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[C]oming out of nowhere, international labor law has grabbed the attention of globalizing multinationals, the international labor movement, activists, newspapers, governments, and non-governmental diplomatic organizations (NGOs) the world over. In the process, international employment law morphed from an arcane backwater into a tinderbox that (quite literally) ignites violence in the world's streets. Today, it is little wonder that the outlook is indeed rosy for international employment law practitioners.

Donald C. Dowling, Jr., *The Practice of International Labor and Employment Law: Escort your Labor/Employment Clients into the Global Millennium*, 17 LAB. LAW. 1, 3 (2001).

A. INTRODUCTION

Imagine that you are an employment lawyer whose firm represents transnational corporations. Your client, a U.S. manufacturer of medical devices, plans to issue stock options to its executives. In return for the options, the client wants executives located in twenty-two national jurisdictions to sign covenants not to compete that will prevent them from working for the client's competitors for a certain period of time after their departure from the company.

Think about the ways in which this assignment is challenging. Noncompete agreements are devices increasingly used domestically by U.S. employers to prevent former employees from using the human capital they develop on the job on behalf of a competitor. In the United States, employers sometimes enforce these agreements by filing suit seeking to enjoin the postemployment activities of former employees. See Katherine V. W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 576-92 (2001). Yet some countries do not permit restrictive covenants. And of those that do, some restrict their use. Germany, for example, prohibits the agreements from running longer than two years, and requires the former employee be paid an amount equal to at least one-half of his or her last salary. See Chapter 9 on German employment law. In Canada, restrictive covenants are considered prima facie unenforceable. Only a limited range of employer interests are held to justify them. See Chapter 4 on Canadian employment law.

Your project is challenging, however, not simply because there are national differences in substantive law that must if possible be harmonized to meet the client's needs. There are also logistical and cultural barriers to be surmounted. How will you determine the

content of the law in other countries? If, like most employment lawyers, you are not licensed to practice in another national jurisdiction, who will advise your client and draft enforceable agreements? Unless your firm employs lawyers who are licensed to practice abroad, you will need to contact foreign law firms. Will lawyers in countries, where the use of restrictive covenants is prohibited or more limited than in the United States, balk at developing a strategy to achieve the client's goals? How might the foreign executives asked to sign the agreements react?

Although in general labor and employment law practice is a local endeavor, interest in the transnational aspects of workplace law has grown as lawyers increasingly encounter issues implicating the laws of other countries. In Western Europe, legal practitioners have grown accustomed to working on employment matters that span national borders. Practice is beginning to change in the United States as well. The example here is not a law professor's hypothetical. It was a project given to a large U.S. labor and employment law firm. See Susan Bisom-Rapp, *Exceeding Our Boundaries: Transnational Employment Law Practice and the Export of American Lawyering Styles to the Global Worksite*, 25 COMP. LAB. L. & POL'Y J. 257, 333-34 (2004) (hereinafter Bisom-Rapp, *Exceeding Our Boundaries*).

Moreover, workers' representatives share this interest, which extends to the possible uses of international law. In 2002 the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) filed a complaint against the United States with the International Labour Organization (ILO), a specialized agency of the United Nations (UN). The complaint challenged the U.S. Supreme Court's decision in *Hoffman Plastic* as violating U.S. obligations under the ILO's 1998 Declaration on Fundamental Principles and Rights at Work. In *Hoffman*, the Court held that back pay may not be awarded to undocumented workers illegally discharged for union activity. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002). The ILO's Committee on Freedom of Association (CFA) found that eliminating the back pay remedy leaves the government with insufficient tools for ensuring that undocumented workers are protected against antiunion discrimination. What might the AFL-CIO hope to accomplish with this victory for organized labor? The CFA's powers are limited to making recommendations and requesting follow-up reports when it finds a complaint meritorious. See International Labour Organization, Committee on Freedom of Association, Complaints against the Government of the United States Presented by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM), Case No. 2227, Report No. 332 (2003).

Changes in the economy and methods of production, trade liberalization, and improvements in technology and communication affect the workplace and the efficacy of the legal systems that were designed to regulate it. In order to represent a broad range of clients, and when necessary collaborate with lawyers from other countries, advocates for employers and employees alike benefit from a familiarity with labor and employment laws outside their borders. Acquaintance with international and foreign national law also promotes reflection on the effectiveness of regulatory systems back home, and can produce important insights about one's own workplace laws, an especially helpful exercise for policy makers.

