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The Multinational Corporation and the Extraterritorial Application of the Labor Management Relations Act

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Business rather than legal considerations dictate the initial determination to invest abroad and to operate in a particular foreign country.¹ These considerations generally include market availability, transportation and communication facilities, sources of raw materials, skilled labor, and product preferences of the target group.² Nevertheless, legal

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1. W. SURREY & C. SHAW, A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 188-200 (1963) [hereinafter cited as SURREY].

2. Of course, other considerations are involved. Some of these are: (i) the need to safeguard the parent company's export markets by penetrating foreign tariff walls; (ii) the need to improve efficiency and responsiveness by replacing exportation with local production in foreign markets; (iii) the need to reduce production costs; (iv) the fear that compet-

considerations (*e.g.*, tax and antitrust implications) guide the choice of the particular *form* of business organization for the proposed foreign investment enterprise. While the advantages of a particular form of business organization may vary from one nation to another, Americans most frequently invest abroad by establishing foreign subsidiaries wholly or largely owned by American parent corporations.³

Once a subsidiary has been established in a foreign country, it may be, and sometimes is, used as a vehicle for the transmission of "home" governmental policies. The home government's decision to transmit its policies abroad is usually influenced by the desire to protect its nationals' business and investment interests while protecting the home government's interest in the free flow of trade and commerce. Considerable criticism has been directed at American efforts to protect these interests through the exportation, or extraterritorial application,⁴ of domestic securities and antitrust laws. This article examines the propriety under international and domestic law of efforts to protect these same interests through the extraterritorial application of domestic labor laws—specifically the Labor Management Relations Act of 1947.⁵

I

LABOR RELATIONS AND THE MULTINATIONAL CORPORATION: AN OVERVIEW

In this article, the term "multinational corporation" (MNC) refers to the foreign aspects of an American company. While this designation does not affect the company's potential liability for *domestic* activities,

itors operating abroad may capture lucrative foreign markets or acquire cheaper sources of supply, thereby threatening the parent company's domestic market position; (v) the need to offset fluctuations in earnings by diversifying product lines; (vi) the desire to avoid stringent home country regulations (*e.g.*, antitrust, securities and labor laws); and (vii) the desire to obtain lower capital and labor costs. See 1 U.S. DEPT. OF COMMERCE, THE MULTINATIONAL CORPORATION: STUDIES ON U.S. FOREIGN INVESTMENT 14 (1972) [hereinafter cited as COMMERCE].

3. See SUBCOMM. ON MULTI. CORPS. OF SENATE COMM. ON FOREIGN REL., DIRECT INVESTMENT ABROAD AND THE MULTINATIONAL: EFFECTS ON THE UNITED STATES ECONOMY, 94TH CONG., 1ST SESS. (1975) [hereinafter cited as SUBCOMM. ON MULTI. CORPS.].

4. Extraterritorial application is the application of a domestic (American) statute to persons or events linked with other countries as well as the United States. H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 853 (1968). The question of extraterritorial application initially involves a determination of a court's jurisdiction to hear evidence on the subject matter of the alleged statutory violation.

5. 29 U.S.C. §§ 141-188 (1970). For a discussion of the possible extraterritorial application of other American labor statutes, see Goldberg, *Labor Relations and Labor Standards for Employees of United States Enterprises Working in Foreign Areas*, 48 N.D.L. REV. 23 (1971).

its effect on corporate responsibility for *foreign* operations raises questions that are relevant to this discussion.

The literature abounds with varying definitions of the multinational (international, transnational) corporation or enterprise. Most of these definitions relate to the economic or sociological aspects of the MNC rather than to its legal aspects.⁶ Moreover, the term "multinational corporation" is in itself misleading, for it implies the existence of a legal entity which does not in fact exist. Although some truly international corporations have been founded and governed by multilateral treaties, the term "MNC" commonly refers to entities that are not, in a legal sense, really international corporations. Indeed, according to many commentators, an MNC is nothing more than a group of separate legal entities that are incorporated in, and subject to, the laws of the countries in which they operate.⁷ Nevertheless, practical application belies this "definition," since certain countries attempt to regulate the foreign operations of their MNCs.⁸ Although this article recognizes and at-

6. See U.N. DOC. ST/ECA/190 (1973). See also INTERNATIONAL LABOUR OFFICE, INTERNATIONAL PRINCIPLES AND GUIDELINES OF SOCIAL POLICY FOR MULTINATIONAL ENTERPRISES: THEIR USEFULNESS AND FEASIBILITY (1976) [hereinafter cited as PRINCIPLES AND GUIDELINES]; NATIONAL ASSOCIATION OF MANUFACTURERS, U.S. STAKE IN WORLD TRADE AND INVESTMENT: THE ROLE OF THE MULTINATIONAL CORPORATION 11 (1972); COMMERCE, *supra* note 2; Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739 (1970). The attempts of these studies to define the MNC include the following: (i) a company whose foreign sales have reached a ratio of 25% (or some other proportion) of its total sales; (ii) a company with global product divisions rather than an international division; (iii) a company that attempts to carry out international activities through a common strategy directed from a corporate center as though national boundaries did not exist; (iv) a company with a certain distribution of ownership or nationality mix of managers or directors; and (v) there is no agreed definition.

7. See PRINCIPLES AND GUIDELINES, *supra* note 6, at 8 n.3; INTERNATIONAL LABOUR OFFICE, MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (1973) [hereinafter cited as MULTINATIONAL ENTERPRISES].

8. For example, the United States asserts the right to command the allegiance of its nationals (both corporate and individual) when they venture outside the country. Host countries oppose this position since they too claim the right to regulate these persons when they come within their territory. See Vagts, *supra* note 6, at 741. Frequently the home country (particularly the United States) cannot resist the temptation to extend its authority to foreign subsidiaries of MNCs, thereby treating them as mere extensions of the parent company (and of the home country). The rationalization for this practice is that the capital exporting nation is in the best position to impose rules and regulations at the source. At the same time, host countries have difficulty ignoring foreign control over "their" corporations while attempting to treat them the same as local firms. *Id.* at 743. See also Kronstein, *The Nationality of International Enterprises*, 52 COLUM. L. REV. 983, 993-98 (1952). According to Kronstein, it is ridiculous to ascribe different nationalities to the central enterprise and its foreign establishments. Logically extended, this position would deny that these entities have allegiances to different national laws.

tempts to resolve the resulting dilemma, it does not attempt to set forth the penultimate definition of the MNC. It is not necessary to do so.

For the purposes of this article, and those of any discussion concerning the regulation of extraterritorial activity of an MNC, the essential nature of an MNC lies in the fact that it locates its managerial headquarters in one country (the home country), while it operates in a number of other countries as well (the host countries).⁹ As a working framework, we can identify the following criteria as essential characteristics of an MNC: (a) its identification as a group of corporate and noncorporate entities joined together by some degree of common control; (b) the submission of different entities within the group to different national legal systems; and (c) substantial economic activity on an international scale.¹⁰ These characteristics of an MNC give it a supranational point of view which may conflict, in many cases, with the social, economic, and political concerns of individual host countries. To alleviate this conflict, host countries may attempt to regulate the MNC's operations, even while trying to protect the MNC's interests.

Conflicts with host countries are not the only difficulties faced by MNCs. Special interest groups in both home and host countries have recently forced many MNCs to respond to criticism of their foreign operations. Labor groups have alleged that the use of the MNC as a vehicle for foreign investment¹¹ undermines prospects for economic growth by jeopardizing the living standards, wage rates,¹² and job oppor-

9. The degree of centralized control varies among MNCs according to the predilections of management and such factors as the type and extent of economic activity involved. *MULTINATIONAL ENTERPRISES*, *supra* note 7, at 3.

10. *Id.*

11. Several studies and inquiries into the operations of MNCs have been undertaken by committees of the United States Senate and House of Representatives, by various Executive departments and agencies, and by international organizations. See notes 2, 5, 6, & 7 *supra*, notes 15 & 25 *infra*. A recent study found that two-thirds of direct foreign investment went to technically advanced countries, and, of the remainder, nearly one-half went into petroleum operations. Investment in developing nations accounted for less than 20% of the total. *SUBCOMM. ON MULTI. CORPS.*, *supra* note 3, at xi. The increasing scope of MNC operations in developed countries is a recent phenomenon, and these operations create the most difficult labor relations problems. Seham, *Transnational Labor Relations: The First Steps are Being Taken*, 6 *L. & POL'Y INT'L BUS.* 337, 338-39 (1974), points out the different motivations for investing in developing, as opposed to developed, countries.

12. Although foreign wage scales are generally thought to be substantially lower than those in the United States, this assumption can be misleading in calculating the effects of MNCs on employment. Wage scales in industrialized countries such as the United Kingdom, Canada, Japan, and West Germany, are rising to a level almost equal to that of the United States. Furthermore, direct wages are not always an accurate indicator of prevailing "wage scales." For example, it has been estimated that the cost of labor benefits in certain countries amounts to 35% of the actual payroll. This consideration runs counter

tunities of American and foreign workers alike.

In the eyes of American labor unions, the foreign operations of MNCs significantly affect jobs.¹³ In turn, labor unions in host countries¹⁴ argue that the international nature of MNCs impairs the ability of host country unions to engage in effective collective bargaining¹⁵ and puts MNCs beyond the reach of the host government's labor regulations.¹⁶

to the hypothesis that MNC operations will equalize factory costs and wages in line with the classical theory of international trade. Günter, *An Overview on Multinational Corporation and Labour*, 12 INT'L INST. LABOR STUDIES BULL. 37, 41 (1974) [hereinafter cited as *An Overview*]. See also INTERNATIONAL LABOUR OFFICE, *WAGES AND WORKING CONDITIONS IN MULTINATIONAL ENTERPRISES* (1976).

13. MULTINATIONAL ENTERPRISES, *supra* note 7, at 28. American unions claim that MNCs shut down domestic plants and lay off domestic workers in order to transfer this production to foreign plants. See generally *An Overview*, *supra* note 12, at 37-46.

14. Of course, depending on their individual needs and perceptions, labor organizations in various host countries often have different views on the problems created by MNCs. For example, unions in industrialized nations are primarily concerned with preventing job losses, while unions in developing nations are primarily interested in encouraging an influx of capital to stimulate economic development and create new jobs. See INTERNATIONAL LABOUR OFFICE, *MULTINATIONALS IN WESTERN EUROPE: AN INDUSTRIAL RELATIONS EXPERIENCE* (1975) [hereinafter cited as *WESTERN EUROPE*]. In nations such as Canada, where 65% of union membership is affiliated with American international unions, the major concern is to prevent the undermining of national sovereignty. See TARIFF COMM'N, 93D CONG., 1ST SESS., REPORT TO THE SENATE COMM. ON FINANCE AND ITS INTERNA'L TRADE SUBCOMM., *IMPLICATIONS OF MULTINATIONAL FIRMS FOR WORLD TRADE AND INVESTMENT AND FOR U.S. TRADE AND LABOR* 673 (Comm. print 1973) [hereinafter cited as *TARIFF COMM'N REPORT*].

15. One problem with collective bargaining stems from the difficulty the host country union has in persuading the parent company to disclose necessary financial information directly related to host country activities of the MNC. In the United States, the employer's duty to bargain in good faith requires the disclosure, upon union request, of sufficient information to enable the union to understand and intelligently discuss bargaining issues. *S.L. Allen & Co.*, 1 N.L.R.B. 714 (1936). Good faith bargaining may also require the employer to divulge certain financial data to support claims presented during the bargaining process. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956). See *Seham*, *supra* note 11, at 342 n.18.

In the absence of similar requirements for foreign operations, host country unions are at a significant disadvantage, since an MNC is generally required to publish information about its finances and operations only in its home country.

16. The multinational character of an enterprise has affected the outcome of judicial proceedings in various countries. In one case, the court upheld an MNC's notice of dismissal to its executive employees that was shorter than the notice usually demanded of local companies. See *Chen v. Ideal Standard* (Belgium Labor Court of Nivelles, 1972). See also *PRINCIPLES AND GUIDELINES*, *supra* note 6, at 12. Sometimes host country governments actually participate (whether willingly or not) in alleged MNC union busting strategies. This is most common in less-developed countries, due to their desire to attract increased foreign investment. For example, South Korea has prohibited strikes against subsidiaries of foreign corporations.

Due to the disproportionate power of the MNCs, host country labor unions express apprehension about dealing with MNCs in labor relations matters. This apprehension is enhanced by union uncertainty as to the power of local MNC management to make final and binding decisions in bargaining or grievance sessions.¹⁷ Furthermore, many MNCs actively resist or withhold union recognition and attempt to apply specialized home country practices to their foreign operations, ignoring local customs, regulations, and practices.¹⁸ Host country unions also contend that, even if they overcome bargaining and recognition problems, there will be a continual threat to job security. Unlike local firms, MNCs are able and willing to shut down or shift operations from one plant or subsidiary to another. The unions argue that these shutdowns and shifts are designed not only to obtain maximum profit, but also to secure the most effective position for bargaining with workers in order to ensure continued production during strikes or periods of other economic action.¹⁹

17. Unions feel that the relevant and important decisions are made at the MNC's home country headquarters and are, therefore, beyond the reach of local union activity. See Seham, *supra* note 11, at 341. See also Blake, *International Labor and the Regulation of Multinational Corporations: Proposals and Prospects*, 11 SAN DIEGO L. REV. 179, 181 (1973). Unions fear that home office decision-makers cannot adequately appreciate the concerns and attitudes of foreign workers. They view MNCs as having no nationality and no concern for working conditions in a particular country.

18. TARIFF COMM'N REPORT, *supra* note 14, at 683; WESTERN EUROPE, *supra* note 14, at 2. Home country conceptions of the nature of collective bargaining and strike action may influence the foreign labor relations conduct of MNCs. This can be a significant irritant to host country unions and can impair labor-management relations. For example, some American corporations transfer home-grown convictions on union recognition and security to their overseas operations. Thus, they often refuse to recognize unions until the Labor Management Relations Act, with its exclusive election process, compels them to do so. In countries where there is no legal obligation to recognize unions, as in the United Kingdom and the Netherlands where recognition is voluntary, some MNCs have precipitated major problems by failing to understand that custom often dictates automatic recognition. Union recognition can also be a troublesome problem in less industrialized nations where unionism is less established. In those areas, unions may have difficulty organizing plants in the face of the MNC's imported conceptions about union recognition. In some cases, American firms have recognized unions but have sought to avoid the problems of multi-unionism, often characteristic of British bargaining, by signing closed-shop agreements with particular unions and insisting that employees can join only these. See generally WESTERN EUROPE, *supra* note 14, at 4-5.

19. Seham, *supra* note 11, at 343. These practices can be a significant factor in union-company relations. Another factor in the balance of bargaining power is the MNC's financial ability to withstand a strike. If production at the plant affected by the strike is not necessary to continue operations at the parent corporation's plants in other countries, the loss of revenue caused by the strike may be insignificant in relation to the parent corporation's total production turnover.

While the foregoing discussion indicates that an MNC's operations cause severe labor relations problems, objective evidence shows that many of these complaints are unwarranted.

First, although most home country labor organizations have reacted to the outflow of domestic capital and technology by pressing for restrictive legislation to protect domestic employment, studies released by the United States International Trade Commission and the Department of Commerce reveal that direct foreign investment results in no loss of domestic jobs.²⁰ Instead, these studies indicate that foreign investment through MNCs actually stimulates both domestic employment and domestic economic activity.²¹ In addition, the American economy continually benefits from the export of American goods and services bound for use in MNC operations abroad. Furthermore, despite the rapid growth of overseas investment, goods which embody low-wage foreign labor are traditionally imported to the United States in small numbers.²² Thus, it appears as though slowing economic growth and the concomitant rise of unemployment have led unions to strike out at MNCs in an attempt to find a scapegoat for these economic woes.²³

20. See generally COMMERCE, *supra* note 2; TARIFF COMM'N REPORT, *supra* note 14. Section 283 of the Trade Act of 1974, 19 U.S.C. §§ 2102-2487 (1975), requires firms moving production facilities outside the United States to offer employment opportunities to employees who lose their jobs as a result of the move and to assist those employees in relocation. Moreover, the firm must notify concerned employees at least 60 days before the move.

21. COMMERCE, *supra* note 2, at 28; TARIFF COMM'N REPORT, *supra* note 14, at 651-72. In the past when imports into the home country were low or of a noncompeting nature or were balanced with exports, the possible impact of MNC operations on home country employment attracted little attention, for they were regarded as normal trade effects. Now however, trade unions have come to regard MNC operations abroad as a primary cause of home country job losses. Unions feel that foreign expansion reduces domestic employment in two ways: (i) by increasing home country reliance on imported goods; and (ii) by increasing foreign market reliance on goods made by subsidiaries located abroad rather than by plants in the home country. It is not clear whether MNC operations abroad cause an overall net loss of employment opportunities in the home country, but job losses in the United States have generally affected the low skilled sector. Direct investment abroad almost inevitably affects host country employment, since the subsidiary offers employment to host country nationals, but the extent of this impact varies widely with such factors as the level of industrialization in the host country.

22. COMMERCE, *supra* note 2, at 21.

23. Most commentators treat foreign investment and domestic employment as functions of disparate factors and deny that American foreign investors are exporting American jobs. It is by no means certain that domestic employment rises and falls as overseas investment expands or contracts. Instead, domestic employment is more directly related, both in theory and in practice, to the general state of the American economy. When the domestic economy operates at full employment levels, labor shows little interest in foreign investment.

