to join a union, the closed shop provision does limit the freedom of individuals to choose union affiliation.[269] The ramifications of this provision have a profound effect on union effectiveness, as will be seen later in this section.[270]

Collective bargaining is also a guaranteed right under Mexican labor law. The Federal Labor Act of 1970 requires all employers of persons belonging to trade unions to engage in collective bargaining at the request of the union.[271] Collective bargaining agreements cover a variety of work-related conditions, most notably wages.[272] The labor law prohibits the collective bargaining structure to cut back on concessions received under previous agreements.[273] However, collective bargaining agreements may be modified by mutual consent[274] or upon request of either of the parties to the Conciliation and Arbitration Board (CAB).[275] In order for such changes to be approved by the Board, there must be a showing of changes in the financial condition of an enterprise, or losses in the real value of wages vis-a-vis the cost of living.[276] Accordingly, labor gains may be undercut, so long as such regressions do not fall below the minimum level of rights established by the labor law.[277] On the other hand, the situation of employees can be improved with the appropriate showing of economic changes mandating an increase in worker benefits.[278]

Unions may strike and strikes may be for the sole purpose of enabling workers to seek equilibrium between themselves and employers.[279] This may include efforts to seek compliance with collective

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267 *Id.* at 11 n.8 (citing Federal Labor Law, art. 355).

268 *Id.* at 12 (citing Federal Labor Law, art. 395).

269 *Id.* Where collective bargaining agreements allow for closed shop clauses (exclusion clauses), employers may limit hiring to members of the union and may terminate those who resign from the union. *Id.*

270 *See infra* part V.D.

271 Bartow, *supra* note 256, at 194; COMPARISON, *supra* note 262, at 14 (quoting Federal Labor Law, pt. VII, ch.1, art. 387). In addition to collective bargaining, contralto-leys (law contracts) are also part of the labor-management scheme in Mexico. Contralto-leys are cross union agreements between workers and several employers entered into on a regional or national basis. Bartow, *supra*, at 196; COMPARISON, *supra*, at 15 (quoting Federal Labor Law, art. 404).

272 COMPARISON, *supra* note 262, at 14.

273 Bartow, *supra* note 256, at 195 (citing Federal Labor Law, art. 394).

274 COMPARISON, *supra* note 262, at 15 (citing Federal Labor Law, art. 401).

275 COMPARISON, *supra* note 262, at 16-17 (citing Federal Labor Law, arts. 900-919). Conciliation and Arbitration Boards are dispute resolution bodies, set up regionally and at the federal level, which hear disputes between workers and employers. Bartow, *supra* note 256, at 198 (referencing J. SCHLAGGHECK, THE POLITICAL, ECONOMIC, AND LABOR CLIMATE IN MEXICO 104, 135 (1977)). Certain industries are covered by federal boards, and others are covered by the regional boards. *See id.* at 186.

276 COMPARISON, *supra* note 262, at 17.

277 *Id.* (citing Federal Labor Law, art. 919).

278 *Id.*

279 *Bartow*, supra note 256, at 199.

bargaining agreements or contralto-leys,[280] changes in established wages, or profit sharing.[281] Support strikes are also allowed under the law, though workers engaged in support strikes have no right to compensation for lost wages from an otherwise uninvolved employer.[282] In either case, the Federal Labor law requires that unions notify the CAB, and submit to a series of conciliation procedures for a strike to be deemed legal.[283] If a strike is not deemed legal, workers can be legally terminated for failure to return to work.[284]

Minimum wages are determined by the government, are established separately for various occupations and for the eighty-nine geographical zones,[285] and are revised annually.[286] Presently, there are four different minimum wage rates in effect in Mexico, based upon sectors.[287]

In addition to the rights of unionization, collective bargaining and the right to strike, other workers rights are included in the Mexican Law. The Constitution regulates hours and fair employment practices regardless of sex.[288] Job security in terms of protection from arbitrary dismissal is also a feature of the Mexican Constitution.[289] Furthermore, lockouts are strictly regulated and are allowed only under price sensitive conditions.[290] The Constitution also guarantees the priority of wages earned and indemnification owed in cases of firm bankruptcy or receivership.[291] While social security is guaranteed in the Constitution,[292] benefits in the areas of disability, provision for old age and life insurance, and health insurance are specifically provided for in the So-

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280 *See supra* note 271 (defining contralto-leys).

281 COMPARISON, *supra* note 262, at 23 (citing Federal Labor Law, art. 450).

282 *Id.*

283 Bartow, *supra* note 256, at 199.

284 COMPARISON, *supra* note 262, at 24.

285 Amy Goldin, Comment, *Collective Bargaining in Mexico: Stifled by the Lack of Democracy in Trade Unions*, 11 COMP. LAB. L. J. 203, 219 (1990).

286 PETER GREGORY, THE MYTH OF MARKET FAILURE: EMPLOYMENT AND THE LABOR MARKET IN MEXICO 247 (1986).

287 *Id.* at 218.

288 *Id.* The list of constitutional protections is rather extensive, covering, in addition, workmens compensation, workplace safety, and worker participation in firm profits (eight percent of taxable income, though worker participation is not guaranteed, it is a common practice), and the right to organize. Bartow, *supra* note 256, at 184.

289 Bartow, *supra* note 256, at 187. The Mexican Constitution states:

> In the event of unjustifiable discharge, a worker has the right to choose between reinstatement in his work or to appropriate indemnity, determined by legal proceedings. In case of abolishment of positions, the affected workers shall have the right to another position equivalent to the one abolished or to an indemnity.

Id. (quoting MEX. CONST., pt. B, ch. IX).

290 Bartow, *supra* note 256, at 185.

291 *Id.* at 185 (citing MEX. CONST. pt. A, ch. XXIII).

292 Bartow, *supra* note 256, at 186. The provision of the Constitution states: "Enactment of a social security law shall be considered of public interest and it shall include insurance against disability, old age, on life, against involuntary work stoppage, against sickness and accidents, infant care services, and other forms for similar purposes." MEX. CONST. art. 123, pt. A, chapt. XXIX.

cial Security Law.[293]

Legislatively, workers are protected in the event of the sale of a firm. Under the Federal Labor Law, new owners are required to honor terms of employment under prior ownership,[294] but an employee may still be terminated at the end of contracted work, closing of the company, disability of the worker, or by mutual consent.[295]

On paper, the Mexican labor laws, both constitutionally and legislatively, appear to protect workers' interests consistent with standards generally applied in industrialized nations. The controversy is not the law, as much as the implementation of the law. Among the criticisms of Mexican labor law implementation are lack of adequate means for enforcement, lack of labor independence, and excessive use of discretion in interpreting the laws in effect.[296]

D. Criticism of Labor Practices in Mexico

Critics both inside and outside of Mexico have complained that Mexican workers' interests are not protected by independent representatives.[297] There is a close relationship between organized labor and the ruling Partido de la Revolucion Institucional (PRI).[298] The dominant union federation is the Confederacion de Trabajadores Mexicanos (CTM).[299] The CTM and the PRI have had an "official" relationship since 1938, the year in which the CTM was brought into the party as part of the PRI's "labor sector."[300] Other union federations are included in the party structure as well.[301] The requisites of union formation coupled with the historical relationship between the PRI and unions, with labor leaders frequently given active roles in the party, supports the notion that the party and union leadership carry on a "symbiotic relationship."[302] Descriptions of this relationship range from it having little effect on effective representation of workers' interests,[303] to its forming a stranglehold on the effective enforcement of

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293 *See* Jeffrey S. Thomas, *Should Canadian Labor Be Concerned About NAFTA?*, 27 U.C. DAVIS L. REV. 883, 885 (1994).

294 Bartow, *supra* note 256, at 187.

295 *Id.*

296 *See infra* part V.D.

297 Critics of the plight of Mexican workers are quite numerous. Typical examples of Congressional testimony representing both U.S. and Mexican criticisms of the worker protections can be found in *Organizing Workers in Mexico, a NAFTA issue: Hearing Before the Employment, Housing, and Aviation Subcomm. of the House Comm. on Government Operations*, 103d Cong., 1st Sess. 97 (1993) [hereinafter *Organizing Workers*] (report of Jerome Levinson, *Unrequited Toil: Denial of Labor Rights in Mexico and Implications for NAFTA* and Testimony of Ezequiel Garza, secretary of collective bargaining, Metal Workers Union of the Authentic Workers Front).