This book surveys the legal scene by taking both an international and a comparative approach. It reviews materials and discusses the mechanisms for attempting to achieve global labor standards, matters that transcend national boundaries, and that we refer to as

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“international.” The book also considers and compares the laws and legal environments of several important national jurisdictions, an exercise in comparative workplace law. As you read through these materials, keep in mind some fundamental questions. Why do governments regulate the labor market? How do different nations conceptualize and attempt to secure core labor rights for workers? How is the success of those regulatory efforts to be measured? What is the best way to achieve humane working conditions for all employees?

To set the stage for considering these questions, this chapter first turns to the phenomenon known as globalization and its implications for labor and employment law and its practitioners. Having laid out the problem – globalization and its effects – we advance to a discussion of international and comparative law as possible tools for meeting its challenges. The chapter concludes with a brief primer on workplace law in the international realm.

Before beginning, a word about terminology is in order. In this book, as in American legal parlance more generally, the term “labor law” refers to the legal regulation of collective bargaining and labor relations, including laws structuring the relationship between unions and employers, and also that between unions and employees. “Employment law,” as used in this text, is defined more expansively than is typical in the United States, covering not only labor law but also legal regulation considered more individual in orientation, including laws prohibiting discrimination, the regulation of wages and hours, the safeguarding of pensions, and the individual contractual terms of employment. A term synonymous with employment law in this book is “workplace law,” an umbrella term encompassing both labor and individual employment law.

1. Globalization

Globalization is a buzzword often bandied about but less frequently defined. Professor Peter Thomas Muchlinski has identified five ways in which the term is used. The first is a geographical approach, which sees rapid communications and ease of travel as the basis for a new global order. Technological advances in this view facilitate geographic alterations of economic activity away from national economies toward, for example, the transnational production and distribution chains developed by transnational corporations (TNCs). A second definition centers on interpreting economic data, which show growing cross-border economic integration evidenced by increases in international trade, foreign direct investment (FDI), and cross-border financial flows. Muchlinski’s third approach, the business management approach, focuses on the rise and activities of global corporations, which are viewed as the vehicles for worldwide integration of trade and production. The sociological approach, a fourth conception of globalization, places the emphasis on the effects of global cultural exchange, and examines phenomena such as worldwide consumption patterns, globalization backlash in the form of nationalism, and the development of multiculturalism. Finally, the political science approach is characterized by discussions about the displacement by supranational structures of the nation-state as the primary site of political governance. Peter Thomas Muchlinski, *Globalisation and Legal Research*, 37 INT’L LAW. 221 (2003).

There is overlap between these globalization categories, and debate surrounding both category content and the effects of the phenomena the categories describe. In light of its close connection to employment matters, it seems reasonable first to examine the globalization of business management, looking particularly at TNCs.

a. *The Globalization of Business Management*

The UN defines a TNC as an enterprise controlling the assets of another entity outside its home economy, usually by owning at least 10 percent of the foreign enterprise. Most such corporations situate their headquarters within the United States, the European Union, or Japan. Of the top fifty nonfinancial TNCs, eleven are headquartered in the United States, Germany and France each claim eight, the United Kingdom is home to seven, and Japan is the base for four. Overall, there are sixty-four thousand TNCs involved in international production. These entities operate through 866,000 foreign affiliates. More than half the foreign affiliates are located in developing countries, with the greatest concentrations in Asia, Latin America, and the Caribbean. U.N. CONF. ON TRADE & DEV., DEVELOPMENT AND GLOBALIZATION 2004: FACTS AND FIGURES 40, 44, <http://globstat.unctad.org/html/index.html> (hereinafter DEVELOPMENT AND GLOBALIZATION 2004).

As a result of a wave of mergers and acquisitions over the last fifteen years, these mega-corporations have increased their share of economic activity along with their power and influence. Today TNCs generate over two-thirds of world trade. Bernhard G. Gunter & Rolph van der Hoeven, *The Social Dimensions of Globalization: A Review of the Literature* 18 (ILO working paper No. 24, 2004), www.ilo.org/public/english/bureau/integration/globaliz/publicat.htm. TNCs also employ tremendous numbers of people worldwide. In the early 1980s, only nineteen million employees worked for foreign affiliates. In 2002, foreign affiliates of TNCs employed fifty-three million people. DEVELOPMENT AND GLOBALIZATION 2004, at 44. Although this increase is significant, one should note that the numbers nevertheless represent a small percentage of the total global workforce.