Second, although labor relations practices vary among different MNCs and depend largely upon the particular host country involved, certain nearly uniform conclusions can be made. Generally, decision-making power is decentralized. This is particularly true in the case of issues related to collective bargaining, since the crucial policies and techniques are closely related to the legal, economic, and social environment of the MNC's place of operation.²⁴ While the practice may vary, MNCs generally assign only major investment decisions (*e.g.*, expansion or contraction) for determination by the home office.²⁵ Nevertheless, due to the nature of collective bargaining, the place where a decision is made may be of little importance. Business interests, such as productivity and profit considerations, will dictate the same response to the labor union regardless of where that response originates.²⁶

Third, objective evidence also indicates that the MNC's ability to transfer production does not seriously weaken the bargaining position of host country labor unions; nor does this factor appear to reduce the effectiveness of anticipated strike action.²⁷

24. The available evidence tends to support the view that, at least in Western Europe, industrial relations matters are handled by the subsidiary management. *An Overview*, *supra* note 12. See also MULTINATIONAL ENTERPRISES, *supra* note 7, at 93, stating that many MNCs have no company-wide labor relations policies and give autonomy in this area to their subsidiaries.

25. WESTERN EUROPE, *supra* note 14, at 15.

26. While the spreading of production facilities throughout different countries is often perceived as a threat to national union power, this extension of facilities can make a company more vulnerable than a purely national competitor. In the case of a highly integrated corporation with specialized functions in different countries, a strike in any plant could have an impact on the company's worldwide operations. See, *e.g.*, *Time*, June 14, 1976, at 54, discussing the recently proposed worldwide boycott of the United Rubberworkers Union against the Firestone Tire & Rubber Company. Of course, MNCs are likely to become involved with their subsidiaries more often in cases of strike or boycott action than in other phases of labor relations. Marketing considerations may influence the policy of MNCs toward their overseas subsidiaries. If, for example, a particular subsidiary ships an important part of its output abroad, the home office is likely to be more concerned about a strike than it would be if the plant supplied only a local market. See generally WESTERN EUROPE, *supra* note 14, at 24-29.

27. When considering the transfer of production, a MNC will certainly take into account not only labor relations and labor costs in the new location, but also such factors as the degree of inflation in that country, its political stability, the possibility of capital repatriation, tariff regulations, and the threat of government intervention. According to most commentators, obstacles to the transfer of production are usually insurmountable. See MULTINATIONAL ENTERPRISES, *supra* note 7, at 90; *Industrial Relations in a Multinational Framework*, 107 INT'L LAB. REV. 489, 496 (1973) [hereinafter cited as *Industrial Relations*]. The MNC fear is that it will be caught in a gigantic whipsaw strike in which its worldwide work force will attempt to get the best holiday in one country, the best vacations in another, the best pensions in another, and so on. Nevertheless, MNCs dis-

Nevertheless, there may be some merit to the contention that MNCs frequently fail to conform to host country regulations and practices by trying to transfer personnel and labor relations practices from their home country.²⁸ Many MNCs respect and adapt to host country labor relations practices and policies, and are even occasionally compelled to conform.²⁹ At the same time, MNCs often implement the most important of their home country practices. Their styles of labor management often show distinct home country influence, and on some matters they operate under direct home country control.³⁰

At least two factors compel this continued export of home country labor relations practices. First, few host countries have a comprehensive set of labor relations regulations. If MNCs failed to apply their home country policies, many labor-management dealings would be uncontrolled.³¹ Second, host country labor unions have recently intensified their efforts to organize transnational economic cooperation among unions, including bargaining with MNCs.³² This raises great practical and

claim the power to shift production resources as a bargaining tool and argue that their commitment to capital resources and materials is too substantial to permit some assembly lines to be turned off while others are speeded up like spigots. Whatever the MNC's capacity to effect international transfers of funds and currencies, the same flexibility does not exist in dealing with production capacity itself. *MULTINATIONAL ENTERPRISES*, *supra* note 7, at 90; *Seham*, *supra* note 11, at 345.

28. *MULTINATIONAL ENTERPRISES*, *supra* note 7, at 92; *Industrial Relations*, *supra* note 27, at 498.

29. Many of the host country policies adopted by MNCs actually relate to terms and conditions of employment (*e.g.*, nondiscrimination, minimum wages, working hours, safety and health standards), rather than to labor relations. *See generally* *PRINCIPLES AND GUIDELINES*, *supra* note 6, at 13-14. In those matters, there is no difference between MNCs and other enterprises. *Id.* at 13.

30. *WESTERN EUROPE*, *supra* note 14, at 3-9, 35-37. *See* notes 17-18 *supra* and accompanying text.

31. *See generally* *WESTERN EUROPE*, *supra* note 14, at 27. For example, much of the substance and structure of labor-management relations is prescribed by law in the Federal Republic of Germany. This inevitably assures greater conformity by MNCs to national practices than in voluntaristic systems such as that of the United Kingdom, where MNCs are more likely to introduce home country practices.

32. *Id.* at 65-69. *See also* *Seham*, *supra* note 11, at 347-57. At one time or another, most host country unions have called upon home country unions to intervene on their behalf in disputes with subsidiaries of MNCs. Some unions have, in fact, placed pressure upon management on behalf of workers in a foreign subsidiary of the MNC. This type of action, or similar action by groups of unions dealing with the same company in different countries, is often coordinated by one of the international trade union secretariats. It seems to be the most widespread and readily available form of international cooperation by unions dealing with the same MNC. In spite of this demonstrated solidarity, some obstacles have been encountered. These obstacles, which unions are seeking to eliminate, vary from country to country depending on legal limitations on the right to strike, the right to

legal problems for MNCs. It would be impractical to respond to this cooperative action by relying on the diverse labor relations laws of those host countries that have passed relevant legislation. If this practice were followed, unions could profit by taking action only in favorably regulated or unregulated countries. From the MNC's standpoint, the best response to this action would be to apply the home country's domestic labor laws.³³

The extraterritorial application of home country labor laws raises two questions. The first involves the scope of application; *i.e.*, whether home country laws should be applied to *all* aspects of the MNC's labor rela-

refuse overtime work, and the right to refuse to work on "struck" production on behalf of workers in another country. In view of these obstacles and the rather limited development of transnational union-management relations, it is not surprising that there has been only a limited amount of such sympathetic supportive action. It appears as though action of this type will have limited effect until coordinated transnational bargaining with MNCs has developed to a greater extent. *See id.* at 358. Among the barriers to this development are: the relatively good wages and working conditions in most multinational subsidiaries; the existence of plural unionism and plural international union affiliations in many countries; the nature of bargaining structures in the MNC's own countries; legal obstacles to transnational union action; the great cost of bringing trade unionists together, even for preliminary meetings to plan strategy and tactics; and language barriers. WESTERN EUROPE, *supra* note 14, at 42-48. Nevertheless, transnational negotiations with MNCs (such as Ford, Philips, and Nestle) are increasing, and union coordination in these negotiations often equals that of the management of MNCs. *An Overview, supra* note 12, at 44. In the North American automobile industry, collective bargaining agreements have been reached between an American corporation and its Canadian subsidiary, on one side, and an international union established in the United States on behalf of unions in each country, on the other. *See PRINCIPLES AND GUIDELINES, supra* note 6, at 15. One device to hasten multinational collective bargaining is the use of common expiration dates in agreements. Fairweather, *European Labor Relations and the American Corporate Management*, in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS 99, 105 (1972). For a discussion of the U.S. labor movement's resistance to the concept of international labor solidarity, see TARIFF COMM'N REPORT, *supra* note 14, at 686.

33. Increasing demands have been made for public governmental control of MNC labor relations activities on an international basis. Among the suggestions are the drafting of model contracts for foreign operations and the adoption of an International Code of Conduct to be administered by an international agency under the direction of the International Labor Organization. *An Overview, supra* note 12, at 39. The International Labor Organization recently decided that international rules for collective bargaining may be appropriate. *See MULTINATIONAL ENTERPRISES, supra* note 7. Many international trade unions have also called for a United Nations conference to lay down a code of conduct for multinational corporations. *See Industrial Relations, supra* note 27, at 491. The International Metal Workers Federation has adopted a resolution which envisages a number of measures, including international company laws, to regulate the operation and activities of corporations that operate across national frontiers. This resolution urges the International Labor Organization to establish and publish a black list of MNCs found to be violating the provisions of international company laws relating to the concerns of workers. *Id.* at 493.

tions (including recognition of unions, arbitration, and collective bargaining) or only to union economic action such as strikes and boycotts.³⁴ The second question stems from the fact that the home country's labor laws may have never before been applied in a transnational setting and from the possibility that such an application may interfere with the sovereignty of host states to which the MNC subsidiary owes allegiance. Thus, the major question is whether the extraterritorial application of domestic labor laws is practical and consistent with both international law and the domestic law of the particular home country.

This discussion of the proposed application of the Labor Management Relations Act to the extraterritorial activities of MNCs may be novel, but the MNC itself is a novel institution. It is an institution with transnational decisional power, strategic orientation, and functional requirements that have no counterpart at the national level.³⁵ As a home country, the United States may be forced to exercise labor jurisdiction over its entire group of multinationals in order to control the institution. The same course of action may also be necessary to prevent the diversity of host country labor laws from impairing the MNC's effectiveness as a vehicle for investment abroad.

II

INTERNATIONAL LAW ASPECTS AFFECTING THE EXTRATERRITORIAL APPLICATION OF THE LABOR MANAGEMENT RELATIONS ACT

International law is a system of principles,³⁶ derived largely from accepted practice, which sets forth the standard of conduct for states and other entities subject to its tenets.³⁷ The content of international law varies with time, as nations engage in an interest balancing process to

34. Practical problems associated with the extraterritorial application of labor relations laws are discussed in Part IV. A related problem is whether international law allows these laws to be applied to all employees of the MNC, only to foreign workers, or only to home country employees who have been brought into the host country by the MNC. This problem is discussed in Part II.

35. PRINCIPLES AND GUIDELINES, *supra* note 6, at 9.

36. Although readily distinguishable in many respects from domestic law, this system has definite characteristics, some of which are common to domestic law. See W. BISHOP, *CASES AND MATERIALS ON INTERNATIONAL LAW* 11 (3d ed. 1971).

37. 1 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 1 (1940). Since individuals and organizations may be governed directly by international law, it may be more precise to define international law in terms of the manner in which it is created. Thus, international law can be described as a system of governing principles created by the acts of two or more states—whether through convention or custom. See H. KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 201 (1952).

adhere to certain practices and discard others.³⁸ When certain practices are adopted, they attain the stature of accepted principles or norms and are considered binding upon those entities subject to international law. There are several sources for these norms.³⁹

A. CUSTOMARY INTERNATIONAL LAW

Customary international law consists of those practices which have acquired the force of law due to their acceptance as such by the international community.⁴⁰ A state which presses a claim on the basis of custom must demonstrate that the custom is generally regarded as binding. In any given case, this assessment cannot be made without considering the growing disagreement over which principles of state

38. See 1 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 1 (1963).

39. Article 38 of the Statute of the International Court of Justice, which enumerates the sources of international law, provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

I.C.J. STAT. art. 38, para. 1 (1945). To the best of our knowledge, the sources of international law set forth in paragraphs (c) and (d) contain no rules either permitting or prohibiting the extraterritorial application of domestic law. They will, therefore, be given no further consideration in this article. Nevertheless, they may be important insofar as they lend flexibility to published international law and completeness of both custom and convention.

40. To establish the existence of a rule of customary international law, a state must demonstrate the following elements: (a) concordant practice by a number of states with regard to a type of situation within the domain of international relations; (b) continuation or repetition of the practice over a considerable period of time; (c) demonstrated conception that the practice is required by, or consistent with, prevailing international law; and (d) general acquiescence in the practice by other states. Hudson, *Article 24 of the Statute of the International Law Commission*, [1950] 2 Y.B. INT'L L. COMM'N 26, U.N. Doc. A/CN.4/16 (1950). See generally 1 M. WHITEMAN, *supra* note 38, at 75. Since customary international law originates with the consent of states, many commentators argue that no state is obligated by a rule of customary international law unless it has consented to that rule. Many supporters of this position also contend that new states are not bound by customary rules established before they became states. *But cf.* H. KELSEN, *supra* note 37, at 148-55, which contends that states can be bound by general international law without their consent and even against their will. For example, this position would hold a new state to all obligations of general international law, even though that state has not recognized each obligation.

responsibility enjoy continuing validity in the contemporary world. Due to this disagreement, nations involved in a dispute are likely to have different views on both the content and binding effect of customary international law.⁴¹

Standards prescribed by customary international law cannot be considered in a vacuum, however, for every state has certain "fundamental rights" which originate in neither custom nor agreement but in the very nature of the nation-state. These fundamental rights are the ultimate basis of positive international law and, therefore, have greater force than rules created by custom or agreement.⁴² One of the most basic of these rights is the right of a state to exercise jurisdiction over all persons, property, and conduct within its territory.⁴³

Nevertheless, the right of a state to exercise jurisdiction is not unrestricted.⁴⁴ Since the goals of international law are based upon reciprocity, certain correlative restrictions and duties have been recognized as rules of customary law. These include: (i) the duty to refrain from performing acts of sovereignty within the territory of another state; and (ii) the duty to refrain from interfering with the exercise of another state's jurisdiction.

Upon first consideration, these restrictions seem to indicate that no state may ever exercise its jurisdiction extraterritorially, unless a permissive rule of international law specifically provides otherwise. Nevertheless, international law contains no general prohibition on the extraterritorial exercise of jurisdiction. Therefore, even in the absence of a permissive rule, a state is not automatically prohibited from exercising its jurisdiction within the territory of another state.⁴⁵ The only limita-

41. SURREY, *supra* note 1. A state's position with respect to customary international law is often illustrated by its municipal court decisions (which are themselves a subsidiary source of international law). For example, in *The Paquette Habana*, *The Lola*, 175 U.S. 677 (1900), the Supreme Court recognized that customary international law does indeed bind the United States. *Id.* at 700; *accord*, *Interhandel Case*, [1959] I.C.J. 28: "The decisions of the United States courts bear witness to the fact that [they] are competent to apply international law in their decisions when necessary . . ." *See also* *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 228 (1796); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 161 (1795).

42. SURREY, *supra* note 1.

43. This fundamental right was recognized in the case of *Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 136 (1812), where the court stated that a nation's jurisdiction within its own territory is necessarily exclusive and absolute and is susceptible of no limitation not imposed by itself. *See also* D. GRIEG, *INTERNATIONAL LAW* 164 (1970).

44. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 6 (1972) uses jurisdiction to signify a state's capacity, under international law, to prescribe or enforce a rule of law.

45. A permissive rule does exist. The classic Case of the S.S. "Lotus," P.C.I.J., ser. A,

tion is that the extraterritorial exercise of jurisdiction must not conflict with a correlative restriction or duty of customary international law. Thus, no custom binds a state to defer to the exclusive jurisdiction of another simply because the act in question took place within the borders of the other nation.

A related aspect of this question is the right of a state to apply its laws to conduct of its own nationals occurring within the territory of another state. Such an exercise of jurisdiction raises few, if any, international legal complications, except in those rare cases when a treaty provides otherwise.⁴⁶ As the United States Supreme Court said in *Blackmer v. United States*,⁴⁷ a state's authority to regulate the extraterritorial conduct of its nationals involves no question of an international legal violation, but solely a question of the purport of the municipal law that establishes the duties of citizens in relation to their government.⁴⁸ Thus, under existing international practice, a state is assumed to have practically unlimited legal control over its nationals. This competence can be justified on the basis of comity⁴⁹ and because a state's treatment of its own nationals is not ordinarily a matter of concern to other states or to international law.

In *Skiriotes v. Florida*,⁵⁰ the Supreme Court stated that "the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed."⁵¹ Thus, as long as the United States maintains respect for

No. 10 (1927), [1927-1928] Ann. Dig. 153 (No. 98), 22 AM. J. INT'L L. 8 (1928), is generally cited for the proposition that international law allows a state to apply its laws extraterritorially in the case of an act which has direct effects within the borders of that state. For a municipal decision on this point, see *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927). In the absence of specific treaty obligations, prohibitions of international law are neither easy to identify nor lightly to be presumed.

46. BISHOP, *supra* note 36, at 531.

47. 284 U.S. 421 (1931).

48. *Id.* at 439. See also HALL, INTERNATIONAL LAW 56-57 (8th ed. 1924). A country's laws travel with its nationals wherever they go, both in places within and without the jurisdiction of other powers.

49. Comity has been defined as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." See *The Janko (Norsktant)*, 54 F. Supp. 241, 244 (E.D.N.Y. 1944), citing *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

50. 313 U.S. 69 (1941).

51. *Id.* at 73-74, 77. See also *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952). The rule of law first set down in *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945), enlarged the jurisdictional powers of the United States by holding that: "[I]t is settled law . . . that any state may impose liabilities, even upon persons not within

the personality, sovereignty, and independence of foreign states, there seems to be no international restriction preventing it from applying the Labor Management Relations Act to govern the extraterritorial conduct of its nationals. Furthermore, comity would seem to require host countries to recognize American application of the Labor Management Relations Act, provided that application does not endanger the rights of its own citizens or those of other persons under the protection of its laws.

B. CONVENTIONAL INTERNATIONAL LAW (TREATIES)

Conventions give positive expression to agreements among states and, as such, bind only the contracting parties and cease to bind them when they cease to be contracting parties.⁵² Conventions may refer to, recog-

its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." The *Alcoa* decision led to the adoption of § 18 of the RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965), which states that:

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if . . . (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

The Restatement rule raises the possibility of conflict, as in a case where the jurisdiction of the territorial state is not exclusive and another state applies its rules to the situation. A classic example of this situation is the case of *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.* [1955] 37 Ch. In that case, the decree of the American court required action by ICI, which the British courts then prohibited. The case of *United States v. Watchmakers of Switzerland Information Center*, 133 F. Supp. 40 (S.D.N.Y. 1955), in which the Swiss government strongly protested the application of an American decree, posed another such situation. The application of national law to the conduct of foreign nationals outside the United States could create many conflicts. We feel that there would be a serious problem, under international law, with an attempt to justify an assertion of home country jurisdiction over host country nationals solely on the ground that their actions have consequences within the United States. Such an assertion could, in effect, seek to apply American law to a French citizen who has done an act in France. Even ignoring international law, this sort of attempt to govern the conduct of French citizens in France infringes the rights of both France and its nationals. It is our conclusion that there must be retrenchment from the jurisdictional doctrine espoused in *Alcoa*. International law precludes the extraterritorial application of the Labor Management Relations Act to foreign nationals abroad—even if (contrary to *Alcoa*) their conduct outside American borders has consequences within American borders which America reprehends. See Raymond, *A New Look at the Jurisdiction in ALCOA*, 61 AM. INT'L L. J. 558 (1967).