298 Goldin, *supra* note 285, at 207.

299 *Id.* at 207-8.

300 *Id.*

301 *Id.*

302 Bartow, *supra* note 256, at 193.

303 IAN ROXBOROUGH, UNIONS AND POLITICS IN MEXICO: THE CASE OF THE AUTOMOBILE

workers' rights where those rights are against the interests of the government.[304]

The scenario for conflict of interests is based upon crucial decision-making points in the Mexican labor system. Minimum wages are determined by regional commissions made up of labor, management, and government representatives.[305] With most organized labor involved in the symbiotic relationship, the potential for abuse of what is supposed to be an independent process is apparent.[306] While the minimum wage is reported to have remained behind the rapid rise of inflation in the 1980s,[307] historically the minimum wage rate increases have met the rate of inflation, and at others, been off the mark.[308] Minimum wages frequently have been set at levels above the market price of unskilled labor.[309] Among the most successful worker groups in the area of wages are those, particularly in the auto industry, that have been represented by independent labor unions.[310] Nonetheless, minimum wages are reported to be evaded frequently, and this evasion may be the fault of inactive monitoring on the part of unions as well as failure of the government to enforce its laws.[311] In essence, the inconsistent picture of Mexican wages reflects a system not as fully responsive to labor interests as many would prefer. Even the so-called "social wages" or non-monetary benefits such as health care, subsidized food, housing and other essentials, do not make up for the shortfall due to their insufficiency and the uneven and inconsistent nature of their distribution.[312] The criticism on the wage front reflects the variety and complexities of Mexican labor policy.

Union organizing and union activity are another point of decision-making susceptible to abuse. Mexican law permits closed shop op-

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INDUSTRY 27-8, 175 (1984). Roxborough makes the argument that workers represented by unions generally enjoy higher wages than workers not represented by unions, and he criticizes the traditional view of a compromised union structure because that view does not offer a valid assessment of what might have occurred but for the compromising of union leadership. *Id.* at 27-8. Furthermore, Roxborough places great stock in the independent labor movement—those unions that are not affiliated with the PRI—as being militant agitators for worker rights, and who have, in the process, eroded some of the affiliated labor movement's clout. *Id.* at 175.

304 Goldin, *supra* note 285, at 203-4.

305 *Organizing Workers*, *supra* note 297, at 97.

306 Goldin, *supra* note 285, at 203.

307 *Id.* This may be attributed to the incomes policy which was unofficially implemented between organized labor affiliated with the PRI, and the government during the high inflation period of the late 1970s and 1980s. ROXBOROUGH, *supra* note 303, at 80, 173. Much of the failure during the 1980s to keep wages abreast of inflation might be attributed to the depressed state of the Mexican economy during the first half of that decade which was brought on by Mexico's debt burden and the drop in petroleum prices. Gregory, *supra* note 286, at 243.

308 GREGORY, *supra* note 286, at 246-47.

309 *Id.* at 252-3.

310 ROXBOROUGH, *supra* note 303, at 167.

311 Goldin, *supra* note 285, at 220.

312 *Id.* at 221.

erations.[313] Workers are limited in their choices as to union membership. They can either join the union representing an operation's workers, or simply not work for that operation. In a labor society such as Mexico's where dominant labor organizations are aligned with the ruling party, the likelihood of competition for the right to represent workers is limited also.[314] Hence, if representation other than that of the "official unions" is desired, workers must organize independent unions. This is a risky task considering the possibility of dismissal if expelled from the union representing an operation's workers.[315] While union representation may be changed by worker election,[316] an independent union requires official sanction under the labor law to be truly effective.[317]

Critics claim that the discretion built into the system favors "official" unions.[318] Getting recognition for an independent union, getting permission for strikes, and getting favorable collective bargaining agreements are subject to subjective decision making on the part of the government and management.[319] Needless to say, independent unions are not favored in this process because they are outside of the symbiotic relationship.[320]

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313 *See supra* notes 270-271.

314 The closed shop issue requires some elaboration. Collective agreements may include closed shop provisions so long as workers employed prior to the bargaining are not prejudiced. Bartow, *supra* note 256, at 195. The agreement may require employers to dismiss workers who have resigned or have been expelled from the union. *Id.* However, the benefits of collective bargaining must be extended to all members of a work force regardless of union membership. *Id.* at 196.

315 The decision to expel a worker from a union belongs to the union in control where collective bargaining agreements specify closed shop operations. Bartow, *supra* note 256, at 195. Workers may have dual membership and need not resign nor be expelled from the union in control. Goldin, *supra* note 285, at 211 n.39.

316 The rights to elect and to reject unpopular leaders certainly exist within Mexican union governance. However, as Roxborough notes, the reality of effective union democracy is a complex and varied reality. ROXBOROUGH, *supra* note 303, at 143-44. In a study of the Mexican automotive industry, Roxborough concluded that union governance ranged from "lively and meaningful internal democracy," *id.*, to union governance characterized by the term "charrismo" which is defined as a form of union control characterized by the use of "repressive forces of the state to support" particular union leaders, "systematic use of violence," "violations of worker union rights," and a variety of other examples of actions not in workers' interest. *Id.* at 132.

317 Goldin, *supra* note 285, at 210-11. Only officially recognized unions may engage in collective bargaining, enter arbitration hearing on behalf of members, negotiate labor contracts, or take part in government commissions on wages. *Id.* at 211 n.40 (citing Federal Labor Law, art. 364). Furthermore, unrecognized unions may have difficulty engaging in strikes since the government is empowered to oversee the implementation of a strike. Bartow, *supra* note 256, at 198-99. If a strike is not called for appropriate reasons or does not meet the requirements set by the law, *see supra* notes 280-285 and accompanying text, the strike can be deemed illegal. Determination of legality is made by the Conciliation and Arbitration Boards, which are susceptible to politicization. *See* Goldin, *supra*, at 211.

318 *See generally Organizing Workers*, *supra* note 297 (statement of Ezequiel Garza, Secretary for Collective Bargaining, Metal Workers Union of the Authentic Workers Front, FAT, Mexico).

319 *Id.*

320 However, one observer suggests that the independent unions in the automotive in-

In summary, the criticism is based upon the belief that union leadership has been co-opted by government through PRI affiliation with the dominant labor federations, or that organized labor has been rendered ineffective by a labyrinth of subjective practices under the auspices of laws that look good on paper. Given the resultant ineffectiveness and lapses in the government's enforcement of its laws, its decisions against the interest of workers can continue without effective challenge. The evidence, though often anecdotal,[321] would seem to support these observations.

On the other hand, it is not entirely clear that the Mexican labor system is the hopeless cause that the critics suggest. One way of looking at the situation is to consider the system as a half-full glass, as opposed to a half-empty one. Independent unions in the auto industry have been reasonably successful in gaining advantages for their members.[322] The independent union movement is more likely to grow than to recede as the development process continues.[323] Through the symbiotic relationship between the PRI and the official unions, sufficient benefits have been made available to provide a reasonable degree of political stability.[324] Wage levels, though they have inconsistently kept up with the rate of inflation, are subject to annual increases in minimum wages.[325] Finally, Professor Zamora notes:

> It should not surprise U.S. citizens that labor conditions in Mexico are often below the standards of those enjoyed in the United States. The same is true, unfortunately, of many other conditions of life in Mexico, including housing, public health, streets and highways, transportation—the list is a long one. Mexican citizens routinely endure conditions that would be considered intolerable in the United States. Despite cynical views to the contrary, the Mexican government is trying to improve these conditions. But Mexico is not an affluent country. Mexican per capita income is about one-tenth that of the United States; even this measure understates the problem, because wealth is so unevenly distributed in Mexico.[326]

While the vilification of the Mexican government's role in labor control is not the only analysis of the circumstances, the realities of the Mexican economy and its state of labor give some cause for concern in light of the social dumping problem. Often overlooked in the debate over NAFTA is the fact that the Europeans have a potential social dumping problem of their own.[327] Though arguments can be made

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dustry have enjoyed success rates in representing their constituency unions in the face of opposition from the powerful CTM. ROXBOROUGH, *supra* note 303, at 167.