To demonstrate how the presence of foreign affiliates affects national industries, Professor Roger Blanpain and researcher Michele Colucci recently recounted the penetration of such interests in Belgium's technology industry:

[T]he Americans have a very important piece of the cake. 25% of employment in the technological enterprises is in US hands. France is good for 13%, Germany and the Netherlands each for 11%. Japan employs 3.3% of the workforce.

ROGER BLANPAIN & MICHELE COLUCCI, THE GLOBALIZATION OF LABOUR STANDARDS: THE SOFT LAW TRACK 3 (2004).

As grateful as they may be for the creation of jobs, worker insecurity or a sense of a national "loss of control" may well accompany this state of affairs. Blanpain and Colucci observe that "decision-making power regarding many jobs in Belgium lies with far away headquarters." *Id.*

The numbers detailed here hint at a massive global trend: the rise over the last ten years of global production chains or international production sharing. Production under these systems is carved up and outsourced, sometimes to foreign affiliates but also to contractors and subcontractors located outside the producer's home territory. William Milberg, *The Changing Structure of International Trade Linked to Global Production Systems: What are the Policy Implications?* (ILO working paper No. 33, 2004), www.ilo.org/public/english/bureau/integration/globaliz/publicat.htm; Hilary K. Josephs, *Upstairs, Trade Law; Downstairs, Labor Law*, 33 GEO. WASH. INT'L L. REV. 849, 860 (2001). The industries in which global production predominates include high technology,

Cambridge University Press

978-0-52184785-8 - The Global Workplace: International and Comparative Employment Law - Cases and Materials

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Excerpt

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labor-intensive consumer goods, and even the service sector, as exemplified by foreign call centers and financial services offices.

b. Global Economic Integration

The growth of TNCs and new methods of production are both symptoms of and catalysts for global economic integration, a phenomenon associated with the creation and consolidation of a unified world economy. WILLIAM TWINING, *GLOBALISATION AND LEGAL THEORY* 4 (2000). The concept of a unified global economy implies much more than greater trade between nations. As Professor Brian Langille notes:

To get to the real phenomenon of globalization. . . . we must shift from a world in which not only goods, but services, ideas, money, markets, and production are truly global and mobile by virtue of advances in communication and transportation technologies. We must move from the model of *shallow* economic integration to a model of *deep* economic integration in which advancements in transportation and technology enable capital to see the whole world as its stage.

Brian A. Langille, *Seeking Post-Seattle Clarity*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION* 137, 143 (Joanne Conaghan, Richard Michael Fischl & Karl Klare, eds., 2002).

Law and policy play a great role in global economic integration. Deep connections between national economies could not be made in the absence of a hospitable legal and policy environment. Indeed, *neoliberalism*, an economic and political movement championing free markets that was embraced by most governments around the globe in the 1980s and 1990s, greatly facilitated significant “removal of government interference in financial markets, capital markets, and barriers to trade. . . .” JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 59 (2003). During this period, public policy analysis became dominated by pro-market economic theory that promised deregulation would provide worldwide opportunity for growth and development. The magnitude of global economic integration that took place in the wake of this movement can be appreciated by considering increases in trade, foreign direct investment, and large cross-border financial flows. Twenty years into the process, we are now positioned to evaluate the contentions of proponents of neoliberal strategy.

For example, the claim underpinning free trade, a linchpin of neoliberalism, is that the total economic pie for the world as a whole is larger with free trade than without. Potentially, all people could be better off in a world without trade barriers. Think of the advantages we gain from free trade as consumers. The blue jeans or consumer electronics we buy are less expensive when they are produced in a global free market than if each country created its own market for these products. With free trade, a huge purchaser of consumer goods, such as Wal-Mart, can search the globe for the lowest cost blue jeans or DVD players, thereby driving down the retail price for these items.

But does an opening of markets lead to a larger economic pie? Spurred by international, regional and national liberalization policies encouraging free markets, world trade has expanded significantly over the last twenty years. In 2002, 54 percent of the world’s output was globally traded, an increase from 31 percent in 1980. THE WORLD BANK GROUP, *WORLD DEVELOPMENT INDICATORS 2004* 303 (2004) (hereinafter *World Development Indicators 2004*), <http://www.worldbank.org/data/wdi2004/index.htm>. From 1980 to 2000, the value

of worldwide manufacturing exports tripled. WORLD COMM'N ON THE SOCIAL DIMENSION OF GLOBALIZATION, FACTS AND FIGURES (2002) (hereinafter FACTS AND FIGURES). Merchandise exports from all the world's countries totaled U.S.\$6.4 trillion in 2002. Service exports in 2002 were valued at U.S.\$1.6 trillion. DEVELOPMENT AND GLOBALIZATION 2004, at 48.