52. See J. BRIERLY, *THE LAW OF NATIONS* 68-69 (3d ed. 1942). The Vienna Treaty on Treaties makes the law governing treaties into treaty law. Article 2-1A of that Treaty provides that a treaty is an international agreement concluded between states in written form and governed by international law, whether embodied in one or more instruments.

nize, adopt, modify, or contradict rules of customary international law.⁵³ International law, through the doctrine of *pacta sunt servanda*, requires contracting parties to carry out their treaty obligations, but those obligations are not themselves the law. According to the United States Constitution, treaties are the law of the land and, therefore, have the same status as domestic law.⁵⁴

In the absence of conflict with domestic law—in which case the later in time prevails⁵⁵—international law as embodied in conventions or treaties may form the basis for a decision on the legality of the extraterritorial application of domestic law. The United States has ratified several treaties that may affect the extraterritorial application of the Labor Management Relations Act.⁵⁶

1. *Treaties of Friendship, Commerce and Navigation*

Bilateral treaties of friendship, commerce and navigation (“FNC treaties”) are perhaps the most familiar instruments of diplomacy. While the precise content and treatment of these instruments have varied with the needs of time, the usages of the countries involved, and the foreign policy objectives in issue, in United States practice such instruments have evolved into a comprehensive charter of relations in the domain of private affairs.⁵⁷ Essentially these treaties define the treatment each contracting party owes to the nationals, companies and products (hereinafter “nationals”) of the other; their rights to engage in business and other activities within the boundaries of the host country; and the respect due these nationals, their property and their enterprises.

FCN treaties typically contain two principal standards which define the commitments each contracting party has assumed with respect to treatment and regulation of nationals of the other party: the most fa-

The parties to the treaty must intend it to create binding obligations for the terms of the Vienna Treaty to apply.

53. See G. HACKWORTH, *supra* note 37, at 17.

54. U.S. CONST. art VI, § 2.

55. Although the “later in time” rule may render a treaty ineffective within the United States, an international tribunal would disregard this rule and enforce the treaty. 1 M. WHITEMAN, *supra* note 38, at 104.

56. The Labor Management Relations Act was adopted in 1947. If it is interpreted to be susceptible to extraterritorial application, any inconsistent treaty obligation would have to be later in time to prevail.

57. These treaties are not political in character; rather they are fundamentally economic and legal. Although commerce and navigation complete their title, today such treaties are typically ones of establishment, concerned with the protection of persons, natural and juristic, and of the property and interests of such persons.

vored nation clause and the national treatment clause.⁵⁸ While the former assures nondiscrimination as compared with other aliens or alien things, the latter assures nondiscrimination as compared with citizens of the host country and national things.⁵⁹ Usually these standards focus on the business and occupation rights of nationals, particularly as they may affect the host country's labor markets and trades.

The contracting parties to FCN treaties may agree that the labor standards and relations laws of either the host country or the home country will be applicable to the nationals of the other when such nationals are employed in the host country. However, while application of labor standards legislation has been a topic in FCN treaties,⁶⁰ none of the FCN treaties in effect dictates the application of the labor relations laws of either host or home country under such circumstances. Nevertheless, certain provisions of FCN treaties may be interpreted as permitting the extraterritorial application of the home country's labor relations laws. For example, with respect to hiring skilled personnel from abroad, FCN treaties typically give the MNC the right to hire "accountants and other technical experts, executive personnel, attorneys, and agents and other specialists of its choice."⁶¹ The hiring of such persons is presumably subject *only* to the local immigration, labor standards and alien employment laws of the host country. Furthermore, each of the FCN treaties contains a general provision stating that nothing in the treaty shall preclude the application of home country regulations which are necessary to fulfill the obligations of the home country for the maintenance or restoration of international peace and security, or which are necessary to protect its essential interests. Conceivably, essential interests might be construed to include internal or *economic* security. So construed, this escape clause would open the door to the extraterritorial

58. These are "contingent" standards which are, as the name implies, ones that define in relative terms the treatment to be provided. At any given time, the specific nature of the treatment is determined not merely from a reading of the treaty itself, but also by reference to an exterior state of the law and fact. The objective is to secure nondiscrimination or equality of treatment.

59. Several provisions of the Treaty of Friendship, Commerce and Navigation between the United States of America and Japan, April 2, 1953, [1953] 2 U.S.T. 2063, T.I.A.S. No. 2863, reflect this principle of equal protection. For example, Article 5 states that "[n]either party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests within its territories of nationals and companies of the other Party in the enterprises which they have established." Article 7 of the same treaty states that nationals and companies shall be permitted to establish and maintain branches, to organize companies (subsidiaries), and to control and manage domestic enterprises which they have established or acquired within the territory of the other party.

60. See, e.g., *id.*, respecting workmen's compensation and social security.

61. See, e.g., *id.*, Art. 8.

application of home country regulations, such as its labor relations laws, if such regulations are arguably necessary to protect its economic interests.⁶²

2. *General Agreement on Tariffs and Trade*

The General Agreement on Tariffs and Trade ("GATT") is a multilateral treaty to which the major governments of the world, together accounting for more than four-fifths of world trade, subscribe.⁶³ While creating a code of conduct for the contracting parties, the GATT also provides a forum under which such parties can discuss their trade problems and negotiate to enlarge world trading opportunities.⁶⁴

Despite the complexity of the GATT, its essence can be stated in four fundamental principles: nondiscrimination, trade liberalization, consultation, and tariff negotiations. Of these, only the first, nondiscrimination, is relevant to our discussion. As in FCN treaties, the GATT nondiscrimination principle is predicated on two basic concepts: most favored nation treatment and national treatment.

Article 3 of the GATT, which deals with national treatment, is the only provision which arguably restricts the extraterritorial application of a contracting party's domestic legislation.⁶⁵ However, Article 3 only affects the application of a contracting party's laws and regulations as they pertain to its products. It does not apply to the regulation of the commodity of labor which produces those products. Furthermore, Article 20 of the GATT (general exceptions) states that,

62. See STEINER & VAGTS, *supra* note 4, at 1326.

63. General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194. See generally, J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969); TRENDS IN UNITED STATES MERCHANDISE TRADE, *GATT STUDIES IN INTERNATIONAL TRADE* No. 3 (JULY, 1972); EXECUTIVE BRANCH GATT STUDIES, *COMPILATION OF 1973 STUDIES PREPARED BY THE EXECUTIVE BRANCH*, for the SUBCOMM. ON INT'L TRADE OF SENATE COMM. ON FIN., 93RD CONG., 2D SESS. (1974). GATT is the only multinational convention that lays down agreed rules for international trade and whose reciprocal rights and obligations apply to most trading nations. For the past 30 years, GATT has also functioned as the principle international body concerned with negotiating the reduction of trade and non-trade barriers and with international trade relations.

64. For the purposes of this article we shall assume that the United States has validly entered the GATT and is bound by its provisions as in any treaty. See JACKSON, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249 (1967).

65. Article 3 of Part 2 of the GATT states that the contracting parties recognize that internal taxes and other charges, and the laws and regulations affecting the sale, offering for sale, purchase, transportation, distribution or use of products in specified amounts or proportions shall not be applied to imported or domestic products so as to afford protection to domestic production.

subject to the requirements that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction of international trade, nothing in [the GATT] shall be construed to prevent the adoption or enforcement by any contracting party of measures necessary to secure compliance with laws or regulations (of that contracting party) which are not inconsistent with the provisions of the GATT.

Thus, by its own terms the GATT would not restrict the extraterritorial application of the Labor Management Relations Act.

3. *The International Labor Organization*

Established by international agreement, the International Labor Organization ("ILO") is an organization through which member countries adopt and enforce international labor standards legislation.⁶⁶ Composed of conventions and recommendations,⁶⁷ this legislation is systematically arranged to comprise the International Labor Code. In no case may the adoption of any such legislation by any member country be deemed to affect any domestic or municipal law of that country which assures more favorable conditions to the workers concerned than those provided for in the convention or recommendation.⁶⁸

While the value of the International Labor Code cannot be fully gauged, its worth lies in the impact which its standards have had, or are likely to have, on the working and living conditions of laborers in the member countries. At best, the effect of the International Labor Code has only been to secure from member countries a pledge to maintain their national law and practice in full conformity with the conventions of the International Labor Code as long as these conventions remain in force with the ratifying country.⁶⁹

66. Constitution of the International Labor Organization, as amended Oct. 9, 1946, 62 Stat. 1151, 15 U.N.T.S. 35. Membership in the ILO compares favorably with that of the GATT.

67. Article 19 of the Constitution of the ILO sets forth two separate procedures and instruments for adopting international labor legislation; the convention and the recommendation. A convention is an instrument which not only sets standards of achievement but which when ratified creates binding international obligations for the country concerned. The recommendation creates no such obligation, but is essentially a guide to national action. The procedures for ratification or adoption of conventions and recommendations are set forth in Article 19, Sections 5 and 6 of the ILO Constitution.

68. Article 19, Section 8 of the ILO Constitution.

69. Every convention, however, includes a standard clause permitting the ratifying country to denounce it once a period of ten to thirty years has passed since its original entry into force.

Of course, the extent to which ILO standards have had a positive influence on the national laws and practices of member countries depends in large part on the countries' economic and constitutional structures, on the degree and the timing of their social development, and on several other related factors. Because ILO conventions and recommendations essentially contain minimum provisions intended to serve as a common denominator for the circumstances prevailing in many different countries, and since conformity of law and practice to these ILO standards may involve a raising of national levels of labor protection to meet international norms, the potential impact of ILO standards is greater in countries in an early stage of economic and social advancement than in those countries in a more highly industrialized stage of advancement.

In a practical sense, the international labor standards legislation of the International Labor Code regulates only conditions of labor and not labor relations. Thus, with respect to labor conditions, MNCs of member countries of the ILO would be required, pursuant to "international law," to comply with the International Labor Code or with general national laws maintained in conformity with the Code in every country of their operation—there would be no distinction between MNCs and local firms in this respect.⁷⁰ Therefore, MNCs could not import and institute home country practices or regulations with respect to labor conditions if such conditions were less favorable than those provided in the International Labor Code. However, with respect to labor relations, the existing international labor standards leave room for a diversity of national solutions and neither provide nor require restriction, regulation or guidance. Not surprisingly, there is no provision in the International Labor Code which restricts a member country from applying its labor relations law extraterritorially to its nationals located in another country.⁷¹

70. The standards adopted and contained in the International Labor Code which relate to conditions of work and of employment include: an eight hour day, a forty-eight hour workweek; minimum wages; minimum age; employment of women; night work by women; unemployment; workmen's compensation; occupational diseases and sickness; industrial safety; non-discrimination; hours of work; holidays with pay; weekly wages, social security; and protection of freedom of association.

71. The ILO has, however, made initial attempts to discuss the question of the usefulness of establishing both international labor relations regulations and international principles and guidelines for MNCs. See note 33 *supra*; PRINCIPLES AND GUIDELINES, *supra* note 6, at 4. See also MULTINATIONAL ENTERPRISES, *supra* note 7, at 107-58. Most participants at a meeting on the "Relationship between Multinational Enterprises and Social Policy," while of the opinion that further study on the subject was advisable, felt that governments of home countries should regulate and supervise the activities of their MNCs. See generally Landy, *The Influence of International Labor Standards: Possibilities and Performance*, 101 INT'L LAB. REV. 555 (1970); Seham, *supra* note 11, at 366.

It therefore appears that no rule or principle of international law, either customary or conventional, restricts or proscribes the extraterritorial application of the Labor Management Relations Act to American employees of an MNC.

III

DOMESTIC LAW ASPECTS AFFECTING THE EXTRATERRITORIAL APPLICATION OF THE LABOR MANAGEMENT RELATIONS ACT

A. EXERCISE OF NATIONAL LABOR RELATIONS BOARD JURISDICTION

While the previous discussion has demonstrated that international law does not operate as a constraint on the extraterritorial application of the Labor Management Relations Act to American employees working on foreign soil for American MNCs,⁷² the National Labor Relations Board (the "Board") has never applied the Act, either through recognition or unfair labor practice proceedings, to American employees under such circumstances.⁷³ Furthermore, only one reported decision,

72. Hence, we need not discuss the related considerations suggested by the maxim under which a court, after determining that Congress clearly intended a statute to have extraterritorial application, is bound to follow the statute even if accepted principles of international law would be thereby transgressed. *See, e.g., Rainey v. United States*, 232 U.S. 310, 316 (1914); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972). *See also* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 3 (1965). Of course, even given such clear congressional intent, extraterritorial application would still be constrained by the due process clause of the Fifth Amendment. Jones, *An Interest Analysis Approach to the Extraterritorial Application of Rule 10b-5*, 52 TEX. L. REV. 983, 992 n.40 and accompanying text (1974). Furthermore, assuming that an American court decided to apply extraterritorially a domestic statute which contravenes international law, a foreign court would not necessarily enforce any orders issued by the American court pursuant to that statute. *See Griffin, The Power of Host Countries Over the Multinational: Lifting the Veil in the European Economic Community and the United States*, 6 L. & POL'Y INT. BUS. 375, 420-27 (1974).

73. The Board can and has asserted jurisdiction over the American employees of foreign corporations, and the foreign employees of both American and foreign corporations, where the work was performed within the United States. For cases in which the Board asserted jurisdiction over aliens working within the United States, *see, e.g., NLRB v. Scott Paper Co.*, 440 F.2d 625 (1st Cir. 1971); *C.P. Clare & Co.*, 191 N.L.R.B. 589 (1971); *Great Northern Paper Co.*, 171 N.L.R.B. 824 (1968). Furthermore, employees of American transportation companies with an American terminus have been held to be covered by the Labor Management Relations Act, even though foreign travel was involved. *Freeport Transport, Inc.*, 220 N.L.R.B. No. 125 (1975); *Grace Line, Inc.*, 135 N.L.R.B. 775 (1962). *Cf. e.g., McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10 (1963), in which the Supreme Court held that the Board did not have jurisdiction over foreign sailors on foreign-flag ships owned by American corporations which operated between foreign and

RCA OMS, has even attempted to address the issue.⁷⁴ In this case, a union sought to represent the American employees of an American MNC at five Distant Early Warning (DEW line) sites located in Greenland. Even though the employees were required to have a United States security clearance, were hired in and paid from the United States, and returned to the United States upon completion of their jobs, the Board refused to order an election on the ground that Greenland did not come within the jurisdiction of the Act. The Supreme Court decision in *Benz v. Compania Naviera Hidalgo*⁷⁵ was the sole authority cited by the Board in support of its holding.⁷⁶

American ports; Pennsylvania Greyhound Lines, 13 N.L.R.B. 28 (1939), where the Board held that it had no jurisdiction over the foreign operations of a Canadian bus company which had about 10% of its operations within the United States; and Detroit & Canada Tunnel Corp., 83 N.L.R.B. 727 (1949), where the Board, without addressing the issue of jurisdiction, excluded Canadian employees working in Canada for an American employer from a unit consisting of the employees who worked in the United States for that employer. Additionally, the Board has asserted jurisdiction over foreign companies doing business in the United States, even when some of the employees have been foreigners. See, e.g., Italia Societa per Azione di Navigazione, 118 N.L.R.B. 1113 (1957); Delta Match Corp., 102 N.L.R.B. 1400 (1953); The Royal Bank of Canada, 67 N.L.R.B. 403 (1946). *But see* AGIP, USA, Inc., 196 N.L.R.B. 1144 (1972); Herbert Harvey, Inc., 171 N.L.R.B. 238 (1968); British Rail-Int'l, Inc., 163 N.L.R.B. 721 (1967); Pennsylvania Greyhound Lines, 13 N.L.R.B. 28 (1939). In these cases the Board declined to assert jurisdiction without ever reaching the question whether the Board in fact had jurisdiction, because of the employer's close relationship with a foreign government. Based on these cases, especially the more recent rulings, an administrative law judge recently decided that the Board should not rule on a petition for an election at the State Bank of India's Chicago branch for although those rulings indicate the Board has discretion to assert jurisdiction, its policy is not to do so. The Board, however, scheduled oral argument in mid-February, 1977, on the question of whether it should assert jurisdiction over companies that are owned and operated by foreign governments, but do business in the United States and employ American citizens. State Bank of India, Case No. 13-RC-14061, July 15, 1976.

74. RCA OMS, Inc., 202 N.L.R.B. 228 (1973). *But see* Currie, *Flags of Convenience, American Labor, and the Conflict of Laws*, 1963 Sup. Ct. Rev. 34, 79 n.179 (1963), referring to a release dated March 2, 1962, in which the General Counsel dismissed charges filed by American workers against an American company for alleged unfair labor practices with respect to the company's engineering services in Pakistan. The reference in the Currie article, however, does not indicate whether the workers employed in Pakistan were Americans or foreigners. *Cf.* Bell & Howell Airline Serv. Co., 185 N.L.R.B. 67 (1970), where the Board excluded all persons working exclusively in a foreign country, regardless of nationality, from a unit of American based employees. The issue of jurisdiction, however, was not discussed.

75. 353 U.S. 138 (1957).