321 *See, e.g., Organizing Workers*, *supra* note 297, at 3-18 (statement of Ezequiel Garza).

322 *See* ROXBOROUGH, *supra* note 303, at 167.

323 *See id.*; Goldin, *supra* note 285, at 219 (referencing Serbolov, *A la Vista, en Mexico, la Decima "Ola" de Inestabilidad Laboral*, EL FINANCIERO, Jan. 26, 1989, at 44).

324 Zamora, *supra* note 258, at 432.

325 GREGORY, *supra* note 286, at 247.

326 Zamora, *supra* note 258, at 433.

327 *See supra* text accompanying note 9.

that the similarity in economic development between the members of the European Union discount any comparison with the circumstances between the three parties of NAFTA, wide variations do exist within the Union.[328] Accordingly, a comparison with EU practice is appropriate. The next section critiques the North American structure by comparing it with certain aspects of the European process.

VII. Comparisons of the North American and European Systems

A. Introduction

In the European Union, little is left to chance in those areas of labor policy addressed by social policy legislation. Although the social policy movement has not been all-encompassing, with glaring gaps of coverage as in the wage area, the Union has laid the procedural and political foundation for harmonization.[329] Resources through the European Social Fund are available to assist national development and efforts at legislation.[330] Individuals are able to challenge national policies as being inconsistent with Union law before the ECJ, albeit indirectly.[331] However, under NAFTA and particularly the NAALC, there is a mere reliance upon the standards set by each of the parties to that agreement.[332]

B. Problems with the Unharmonized System of Social Policy

There are three problems with the NAALC approach under which Parties are required to enforce their own labor laws, the first of which is the most obvious. The enforcement system is not a deterrent to Party behavior inconsistent with either national laws or general principles of basic workers' rights. The NAOs may request consultations,[333] parties may engage in ministerial consultations,[334] and the ECEs may convene examinations of labor policy practices,[335] but this does not guarantee any particular obligation on the part of a Party to take positive action to change the complained of behavior. Even where dispute resolution is sought, neither individual complaints nor complainants[336] can be heard under the standing rules of procedure.[337] This is

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328 *Id.*

329 *See supra* part V.

330 EEC TREATY art. 123.

331 *See supra* part IV.A.

332 NAALC, *supra* note 19, art. 2. This tact is taken by the EU in certain matters, such as collective bargaining involving locally established firms and wage rates, though the latter is subject to some oversight by the Union as a whole. 1989 Social Action Program, *supra* note 29, at 14.

333 NAALC, *supra* note 19, art. 21, ¶ 1.

334 *Id.* art. 22.

335 *Id.* art. 23.

336 *See supra* part VI.B. Article 29 provides that a Party may request the institution of an arbitral panel in the absence of resolution of a matter via special session of the Council, as provided under Article 28. NAALC, *supra* note 19, art. 28-29.

because a finding of a "persistent pattern" is required before the measures provided for in the NAALC under the dispute resolution procedures can be taken.[338] The rule turns the process into a mechanism under which only class action-like complaints can be heard.[339] Where sporadic behavior ends and persistent patterns begin is anyone's guess.[340] Overall, the system does not provide for any kind of significant oversight of national labor policies.

Second, even if the dispute resolution mechanism were suitable to the task of forcing domestic enforcement, the process would produce an unstandardized patchwork of protections for labor in the three countries, in spite of the fact that only mutually recognized labor laws are to be examined.[341] This may not be a significant problem, however, since Mexico has a well defined body of worker protections and since there likely will be little gap between Mexican laws and the laws of the United States.[342]

Finally, assuming adequate labor protection in each of the countries, neither NAFTA nor the NAALC lock in these local labor standards as NAFTA does with trade policy. Local economic rules mandating lower tariffs may not be changed under NAFTA without going through the escape clause provisions of the treaty because such

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[337] The mandate for arbitral panels is to determine whether there has been a "persistent pattern of failure by the party complained against to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards . . . ." NAALC, *supra* note 19, art. 29, ¶ 1.

[338] *Id.* Persistent pattern is defined as "a sustained or recurring pattern of practice." A "pattern of practice" is defined as a "a course of action or inaction . . . and does not include a single instance or case." Apparently, by reading the two definitions literally, there must be a recurring series of actions or inactions that do not constitute a mere single case. *Id.* art. 49.

[339] By class action-like, it is meant that a single violation could not meet the persistent pattern requirement. Several violations involving several workers, would seem to be what would be required to show a "sustained or recurring pattern of practice." Of course, in a class action suit, several individuals could seek redress before a court. Under the NAALC, a request must be made by a party before any of the consultation or dispute resolution procedures could be instituted. NAALC, *supra* note 19, art. 27(1).

[340] Maybe someday there will be arbitral decisions to help clarify this meaning. Presently, there is some indication that the NAOs have been willing to at least request ministerial consultations involving single complaints involving several individuals complaining of a series of firm misbehavior. The degree to which such behavior implicates a Party's violation of its own laws in a manner consistent with the persistent pattern rule is not clear. *See infra* part VII.D.2.

[341] The panel's standard of evaluation, in the provision outlining the procedure for its initial report, is to determine

> whether there has been a persistent pattern of failure by the Party complained against to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards in a matter that is trade-related and covered by mutually recognized labor laws, or any other determination requested in the terms of reference. . . .

NAALC, *supra* note 19, art. 36, ¶ 2.

[342] Mexican standards exceed U.S. protections in areas such as social security, which provides medical and maternity care, pensions, and payment for temporary and permanent disability. SCHOTT & HUFBAUER, *supra* note 7, at 119 (referencing Robert Zoellick, *North American Free Trade Agreement: Extending Fast-Track Negotiating Authority*, U.S. Department of State, Bureau of Public Affairs, Apr. 11, 1991, at 8.)

changes would violate the spirit under which the negotiations were conducted.[343] No such understanding exists in the labor area,[344] and parties are free to change their laws as they see fit. If the legislative scheme is any inspiration here for a more effective system of labor protections to accompany the North American integration, certainly some sort of harmonization is needed.

C. *Comparisons of North American and European Legislative Harmonization*

Comparisons to the European Union are not appropriate in certain areas of social policy. Freedom of movement and the resulting antidiscrimination laws accommodating labor mobility are clearly necessary for the realization of the European Union's goal of a single market. Such aspirations are not part of NAFTA because they are not necessary to the relatively limited economic goals of that agreement.

However, the lack of uniformity is a matter of concern in other areas of labor policy. The NAALC does not resolve these concerns since it only mandates the implementation of local laws and policies.[345] Even if the NAALC procedures allowed for enforcement of local laws and policies, interpretation remains a matter of local discretion. An example of this dilemma is the area of health and safety standards. The European Union has been rather explicit in its regulation of workplace health and safety and the procedural groundwork has been laid for further and more exacting activity in this area.[346] Reliance on the procedural safeguards of the NAALC falls far short of the EU model.[347] The result is that the kind of worker safety obligations typical in the United States may or may not be the case in Mexico, depending upon levels of enforcement of workers' rights legislation. Under the North American model, there is no way to mandate a har-

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[343] NAFTA, *supra* note 3, art. 801. This escape clause provision deals with free trade obligations among the three parties, and allows each of the parties, where increased quantities of trade in a good is caused by the reduction or elimination of duties, and are a substantial cause of serious injury or threat of such, to suspend its obligations to reduce or eliminate the duty, or to increase such duty. *Id.*

[344] The preamble provision of Part Two dealing with obligations recognizes:

> the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.

NAALC, *supra* note 19, art. 2. Inasmuch as any mention of minimum labor standards are merely hortatory (i.e., the guidelines listed at Annex 1 of the NAALC are referred to as "guiding principles that the Parties are committed to promote . . . but do not establish minimum standards . . .," *id.* annex 1), Parties have the freedom to modify existing labor standards under the NAALC. *See id.* art. 2.

[345] *See supra* note 216 and accompanying text.

[346] *See* Agreement on Social Policy, *supra* note 190.