Despite this impressive economic activity, the expansion in trade is unevenly distributed. Two-thirds of the merchandise exports in 2002 and close to three-fourths of the service exports were from the affluent nations of the developed world. *Id.* Moreover, an uneven growth pattern is also evident within the developing world. For example, although developing countries increased their share of manufacturing exports from 23 percent in 1970 to 38 percent in 1997, most of the growth is due to the performance of just thirteen economies. Although some East Asian and Latin American economies saw a significant increase in exports, most developing nations did not. DEVELOPMENT AND GLOBALIZATION 2004, at 50. Notwithstanding the implementation of trade liberalization programs, over the last two decades most of what the UN terms Least Developed Countries (LDCs) sustained a proportional decline in their share of global markets. WORLD COMM'N ON THE SOC. DIMENSION OF GLOBALIZATION, A FAIR GLOBALIZATION: CREATING OPPORTUNITIES FOR ALL 25 (2004), <http://www.commissiononglobalization.org/homelinks/AFairGlobalization.pdf> (hereinafter A Fair Globalization).

Another sign and catalyst of global economic integration is foreign direct investment (FDI), which, with the exception of brief declines in the early 1980s and early 1990s, has grown steadily for the last thirty years. FDI occurs when an individual or business entity from one national economy obtains an interest in and influence over an enterprise in another national economy. That the foreign investor maintains significant control over management of the entity invested in is a notable aspect of FDI. Cross-border-mergers and acquisitions make up a portion of global FDI. DEVELOPMENT AND GLOBALIZATION 2004, at 32. Much of this investment is tied to the globalization of manufacturing production processes and services. A Fair Globalization, at 33.

Like trade, FDI has been enabled by liberalization measures adopted at the international, regional, and national levels. One is hard-pressed to identify countries that do not wish to lure foreign investment. From 1991 to 2002, 95 percent of the amendments made to FDI laws by 165 countries made it easier for FDI to occur. DEVELOPMENT AND GLOBALIZATION 2004, at 36. Despite an improving legal environment for FDI overall, three-quarters of the foreign investment takes place in wealthy developed countries. Most of the FDI in the developing countries touches just ten nations, including China, Brazil, Mexico, Singapore, and Argentina. In 2000, the percentage of FDI inflows in African nations was less than 1 percent. FACTS AND FIGURES, at 1.

There has been a recent dropoff in FDI. Global FDI, which was valued at U.S.\$202 billion in 1990, peaked in 2000 at U.S.\$1.5 trillion. In 2002, it had dropped to U.S.\$631 billion. World Development Indicators 2004, at 304. Reasons cited for the drop include weak economic growth, falling stock markets, a decrease in cross-border mergers and acquisitions, and the completion of privatization in a number of countries. DEVELOPMENT AND GLOBALIZATION 2004, at 32. Whether the dropoff will persist is unclear. Nonetheless, FDI remains a major indicator of the extent to which various national economies are integrated.

In addition to FDI, other forms of private financial flows are associated with growing international economic integration. These resources include foreign investments in

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national equity markets, foreign bank lending, bonds and trade-related lending by foreign private creditors, and short-term speculative foreign investment into currency markets. *A Fair Globalization*, at 29.

Beginning in the late 1980s, the trend toward greater liberalization of financial markets made possible significant capital mobility, and greatly increased the influence of private banks, hedge funds, equity funds, and rating agencies over the economies of developing nations. *Id.* at 34. These flows are volatile and subject to speculation; the rapid outflow of such resources can wreak havoc on an emerging economy, leaving unemployment and poverty in its wake. Moreover, like FDI and trade, cross-border financial flows reach only a few emerging market economies; most developing nations and the LDCs are largely left out of the private global financial system. *Id.* at 35.

Some of the data referenced above appeared in a 2004 report issued by the ILO's World Commission on the Social Dimension on Globalization. The Commission was established to review in addition to economic growth, changes in employment, income distribution, and poverty reduction over the roughly twenty-year period in which neoliberal economic policy came to dominate public policy and law reform. The following excerpt, by Susan Hayter, summarizes the Commission's findings.

SUSAN HAYTER, THE SOCIAL DIMENSION OF GLOBALIZATION: STRIKING THE BALANCE

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A startling feature of the global economy is that since 1990, aggregate global GDP [gross domestic product] growth has in fact been slower than previous decades. A few points about the trends behind this picture of aggregate global GDP growth deserve mentioning:

First, this growth has been uneven across countries. Industrialized countries with a strong initial economic base, abundance of capital, skill and technological know-how were well placed to benefit from globalization. Importantly, countries, with large populations such as China and India experienced significant improvements in economic growth. However, few developing countries were able to benefit from the fruits of global economic integration and some suffered negative growth.