76. 202 N.L.R.B. 228 (1973). It is important to note that the decision in the *RCA OMS* case was predicated upon the Board's finding that it had no jurisdiction, rather than upon the Board's declining to assert jurisdiction. The Supreme Court has long recognized that "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so singlemindedly that it may ignore other and equally important Congressional

In *Benz*, a foreign shipowner brought a common-law tort action for damages caused by an American union's peaceful picketing of a foreign-flag ship, while the ship was temporarily in an American port, in furtherance of a strike by the foreign crew. The Court held the picketing was not arguably regulated by the Labor Management Relations Act since the Board did not have jurisdiction over the shipowner and its crew.⁷⁷ Accordingly, the preemption doctrine was not applicable, and the awarding of damages, pursuant to a common-law tort theory, was deemed appropriate.⁷⁸ The Court's decision in *Benz* was based upon an analysis of the legislative history of the Labor Management Relations Act and turned on the fact that the primary dispute was "between nationals of other countries operating ships under foreign laws."⁷⁹ Concluding that "[t]he whole background of the Act is concerned with industrial strife between American employers and employees,"⁸⁰ the Court held that there was no indication of congressional intent, as is required, on the extraterritorial scope of the statute. Since this intent would not be inferred by the Court "in such a delicate field of interna-

objectives." *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). Moreover, foreign policy and international considerations are examples of "other congressional objectives" which have led the Board, in its discretion, to decline to assert jurisdiction over matters which seem to be covered by the Act. *See, e.g.*, *Contract Services, Inc.*, 202 N.L.R.B. 862 (1973), *direct review denied*, 375 F. Supp. 421 (E.D. Pa. 1974); *AGIP, USA, Inc.*, 196 N.L.R.B. 1144 (1972); *Pennsylvania Greyhound Lines*, 13 N.L.R.B. 28 (1939); *Panama R.R.*, 2 N.L.R.B. 290 (1936). *Cf. Herbert Harvey, Inc. v. NLRB*, 424 F.2d 770 (D.C. Cir. 1969). While a discretionary refusal by the Board to assert jurisdiction may be an additional constraint to the Act's application to American employees working on foreign soil for American corporations, this is a far cry from the outright lack of jurisdiction claimed by the Board in *RCA OMS*.

77. 353 U.S. 138, 143 (1957). If this picketing had been arguably regulated by the NLRB, the trial court would have lacked jurisdiction over the common-law tort claim, under the then-applicable preemption doctrine set forth in *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954). The preemption doctrine in its present form, which would not have changed the result in *Benz*, is generally traced to *San Diego Bldg. & Trades Council v. Garmon*, 359 U.S. 236 (1959). *Compare, e.g.*, *Int'l Longshoremen's Ass'n, Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970), *with Windward Shipping Ltd. v. American Radio Ass'n*, 415 U.S. 104 (1974).

78. 353 U.S. 138, 144-45 (1957). Since the trial court did not lack jurisdiction over the common law claim, damages could be awarded to the foreign shipowner for injuries suffered from even peaceful picketing. *Teamsters, Local 695 v. Vogt*, 354 U.S. 284 (1957).

79. 353 U.S. at 143.

80. *Id.* at 144. The ship's crew in *Benz* was, of course, composed of aliens, not American nationals. No case has yet come before the Board involving the application of the Labor Management Relations Act to the American crew of an American-owned foreign flag ship. In such a situation, the concerns of the Act would be met, but its application may offend the rule of international law that the law of the vessel follows its flag.

tional relations," the Act was held not to be applicable extraterritorially.⁸¹

Regardless of the propositions *Benz* arguably represents, the decision does not support the Board's holding in *RCA OMS* that it lacked jurisdiction over American employees working in Greenland for an American MNC. The Court viewed the foreign-flag ship in *Benz* as being the equivalent of foreign territory.⁸² Given this view, any application of the Labor Management Relations Act to the foreign crew and its shipowner would be tantamount to the Board's asserting jurisdiction over the French employees of a wholly French corporation at a factory in Marseilles.⁸³ A clearer violation of a foreign state's sovereignty could not be imagined.⁸⁴ In contrast, the factual situation in *RCA OMS*, while nominally taking place in Greenland, involved American workers and an American employer. Certainly, Greenland had an interest in the installation itself. Greenland's concern over labor relations between the American employees and their American employer, however, is not nearly so obvious.⁸⁵ Contrary to the Board's belief in *RCA OMS*, neither *Benz* nor its prolific progeny address the issue of whether the Labor Management Relations Act applies or can be applied to American employees working on foreign soil for an American employer.⁸⁶ Consequently, this issue

81. *Id.* at 147.

82. *Id.* at 142. *See also* *United States v. Bowman*, 260 U.S. 94 (1922). This view was strengthened considerably in *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10 (1963), where the Court held that the Act does not apply to foreign sailors on foreign-flag ships owned by American corporations, which operate between foreign and American ports. The "well established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship" would not be disregarded, the Court said, absent an expression of clear congressional intent to that effect. 372 U.S. at 21. Since its language and legislative history "inescapably describes the boundaries of the Act as including only the workmen of our own country and its possessions," the law of the foreign flag governed, and jurisdiction could not be deemed to exist. 372 U.S. at 18, quoting *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 144 (1957).

83. *Cf.* *Pennsylvania Greyhound Lines*, 13 N.L.R.B. 28 (1939), where the Board held that it had no jurisdiction over the Canadian operations of a Canadian bus company which employed Canadian drivers.

84. *See* *Empresa Hondurena de Vapores, S.A. v. McLeod*, 300 F.2d 222, 234-35 (2d Cir. 1962) *rev'd sub nom.* *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10 (1963).

85. *But see* *Currie*, *supra* note 74, at 79-80.

86. *But see* *Goldberg*, *supra* note 5, at 27-28. *Benz* and its progeny, stressing that the Act is concerned with American labor relations, found a lack of jurisdiction in the following situations: picketing by an American union of a foreign-flag ship in furtherance of a strike by the foreign crew, *Benz v. Compania Naviera Hidalgo*, 357 U.S. 138 (1957); a representation petition filed by an American union covering foreign sailors on foreign-flag ships, *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10 (1963); picketing by an American union of a foreign-flag ship in furtherance of its desire to organize the foreign crew, *Inces S.S. Co. v. Maritime Workers*, 372 U.S. 24 (1963); and picketing by an

deserves a more deliberate consideration.⁸⁷

American union of a foreign-flag ship in protest over wages paid to foreign seamen, *Windward Shipping Ltd. v. American Radio Ass'n*, 415 U.S. 104 (1974). *Cf.* *American Radio Ass'n v. Mobile S.S. Ass'n*, 419 U.S. 215 (1974). Where the American union picketed foreign-flag ships to protest substandard wages paid by those shipowners to American longshoremen, however, the Act was held to be applicable. *International Longshoremen's Ass'n, Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970). Thus, in all but the *Ariadne* case, foreign workers were involved, while *RCA OMS* involved American workers. Since *Ariadne* did not require that the Act be applied extraterritorially, however, its precedential value is greatly limited in a situation such as in *RCA OMS*.

87. Regardless of whether it applies directly to American employees working on foreign soil for American corporations, the Labor Management Relations Act gives rise to a number of penumbral ramifications in an *RCA OMS* situation. For example, it is clear that the Board has jurisdiction over secondary boycott activities of an American union within the United States, even though the primary employer with whom the union has a dispute is located in a foreign country. *Grain Elevator, Flour and Feed Mill Workers, Local 418 v. NLRB*, 376 F.2d 774 (D.C. Cir.), *cert. denied*, 389 U.S. 932 (1967); *Madden v. Grain Elevator, Flour and Feed Mill Workers, Local 418*, 334 F.2d 1014 (7th Cir.), *cert. denied*, 379 U.S. 967 (1964). Where the Board has jurisdiction over this secondary activity, state law is preempted. *Mountain Navigation Co. v. Seafarers Int'l Union of No. America*, 348 F. Supp. 1298 (W.D. Wis. 1971); *Manners Navigation Co. v. Seafarers Int'l Union of No. America*, 82 L.R.R.M. 2433 (D. Minn. 1972); *Norris Grain Co. v. Nordaas*, 232 Minn. 91, 46 N.W.2d 94 (1950), *rehearing denied*, 232 Minn. 91, 46 N.W.2d 105 (1951). Similarly, an American corporation with foreign establishments can be unlawfully coerced within the meaning of 29 U.S.C. § 158 (b)(4) (1970), if the union's secondary boycott activities take place in the United States. *Teamsters, Local 25 v. New York, N.H. & N.R.R.*, 350 U.S. 155 (1956); *Great No. Ry. v. NLRB*, 272 F.2d 741 (9th Cir. 1959). As long as the corporation qualifies as a "person engaged in commerce," it will be protected by § 8(b)(4) even though it is not a statutory employer. *American Radio Ass'n v. Mobile S.S. Ass'n*, 419 U.S. 215 (1974). If the dispute which caused the American union to engage in secondary boycott activity is deemed to be non-labor in nature, it is unsettled as to whether the Board would have jurisdiction. *Compare NLRB v. Int'l Longshoremen Ass'n, Local 1355*, 332 F.2d 992 (4th Cir. 1964); *Danielson v. Fur Dressers, Local 2F*, 90 L.R.R.M. 2820 (S.D.N.Y. 1975); and *Upper Lakes Shipping, Ltd. v. Seafarer's Int'l Union of Canada*, 18 Wis. 2d 646, 110 N.W.2d 426 (1963); *with National Maritime Union of America v. NLRB*, 346 F.2d 411 (D.C. Cir.), *cert. denied*, 382 U.S. 840 (1965); and *National Maritime Union of America v. NLRB*, 342 F.2d 538 (2d Cir.), *cert. denied*, 382 U.S. 835 (1965). In the case of a non-labor dispute, however, the employer himself could still obtain an injunction in federal court regardless of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1970). *Compare Harrington & Co. v. International Longshoremen Ass'n, Local 1416*, 356 F. Supp. 1079 (S.D. Fla. 1973); and *West Gulf Maritime Ass'n v. Longshoremen*, 90 L.R.R.M. 2260 (S.D. Tex. 1975) *with Marine Cooks & Stewards v. Panama S.S. Co.*, 362 U.S. 365 (1960). Finally, even though an American corporation with foreign establishments, under the particular set of facts, might not qualify as a statutory employer, it could violate § 8(e) by entering into a hot-cargo agreement with any statutory labor organization. This is true even though § 8(e) itself refers to agreements between "employers" and labor organizations. *Lufthansa German Airlines*, 197 N.L.R.B. 232 (1972), *aff'd sub nom. Marriott Corp. v. NLRB*, 491 F.2d 367 (9th Cir. 1974). Presumably, in order to violate § 8(e), the American corporation with foreign establishments would still have to qualify as a "person

B. THE ANALYTICAL FRAMEWORK OF EXTRATERRITORIAL APPLICATION

In order to properly develop the issue of whether the Labor Management Relations Act applies to American employees working on foreign soil for American MNCs, it is necessary to examine the various techniques of statutory analysis which the courts have relied upon in determining the territorial scope of congressional enactments.⁸⁸ As will be discussed in detail, three principal techniques have evolved, all of which look *inter alia* to legislative intent in varying degrees. Although "legislative intent" is a fairly esoteric subject to which much attention has been given by commentators,⁸⁹ in examining legislative intent, the present article will concern itself only with such traditionally recognized factors as statutory language, legislative history, and the underlying policies of the act in question.⁹⁰ While it is true that all three techniques examine legislative intent, their respective modes of analysis differ greatly. Indeed, inconsistent results can be reached depending upon which technique is chosen by a court to determine the territorial scope of a particular statute.

1. The "Traditional" Technique

The technique which has traditionally been used by courts in determining territorial scope operates upon the presumption that a statute is intended to apply only within the physical boundaries of the United States, unless a contrary intent is clearly expressed.⁹¹ As one commentator has observed, this presumption against extraterritoriality "has been

engaged in commerce." *Cf.* American Radio Ass'n v. Mobile S.S. Ass'n, 419 U.S. 215 (1974).

88. Prior to construing a statute to determine whether Congress intended it to be applied extraterritorially, the threshold question of legislative power must be answered. Nationality, however, is sufficient in itself as a basis for jurisdiction. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 30(1)(a) (1965). *See* notes 46-48 *supra*. Hence, it is clear that the issue of whether a statute can be applied extraterritorially, "so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power." *Blackmer v. United States*, 284 U.S. 421, 437 (1932).

89. *Compare, e.g.,* Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the Modern Federal Courts*, 75 COLUM. L. REV. 1299 (1975), with Dickerson, *Statutory Interpretation: A Peek into the Mind and Will of a Legislature*, 50 IND. L.J. 206 (1975).

90. *See generally* J. SUTHERLAND, STATUTORY CONSTRUCTION (4th ed. Sands 1973); R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES (1975).

91. *See, e.g.,* *Blackmer v. United States*, 284 U.S. 421, 437 (1932); *Sandberg v. McDonald*, 248 U.S. 185, 195 (1918); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909).

an albatross which the [Supreme] Court has struggled to remove almost ever since [its inception]."⁹² The presumption itself can be traced to a willingness on the part of the judiciary to accept the following assumptions: (1) because an Act of Congress, if possible, ought never to be construed to violate the "law of nations,"⁹³ courts should apply statutes extraterritorially, in derogation of international law, only if Congress clearly intended this result;⁹⁴ and (2) because Congress is primarily concerned with domestic conditions, statutes are ordinarily intended to apply only within the physical boundaries of the United States.⁹⁵ Of course, if international law would not be transgressed were a statute to be applied extraterritorially, then the first assumption would appear to be groundless, and the presumption of territoriality would logically not come into play.⁹⁶ Given the presumption does not arise, a court simply determines the territorial scope of the congressional enactment through ordinary rules of statutory construction.

Two Supreme Court cases are illustrative of the mechanics and nuances of the traditional technique. In *Steele v. Bulova Watch Co.*,⁹⁷ the Court was faced with the issue of whether the Lanham Act⁹⁸ governs an American citizen infringing an American trademark in a foreign country. The alleged infringer, after purchasing unfinished watches in the United States, stamped the watches in Mexico with the Bulova trademark, and sold them in Mexico in competition with the real Bulova product.⁹⁹ Utilizing ordinary rules of statutory construction, the Court interpreted the Act as applying in this transnational factual situation.¹⁰⁰

92. Currie, *supra* note 74, at 57.

93. See, e.g., *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 450, 452 (1804).

94. *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10, 19-22 (1963); *Foley Bros. v. Filardo*, 336 U.S. 281, 292 (1949) (Frankfurter, J., concurring); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 388 Reporters' Notes 1-2, at 108-11 (1965).

95. *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

96. Jones, *An Interest Analysis Approach to Extraterritorial Application of Rule 10b-5*, 52 TEX. L. REV. 983, 988 (1974); Note, *The Extraterritorial Scope of NEPA's Environmental Impact Statement Requirement*, 74 MICH. L. REV. 349, 354-58 (1975). Cf. *Skiriotes v. Florida*, 313 U.S. 69 (1941); *Old Dominion S.S. Co. v. Gilmore*, 207 U.S. 398 (1907), which did not utilize the presumption of territoriality when a statute was sought to be applied to acts committed by American citizens in areas subject to the laws of no sovereign. In such a situation, there is no possibility of violating another country's laws. See also *United States v. Bowman*, 260 U.S. 94 (1922), involving the application of criminal statutes beyond American territorial limits.

97. 344 U.S. 280 (1952).

98. Trademark Act of 1946, 15 U.S.C. § 1051, *et seq.* (1970).

99. 344 U.S. 281-82 (1952).

100. *Id.* at 285-87.

Since Mexican courts had previously nullified the infringer's Bulova trademark in that country, the court noted that there was no possibility of conflict with Mexican law through application of the Lanham Act extraterritorially.¹⁰¹ Accordingly, the presumption of territoriality did not come into play because "the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed."¹⁰²

In contrast to the *Steele* decision, in *Foley Bros., Inc. v. Filardo*¹⁰³ the Supreme Court utilized the presumption of territoriality. In this case, the Court was confronted with the issue of whether the overtime provisions of the Eight Hours Law¹⁰⁴ applied to work done by American employees on construction projects in Iraq and Iran under a contract between the United States and an American company. Because the Court found that labor conditions such as those which were sought to be regulated in *Foley Bros.* by the Eight Hours Law were "the primary concern of a foreign country,"¹⁰⁵ the presumption of territoriality was superimposed upon the ordinary rules of statutory construction.¹⁰⁶ Consequently, the Court, "in the absence of a clearly expressed purpose," refused to infer that Congress intended to apply the statute extraterritorially, and held that the Act was therefore inapplicable.¹⁰⁷

101. *Id.* at 289.

102. *Id.* at 285-86, quoting *Skiriotes v. Florida*, 313 U.S. 69, 73 (1941). *Cf.* *The Queen v. Jameson*, [1896] 2 Q.B. 425, 430. *See also* *Vanity Fair Mills, Inc. v. T.E. Eaton Co.*, 234 F.2d 633, 642 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956) (Trademark Act could not be applied extraterritorially against a foreign national acting under a trademark deemed valid by his own country). The court in *Steele* also discussed the effects of the illegal foreign activity within the United States. The "effects" doctrine itself is not controlling when jurisdiction is sought over an American citizen situated in a foreign country. Still, the presence of effects within the United States resulting from the foreign activities of an American citizen can be crucial under the ordinary rules of statutory analysis. One important factor which is examined in such an analysis is whether applying the statute in question extraterritorially would advance its underlying policies. Since Congress is primarily concerned with domestic conditions, however, *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949), the domestic effects of foreign activities, as they relate to the underlying policies of the statute under scrutiny "are often decisive" in determining the issue of territorial scope. *See Steele v. Bulova Watch Co.*, 344 U.S. 280, 288 (1952).

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

104. 40 U.S.C. §§ 321-326 (1970).

105. 336 U.S. at 286.

106. *Id.* at 285.

107. *Id.* at 286. *Cf. Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948), where the Fair Labor Standards Act was applied extraterritorially to a military base leased in Bermuda, because the base was construed to be a "possession" within the meaning of the Act.