[347] Compare EU social harmonization, *supra* part V and judicial procedure, *supra* part IV, with the NAALC's lack of both legislative harmonization and judicial review, *supra* parts VII.C and D.

monized system of actual worker protections.[348]

Mexican law does address employment security. Under the Mexican Constitution, workers' compensation and wages are protected to some degree in cases of firm closure.[349] However, these rights are based upon collective bargaining agreements, a process that, as noted, has received criticism as not being fully protective of worker interests.[350] The European Union relies on local collective bargaining agreements for its regulation of job security at the time of firm transformation and enforces such agreements by directive.[351] Because the right to collective bargaining is provided for in the Treaty of Rome and many significant terms of contracts are protected by directives,[352] an individual may bring complaints of denial of specific rights due under the legislation before national courts. If these issues are heard by the highest court of a Member State, they must be heard by the ECJ.[353] All an individual can rely on under the North American system is local judicial or administrative enforcement of local laws.[354]

D. Harmonization through Judicial and Administrative Review

1. Comparisons of North American and European Review Systems

The NAALC does not specifically allow for judicial review of Party behavior in the labor policy area. Under the European Union, judicial review is crucial to the harmonization process. Without judicial review, member States could engage in selective exit by implementing only those Union laws with which they agree.[355] In areas such as sex discrimination,[356] member States are obliged to bring national laws in harmony with Union directives. Their success in so harmonizing is subject to review by the ECJ.[357] The rulings in *Rinner-Kuhn*[358] and *Pacifica Dekker*,[359] which upheld Union rules against sex discrimination, are examples of judicial review over social policy harmonization.[360]

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348 *See supra* part VI.

349 *See supra* note 291 and accompanying text.

350 *See supra* part VI.D.

351 Council Directive 77/187, *supra* note 141, art. 6, as amended by Council Directive 92/56, 1992 O.J. (L 311) 40.

352 *See supra* part V.A.2.b.

353 *See supra* part IV.A; EEC TREATY art. 177.

354 *See supra* part VI.B.

355 *See supra* part IV.B.

356 *See supra* part V.B.2.d.

357 EEC TREATY art. 177.

358 *See supra* note 162 and accompanying text.

359 *See supra* note 163 and accompanying text.

360 The ECJ, through its interpretation of Council Directive 75/117 in the *Rinner-Kuhn* case, set a standard that applies EU-wide by holding that the directive regarding equal pay for men and women prohibited practices that impacted negatively one sex more than the other in terms of wages. *See supra* note 160. Similarly, the interpretation of Council Directive 76/

This kind of case-specific examination, where one individual can bring a matter before a national court and have the matter reviewed before an international court is not contemplated under the NAALC,[361] and could likely start a proliferation of reviews for which the NAALC procedures could not handle.

Under the European system, private access to the ECJ is indirect but mandatory once a matter reaches a Member State's highest court.[362] Under the North American system, a procedure under an NAO may be initiated, but local redress must be sought before an NAO is likely to find a failure to enforce local labor laws.[363] This "failure finding" is a prerequisite for resorting to post-NAO ministerial consultations or adjudicatory processes.[364] Even then, such resort is not mandatory under NAALC rules, but indications are that a showing of failure to enforce labor laws may be easier to establish where local procedures have been pursued and completed.[365] However, it is clear that workers have to jump through several hoops to receive the same attention that European workers receive with less effort and uncertainty.

2. *Current Review Activity Under the NAALC*

As of this writing, four matters[366] have been filed and two opinions[367] have been issued by the United States NAO dealing with the freedom of association and job security. In the cases of *In re Honeywell*,[368] *In re General Electric*,[369] and *In re Sony*,[370] the parties bringing the matters before the NAO were the International Brotherhood of Teamsters, the United Electrical, Radio and Machine Workers of America,

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207 in the *Dekker* case also set EU-wide standards regarding equal treatment. *See supra* note 161.

361 Under the NAALC, a similar case brought by an individual citizen of one of the Parties would not receive the type of attention allowed for in *Rinner-Kuhn* and *Pacifica Dekker* cases primarily because there is no guaranteed right of access to supranational review. *See supra* part V.B.

362 *See supra* text accompanying notes 87-89.

363 *See infra* part VII.D.2.d.

364 *Id.*

365 *Id.*

366 The four filings are In re Honeywell (U.S. National Administrative Office Submission 940001), In re General Electric (filed twice) (U.S. National Administrative Office Submission 940002 and 940004), and In re Sony (U.S. National Administrative Office Submission 940003).

367 Opinions have been issued in the Honeywell and General Electric matters by a joint opinion, and in the Sony matter. *See infra* parts VII.D.2.a-b.

368 U.S. National Administrative Office Submission #940001.

369 U.S. National Administrative Office Submission #940002. Following the hearing, the United Electrical Workers, complainants in *General Electric*, refiled its complaint as submission #940004. However, the union withdrew the case in February, 1995, claiming that it refused to take part in an effort that would not yield a "full and fair consideration" of the charges alleged by the union. *Electrical Workers Drops [sic] GE Petition, Calling NAO Mexico Probe a Whitewash*, 12 Int'l Trade Rep. (BNA) 272 (Feb. 28, 1995).

370 U.S. National Administrative Office Submission #940003.

and a coalition of human rights organizations respectively.[371] The parties allege the use of intimidation to thwart non-official (independent) union organizing efforts at their respective operations in Mexico.[372] They also allege the payment of depressed wages,[373] the failure to pay overtime,[374] the existence of health and safety violations,[375] and the refusal to comply with minimum employment standards regarding hours of work and holiday work.[376] Additionally, a complaint filed before a Conciliation and Arbitration Board (CAB) by one of the dismissed workers in the *Honeywell* case alleged that CABs have a reputation for refusing to reinstate workers fired for supporting independent unions.[377] A fifth case was brought before the Mexican NAO complaining that the telecommunications company Sprint closed one of its plants located near San Francisco, allegedly to thwart plans to unionize workers there.[378]

Other than being the first complaints filed under the NAALC, these cases are noteworthy for what they demonstrate about the current system and the potential for harmonization. Under NAALC, each country's NAOs are charged with consulting with each other regarding labor laws, administration, and labor market conditions.[379] The NAO process does not formally constitute an institution of dispute resolution, like filing a complaint in court, though in practice the NAO process is becoming the beginning point for subsequent procedures of review.[380] Article 16 states that each NAO "shall serve as a point of

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371 The Sony submission was filed with the NAO on August 16, 1994 by the International Labor Rights Education and Research Fund, the Asociacion Nacional de Abogados Democraticos (National Association of Democratic Lawyers), the Coalition for Justice in the Maquiladoras, and the American Friends Service Committee. U.S. NAO Public Report of Review, NAO Submission #940003, Apr. 11, 1995, at 2-3 [hereinafter NAO Submission #940003].

372 U.S. NAO Public Report of Review, NAO Submission #940001 and NAO Submission #940002, Oct. 12, 1994, at 3 (Honeywell), at 5 (General Electric) [hereinafter NAO Report #940001 & #940002]; NAO Submission #940003, *supra* note 371, at 3.

373 NAO Report #940001 & #940002, *supra* note 372, at 2 (regarding Honeywell).

374 *Id.* at 6 (regarding General Electric).

375 *Id.* (regarding General Electric).

376 The NAO declined to accept allegations regarding minimum work standards stating in the Sony case: "However, the guidelines permit the NAO to decline to review a submission if, inter alia, the submission or available information demonstrates that appropriate relief has not been sought under the domestic laws of Canada or Mexico." Notice of Determination Regarding Review of Submission #940003, 59 Fed. Reg. 52,992 (1994).

377 NAO Report #940001 & #940002, *supra* note 372, at 3.

378 *U.S. Reviews Mexican NAO Request to Discuss Sprint Labor Practices*, 12 Int'l Trade Rep. (BNA) 989 (June 7, 1995) [hereinafter *U.S. Reviews Mexican NAO Request*].