While the mechanics of the traditional technique were properly followed in *Foley Bros.*, the result is nevertheless flawed due to the Court's improper finding that the labor conditions at issue were "the primary concern of a foreign country."¹⁰⁸ In making this finding, the Court placed considerable reliance on the "scheme of the Act" as indicated by its remark:

No distinction is drawn therein between laborers who are aliens and those who are citizens of the United States. Unless we were to read such a distinction into the statute we should be forced to conclude, under the respondent's reasoning, that Congress intended to regulate the working hours of a citizen of Iran who chanced to be employed on a public work of the United States in that foreign land. Such a conclusion would be logically inescapable although labor conditions were known to be wholly dissimilar to those in the United States and wholly beyond the control of this nation.¹⁰⁹

However, this "logically inescapable conclusion" does not withstand careful analysis. Before a statute can be construed, the threshold question of Congressional legislative jurisdiction must be addressed. When a statute is sought to be applied extraterritorially to regulate the conduct of an American citizen, nationality is itself sufficient as a basis for finding jurisdictional power.¹¹⁰ A foreigner acting completely outside the United States, however, obviously does not provide this same basis of jurisdiction. In such a case, the foreigner must generally engage in conduct which has a substantial and foreseeable effect within the United States before Congress will be deemed to have the power to assert legislative jurisdiction.¹¹¹ In *Foley Bros.*, the Court never addressed the

108. 336 U.S. at 286.

109. *Id.*

110. *See* note 88 *supra*.

111. This is part of the infamous "effects" doctrine. Under this doctrine, a country has the power to assert jurisdiction over conduct occurring outside its borders, even as to foreign citizens situated in foreign territory, so long as that conduct produces effects within the forum country's borders. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965). There are limitations upon the doctrine. *See id.* at § 18(b); *United States v. Alcoa*, 148 F.2d 416, 443-44 (2d Cir. 1945) (decision by Second Circuit Court of Appeals upon certification and transfer from the U.S. Supreme Court for failure of a quorum of qualified justices, 322 U.S. 716 (1944)). If the conduct of a foreigner abroad has the requisite domestic effects, then Congress has the power to assert legislative jurisdiction. The statute itself, however, must still be analyzed to determine whether extraterritorial application was intended. *Cf.* note 88 *supra*. The application of American antitrust and securities laws to foreigners abroad illustrates the mechanics of this two step process. First, the activities of the foreigners abroad must have the requisite domestic effects. Secondly, since Congress clearly intended to apply antitrust and securities laws extraterritorially against foreigners, these laws will be given extraterritorial effect, even if

crucial issue of whether Congress even had the power to legislate regulatory jurisdiction over alien workers in Iran. If Congress did not possess this power, then the lack of distinction in the Act between American and alien laborers, which the Court found to be important, would have been irrelevant, and a conclusion predicated on this reasoning is ill-founded.

Furthermore, the presumption against extraterritoriality was prematurely superimposed upon the ordinary rules of statutory construction. On the basis of independent analysis, the Court initially should have addressed the issue of whether application of the Act to Americans working in Iran for an American company would have transgressed international law. This issue is totally distinct from the issue of whether application of the Act to aliens working in Iran for an American company would infringe upon a "primary concern of a foreign country." Since the Court did not make an independent analysis as to the American workers, its decision in *Foley Bros.*, if not its use of the traditional technique, is at best questionable.

2. The "Contacts" Technique

The second theory of statutory analysis which courts have applied in determining the territorial scope of a congressional enactment, the "contacts" technique, has its origins in the Supreme Court decision of *Lauritzen v. Larsen*.¹¹² Under this technique, a court initially examines the interests being advanced by the statute under scrutiny. In light of those interests, the court then ascertains and weights each point of contact between the transaction forming the basis of the lawsuit and the countries affected. If American interests are deemed to be

international law is thereby transgressed. See, e.g., Trautman, *Application Abroad of American Regulatory Legislation—The General Framework*, in INTERNATIONAL SECURITIES REGULATION 263 (Practising Law Inst. 1973); Bator, *Extraterritorial Application of Law: United States Securities Laws*, 64 AM. J. INT'L L. 141 (Supp. 1970); Kintner & Hallgarten, *Application of United States Antitrust Laws to Foreign Trade and Commerce—Variations on American Banana Since 1909*, 15 B.C. IND. & COM. L. REV. 343 (1973); Maw, *United States Antitrust Law Abroad—The Enduring Problem of Extraterritoriality*, 40 A.B.A. ANTITRUST L.J. 796 (1971). But see note 72 *supra*. The doctrine, however, has been severely criticized by commentators. See, e.g., A. NEALE, THE ANTITRUST LAWS OF THE U.S.A. 360-72 (2d ed. 1970); Henry, *The United States Antitrust Laws: A Canadian Viewpoint*, 8 CAN. Y.B. INT'L L. 249 (1970); Jones, *supra* note 72, at 985-87. In any event, the effects doctrine is not controlling when jurisdiction is sought over an American citizen situated in a foreign country, since nationality alone is a sufficient basis for jurisdiction. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 18, comment (a) at 47 (1965). Nevertheless, even in this area, "[u]nlawful effects in this country . . . are often decisive . . ." *Steele v. Bulova Watch Co.*, 344 U.S. 280, 288 (1952).

112. 345 U.S. 571 (1953). See also *New York Cent. R.R. v. Chisolm*, 268 U.S. 29 (1925).

“substantial,” the statute should be applied to the transnational factual situation.¹¹³

For example, in *Lauritzen*, the question before the Court was whether the Jones Act¹¹⁴ applied to a Danish seaman who, after joining the crew of a Danish ship in New York City, was negligently injured while the ship was anchored in Havana harbor.¹¹⁵ After examining the language, legislative history and underlying policies of the Act, the Court proceeded to identify the relevant contacts.¹¹⁶ While Denmark, the United States, and Cuba each could claim contacts with the transaction forming the basis of the lawsuit,¹¹⁷ the Court, in weighing those contacts, found “an overwhelming preponderance in favor of Danish law.”¹¹⁸ Accordingly, the Jones Act was held inapplicable to the transnational facts of *Lauritzen*.¹¹⁹

The importance of the “contacts” technique in the area of international labor relations should not be overstated however. In addition to having received a fair amount of criticism,¹²⁰ the technique has been explicitly rejected by the Supreme Court within the context of the Labor Management Relations Act.¹²¹

113. This second theory, which is particularly prevalent in the area of maritime torts, is generally known as the contacts theory of conflict of laws. See generally G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 386-94 (1957); R. LEFLAR, *AMERICAN CONFLICTS LAW* 344-47 (1968).

114. 46 U.S.C. § 688 (1970).

115. 345 U.S. at 573.

116. *Id.* at 579-83.

117. *Id.* at 582-83.

118. *Id.* at 592. The “connecting factors” which the court indicated were relevant to this maritime tort claim were: (1) place of the wrongful act (*lex loci delicti commissi*); (2) law of the flag; (3) allegiance or domicile of the injured; (4) allegiance of the defendant shipowner; (5) place of contract; (6) inaccessibility of foreign forum; and (7) law of the forum. *Id.* at 583-92.

119. *Id.* at 592-93. For other examples of the *Lauritzen* technique, see, e.g., *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970); *Romero v. Terminal Operating Co.*, 358 U.S. 354 (1959); *Air Line Stewards and Stewardesses Ass’n v. Trans World Airlines, Inc.*, 173 F. Supp. 369 (S.D.N.Y.), *aff’d per curiam*, 273 F.2d 69 (2d Cir. 1959), *cert. denied*, 362 U.S. 988 (1960).

120. See, e.g., *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10, 19 (1963); Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 176-77; Currie, *supra* note 74, at 43-46; Jones, *supra* note 72, at 989. *But see* Comment, *The Transnational Reach of Rule 10-5*, 121 U. PA. L. REV. 1363, 1392-403 (1973).

121. At one time, the NLRB utilized the *Lauritzen* approach to determine whether it had jurisdiction over foreign-flag ships. See, e.g., *Owens-Illinois Glass Co.*, 136 N.L.R.B. 389 (1962); *West India Fruit & S.S. Co.*, 130 N.L.R.B. 343 (1961); *Peninsular & Occidental S.S. Co.*, 120 N.L.R.B. 1097 (1958). The Supreme Court, however, explicitly rejected the Board’s use of the contacts technique in *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10, 19 (1963).

3. The "Governmental Interest" Technique

Labeled by commentators as the "governmental interest theory," the third technique of statutory analysis has been used extensively by the Supreme Court to determine the territorial scope of the Labor Management Relations Act.¹²² The technique essentially incorporates the interest analysis approach from the conflict of laws area.¹²³ Under the theory, a court first determines the policies behind the relevant laws of all countries having an apparent interest in the transaction or circumstances which form the basis of the controversy. If one country's policies would be advanced through application of its law, while other countries' policies would not thereby be disturbed, a "false" conflict is said to exist as only the former country has a real interest in applying its law to the controversy. In the case of a false conflict, the law of that country whose policies would be advanced as determined from the relevant statutes is controlling. However, when the transaction in question affects the interests of two or more countries, a "true" conflict exists. In this case, assuming the court has jurisdiction in the broader sense,¹²⁴ if the interests of the forum country are *substantially* advanced by the application of its laws, the law of the forum will be applied.¹²⁵

The Supreme Court decisions in *Windward Shipping Ltd. v.*

122. The series of relevant Supreme Court cases consists of "The Benz case and its progeny," referred to in note 86 *supra*.

123. See E. CHEATHAM, E. GRISWOLD, W. REESE & M. ROSENBERG, *CASES ON CONFLICT OF LAWS* 477-78 (5th ed. 1964); R. LEFLAR, *AMERICAN CONFLICTS LAW* 222-25 (1968); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958).

124. See notes 72, 88 & 111 *supra*.

125. Oftentimes, in dealing with a potential conflict of laws problem, the law of the foreign jurisdiction and its underlying policies may be unclear, especially when the jurisdictions having an apparent interest in the transaction are countries rather than states. In the context of the Labor Management Relations Act, however, where the issue is not which country's law shall apply, but simply whether the Act should apply, the murkiness of the foreign country's law is not fatal to the governmental interest technique.

Under a *strict* governmental interest theory, as long as there are *any* American interests being served by the Labor Management Relations Act which would be furthered by its being applied to the transaction in question, an American court would be constrained to comply with the will of Congress whether the conflict was "true" or "false." Contrary to the "strict" theory, the governmental interest theory generally requires the furtherance of a substantial American interest for the Act to be applied. See E. CHEATHAM, E. GRISWOLD, W. REESE & M. ROSENBERG, *CASES ON THE CONFLICT OF LAWS* 477-78 (5th ed. 1964); B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 183-84 (1963). This facet of the "governmental interest" approach to the conflict of laws has been criticized. See R. LEFLAR, *AMERICAN CONFLICTS LAW* 224-25 (1968). Nevertheless, under either theory the substance of the foreign law need not be analyzed in ascertaining whether the Act should be applied in a given case.

*American Radio Ass'n*¹²⁶ and *International Longshoremen's Ass'n, Local 1416, AFL-CIO v. Ariadne Shipping Co.*¹²⁷ are illustrative of the governmental interest technique.¹²⁸ Within the context of federal preemption,¹²⁹ both cases involved peaceful picketing by American unions of foreign-flag ships, temporarily docked at American ports, in protest over allegedly substandard wages.¹³⁰ While the picketing in *Ariadne* was directed at wages paid by the foreign-flag ship owners to American longshoremen,¹³¹ the picketing in *Windward Shipping* was aimed at wages paid by such owners to foreign seamen.¹³²

Each decision began with the proposition that Congress had the power to exercise legislative jurisdiction over foreign-flag ships within American territorial waters.¹³³ Moreover, if interpreted literally, the jurisdictional formula of the Labor Management Relations Act appears sufficiently broad for one to infer that Congress intended that the Act apply to each set of circumstances.¹³⁴ However, given the transnational nature of the factual situation, the Court, using the governmental interest technique, examined the policies sought to be advanced by the Labor Management Relations Act. In each case the Court maintained that the Act was a "bill of rights for *American* workingmen and their employers."¹³⁵

However, in the determination as to whether the policies behind the Act would be furthered by its application to the given factual situations, the decisions diverged. Because the picketers in *Ariadne* were protesting substandard wages being paid to *American* workers and application of the Labor Management Relations Act "would have threatened no interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law," the policies behind the Act were advanced by the holding that such picketing was regulated by federal law.¹³⁶ Accordingly, state court jurisdiction to issue an injunction under

126. 415 U.S. 104 (1974).

127. 397 U.S. 195 (1970).

128. The Supreme Court has not applied a strict "governmental interest" theory in the *Benz* line of cases. See note 125 *supra*. Rather, the presence of dominant contacts with one country or another has also been considered. See R. LEFLAR, *AMERICAN CONFLICTS LAW* 330 (1968).

129. See note 77 *supra*.

130. 415 U.S. at 106-07; 397 U.S. at 196-97.

131. 397 U.S. at 196.

132. 415 U.S. at 114.

133. See *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 142 (1957), citing *Wildenhuis's Case*, 120 U.S. 1 (1887).

134. 415 U.S. at 112-13.

135. *Id.* at 110; 397 U.S. 195, 198-99, both referring to *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 144 (1957).

136. 397 U.S. at 200.

such circumstances was held to be preempted.¹³⁷ On the other hand, the picketers in *Windward Shipping* were protesting substandard wages being paid to *foreign* seamen. Since “[v]irtually none of the predictable responses of a foreign shipowner to picketing of this type . . . would be limited to the sort of wage-cost decision benefitting American workingmen which the Labor Management Relations Act was designed to regulate,” the policies behind the Act would not be furthered by its application under these circumstances.¹³⁸ Consequently, state court jurisdiction to issue an injunction curtailing picketing deemed tortious under state law was held not to be preempted in *Windward Shipping*.¹³⁹

C. EXTRATERRITORIAL SCOPE OF THE LABOR MANAGEMENT RELATIONS ACT

As has already been discussed, even though international law does not operate as a constraint, neither the Board nor the courts have directly examined the issue of whether the Labor Management Relations Act applies to American employees working on foreign soil for American MNCs. Regardless of which statutory technique is used to ascertain the possible extraterritorial application of the Act, however, the conclusion should be that the Act does have such extraterritorial effect.

1. *Statutory Language, Legislative History, and Underlying Purposes*

Since the most logical place to begin an analysis of the territorial scope of the Labor Management Relations Act is with the Act itself, it should first be noted that the type of activity which triggers jurisdiction under the Act involves circumstances “affecting commerce.”¹⁴⁰ Section 2(6) defines “commerce” to mean:

trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any territory of the United States and any State or other Territory, or *between any foreign country* and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory or between points in the same State but through any other State or any territory or the District of Columbia or *any foreign country*.¹⁴¹

The term “affecting commerce” is defined by Section 2(7) as meaning:

137. *Id.* at 200-01.

138. 415 U.S. at 115.

139. *Id.* at 115-16.

140. Labor Management Relations Act, 29 U.S.C. § 160(a) (1970); 29 U.S.C. § 159(c) (1970).

141. 29 U.S.C. § 152(6) (1970) (emphasis added).

in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.¹⁴²

Although it is well recognized that Congress has the power to assert legislative jurisdiction over American citizens located outside of the United States,¹⁴³ if interpreted literally, the Labor Management Relations Act would apply not only to American employees working on foreign soil for an American corporation,¹⁴⁴ but also to French employees working in Marseilles for a French concern.¹⁴⁵ As the Supreme Court has recognized on several occasions, however, a simple reading of the statute is not determinative of its territorial scope.¹⁴⁶ Other factors, such as legislative history and the policies underlying the statute, must also be considered regardless of which technique of statutory analysis is chosen. Consequently, the Labor Management Relations Act must be viewed in its appropriate context.

142. 29 U.S.C. § 152(7) (1970).

143. See note 88 *supra*.

144. See, e.g., *Windward Shipping Ltd. v. American Radio Ass'n*, 415 U.S. 104, 112-13 (1974). The jurisdictional formula of most federal labor statutes precludes all inquiry as to whether Congress intended extraterritorial application. See, e.g., Title VII of the Civil Rights Act of 1964, §§ 702, 706(f), 42 U.S.C. §§ 2000e-1, 2000e-5(F)(3) (Supp. IV 1974); Occupational Safety and Health Act of 1970, § 3(3), 3(8), 29 U.S.C. § 651(3), 651(8) (1970); Fair Labor Standards Act of 1938, as amended, § 13(f), 29 U.S.C. § 213(f) (1964). Regarding the history of Section 13(f) of the FLSA, see Goldberg, *supra* note 5, at 30-32. The jurisdictional formula of the Railway Labor Act, 45 U.S.C. §§ 151-188 (1970), would seem to preclude all inquiry as to territorial scope. Coverage under the Railway Labor Act, which is applicable to railroads and airlines, is limited to activities within the jurisdiction of the ICC, 44 Stat. 577 (1926), 45 U.S.C. § 151 (First), 151 (Fifth) (1970). This extends "only insofar as such transportation . . . takes place within the United States." 49 U.S.C. § 1 (1), 1(2) (1970). See *United States v. Pennsylvania R.R.*, 323 U.S. 612 (1945). Even so, a fair amount of litigation has been spawned regarding the extraterritorial application of the RLA against airlines. *Air Line Dispatchers Ass'n v. National Mediation Bd.*, 189 F.2d 685 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951) (holding that dispatchers hired by an American-owned airline operating wholly outside of the United States are not covered by the bargaining provisions of the RLA); *Air Line Stewards and Stewardesses Ass'n v. Northwest Airlines, Inc.*, 267 F.2d 170 (8th Cir. 1959), *cert. denied*, 361 U.S. 901 (1959); *Air Line Stewards and Stewardesses Ass'n v. Trans World Airlines, Inc.*, 173 F. Supp. 369 (S.D.N.Y.), *aff'd*, 273 F.2d 69 (2d Cir. 1959), *cert. denied*, 362 U.S. 988 (1960) (the latter two cases holding that employees working on flights which travel solely between points in foreign countries are not covered by the RLA, even though the flights began or ended in the United States). See generally Note, *Railway Labor Act—Coverage—International Air Carriage*, 35 J. AIR L. & COM. 100 (1969); Goldberg, *supra* note 5, at 26-27. For a criticism of this literal adherence to the RLA's jurisdictional provisions against airlines, see Currie, *supra* note 74, at 82 n.189.