379 NAALC, *supra* note 19, art. 21(1).

380 Both the Sony and Sprint cases precipitated calls by the U.S. and Mexican NAOs for ministerial consultations. *See infra* parts VII.D.2.b-c. The fact that the NAO procedure does not formally constitute such an institution of subsequent review procedures is evidenced by the fact there is no formal link between ministerial consultations and NAO review. Under Article 22 of the NAALC, a Party may request consultations with another party regarding matters within the scope of the Agreement irrespective of prior NAO review. *See* NAALC, *supra* note 19, art. 22. While it is too early to tell if this will develop into a standard practice,

contact with: (a) government agencies of that Party; (b) NAOs of the other Parties; and (c) the Secretariat."[381] Further functions of the NAO include disseminating information on labor matters and "provid[ing] for the submission and receipt . . . of public communication on labor law matters arising in the territory of another Party. Each NAO shall review such matters, as appropriate, in accordance with domestic procedures."[382] Filed complaints would appear to fall under the NAO's functions of acceptance and review of "public communications" but for the requests for remedies, a feature resembling a legal complaint before a judicial body.[383]

a. In re General Electric and *In re Honeywell*

The principal issues addressed by the NAO in *Honeywell* were the allegations that Honeywell had fired 22 workers[384] who had an interest in joining an independent union, and that Honeywell had coerced those employees to accept their severance pay.[385] Likewise, in *General Electric*, the chief concern of the NAO was the dismissal of workers involved in union activity and whether such dismissals implicated the Mexican government's enforcement of its labor laws.[386] The companies' responses to the allegations centered upon explanations for the workers' dismissals, including poor performance and violations of workplace rules.[387] In both cases, the Teamsters requested the convening of a public hearing in Chihuahua, Mexico or El Paso, Texas for the taking of evidence, the reinstatement of the workers fired for alleged union activity, the institution of ministerial consultations under Article 22 of the NAALC, and the beginning of a harmonization process to be administered by the National Labor Relations Board covering U.S. companies operating in Mexico.[388] Under the last request for relief, standards would be developed based upon the general norms set out in Annex 1 of the NAALC.[389] The complaints went on to re-

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the ministerial reviews that have been requested in the Sony and Sprint cases have come after NAO review.

381 NAALC, *supra* note 19, art. 16(1).

382 *Id.* art 16(3).

383 Civil remedy is defined as "the remedy afforded by law to a private person in the civil courts in so far as his private and individual rights have been injured by a delict or crime . . . ." BLACK'S LAW DICTIONARY 1294 (6th ed. 1990).

384 *Id.* at 26.

385 *Id.* at 28. Acceptance of severance pay acts as a release of the company against subsequent claims.

The NAO did not specifically address the charge that the Mexican Conciliation and Arbitration Board (CAB) had a reputation of refusing to reinstate workers fired for their support of independent unions in its findings and recommendations. *Id.* at 28-30.

386 *Id.* at 28.

387 *Id.* at 10-12.

388 NAO Report #940001 & #940002, *supra* note 372, at 4.

389 The preamble to Annex 1 states :

> The following are guiding principles that the Parties are committed to promote, subject to each Party's domestic law, but do not establish common mini-

quest sanctions for violation of the standards, which included bargaining in good faith with U.S. unions "to ensure that they will comply with the basic labor norms set out in the NAALC, when doing business in Mexico."[390]

Hearings in both *In re General Electric* and *In re Honeywell* were held together, and the U.S. NAO filed a single opinion for both cases.[391] The conclusions of the NAO stated that it was not empowered to govern over disputes between workers and governments, but instead was disposed to take up cases, conduct public hearings, and issue reports on its findings.[392]

Reiterating that its mandate was limited, and that it was not a forum for judicial review,[393] the NAO found that the Mexican government was not in violation of its obligations under the NAALC.[394] The rationale of the NAO was that the workers had access to the CAB system.[395] While noting that CAB delays in issuing rulings might create financial hardship and encourage some of the dismissed workers to accept severance pay instead of pursuing CAB remedies, the NAO reasoned that under such circumstances it would not be possible to evaluate whether the Mexican government failed to enforce the relevant labor laws.[396] In those cases where workers had pursued CAB remedies, judgments were pending, precluding any evaluation of the Mexican government's performance.[397] Nonetheless, the NAO suggested

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> mum standards for their domestic law. They indicate broad areas of concern where the Parties have developed, each in its own way, laws, regulations, procedures and practices that protect the rights and interest of their respective workforces.

NAALC, *supra* note 19, annex 1.

The principles included are: freedom of association and protection of the right to organize; the right to bargain collectively; the right to strike; prohibition of forced labor; labor protections for children and young persons; minimum employment standards; elimination of employment discrimination; equal pay for women and men; prevention of occupational injuries and illnesses; compensation in cases of occupational injuries and illnesses; and protection of migrant workers. *Id.*

390 UE's requested relief is detailed and fairly case specific, requesting that Mexico enforce certain labor laws at issue in the complaint. It does request that, failing this process that the United States request Article 22 ministerial consultations, the establishment of an ECE and the eventual convening of dispute resolution procedures under Article 26. NAO Report #940001 & #940002, *supra* note 372, at 5-7; Complaint of United Electrical, Radio and Machine Workers of America, Feb. 14, 1994, at 15-17.

391 NAO Report #940001 & #940002, *supra* note 372.

392 *Id.*

393 In the words of the NAO: "Moreover, the NAO is not an appellate body, nor is it a substitute for pursuing domestic policies." NAO Report #940001 & #940002, *supra* note 372, at 9. NAALC Article 42 states: "Nothing in this Agreement shall be construed to empower a Party's authorities to undertake labor law enforcement activities in the territory of another Party." NAALC, *supra* note 19, art. 42. Article 43 states: "No Party may provide for a right of action under its domestic law against any other Party on the ground that another Party has acted in a manner inconsistent with this agreement." *Id.* art 43.

394 NAO Report #940001 & #940002, *supra* note 372, at 32.

395 *Id.* at 30.

396 *Id.*

397 *Id.* at 31.

certain follow-up activities for the three nations of the NAALC, namely the providing of information on freedom of association issues.[398]

b. In re Sony

The complaint in this case alleged that Sony maintained surveillance against union activists, fired workers who went on strike, and interfered with union elections. It also claimed that the Mexican government failed to protect the freedom of association by rejecting an independent union on technical grounds and that Mexican police used violence against unions.[399] The NAO found that the complaint provided grounds to request ministerial consultations on the issue of the Mexican government's failure to approve an independent union for Sony workers.[400] It also announced that it would conduct a study of the Mexican CAB's handling of wrongful dismissal cases,[401] that it would request exchanges of information between the two governments on how Mexico protects worker rights within their union,[402] and that it would request information on police involvement in the union activities.[403] A statement agreeing to consultations was signed by U.S. Secretary of Labor Robert Reich and the Secretario del Trabajo y Prevision Social Santiago Onate and became effective on June 26, 1995.[404]

c. Sprint

The Mexican NAO formally requested ministerial consultations in the Sprint case after the Telephone Workers Union of the Republic of Mexico filed a complaint alleging that the closing of the plant owned by a Sprint subsidiary near San Francisco was motivated by a desire to thwart union activity.[405] The closing resulted in the dismissal of nearly 200 workers just prior to a union election.[406] Sprint claimed the closing was motivated by commercial reasons and not the desire to stem union activity.[407] Proceedings before the National Labor Relations Board had commenced, and a request by the Board for a federal in-

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398 NAO Report #940001 & #940002, *supra* note 372, at 31.

Claims by the unions concerning low wages and poor working conditions were not addressed by the NAO, presumably because no complaint was filed before the Mexican agency that oversees such matters. *See id.* at 28.

399 NAO Report #940003, *supra* note 371, at 4-6; *Sony in Mexico Labor Complaint*, FIN. TIMES (London), Aug. 17, 1994 at 6.

400 NAO Report #940003, *supra* note 371, at 30-32.

401 *Id.* at 26-28.

402 *See id.* at 28-29.

403 *Id.* at 29-30.

404 Ministerial Consultations — Submission 940003: Agreements on Implementation (provided by the United States National Administrative Office).

405 Complaint of the Union of Telephone Workers of the Republic of Mexico with the National Administrative Office of the United States of Mexico, Feb. 9, 1995 (published by the Bureau of National Affairs, Inc.).