145. See *Empresa Hondurena de Vapores, S.A. v. McLeod*, 300 F.2d 222, 231 (2d Cir. 1962), *rev'd sub nom. McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10 (1963).

146. See note 88 *supra*.

The plight of the American workingman, as well as his attempts to improve the terms and conditions of his employment through concerted activity, have been given attention only recently by federal law. Originally, American courts held that any combination on the part of the workmen to raise their wages was illegal.¹⁴⁷ As this doctrine waned, the federal labor injunction took its place as the legal method by which unionism was discouraged.¹⁴⁸ It was not until 1914, when the Clayton Act was passed, that Congress gave even theoretical acknowledgement to the right of employees to organize and to bargain collectively.¹⁴⁹ Federal labor injunctions continued to plague union efforts,¹⁵⁰ however, until

147. *Commonwealth v. Pullis* (Philadelphia Cordwainer's Case), collected in 3 DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59-250 (J. Commons & L. Gilmore eds. 1910).

148. R. SMITH, L. MERIFIELD & T. ST. ANTOINE, LABOR RELATIONS LAW 22-23 (5th ed. 1974). The federal preliminary injunction was deadly to union activity, and suffered from severe procedural shortcomings. See, e.g., *Great Northern Ry. v. Brousseau*, 286 F. 414 (D.N.D. 1923). See generally F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1930); C. MORRIS, THE DEVELOPING LABOR LAW 7 (1971). As early as 1896, the rumblings of future congressional discontent could be seen on the horizon, as evidenced by the Democratic platform of that year:

We denounce arbitrary interference by Federal authorities in local affairs as a violation of the Constitution of the United States and a crime against free institutions, and we especially object to government by injunction as a new and highly dangerous form of oppression by which Federal Judges, in contempt of the laws of the States and rights of citizens, become at once legislators, judges and executioners.

Quoted in McCulloch, *New Problems in the Administration of the Labor-Management Relations Act: The Taft-Hartley Injunction*, 16 Sw. L.J. 82, 87-88 (1962) (emphasis added). Bills were introduced to curb the federal labor injunction for twenty consecutive years between 1894 and 1914. President Roosevelt sent five consecutive messages to Congress stressing the need for reform. President Taft, in his 1909 State of the Union Message, spoke extensively about the evils of the labor injunction. McCulloch, *supra*, at 88.

149. The Clayton Act states that "[t]he labor of a human being is not a commodity or article of commerce." Clayton Act § 6, 15 U.S.C. § 17 (1970), formerly ch. 323, § 6, 38 Stat. 731 (1914). The Clayton Act also limits the power of federal courts to issue injunctions in labor disputes. Clayton Act § 20, 29 U.S.C. § 52 (1970), formerly ch. 323, § 20, 38 Stat. 738 (1914). Section 6 further provided that nonenjoinable union conduct was not in violation of federal antitrust laws.

150. Although Samuel Gompers, President of the American Federation of Labor, described the Clayton Act as the "industrial magna charta," 21 AMERICAN FEDERATIONIST 971 (1914), federal courts were to narrowly construe the sections dealing with the labor injunctions. FRANKFURTER & GREENE, *supra* note 148, at 175. See, e.g., *Bedford Cut Stone v. Journeymen Stone Cutters Ass'n*, 274 U.S. 37 (1927) (union refusal to work on stone quarried by opponents of the union); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921) (secondary boycott); but cf. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921) (picketers could not be enjoined from peaceful persuasion). In spite of Section 20 of the Clayton Act, injunctions were granted by federal courts in

Congress enacted the Norris-LaGuardia Act of 1932.¹⁵¹ By depriving federal courts of jurisdiction over peaceful and nonfraudulent labor disputes,¹⁵² the Norris-LaGuardia Act solved the injunction problem, but still provided no substantive protection to the right of employees to freely choose their bargaining representatives.¹⁵³

The economic conditions of the 1930s indicated that the time was right for Congress to provide such protection.¹⁵⁴ Assuming one could find employment, working conditions were poor and devastating strikes were widespread.¹⁵⁵ Industrial peace, in the form of stable labor management relations, was in the best interest of employers, workers, and the general public.¹⁵⁶ While the first real attempt at a legislative solution, the National Industrial Recovery Act,¹⁵⁷ would ultimately fail,¹⁵⁸ the origins of the Wagner Act of 1935 were already in evidence by 1934.¹⁵⁹

Prior to the passage of the Wagner Act of 1935, labor-management

ten of the next thirteen cases in which Section 20 was invoked. *McCulloch*, *supra* note 148, at 89.

151. 29 U.S.C. §§ 101-115 (1970).

152. "The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction." *United States v. Hutcheson*, 312 U.S. 219, 235-36 (1941). This aim was "to take the Federal courts out of the business of granting injunctions in labor disputes, except where violence and fraud are present . . ." *Wilson & Co. v. Birl*, 27 F. Supp. 915, 918 (E.D. Pa.), *aff'd*, 105 F.2d 948 (3d Cir. 1939).

153. Section 2, in setting forth the public policy of the Act, affirmed the right of employees to choose freely their bargaining representatives. 29 U.S.C. § 102 (1968). As with the Clayton Act, however, no mechanisms were provided to protect this right. F. DULLES, *LABOR IN AMERICA* 276 (2d rev. ed. 1960). The Norris-LaGuardia Act also evidenced a congressional belief "that the government should not resolve labor disputes or substitute its wage or price determinations for private contracts in a free market." A. COX, *LAW AND THE NATIONAL LABOR POLICY* 5 (1960).

154. MORRIS, *supra* note 148, at 25.

155. *See, e.g.*, 78 CONG. REC. 12029, in *NLRA LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1207* (1949) (Senator LaFollette) [hereinafter cited as *NLRA LEGISLATIVE HISTORY*]; 79 CONG. REC. 4707 *NLRA LEGISLATIVE HISTORY* 2842 (Representative Connery); 79 CONG. REC. 4707 *NLRA LEGISLATIVE HISTORY* 299 (Representative Blanton).

156. *See, e.g.*, *NLRB v. Fainblatt*, 306 U.S. 601 (1939); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). *Cf. Texas & N.O.R.R. v. Railway Clerks*, 281 U.S. 548 (1930) (constitutionality of Railway Labor Act of 1926, as amended, 45 U.S.C. §§ 151-163, 181-188 (1970)).

157. Act of June 16, 1933, ch. 90, 48 Stat. 195.

158. *See* I. BERNSTEIN, *TURBULENT YEARS 172-185* (1970). As a final blow, § 3 of the NLRA was held to be an unconstitutional delegation of power to the President. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

159. *See generally* Madden, *The Origin and Early History of the National Labor Relations Board*, 20 *GEO. WASH. L. REV.* 234 (1960).

relations were not functioning smoothly, and the economy was suffering as a result. According to Congress, the reason for this inefficiency was "[t]he inequality of bargaining power between employees . . . and employers . . . [which] tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries."¹⁶⁰ The Wagner Act was intended to remedy these defects by providing a legal framework under which workingmen could achieve some degree of bargaining power in order to negotiate with management on relatively equal terms. The declared policy of the Wagner Act makes this clear:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.¹⁶¹

While other methods were available,¹⁶² collective bargaining was chosen as the mechanism for achieving the desperately needed stability in labor management relations.¹⁶³ Unfortunately, one-sided in nature, the

160. 29 U.S.C. § 151 (1970). *See also* MORRIS, *supra* note 148, at 25-26.

161. 29 U.S.C. § 151 (1970).

162. *See, e.g.*, Railway Labor Act of 1926, as amended. The Railway Labor Act relies upon compulsory arbitration through the National Mediation Board as well as upon collective bargaining. While the Taft-Hartley Act of 1947 subsequently provided facilities for the mediation and arbitration of disputes through the Conciliation Service of the Department of Labor, participation is not compulsory. 29 U.S.C. § 173 (1970). As the Supreme Court has noted:

[The Wagner Act] does not compel any agreement whatever. . . . The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel.

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1936). *See NLRB v. Burns Int'l Security Serv., Inc.*, 406 U.S. 272, 282 (1972) (successorship doctrine, wherein the Court stated "Congress has consistently declined to interfere with free collective bargaining"); *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). *Cf. Teamsters Local 357 v. NLRB*, 365 U.S. 667, 676-77 (1961); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 401-02 (1952). Two exceptions to this general reluctance to interfere with free collective bargaining are the imposition of collective bargaining during wartime, and, on occasion, during railway strikes. *NLRB v. Burns Int'l Security Serv., Inc.*, 406 U.S. 272, 282 n.7 (1972).

163. *See* 29 U.S.C. § 151 (1970); SENATE COMM. ON EDUCATION AND LABOR, S. REP. NO. 573, 74th Cong., 1st Sess. 12 (1935). *Cf. Textile Workers v. Lincoln Mills*, 353 U.S. 448, 453-54 (1957); *NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 344 (1939).

Wagner Act provided unions and employees with an unfair advantage.¹⁶⁴ In order to eliminate this advantage and thereby provide a more efficient framework, Congress, in 1947, enacted the Labor Management Relations Act, better known as the Taft-Hartley Act. As if the Wagner Act had not been clear on this point, the Labor Management Relations Act unequivocally declared the great interest which the public had in stable labor-management relations.¹⁶⁵ If the Wagner Act put labor and management in the same arena, providing rules for a more orderly brand of combat, then the Labor Management Relations Act refined those rules, and put up ropes around the ring to prevent the combatants from spilling over into the crowd.

While the rules of the game have continually been refined, the underlying policies of the Labor Management Relations Act have remained virtually unchanged over time. The focal point of the Labor Management Relations Act is still the relationship between employers and employees. All of the desirable effects which the Act seeks to promote—better terms and conditions of employment for employees, industrial peace for employers, improved economic conditions for society in general—are still premised on the concept of healthy bargaining relationships.¹⁶⁶ These desirable effects, however, have never been sought on a world-wide scale. Indeed, such goals are rather ambitious solely on a domestic level. For this reason, labor legislation, perhaps even more so than other types of legislation, tends to be oriented exclusively toward domestic concerns.¹⁶⁷ An examination of the Labor Management Relations Act's legislative history makes it clear that this Act is no excep-

164. MORRIS, *supra* note 148, at 28-29.

165. Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under the law that neither party has any right . . . to jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

29 U.S.C. § 141 (1970).

166. See note 160 *supra* and accompanying text, and note 165 *supra*.

167. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

tion.¹⁶⁸ Inasmuch as Congress never mentioned the situation involving American employees working for American companies in foreign countries, and probably never even contemplated it, the issue concerning the extraterritorial application of the Act hinges, therefore, on whether congressional intent may be inferred. Given that the wording of the statute permits application under such circumstances,¹⁶⁹ it is crucial to examine whether the interests which the Labor Management Relations Act seeks to promote would be furthered by applying the Act to American employees working on foreign soil for American MNCs.¹⁷⁰ This examination will be made within the context of the three techniques of statutory analysis previously discussed.

2. *Inferring Congressional Intent Under the Three Techniques of Statutory Analysis*

Under the traditional technique of statutory analysis, a court may infer that Congress intended an act to apply extraterritorially, only when it is first shown that such application would not transgress international law. In the absence of this showing, the presumption of territoriality must be accorded weight, and a statute can be applied outside of the United States only if Congress clearly intended such a result.¹⁷¹ Since the Labor Management Relations Act concededly does not exhibit this clear intent, the ramifications of international law become critically important under the traditional technique. This article has already demonstrated, however, that application of the Labor Management Re-

168. See generally Currie, *supra* note 74, at 49-50. The Supreme Court's interpretation of the Labor Management Relations Act's legislative history has been that it "inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions." *Windward Shipping Ltd. v. American Radio Ass'n*, 415 U.S. 104, 110 (1974), quoting *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 144 (1957).

169. See note 144 *supra* and accompanying text.

170. Cf. *United States v. Champlin Refining Co.*, 341 U.S. 290 (1951); *Hamilton v. Rathbone*, 175 U.S. 414, 419 (1899); *United States v. Coombs*, 37 U.S. (12 Peters) 72, 75-76 (1838); *Extraterritorial Scope of the Antitrust Laws of the United States and of the Communities and Member States*, in COMMON MARKET AND AMERICAN ANTITRUST: OVERLAP AND CONFLICT 50-116 (J. Rahl ed. 1970); Bator, *Extraterritorial Application of Law: United States Securities Laws*, 64 AM. J. INT'L L. 141 (Supp. 1970); Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on Fruehauf v. Massardy*, 83 HARV. L. REV. 579 (1970); Kauder, *Taxation of Domestically Controlled Foreign Corporations: A Comparative Study of Subpart F and Section 482*, 14 VILL. L. REV. 260 (1969); Comment, *The Foreign Direct Investment Regulations—A Solution to the United States Balance of Payments Crisis?*, 55 MARQ. L. REV. 553, 673-75 (1972); Comment, *The Extraterritorial Scope of NEPA's Environmental Impact Statement Requirement*, 74 MICH. L. REV. 349 (1975).

171. See notes 91-96 *supra* and accompanying text.

lations Act to American employees working on foreign soil for American corporations would not transgress international law.¹⁷² Accordingly, ordinary rules of statutory analysis are controlling in this situation, and congressional intent may be inferred.¹⁷³

Since the American interests which the Labor Management Relations Act seeks to promote would be furthered by applying the Act to American employees working on foreign soil for American corporations, it is submitted that congressional intent should be inferred under the traditional technique of statutory analysis. The history of the American labor movement and the legislative responses which it engendered establish that healthy bargaining relationships are a fundamental goal of American labor policy. However, these relationships, at least as far as the Labor Management Relations Act is concerned, are deemed valuable more because of their desirable effects than for their own sake. Thus, collective bargaining relationships have been considered by Congress to be worthy targets of regulation, because the interests of American workers, American employees, and the American public are all furthered by stability in this area.

Viewed in this context, the situs of the relationship has only a marginal impact upon the interests which the Labor Management Relations Act seeks to advance. The nationality of the participants is much more relevant in this respect. Even when the situs is a foreign country, the interests of American employees and employers are *ipso facto* furthered by a healthy bargaining relationship between such workers and employers. The location of the situs, however, does have importance with respect to the effects of such relationship on the American public, which effects create other interests to be protected under the Act. Naturally, the effects on the American public are diminished if the situs is abroad. Nevertheless, the benefits derived from the mere existence of the bargaining relationships are probably sufficient to infer a congressional intent in support of the extraterritorial application of the Act, even if the economic welfare of the American public in general were not advanced by such relationships. However, although the impact on the American economy is obviously greater when an American situs is involved, it is not true that the bargaining relationships centered abroad do not promote the general economic welfare of the American public. For example, the effect of a strike upon the flow of goods to or within the United States is likely to be greater when the strike occurs within the United States. However, while healthy bargaining relationships are

172. See notes 34-71 *supra* and accompanying text.

173. *But see* *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949), which is discussed in detail at notes 103-111 *supra* and accompanying text.

more apt to soften the impact of an American strike when the primary parties are located in the United States, this is not necessarily the case. Sympathy strikes, boycotts, and refusals to work on struck production may be just as harmful when a union's primary dispute occurs abroad with an American MNC with American employees.

For example, the extension of MNC facilities abroad may make the parent company particularly vulnerable to any international economic action against the foreign subsidiaries. Thus, if a corporation is highly integrated with specialized functions carried out in different countries, economic action at a foreign situs against operations essential for continued home country production would have a significant impact on the corporation's worldwide, as well as American, operations. Such disruptive economic action abroad would in all likelihood affect exports to and imports from the affected foreign operations thereby negatively influencing production and employment in the parent company in the United States.

It is true that the more obvious economic effects of stable wage rates, which the Labor Management Relations Act seeks to promote through greater equality in bargaining power, are likely to be more substantial within the United States when an American situs is involved.¹⁷⁴ One reason is that American employees living and working abroad typically spend their earnings in the foreign country rather than in the United States. However, significant American effects still result from stable wage rates within and between industries comprised of domestic and overseas corporations employing American workers. The efficient allocation of scarce labor resources, particularly of American specialists who are most frequently recruited for overseas employment, requires that any disparity in wages between American employees at home and abroad reflect, so far as possible, differences in supply and demand. To the extent that the Labor Management Relations Act succeeds in stabilizing wage rates by providing a framework for a healthy bargaining relationship between American workers and employers, scarce American labor resources are more efficiently allocated. Regardless of the

174. Of course, wage rates are not the only subject of collective bargaining. Thus, the total scope of the economic package (pensions, holidays, vacations, etc.) regulated at a foreign situs may affect negotiations in the home country if on the whole a great "economic" disparity occurs between the negotiated host and home country benefits. A real fear also exists that an MNC may be caught in a gigantic international whipsaw strike action if its worldwide work force attempts to capitalize on the national bargaining peculiarities in the different countries of the MNC's operations (e.g., West Germany places emphasis on high wages and low pension benefits but Switzerland emphasizes lower wages but higher pension benefits), thereby obtaining the best of all benefits. The impact of both situations would be great even though a foreign situs was involved.

situs of the economic action or of those bargaining relationships, the American economy is thereby benefitted.

One final example of the negligibility of the location of the bargaining situs or economic action situs can be gleaned from the goal of industrial peace. Industrial peace, which results from stable collective bargaining relationships, is sought by employers primarily because of its favorable impact upon profits. To the extent that an American company is able to boost profits through industrial peace, the economic interests of the American public are furthered since additional tax revenue is made available to the United States, and domestic as well as foreign expenditures and investments are increased. These desirable effects occur, however, whether the American corporation which employs American workers is located in the United States or in a foreign country.¹⁷⁵

In sum, all of the American interests which the Labor Management Relations Act seeks to promote are furthered when the Act is applied to American employees working on foreign soil for American corporations. Accordingly, under the first technique of statutory analysis, it should be inferred that Congress intended the Act to apply extraterritorially in such circumstances.