406 *Id.*

407 *U.S. Reviews Mexican NAO Request*, *supra* note 378.

junction against the firings caused by the closing was denied.[408]

The NAO noted that the complaint before it raised concerns relative to the effectiveness in the practical application of certain dispositions that guarantee fundamental labor principles of U.S. legislation to protect workers and called for ministerial consultations.[409] Although the report did not delve into the specifics of the matter at issue, it noted that further evaluation of situations of sudden mass dismissals was warranted.[410]

d. Evaluation of Current Proceedings

The above cases illuminate certain criticisms of the process that workers must go through to raise issues of labor protections. The only issue to be addressed by ministerial consultations (at least with regard to those coming out of the U.S. NAO Procedure) is the process by which independent unions are certified. For example, in the *Sony* case, the workers had availed themselves of the procedures for union registration and the U.S. NAO believed that procedure raised serious questions "concerning the workers' ability to obtain recognition of an independent union through the registration process . . . ."[411]

The NAO report in the *Sony* matter was reasonably consistent with the report in the *Honeywell* and *General Electric* cases in that the standard for requesting ministerial consultations was a demonstration that government institutions were not enforcing domestic labor laws. In *Sony*, the U.S. NAO expressed concern over the outcome of a completed procedure provided for in the Mexican labor laws.[412] In *Honeywell* and *General Electric*, the fact that procedures were not completed, or were not taken advantage of was the reason the NAO gave for not requesting consultations.[413] What this means is that the U.S. NAO is likely to request ministerial consultations where the government has failed to redress grievances in some way that implicates a pattern of governmental practice. Whether the government involved fails to maintain active oversight and provide active inspection and enforcement of labor practices, absent the initiation of a local procedure by an aggrieved worker, appears not to be an appropriate reason for seeking consultations.[414]

However, the Mexican NAO's decision to request ministerial con-

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408 Miller v. LCF, Inc., 147 L.R.R.M. (BNA) 2911 (N.D. Cal. 1994).

409 National Administrative Office of Mexico for the North American Agreement on Labor Cooperation, Report on Review of Public Submission 9501/NAO MEX, May 31, 1995 (NAO (U.S.) Staff Translation), at 11 [hereinafter NAO MEX Report].

410 *Id.* at 11-12.

411 NAO Report #940003, *supra* note 371, at 32.

412 *Id.*

413 *See supra* part VII.D.2.a.

414 It could be argued that the existence of conditions that are not consistent with local labor laws implicates the government's oversight of firms' compliance with those laws. This is a more activist position than that taken as of yet by the U.S. NAO.

sultations regarding the Sprint matter is not so clear. After a detailed evaluation of U.S. law in the labor area, the report appeared to focus upon the plant closure in relation to union activities by Sprint workers and the need to study "the impact that actions motivated by commercial realities have on labor matters and vice-versa."[415] Even though workers in the case had availed themselves of U.S. labor procedures through the National Labor Relations Board, the Mexican NAO found that the issues warranted ministerial consultations.

It would appear that two separate standards are developing with regard to requesting ministerial consultations which does not bode well for the development of procedural harmonization. Of the two standards, the Mexican approach seems to be more reasonable under the agreement. This is because Article 22 of the NAALC does not specifically require a finding of a Party's failure to enforce its labor laws before ministerial consultations may be requested.[416] The provision states that "[a]ny party may request in writing consultations with another Party at the ministerial level regarding any matter within the scope of this agreement."[417] Contrary to the U.S. approach, a finding of failure to enforce labor laws is not required, nor is a suspicion of such a failure.[418] Hence the Mexican approach meets the standards set up by the NAALC.

Furthermore, the Agreement requires that a question regarding a party's persistent failure to enforce its labor protections be presented for the institution of the dispute resolution procedure under Part Five.[419] Part Four procedures do not require allegations of failure to enforce or persistent failure to enforce before NAO hearings,[420] and ministerial consultations may be convened.[421] ECE evaluations are supposed to inquire about a Party's patterns of practice in the enforcement of its labor laws, but that procedure is based upon matters examined under ministerial consultations and is not predicated upon a claim of persistent pattern of non-enforcement.[422] Therefore, the Part Four procedures are flexible enough to allow for a more effective oversight of labor issues in the three countries.

It is also notable that the filings were submitted by American un-

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415 NAO MEX Report, *supra* note 409, at 11.

416 NAALC, *supra* note 19, art. 22.

417 *Id.*

418 *Id.*

419 *Id.* art. 29.

420 NAOs are authorized to "provide for the submission and receipt, and periodically publish a list, of public communications on labor law matters arising in the territory of another Party." *Id.* art. 16, ¶ 3. NAOs are further authorized to "review such matters, as appropriate, in accordance with domestic procedures." *Id.* NAOs may also request consultation at the NAO level to gather information regarding laws, regulations, policies, procedures, and practices, or changes to and clarifications of such matters from a NAO of another party. *Id.* art. 21.

421 *Id.* art 22.

422 *Id.* art. 23.

ions that had collective bargaining agreements with American firms having Mexican operations or by U.S and Mexican human rights organizations. The NAO could receive "public communications" from workers outside the country, but without a procedure by which matters are referred by national courts to an international body, the North American system does not lend itself well to utilization by workers of an offending country. There are practical impediments to such utilization, such as workers attempting to file matters with an NAO in another country and the legal advice necessary for such a filing. In addition there is the issue of lack of protection of the interests of a potential claimant.

Despite procedural impediments to a full-blown adversarial system with access to international oversight, there does appear to be a political means by which international oversight might be obtained. Due to the public nature of filings before the NAO,[423] public pressure could come to bear to trigger further proceedings under the NAALC. Although NAO proceedings do not automatically initiate further proceedings, a Party could be encouraged by public pressure to request an Article 22 ministerial consultation, which could trigger an ECE proceeding under Article 23. This might trigger an arbitral panel review of a Party's "persistent pattern" of failure to enforce its own laws under Part Five. While such a process looks suspiciously more diplomatic than judicial, it could serve the purpose of getting matters examined under the NAALC when other procedures fail.

VIII. Measures for Reform of the North American System—Toward a More Harmonized System

A. *Introduction*

Given the deficiencies of the North American system, some sort of reform is in order. Several different levels of reform are possible with varying degrees of political acceptability.[424] Under what is the least politically acceptable option, the Parties could attempt a European

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[423] *Id.* art. 16, ¶ 3.

[424] The proposals in this section require varying degrees of acceptance of international standards review. In addition to the sovereignty concerns expressed with regard to NAFTA, *see supra* note 220, similar concerns have been expressed regarding other international agreements. Most recently, serious concerns have been raised over international tribunal review of U.S. trade laws under the World Trade Organization agreement. *See* David E. Sanger, *After Years of Talk, Trade Pact Now Awaits Congressional Fate*, N.Y. TIMES, Nov. 27, 1994, at A1; Robert J. Samuelson, *Remember the League of Nations*, WASH. POST, Nov. 23, 1994, at A19; Keith Bradsher, *No Rest on Trade: in the Trenches, Foes Line Up To Do Battle Over GATT*, N.Y. TIMES, Oct. 3, 1994, at D1.

Indeed, recent U.S. history indicates a hesitation to "cede" sovereignty over matters of economic policy. Although the WTO agreement eventually passed congressional scrutiny, a prior and stronger agreement that would have produced what would have the International Trade Organization following World War II failed as a result of many of the same sovereignty concerns. *See* JOHN H. BARTON & BART S. FISHER, INTERNATIONAL TRADE AND INVESTMENT: REGULATING INTERNATIONAL BUSINESS 91-92 (1986).

style harmonization system with binding standards utilizing the doctrine of direct effect or requiring implementing legislation making such standards self-executing. A second option would be for the Parties to incorporate international labor standards as a common foundation of oversight. Finally, the Parties could modify the system in place under NAALC by stipulating that each of their basic legal structures accommodate a minimum level of labor rights protection and formally incorporate those minimums into the agreement itself. In each case, some sort of supranational review would be required.

B. European Style Harmonization

Establishment of such a system is the most problematic of the possible options, but it may be the most efficient system. The United States, Canada, and Mexico would set procedures and institutions to jointly define certain standards on an ongoing basis. This process would be mandated by changes in the current NAFTA regime. National procedures to accommodate such a process would have to be developed (e.g., in the United States, legislation could be passed or regulations issued as appropriate). These standards would be binding on Parties and deviation or inaction would be considered a violation of the Agreement. In any event, the standards would have to be self-executing to ensure individual access to domestic and supranational relief.