Under the "contacts" technique, assuming that it might still be used by a court in determining the territorial scope of the Labor Management Relations Act in a nonmaritime situation,¹⁷⁶ the interests being advanced by the statute under scrutiny are first identified.¹⁷⁷ In the case of the Labor Management Relations Act, those interests include stable collective bargaining relationships, and their desirable impact upon American workers, employers, and society.¹⁷⁸ Next, the relevant contacts are examined in light of the previously identified interests.¹⁷⁹ In a situa-

175. While these same domestic effects can occur when foreign employees work on foreign soil for American companies, it is crucial that the statutory analysis remain separate for American employees. Otherwise, the same mistakes which the Supreme Court made in *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949), are unavoidable. See notes 103-11 *supra* and accompanying text. When the analysis is kept separate, the issue of what domestic effects occur when foreign employees are involved never arises. Even assuming that an adequate basis existed for asserting jurisdiction, international law would be transgressed by applying the Labor Management Relations Act to foreigners working abroad. See note 51 *supra*. Accordingly, the presumption of territoriality would come into play. See note 96 *supra* and accompanying text. Since there is not clear intent on the part of Congress to apply the Act to foreigners working abroad for American companies, the Labor Management Relations Act cannot be given such extraterritorial scope. Cf. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949).

176. See note 121 *supra* and accompanying text.

177. See notes 112 and 113 *supra* and accompanying text.

178. See notes 165 and 166 *supra* and accompanying text.

179. See notes 112 and 113 *supra* and accompanying text.

tion involving American employees who work on foreign soil for an American MNC, both the home country and the host country can claim contacts. Among the more important American contacts are the following: (1) an American employer; (2) American employees; (3) the bargaining relationship between two American parties (even though the employees may be represented by a host country union); (4) the effect of the relationship upon the American economy; and (5) the law of the forum. Contacts with the foreign (host) country would include the location of the bargaining relationship, the host country union, and the effect of the American concern upon the host country's economy. Depending upon the facts of the particular situation, both the home country and the host country could claim contacts as a result of the situs or impact of either party's use of economic weapons.

In light of the underlying purposes of the Labor Management Relations Act, the fact that the participants in the bargaining relationship are American workers and employers means that the United States *ipso facto* has substantial contacts. Moreover, the impact of the relationship upon the American public provides measurable, if not substantial, American contacts. Furthermore, since international law would not be violated were the Labor Management Relations Act to be applied against American employers and employees on foreign soil,¹⁸⁰ the foreign situs of the bargaining relationship is not particularly important with respect to foreign contacts. On the other hand, the impact of the foreign-based bargaining relationship upon the foreign country's economy is admittedly substantial. The American MNC must purchase materials and sell final products, if not from and to the foreign (host) country, then through its commercial channels. American employees, even specialists who do not replace foreign labor, still purchase foreign goods and services with their earnings. Any picketing or strikes would most likely take place in the host country or neighboring foreign countries where the MNC has plants, rather than in the United States, and would spill over into foreign concerns much more readily than into American concerns.

In spite of these substantial foreign contacts, it is submitted that American contacts, being more substantial, must prevail, and that the Labor Management Relations Act must therefore apply.¹⁸¹ Since both

180. See notes 36-71 *supra* and accompanying text.

181. Under a strict "contacts" approach, an American court would apply a domestic statute to transnational facts regardless of the relative substantiality of foreign contacts, so long as American contacts could be deemed substantial on an absolute scale. *Cf.* note 125 *supra*. Since the American contacts are more substantial here, however, the issue of whether a strict contacts approach should be adhered to need not be decided.

host and home countries would have a substantial interest in the relationship, however, there is a real possibility that concurrent jurisdiction would exist.¹⁸² The problems inherent in concurrent jurisdiction provide a possible reason for the United States to decline to assert jurisdiction.¹⁸³ However, these problems do not affect the issue of jurisdiction *vel non*.

All of the cases in which the Supreme Court has utilized the governmental interest technique of statutory analysis to determine the territorial scope of the Labor Management Relations Act have involved "false" conflicts.¹⁸⁴ Application of the Act to the various transnational factual situations either would not have furthered the underlying policies of the Labor Management Relations Act while possibly disturbing other countries' policies, or would not have disturbed other countries' policies while furthering the underlying policies of the Act.¹⁸⁵ In contrast, the issue of whether the Labor Management Relations Act should apply to American employees working on foreign soil for an American MNC involves a "true" conflict.

The underlying purpose of the Labor Management Relations Act is essentially to promote healthy collective bargaining relationships, thereby producing desirable effects upon American workers, employers, and society.¹⁸⁶ Without examining any specific foreign labor statute, it is safe to assume that at least one of its underlying purposes would be to further the interests of the foreign country's society and the workers in that society. Given their respective purposes, a "true" conflict between the Labor Management Relations Act and foreign labor statutes becomes readily apparent. The application of both the Labor Management Relations Act and the foreign labor statute to American employees

182. See notes 204-214 *infra* and accompanying text. The warning of Mr. Justice Jackson, in *Lauritzen*, is relevant here: "[N]or should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction." 345 U.S. 571, 582 (1953). The application of foreign labor law to foreign employees working in the United States for foreign companies is not particularly outrageous. The United States could always exercise concurrent jurisdiction if American contacts warranted such a course of action. The warning of Justice Jackson, however, becomes particularly poignant when considering whether the LMRA, under the "contacts" approach, should apply to foreign employees of an American corporation abroad. The United States would surely protest if a foreign country applied their labor laws to American employees working in the United States for a foreign company. Even under the *Lauritzen* approach, the Labor Management Relations Act would probably not apply to foreign workers abroad, since international law would be thereby violated. 345 U.S. 571, 578 (1953). See note 51 *supra*.

183. See notes 204-214 *infra* and accompanying text.

184. See notes 123-128 *supra* and accompanying text.

185. See cases cited in note 86 *supra*.

186. See notes 163-166 *supra* and accompanying text.

working on foreign soil for American corporations would further the underlying purposes of the respective statutes.¹⁸⁷ Assuming that the interests to be advanced by application of the forum's law would be substantial, the law of the forum applies when a true conflict exists under the governmental interest technique.¹⁸⁸ Accordingly, an American court would have jurisdiction to apply the Labor Management Relations Act to the transnational factual situation.¹⁸⁹ Again, since both the United States and the foreign country would have a significant governmental interest, the possibility of concurrent jurisdiction arises.¹⁹⁰ Since this possibility and its corresponding problems do not affect the issue of jurisdiction *vel non*, however, they are discussed subsequently.

IV

PRACTICAL ASPECTS OF THE EXTRATERRITORIAL APPLICATION OF THE LABOR MANAGEMENT RELATIONS ACT

Having considered the applicability of American labor law to activities of MNCs carried on abroad, this article will now focus on the practical issues concerning such extraterritorial application. Particular attention will be accorded to whether and how cases and parties are brought before the National Labor Relations Board and the courts for adjudication.

A. SUBJECT MATTER JURISDICTION

While there are a number of concepts embodied in the term "subject matter jurisdiction," in the present context attention is accorded to the basis upon which the Board and the courts may entertain the particular matters which are sought to be litigated.

Unlike the situation in many countries, the system of labor-management relations in the United States is highly developed and

187. See notes 171-175 *supra* and accompanying text.

188. See notes 122-125 *supra* and accompanying text.

189. Even assuming that a court had some basis for asserting jurisdiction, the Labor Management Relations Act would not apply, under the governmental interest technique, to foreign employees working for American MNCs on foreign soil. This situation involves a "false" conflict in that application of the Labor Management Relations Act would not further its underlying policies, since the Act is a "bill of rights . . . for American workingmen and for their employers." *Windward Shipping Ltd. v. American Radio Ass'n*, 415 U.S. 104, 110 (1974), quoting *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 144 (1957). At the same time, the foreign country's policies would be infringed and international law would probably be violated.

190. See note 204 *infra* and accompanying text.

regulated by statute. As previously discussed, the core of this regulatory scheme, the Labor Management Relations Act, declares that it is the policy of the United States through the practice and procedure of collective bargaining to eliminate industrial strife and unrest which have the effect of burdening and obstructing the free flow of commerce to and from the United States.¹⁹¹ The Act further empowers the National Labor Relations Board to adopt such rules and regulations as are necessary to carry out this purpose and policy and to prevent any person from engaging in practices contrary to such policy which affect interstate and foreign commerce.

Under the "affecting commerce" test,¹⁹² with relation to a labor dispute, the duties and activities of the employees are not controlling in jurisdictional terms. Since the employer's activities are solely determinative of jurisdiction under the Labor Management Relations Act, a specific employee may come within the protection or under the proscription of the Act even though he himself is not engaged in interstate activity or in the production of goods for interstate sale. The test of the Board's jurisdiction is the effect of the employer's activities upon commerce; that is, whether the obstruction of the employer's operations by a labor dispute would affect commerce.

A series of cases beginning with *Benz v. Compania Naviera Hidalgo*¹⁹³ examined the question of labor disputes in the maritime trade and concluded that a necessary predicate for the exercise of Board jurisdiction over an unfair labor practice in connection with a labor dispute is that the practice must "affect commerce." In all of these cases, the Supreme Court decided that the activities involved did in fact meet this criterion.¹⁹⁴ Nevertheless, the exercise of jurisdiction was declined since

191. See note 165 *supra*. The National Labor Relations Act (NLRA), predecessor to the Labor Management Relations Act, in Section 1 also declares that it is the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce by encouraging the practice and procedure of collective bargaining. The NLRA was upheld as a proper exercise of the power of Congress to regulate interstate and foreign commerce under the Commerce Clause. U.S. CONST. art. I, § 8. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

192. See notes 140-142 *supra* and accompanying text. See also *Herbert Harvey, Inc. v. NLRB*, 424 F.2d 770, 773 n.24 (D.C. Cir. 1969).

193. 353 U.S. 138 (1957).

194. See, e.g., *Windward Shipping Ltd. v. American Radio Ass'n*, 415 U.S. 104, 112-13 (1973), in which the Supreme Court stated:

The term "in commerce," as used in the LMRA, is obviously not self-defining, and certainly the activities in *Benz*, *McCulloch*, and *Inces*, held not covered by the Act, were literally just as much "in commerce" as where the activities held covered in *Ariadne*. Those cases which deny jurisdiction to the NLRB recognize that Congress, when it used the words "in commerce" in the LMRA, simply did

Congress "simply did not intend that Act to erase long-standing principles of comity and accommodation in international maritime trade."¹⁹⁵ Thus, a potential conflict with international law rather than any lack of effect on commerce convinced the Court that the Board *lacked* subject matter jurisdiction. Notwithstanding the interpretation given to these cases, the Court's holdings can be cited for the proposition that the Board did have subject matter jurisdiction, even though it did not exercise such jurisdiction.¹⁹⁶

As expressed in *Herbert Harvey, Inc. v. N.L.R.B.*,¹⁹⁷ the Board "has traditionally reserved a discretion to decline jurisdiction in particular cases where it believes the policies of the Act will not be effectuated by an exercise of its authority."¹⁹⁸ The extent to which the Board chooses to exercise its statutory jurisdiction "is a matter of administrative policy within the Board's discretion and in the absence of extraordinary circumstances whether jurisdiction should be exercised is for the Board, not the courts, to determine."¹⁹⁹ In *Herbert Harvey*, the Board, echoing

not intend that Act to erase long-standing principles of comity and accommodation in international maritime trade (emphasis added).

195. *Id.* The Court also stated:

Recognition of the clear congressional purpose to apply the LMRA only to American workers and employers was doubtless a sufficient reason to place the picketing in *Benz* outside the Act. But the Court in that case made clear its reluctance to intrude domestic labor law willy-nilly into the complex of considerations affecting foreign trade, absent a clear congressional mandate to do so.

Id. at 110.

196. The Board has adopted "jurisdictional yardsticks" to determine whether or not it will take jurisdiction in a particular case. The yardsticks, which apply in both representation and unfair labor practice cases, fix jurisdiction on the basis of the annual dollar volume of interstate business done by the employer. See *Guss v. Utah Labor Relations Bd.*, 353 U.S. 13-14 (1957). In 1959, however, after the decisions in *Office Employees Union v. NLRB*, 353 U.S. 313 (1957), and *Hotel Employees Local No. 255 v. Leedom*, 358 U.S. 99 (1958), Congress added to the Act Section 14(c)(1), 29 U.S.C. § 164(c)(1) (1964), providing:

The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

197. 424 F.2d 770 (D.C. Cir. 1969).

198. *Id.* at 773-74. See also *Contract Serv., Inc.*, 202 N.L.R.B. 862 (1973), where the Board ruled that while it had the power to assert jurisdiction over the operations of American employees in the Canal Zone, it chose not to do so for fear of adversely affecting American-Panamanian relations.

199. *NLRB v. WGOK*, 384 F.2d 500, 502 (5th Cir. 1967); *Herbert Harvey, Inc. v. NLRB*, 424 F.2d 770, 783 n.94 (D.C. Cir. 1969).

the Supreme Court in *Benz*²⁰⁰ and *McCulloch*,²⁰¹ exercised its discretion and declined jurisdiction over the World Bank because it felt that to do otherwise would infringe on the delicate field of international relations.²⁰²

It is entirely possible then that the Board would decline to exercise jurisdiction over the American employees of an MNC operating abroad on the basis of its belief that to do otherwise would not effectuate the Act's policies.²⁰³

B. CONCURRENT JURISDICTION AND CONFLICT OF LAWS

In *Lauritzen*,²⁰⁴ the Supreme Court warned that any contact which the United States holds sufficient to warrant application of American do-

200. 353 U.S. 138 (1957).

201. *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10 (1963).

202. *Herbert Harvey, Inc. v. NLRB*, 424 F.2d 770, 773 (D.C. Cir. 1969); *See also Von Solbrig Hospital, Inc. v. NLRB*, 465 F.2d 173, 174 (7th Cir. 1972); *Contract Serv., Inc.*, 202 N.L.R.B. 862 (1973).

203. Since the exercise of jurisdiction would require the Board to assert authority over a foreign union located abroad, it may believe such action would infringe on the "delicate field of international relations." However, the exercise of jurisdiction over a foreign union would be no more offensive than a host country's exercise of labor relations jurisdiction over an American MNC and its American employees. The Supreme Court, moreover, in both *Ariadne* and *Windward Shipping* saw no problem with the fact that the crews of the vessels were represented by foreign unions. Nationality, however, has not in the past been the principal factor in the Board's decision to assert or decline jurisdiction. The Board has ordered elections and restrained unfair labor practices of businesses owned by foreign nations in the United States. *Compagnie Generale Transatlantique*, 118 N.L.R.B. 1327 (1957); *Italia Societa per Azioni di Navigazione*, 118 N.L.R.B. 1113 (1957); *Delta Match Corp.*, 102 N.L.R.B. 1400, 1401 n.2 (1953); *The Royal Bank of Canada*, 67 N.L.R.B. 403 (1946). *See Currie, supra* note 74, at 80-81, where the following example is given: An American plant in Pakistan bears a much more intimate relationship to the Pakistani than to the American economy, and the application of American labor law to the employees would run a substantial risk of offense to foreign sovereignty. *See* 1 CCH LAB. L. REP. ¶ 1610 (1962). But Currie's argument relates to the application of American labor law to all of the plant's employees, not just to the American employees. The fact that, in terms of representation, the employees will be "bifurcated" should not deter the Board from exercising jurisdiction. The fact that some employees of a company are represented by one union while others are represented by another union or are not represented at all has not troubled the Board in the United States. Neither has the fact that these employees receive different wages or operate under different working conditions, for this is the collective bargaining process. Nor should the fact that American employees are regulated by foreign law be a major deterrent. The only serious problem which bifurcation may present is in any possible attempt by an MNC to forestall coordinated economic action by the bifurcated groups. Practically, how does the MNC apply two sets of national laws to one coordinated group of employees on a picket line? This is a particularly thorny problem if the national laws are divergent in legal effect and application.

204. 345 U.S. 571, 583 (1953).

mestic law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction. Since beyond a certain point, contacts, occurrences, and effects in a transnational setting involve a foreign jurisdiction as much as they do the United States, it is not improbable that a situation will arise in which both the home country and host country have concurrent jurisdiction over the matter. For example, the application by foreign countries of their labor law to foreign employees working in the United States for foreign companies is certainly within reason. As a result, the Supreme Court's warning in *McCulloch* that American extraterritorial action may invoke retaliations from other nations can not be ignored.²⁰⁵

Of course, the possibility of retaliation is not the only factor which may influence the United States to decline to exercise jurisdiction over MNCs abroad. A state may have deep-rooted local policies, customs, or practices which it feels are sufficiently important to require MNCs to abide by local rather than home country laws.²⁰⁶ Labor relations laws, where they exist, are usually based on historical, political and social factors peculiar to the country involved.²⁰⁷ As previously mentioned, there are also national policy reasons for self-imposed limitations.²⁰⁸

205. 372 U.S. 10, 21. See also Craig, *supra* note 170, at 597, which states that American extraterritorial regulation may even encourage foreign states to hold the American parent responsible for the acts of its subsidiary, applying in reverse the precedent of American regulation. Some host countries might attempt to regulate the activities of the parent corporation in response to United States regulation of the subsidiary. Currie, *supra* note 74, at 80 n.83, states that it has been argued the United States would object to an attempt by a foreign government to apply its labor laws here. This does not mean, however, that every assertion of American jurisdiction over Americans in foreign countries is a cause for retaliation. See, e.g., *Blackmer v. United States*, 284 U.S. 421 (1931).

206. Raymond, *The Exercise of Concurrent International Jurisdiction: Move with Circumspection Appropriate*, 8 B.C. IND. & COM. L. REV. 673, 673-77 (1967).

207. MULTINATIONAL ENTERPRISES, *supra* note 7, at 103.

208. The Comment to Section 37 of the RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965), says: "In most situations international law does not provide rules for a choice among the different bases of jurisdiction that international law recognizes. If a state has a basis of jurisdiction that is recognized under international law, it may generally exercise its jurisdiction even though another state may also have a recognized basis of jurisdiction." However, Section 40 states that: "where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as (a) vital national interests of each of the states, (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person, (c) the extent to which the required conduct is to take place in the territory of the other state, (d) the nationality of the person, and (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule

It is no answer to the problem of concurrent jurisdiction to apply the laws of both countries, for in many situations this is impossible as the labor statutes conflict.²⁰⁹ Obviously, conflicting labor statutes can not simultaneously function effectively with respect to the same persons or same occurrence.²¹⁰ While the solution is to have one country's laws defer to the application of the other, the question is which country, in light of the policies that are relevant, should yield in the interest of applying a unitary law. Consequently, the issue involved is not of the power of a domestic court to exercise jurisdiction, but rather of the propriety of its doing so. The question of propriety is, of course, a conflict of laws question.

American courts confronted with actions based upon an application or nonapplication of American laws, have sometimes examined the claims of the various nations interested in the transaction.²¹¹ In the

prescribed by that state." The policy interests which may require limitations on the exercise of jurisdiction include:

(a) Comity—See *United States v. Imperial Chemical Industries, Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951), 105 F. Supp. 215 (S.D.N.Y. 1952).

(b) Nationality of the parties—See *United States v. Watchmakers of Switzerland Information Center*, 133 F. Supp. 40 (S.D.N.Y. 1955).

(c) Conflict with foreign law—See *Steele v. Bulova Watch Co.*, 340 U.S. 280 (1953); *Whitney, Sources of Conflict Between International Law and the Antitrust Laws*, 63 *YALE L.J.* 655 (1954).

209. See generally *Seham*, *supra* note 11, at 358-59; *MULTINATIONAL ENTERPRISES*, *supra* note 7, at 100-04; *Fairweather*, *supra* note 32, at 106; Note, *National Labor Unions v. Multinational Companies, The Dilemma of Unequal Bargaining Power*, 11 *COLUM. J. TRANSNAT'L L.* 124, 127-46 (1972).

210. This relates also to the discretionary jurisdiction of the Board. In *McCulloch*, the Court held that because the simultaneous application of both American and Honduran law would create a chaotic situation, the Board must decline jurisdiction. 372 U.S. at 21-22.

211. Foreseeing such conflicts, American courts at times have been careful to avoid them. For example, in *United States v. General Elec. Co.*, 115 F. Supp. 835 (D.N.J. 1953), implementing the decision in 82 F. Supp. 753 (D.N.J. 1949), the court enjoined Philips, a Dutch firm, from contracting to refrain from exporting lamps and other goods to the United States or producing them there, but qualified the injunction by providing that:

Philips shall not be in contempt of this Judgment for doing anything outside of the United States which is required or for not doing anything outside of the United States which is unlawful under the laws of the government, province, country or state in which Philips or any other subsidiaries may be incorporated, chartered or organized or in the territory of which Philips or any such subsidiaries may be doing business.

115 F. Supp. at 878.

In *United States v. Watchmakers of Switzerland Information Center*, 133 F. Supp. 40 (S.D.N.Y. 1955), the Government alleged a conspiracy of Swiss and American manufacturers and sellers of watches and watch parts, chiefly on the basis of acts done in Switzerland, which the court found affected the commerce of the United States. The court

Jones Act cases,²¹² the Supreme Court balanced the relevant contacts of the nations concerned. Thus, a court, confronted with the issue of the extraterritorial application of the Labor Management Relations Act, may attempt to divide or award jurisdiction between the nations involved in a manner adequate to safeguard their respective interests.²¹³ Consequently, if an examination of the statutory policies at issue is used to resolve conflicts, the application of the Labor Management Relations Act may be circumvented even though in a technical sense it may lawfully be applied extraterritorially.²¹⁴

C. PERSONAL JURISDICTION

Whenever an action is brought under the Labor Management Relations Act before the Board or a court, the authority involved must have power to bind the parties personally to obedience. This raises the question of when and how personal jurisdiction may be obtained over the parties. Personal jurisdiction is not obtained merely because a party's

determined that the defendants' combination and conspiracy was directed towards United States trade and commerce, and many of the acts of defendants in furtherance of the conspiracy took place in the United States. It further found that the agreements and acts were not required by any Swiss law, statute, decree or ordinance in effect in Switzerland. The defendants argued that the court should not assume jurisdiction over their activities because American antitrust laws could not be applied to acts of sovereign governments. After final judgment, the United States moved to modify the judgment so as to avoid possible conflict with Swiss law. Granting specific modifications, the court said that they would prevent any situation from arising such as had occurred in the past when there was believed to be a possible conflict between a decree of a United States court and the sovereignty of a foreign nation. The modifications related to peripheral areas of the judgment which may have been construed as bearing upon the sovereignty of the Swiss Confederation.

212. *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959).

213. For example, under general conflict of law rules, the internal affairs of a corporation (like those of a ship) are governed by the law of its place of incorporation (registry). *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* §§ 303-310 (1969). However, the artificiality of a corporate domicile has been recognized for some time, *e.g.*, Delaware incorporation. On the other hand, the realities of foreign-state incorporation have been recognized by Congress in limiting a corporation's access to the diversity jurisdiction of federal courts by deeming it a citizen of its principal place of business as well as of its place of incorporation. 28 U.S.C. § 1332(c) (1970). Further, if foreign incorporation or registry are a facade when used by American owners to avoid responsibility under the Jones Act, they are the same when used to avoid responsibilities to labor. Currie, *supra* note 74, at 76. Thus, the conflicts concept of corporate domicile is about as sacred as the corporate personality. *Id.* at 86. Thus, where a state's interests are affected, it may apply its own law to a corporation it considers its own despite its foreign incorporation. *See generally Jones, supra* note 72.

214. *See text*, part III(B)(3) *supra*.

conduct has allegedly violated our labor laws. Traditionally, notions of personal jurisdiction are based on a party's presence within the territorial jurisdiction of a particular court.²¹⁵ However, the current view as expressed in *International Shoe Co. v. Washington*²¹⁶ is that the defendant must have sufficient contacts with the forum so that maintenance of a suit against him in that jurisdiction does not offend notions of fair play and substantial justice. With respect to the MNC and its American employees, nationality has been held to be a sufficient contact to justify the assertion by courts of personal jurisdiction, even though the MNC and its employees are located outside the country.²¹⁷

However, there may be a problem with respect to personal jurisdiction if a foreign union which represents the American employees is named as the defendant, unless it gives its consent to jurisdiction or waives any objection thereto.²¹⁸ A foreign union, like a foreign company, may have sufficient minimum contacts in the United States for jurisdictional purposes,²¹⁹ and such minimum contacts may be based upon its relationship with an affiliated American international union as its agent.²²⁰ Furthermore, even though the traditional requirement of minimum contacts must be established by activity within the forum, the case of *Scriptomatic, Inc. v. Agfa-Gevaert, Inc.*²²¹ held that personal jurisdiction may be based on the mere fact of "causing an effect in the state by an act done elsewhere." This, of course, is an extension of the doctrines set forth in *Alcoa* and the RESTATEMENT.²²² However, personal jurisdiction based on effects suffers from the same infirmity as subject matter jurisdiction based on effects. Since reliance therefore should not be placed on this theory to establish personal jurisdiction over an otherwise absent defendant with no "activity" type contacts in the forum, the requirement of personal jurisdiction may deter legal action.

D. VENUE

Unlike jurisdiction, venue does not relate to the inherent power of a court to hear a case. Rather, it relates only to the proper geographic location in which judicial authority may be exercised. Objections to

215. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE (1969).

216. 326 U.S. 310 (1945).

217. See notes 46-49 *supra* and accompanying text.

218. FED. R. CIV. P. 12(h)(1).

219. See *Hoffman Motors Corp. v. Alfa Romeo, S.p.A.*, 244 F. Supp. 70 (S.D.N.Y. 1965).

220. *Id.*

221. 1973-1 TRADE CAS. ¶ 74,594 (S.D.N.Y. 1973).

222. See note 51 *supra*.

venue are waived unless seasonably made and a party may consent to be sued in a district that would otherwise be an improper venue.²²³

Naturally, the district in which the plaintiff resides or transacts business may be the most convenient forum for it to initiate an action, but the general venue laws attempt to strike a fair balance between the competing interests of the parties.²²⁴ For example, if jurisdiction is founded solely upon diversity of citizenship, the case may be brought only in the judicial district where all plaintiffs or all defendants reside or in which the claim arose.²²⁵ However, where jurisdiction is founded on an overseas violation of federal labor laws by a foreign union rather than on diversity grounds, the above principle is inapplicable.²²⁶ The federal venue statute provides, however, that a defendant alien may be sued in any district, in which case such defendant has no protection against an inconvenient suit.²²⁷ In considering this provision in *Brunette Machine Works, Ltd. v. Kockum Industries, Inc.*,²²⁸ the Supreme Court affirmed the principle that the general venue laws will not govern a suit against a foreign defendant. Consequently, it appears that once personal jurisdiction over the foreign defendant is secured, the federal venue provisions will not create a further legal impediment to the extraterritorial application of the Labor Management Relations Act.

E. SERVICE OF PROCESS

In actions involving the application of the Labor Management Relations Act abroad, extraterritorial service of process may be required unless the defendant, or an agent thereof, resides in the district where the court sits. In either case, Rule 4 of the Federal Rules of Civil Procedure, which governs service of process in all civil suits in American federal district courts, provides that service may be effected under an applicable federal statute or under a long-arm statute. In addition, the Rule prescribes the procedure for service found in the foreign country.

Section 10 of the Labor Management Relations Act deals in part with

223. FED. R. CIV. P. 12(h).

224. 28 U.S.C. § 1391 (1970).

225. 28 U.S.C. § 1391(a) (1970).

226. Also inapplicable would be subsections (b), where jurisdiction is not founded solely on diversity of citizenship, venue lies in the judicial district where all defendants reside or where the claim arose, and (c), where a corporation can be sued in the judicial district where it is incorporated, licensed to do business or is doing business.

227. 28 U.S.C. § 1391(d) (1970).

228. 406 U.S. 706 (1970). See also *Vergarra v. Aeroflot "Soviet Airlines,"* 390 F. Supp. 1266 (D. Neb. 1975); *SCM Corp. v. Brother Int'l Corp.* 316 F. Supp. 1328 (S.D.N.Y. 1970); *Hoffman Motors Corp. v. Alfa Romeo, S.p.A.*, 244 F. Supp. 70 (S.D.N.Y. 1965).

the service of process.²²⁹ This Section empowers the Board: to issue and serve a complaint upon persons engaging in unfair labor practices; to petition a federal court of appeals or district court, within *any* circuit or district, to enforce a Board order and have such court cause notice of the filing of the petition to be served; and to petition any district court for appropriate temporary relief, injunctive relief, or restraining order and cause notice thereof to be served. In Section 11, the Act also stipulates that all process of any court, to which application may be made under the Act, may be served in the judicial district where the defendant required to be served resides or may be found.²³⁰ The statute further provides that service of legal process on an officer or agent of a labor organization shall constitute service upon the labor organization itself, thereby making it a party to the suit.²³¹

Cumulatively, these provisions assure that there are no practical territorial limits on service of process. Even if the foreign defendant has no agents which may be served within the United States, Rule 4(i) of the Federal Rules of Civil Procedure provides five ample means by which parties may be served with process in foreign countries.²³² As a result, service of process will also not create a substantial hindrance to the extraterritorial application of the Labor Management Relations Act.

229. 29 U.S.C. § 160 (1970).

230. 29 U.S.C. § 161(5) (1970). Section 10 states in a proviso:

Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members.

29 U.S.C. § 160(1) (1970).

231. 29 U.S.C. § 185(d) (1970).

232. FED R. CIV. P. 4(i) provides the following five alternative manners of service in the foreign country:

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

(B) as directed by the foreign authority in response to a letter rogatory, when service [in the case of either (A) or (B)] is reasonably calculated to give actual notice [a "letter rogatory" is a formal letter from the domestic court to the appropriate court of the foreign country requesting its aid in making service]; or

(C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or

(D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(E) as directed by order of the court.

F. DISCOVERY AND INVESTIGATION

Under the Labor Management Relations Act, extensive supervision and investigation is required for the prevention of unfair labor practices, the direction of elections, and the assurance of good faith negotiations and collective bargaining. For example, the Board must determine appropriate units, hold elections, regulate "good faith" collective bargaining, investigate unfair labor practice charges, issue charges and exercise other supervision and investigation over employers, employees and unions within its coverage.²³³ While the Board is given broad investigatory and discovery powers for the purpose of fulfilling its duties, there is no case law or authority dealing with the power of the Board to conduct investigation and discovery proceedings abroad. Furthermore, the Federal Rules of Civil Procedure, which provide methods of discovery for obtaining information located abroad, do not apply to administrative proceedings such as those conducted by the Board.

In addition, while the Board has power to issue subpoenas to require the attendance of witnesses and the production of evidence, such authority extends only to "any place in the United States."²³⁴ If applied literally, this provision would constitute a serious limitation on the exercise of extraterritorial jurisdiction.

Finally, even if discovery of documents located abroad was permissible under federal law, foreign countries, believing the exertion of discovery power by American courts exceeded the bounds imposed by principles of international law, may not allow their nationals to produce such documents.²³⁵ Under these circumstances, foreign jurisdictions may frustrate the extraterritorial application of the Labor Management Relations Act even when the American court maintains personal jurisdiction over the foreign defendant.

233. See NLRB Rules and Regulations, Series 8, 29 C.F.R. §§ 102.9-102.51, 102.60-102.80 (1971); NLRB Statements of Procedure, Series 8, 29 C.F.R. §§ 101.2-101.12, 101.17-101.21 (1971).

234. 29 U.S.C. § 161(1) (1970).

235. As a result of chauvinistic decrees entered by American courts against foreign firms allegedly engaged in antitrust conspiracies, two Canadian jurisdictions passed laws preventing discovery actions instigated in United States courts. In addition, Great Britain refused to enforce and the Netherlands protested the enforcement of decrees that prohibited conduct specifically permitted by their laws. These countries are by no means unique. See generally A. NEALE, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* 360-72 (2d ed. 1970); Fulgate, *An Overview of Antitrust Enforcement and the Multinational Corporation*, 8 J. INT'L L. & ECON. 1, 3 (1973). See also *United States v. First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968).

G. ENFORCEMENT OF JUDGMENTS

The extraterritorial application of the Labor Management Relations Act maintains some degree of significance only if methods exist to enforce judgments rendered pursuant to the terms of the Act. In the domestic setting, several methods are generally used to require compliance by defendants with judgments against them, *i.e.* attachment, garnishment, and contempt. In fact, the courts use the contempt power to enforce Board relief and decisions. However, although in Section 10(e) of the Labor Management Relations Act the Board has the power to petition any federal court of appeals for the enforcement of its orders,²³⁶ this power is irrelevant if the defendant involved is a foreign national residing abroad.

If a foreign defendant is involved, the United States Constitution offers no assistance to the plaintiff who secures judgment in this country and attempts to enforce such judgment by an action in another country. Rather, the plaintiff must rely on the concept of reciprocity wherein such foreign country will accord an American judgment effect if the United States would enforce the foreign country's judgments in a similar situation.

Presently, the great majority of the nations act in accordance with the reciprocity rule.²³⁷ However, the rule creates numerous problems for those seeking to enforce American judgments abroad. Generally, the courts in foreign countries have had difficulty weaving their way through the tangled and confusing web of federal and state decisions in the United States in trying to determine what effect the United States gives to their nations' judgments.²³⁸ As a result, although American courts have tended to grant conclusive effect to foreign judgments, the same treatment has not always been granted in return.²³⁹ On the whole, except where a specific treaty or convention exists between the United States and the foreign country, enforcement of American judgments abroad tends to be difficult and largely impractical.²⁴⁰

Furthermore, countries which generally abide by reciprocity principles frequently refuse to enforce foreign judgments that are either penal in nature or contrary to the public policy of the forum court,²⁴¹ and American labor relations judgments may often be viewed as falling

236. 29 U.S.C. § 160(e) (1970).

237. E. KINTNER & M. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 62-63 (1974).

238. *Id.*

239. *Id.*

240. *Id.* Of course, there is a possibility that the provisions of some FCN treaties will provide for recognition and enforcement of foreign judgments.

241. *Id.*

within this latter category. Similarly, some countries display a hesitancy to enforce judgments which promote the economic policies of a foreign legislator.²⁴² As a consequence of these disparate attitudes of foreign courts, it may be impossible to establish a uniform, enforceable policy of American labor relations abroad with respect to multinational corporations even if the Labor Management Relations Act is accorded extraterritorial application by the United States.

CONCLUSION

From the analysis, it is evident that principles of international law do not operate as direct constraints upon the extraterritorial application of the Labor Management Relations Act to American employees working on foreign soil for American multinational corporations. Furthermore, under the three primary methods of statutory analysis, one may infer that Congress intended that the Act receive such an application. However, due to the inherent nature of the international setting, practical obstacles, both legal and political, may preclude the furtherance of the underlying policies of the Act despite its extraterritorial application. Conflicting national conceptions of jurisdiction and the proper scope of discovery proceedings may undermine the prevention of unfair labor practices and impair the supervision of union elections conducted abroad. Furthermore, since the extraterritorial recognition of judgments is dependent primarily upon principles of sovereignty, comity and reciprocity, it seems unlikely that one could establish a uniform and enforceable American labor policy governing multinational corporations and their employees abroad through the mere extraterritorial application of the Labor Management Relations Act.

242. *Id.*