The distinguishing feature of the European Union is a general agreement among the countries that something more than an international treaty among fully sovereign states exists within the prescriptions of the Treaty of Rome. This type of consensus is unlikely in this hemisphere, especially with the expansion of the Agreement to the rest of Latin America. Although this observation may be seen as an insurmountable obstacle to harmonization in the Western Hemisphere, such apprehensions are not fully necessary. The federalization of European policy extends far beyond the social area into areas necessary to promote "a harmonious and balanced development of economic activities . . . and solidarity among Member States."[425] Under a reformed and possibly expanded NAFTA regime, such harmonization would be limited to labor policy.

Furthermore, the process of defining standards to be incorporated into national legislation need not be left to an independent body akin to the European Commission. The European Union provides a check on the Commission's actions through the Council's final approval of Commission proposals for harmonization directives.[426] European-like reform of NAFTA could go a step further in providing a check by requiring that each social policy measure to be incorporated into the regime be negotiated and approved through the legislative

[425] EEC TREATY art. 2.
[426] *Id.* art. 100a.

processes like other international trade agreements.[427] The consequence of this process would be to treat any new labor rule as a separate international agreement and not as a legislative enactment under a federalized system as under the EU.

An alternative process to the creation of new law would be to require a leveling-up to the most protective labor standards of the three parties. The party with the most extensive labor protections would serve as the blueprint on which the other parties would pattern their labor laws. Although the temptation would be to lock in such protections, the need to give Parties the freedom to expand protections should be preserved on the assumption that none of the Parties would amend their labor protections beyond their best interests. This "spin" on the European system would simplify things considerably. Nonetheless, the European model remains the least politically acceptable of the possible alternatives precisely because so much of the decision-making power would lie outside national political processes.[428]

C. International Labor Standards

A second approach to harmonization would be the common incorporation of international labor law into the national legislation of the Parties. Presently, Mexico is a more active participant in the international labor law treaty system of the International Labor Organization (ILO) having signed and ratified seventy-three ILO conventions.[429] The United States has signed only nine of over 168 ILO conventions,[430] though it has recognized conventions to which it is not a party as representing basic rights.[431] However, such a process

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[427] In the United States, this could involve a fast-track procedure as provided for under the Trade Agreements of 1974. Trade Act of 1974 §§ 102, 151, 19 U.S.C. §§ 2112, 2191 (1995). Under the fast-track procedure, Congress must vote either for or against negotiated trade agreements and may not amend such agreements. The reason for the procedure is to eliminate the possibility that amendments that are contrary to negotiated agreements are not enacted into law.

[428] As a matter of perception, this is true. However, states do not cede sovereignty when they exercise their sovereignty by obligating themselves to international agreements. Furthermore, as noted by Weiler, the European experience was that enhanced "voice" accompanied the development of transnational rules within the Union. Weiler, *supra* note 89. In essence, the political power of a state to influence the development of such transnational rules within a three state economic integration such as NAFTA cannot be overlooked. If NAFTA expands to include parts of Latin America, such influence could be somewhat diluted. However, even if the Agreement expands to include the major nations of Central and South America, it would not be appreciably larger than the Union. Furthermore, this article only argues for harmonization in a discrete area of national policy—worker rights—and not for an all-encompassing economic harmonization as envisioned for the Union.

[429] COMPARISON, *supra* note 262, at 5.

[430] Theresa A. Amato, *Labor Rights Conditionality: United States Trade Legislation and the International Trade Order*, 65 N.Y.U. L. REV. 79 n.2 (1990).

[431] *Id.* at 83; *see* ILO Convention No. 11, Right of Association (Agriculture) Convention (1921); ILO Convention No. 98, Right to Organize and Collective Bargaining Convention (1949); ILO Convention No. 5, Minimum Age (Industry) Convention (1919); ILO Convention No. 105, Abolition of Forced Labor Convention (1957); ILO Convention No. 1, Hours

would involve a larger international arena than the discrete three-party process envisioned in the European model. The parties could negotiate which international treaties would be commonly acceptable, but this process does not provide the kind of negotiating control present in the European system. In any case, each Party would have to provide that the treaties be self-executing or would have to pass implementing legislation so that individuals would have the right of judicial redress before national courts and a supranational body under the NAALC.

D. Stipulation of National Labor Laws

Under the present system, fealty to sovereignty in domestic policies is paramount.[432] Annex 1 of the NAALC sets out guiding princi-

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of Work (Industry) Convention (1919); ILO Convention No. 131, Minimum Wage Fixing convention (1970); ILO Convention No. 155, Occupational Safety and Health Convention (1981).

[432] The current system evidences an obsession with sovereignty that is ill-placed. The views of columnists Thomas Friedman and William Safire which are generally pro-NAFTA, take the sovereignty fears to task by pointing out that full sovereignty in terms of total control over national policies is unrealistic in an interdependent world and a recipe for isolationism. Thomas L. Friedman, *Return Mail*, N.Y. TIMES, July 2, 1995, at 11; William Safire, *Laughter after NAFTA*, N.Y. TIMES, at A27. These views can be contrasted with those of Patrick Buchanan, columnist Bob Herbert, and Patrick Choate. Patrick J. Buchanan, *America First, NAFTA Never; It's Not About Free Trade — It's About Our Way of Life*, WASH. POST, Nov. 7, 1993, at C1; Bob Herbert, *Nafta and the Elite*, N.Y. TIMES, Nov. 10, 1993, at A27; *The Great NAFTA Debate*, WASH. POST, Oct. 3, 1993, at C3 (referencing the views of Patrick Choate). Those concerns are summarized by consumer advocate Ralph Nader:

> The North American Free Trade Agreement, NAFTA, as it is called by its creators, is not a trade agreement in any traditional sense. It is an international autocratic governance agreement that deeply invades the internal democratic sovereignty of the United States to preserve and advance its own health, safety and workplace standards.

Employment, Housing and Aviation Impact of NAFTA on Minorities: Hearings Before the Subcomm. on Housing, Employment and Aviation of the House Comm. on Government Operations, 103d Cong., 1st Sess. (1993) (statement of Ralph Nader).

The sovereignty concerns appear to be self-conflicting. On the one hand, the critics oppose the inevitable conflict between U.S. and Mexican labor standards while also opposing the principle of supranational oversight and fearing that it will serve to roll back labor standards in this country. Obviously, a system of oversight that mandates raised standards across the board would satisfy this concern. However by treading lightly on the concept of oversight, the drafters of the NAFTA and the NAALC fail to address these fears.

Like a contract, an international agreement between sovereign nations is an agreement to limit one's sovereignty in exchange for benefits of the agreement. Treaties are the ultimate example of the positivist theory of international law by which states, because of their sovereign status, must consent to be bound to international obligations. Julius Stone writes: "The positivist preoccupation with treaties and other evidence of State practice, and the Vattelian preoccupation with each State's fundamental rights, both pointed to the consent of States as the source of international legal obligations." Julius Stone, *The Path to Positivism, in* INTERNATIONAL LAW ANTHOLOGY 33, 33-34 (Anthony D'Amato ed., 1994) (emphasis supplied). As such, it is impossible to talk about a derogation of sovereignty when a state enters into an obligation in exercise of its sovereignty. Furthermore, a state can terminate its obligations under a treaty, which is also an exercise of sovereignty. Depending upon the instrument, such termination or withdrawal may be allowed by the instrument or by consent of the parties, meaning that a withdrawing state will not be deemed in breach, Vienna Convention, *supra* note 4, art. 54, or such withdrawal will be deemed a breach of the treaty, *id.* art. 60. Whatever the case, sovereign prerogatives do determine the status of a state's obligation.

ples that have little meaning, inasmuch as the preamble to the Annex states that the principles do not establish common minimum standards for domestic law.[433] The modification to this system would be to set some actual minimum standards, and to do so by stipulating that the laws in place in each country meet those standards. By such a stipulation, labor laws could be locked-in—a feature that does not exist under the present system. Expansion of labor protections would be permitted, but agreement among the parties would be required to assure that the legislative change is consistent with the social goals of the Agreement.[434] As far as enforcement of existing laws that presumably meet such minimum standards, evaluation of enforcement policies could be based more directly on the presently inert minimum standards. Politically charged issues involving treaty implementation under the international labor law option or the ceding of control of domestic policy to a trinational process which would create new law under the European model could be averted. The only binding requirement would be like the requirements of NAFTA itself—that domestic laws implementing the free-trade agreement be locked in. Under this proposal, existing national laws would be locked in under the minimum standards re-

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In the area of trade, NAFTA constrains the sovereignty of the Parties to pick and choose whatever trade policy that they may wish to conduct. *See, e.g.*, NAFTA, *supra* note 3, arts. 301, 302. As in contract formation, the freedom of the individual, or of the individual state, is not only the freedom to do whatever it pleases, but the freedom to limit itself—to enter into agreements that in fact do constrain its sovereignty, presumably in exchange for some benefit that can be achieved under the agreement. Thus, the monetary loss to national treasuries and the loss of protection of national industries brought on by the elimination of tariffs is the price required for the net welfare gains to society that free trade provides.

Hence, the debate over social policies should not rest on the sovereignty canard. Instead, the debate should center on whether or not ensuring that artificial comparative advantage, brought on by loose enforcement of national labor laws, or even the non-existence of laws to ensure that artificial comparative advantage does not exist, is a goal worth achieving. Unfortunately this is not the atmosphere under which NAFTA has been and is currently being debated. Under the best of circumstances, this debate would have taken place during the negotiations of NAFTA and the NAALC. However, in fairness, the opportunity did not arise as negotiations of NAFTA and the NAALC were conducted in secret. *See Deep Secret*, FIN. TIMES, Aug. 14, 1992, at 11; Stuart Auerbach, *Mexico Wants Exemption from Banking Laws*, WASH. POST, Mar. 25, 1992, at F1; Pat Choate, *Buying the White House Take on Our Book*, WASH. POST, Sept. 25, 1993, at A19; Robert Dodge, *Environmental Omissions: Four Groups Criticize Clinton Administration's NAFTA Efforts*, DALLAS MORNING NEWS, June 9, 1993, at 20.

Unlike those who opposed the free trade agreement, this writer believes that NAFTA need not have been defeated on the basis of the labor issue. With movement in the European Union toward more harmonization of economic and trade policies, approval of NAFTA was a competitive necessity. But since treaties can be amended and reformed, defeat of NAFTA in its present state simply was not necessary. Any obstacles that exist to the reform of NAFTA now existed during the negotiations, and it is not likely that matters would have gone any smoother had the Agreement been defeated and renegotiated. Furthermore, the window of opportunity to negotiate some solid social policies has opened with the planned extension of the Agreement to the rest of Latin America.

433 NAALC, *supra* note 19, annex 1.

434 Under NAFTA, new trade legislation is subject to similar review. *See* NAFTA, *supra* note 3, art. 2004 (providing for access to the dispute resolution processes of the agreement "wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement . . .").

quirement, as existing national economic laws were locked in under NAFTA.[435] However, specific national labor laws would not be set and would not be brought directly under this regime, unlike NAFTA, which sets specific economic obligations.[436]

The system is similar to what is already in place under the NAALC. The obvious difference is that labor laws are not presently assessed in terms of their consistency with the labor principles of the NAALC.[437] The obvious drawback of this option is that it does not provide for a fully harmonized system. The NAALC requires that only mutually recognized labor laws are subject to review under the "persistent pattern of failure to enforce" standard of review.[438] This serves as a sort of harmonization in that only enforcement of such mutually recognized labor laws would be reviewed. In the European Union, Member States are free to improve their social policy laws to the benefit of workers.[439] However, the North American version of harmonization is essentially a negative harmonization serving merely as a limitation on review without the implementation of a minimum standard. In Europe, the minimum standard is the Union legislation itself. In essence, without the stipulation, a Party is free to downgrade its labor laws at will, thus lowering the threshold of mutually recognized labor laws. The stipulation would presumably prevent such manipulation.

Not to be missed is the fact that under this proposal there will be in place some standard that can be evaluated using indices arrived at by a supranational body involved in the review (not national judicial and administrative bodies) and such indices will have the force of law applicable to a party against whom a complaint is based. Such an evaluation would have to be accomplished through a review procedure that ensured access to a trinational body for individuals affected by national labor policies.

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435 "Locked in" refers to the NAFTA provision that allows parties to chllenge changes of another party tht would be inconsistent with the Agreement or would cause nullification or impairment of the benefits expected to accrue under the Agreement. *See* NAFTA, *supra* note 3, art. 2004, annex 2004.

For example, restrictive rules and regulations governing foreign investment in Mexico were eased in the years preceding NAFTA. Although constitutional limits remain on foreign control of natural resources and legislation remains that limits foreign investment in a variety of commercial endeavors, regulations promulgated by Mexico's executive branch, through liberal interpretation, increased opportunities for foreign investment in Mexico prior to the entry into force of the Agreement. *The Likely Impact on the United States of a Free Trade Agreement with Mexico*, USITC Publication 2353, Inv. No. 332-297 (Feb. 1991) 59-65.

436 *See supra* note 434.

437 By specifically stating that the principles in the Annex are not to be construed as minimum standards, Annex 1 effectively precludes any application of the principles in judging national labor laws. *See* NAALC, *supra* note 19, annex 1.

438 *See supra* note 244.

439 EEC TREATY art. 118a, ¶ 1. The provision requires the Council, acting by a qualified majority, to adopt "minimum standards" in the area of social policy. *Id.* art. 118a, ¶ 2.

E. Dispute Resolution

Critical to any harmonization efforts is the establishment of judicial review procedures for enforcement. A dispute resolution process would accomplish this goal and should not be a difficult hurdle in the process of reform. As far as domestic constitutional law is concerned, much of the groundwork has already been laid by the Chapter 19 antidumping and countervailing duty dispute resolution system.[440] United States constitutional problems focusing upon the substitution of an international arbitral panel to adjudicate rights in lieu of the federal judiciary were resolved under the Canada-U.S. Free Trade Agreement.[441] Under both NAFTA and U.S.-Canada dispute resolution procedures, provisions are made for private interests to be represented while the litigants in a panel proceeding would be the state parties involved.[442] Adapting this format to labor issues would require that private parties, in addition to the state Parties, have standing to appear before the dispute resolution body and that the present standard of "persistent pattern of failure" to enforce local laws be eliminated.

Once a review structure is developed, any of the three legal models could be implemented. What is crucial is that individuals have access to judicial review, and that panels have the authority to determine whether the rules being enforced satisfy the goals of the Agreement.

IX. Conclusion

The goal of free trade is a laudable one that deserves every advantage for its achievement. Nonetheless, there can be little serious debate that some economic dislocation comes with free trade, particularly in the area of labor. Harmonization is the only rational way to deal with the problem of capital and job flight by equalizing costs across borders. Harmonization removes the incentive to "take the money and run" on the part of companies of one party.

Harmonization is a form of strict oversight of labor policies. The fact that the NAALC was negotiated is an admission that some over-

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[440] NAFTA, *supra* note 3, art. 1904. For U.S. law provisions for panel dispute resolution under the NAFTA, see 19 U.S.C.A. § 1516a(g) (Supp. 1995).

[441] United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-499, 1988; U.S. Code Cong. & Admin. News (102 Stat.) 1851. Because the NAFTA, like its predecessor, the U.S.- Canada Free Trade Agreement provides exclusive review of determinations by panels composed of individuals representing each of the trade partners, and not through an Article III court, questions were raised as to the constitutionality of such a procedure. By allowing a fast-track means of addressing constitutional challenges to the procedure under the U.S.-Canada implementing legislation, Congress intended to provide the constitutionally required protections under the international panel system as are provided by Article III review. This procedure has been carried forward to the NAFTA. *See generally* Note, *The Constitutionality of Chapter Nineteen of the United States-Canada Free-Trade Agreement: Article III and the Minimum Scope of Judicial Review*, 89 COLUM. L. REV. 897 (1989).

[442] NAFTA, *supra* note 3, art. 1904, ¶ 7.

sight is necessary. However, the provisions of that agreement are not sufficient to ensure that the benefits of free trade and economic integration possible under NAFTA are not tainted by unnecessary job loss occasioned by lax enforcement of national labor laws of the three trade partners. A limited harmonization process focusing solely on labor that steers clear of the breadth of governance apparent in the European Union can be accomplished with relatively little disruption. It may be necessary to relinquish some of the notions of total autonomy in economic matters held so dear in this country, but any economic agreement requires such sacrifice. There is little merit to any other alternative.