Second, the income gap between the richest and poorest countries has significantly increased.

Third, as evidenced by the Asian financial crisis, countries with remarkable past records of economic growth can suffer dramatic reversals and heavy social costs. . . .

Moving beyond economic performance. . . . [a]gain there were significant benefits for some countries and many people. Increased trade and FDI flows did lead to economic growth in some countries and new jobs in certain sectors, even good quality jobs in, for example, the overseas affiliates of multinationals. However, as the Commission's report notes, it is not possible to make broad generalizations about the impact of FDI and trade on employment and incomes.

A growing body of evidence shows that the impact has been mixed. For example, a set of recent ILO studies on the impact of trade on employment and wages in the manufacturing sector show that in the three Asian economies studied, trade growth had favourable impacts on employment and wages in manufacturing. By contrast, in Latin American countries such as Brazil and Mexico, employment levels have either fallen, or there has been no significant

impact on employment. Real wages of unskilled workers declined and the wage differential between skilled and unskilled workers increased significantly. . . .

The picture on income inequality has been mixed. While it increased in some countries in both the industrialized and developing world, the extent to which globalization is to blame for this remains an open question and there is significant debate among economists. However, what is startling is the increase in the concentration of wealth and growing share of gross income that goes to the top 1 percent of income earners in countries such as the United States, the United Kingdom and Canada. These high earnings are typically linked to compensation paid by MNEs [multinational enterprises] and so the increased concentration in wealth can most likely be attributed to globalization.

Notes

1. What are the implications of the report's conclusions for national, regional and international policy making? Should governments of the world "stay the course" and hope that globalization's rising tide will raise all boats? What are the dangers associated with maintaining the status quo?
2. How can a developing nation that has not shared in the fruits of globalization get more of its benefits? Must it engage in a "race to the bottom" by lowering its labor standards in order to gain economic growth? Should it instead invest in infrastructures such as education and health services, to produce the kind of workers TNCs are looking for? Must it forego taxing foreign direct investment in order to attract it?

c. Globalization and Legal Regulation

That globalization produces economic effects is beyond dispute. What about globalization's impact on labor and employment law? One of the most common observations on this subject is that globalization makes it harder for nation-states to regulate their labor markets through protective laws. Professor Katherine Van Wezel Stone describes the phenomenon this way:

[G]lobalization encourages regulatory competition. Regulatory competition occurs when nations compete for business by using lower labor standards. Regulatory competition leads nonlabor groups to oppose labor regulation on the ground that business flight hurts them. Thus, regulatory competition could trigger a downward spiral: nations compete with each other for lower labor standards, while labor loses its historic allies at the domestic level, rendering labor powerless to resist.

Katherine Van Wezel Stone, *To the Yukon and Beyond: Local Laborers in a Global Labor Market* 3 J. SMALL & EMERGING BUS. L. 93, 96 (1999).

Professor Stone's analysis implies that there is tension between a country's desire to attract foreign direct investment (or retain domestic investment) and its ability to maintain laws guaranteeing just relations at work. Is this so? Logically, the threat of capital flight might in theory affect the state's willingness to protect its workers. Patrick Macklem, *Labour Law Beyond Borders* 5 J. INT'L ECON. L. 605 (2002). To achieve business friendly environments, countries could fail to revise outdated labor and employment laws or adopt

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laws antithetical to workers' interests. Bob Hepple, *Introduction*, in SOCIAL AND LABOUR RIGHTS IN A GLOBAL CONTEXT 14 (Bob Hepple, ed., 2002). As Professor Harry Arthurs puts it: "The least that can be said is that few, if any, national governments in the industrialized west have concluded that the strengthening of collective labour laws is the best strategy for enhancing their global competitiveness." Harry W. Arthurs, *The Collective Labour Law of a Global Economy*, in LABOUR LAW AND INDUSTRIAL RELATIONS AT THE TURN OF THE CENTURY, 143, 154 (Chris Engels & Manfred Weiss, eds., 1998) (hereinafter Arthurs, *Collective Labour Law*).

One outspoken advocate of globalization and free trade takes issue with this description of how and why countries adopt or make changes in workplace legislation. Professor Jagdish Bhagwati denies that regulatory competition was a causal factor in the movement toward deregulation that began in the United States in the 1980s. Instead, politicians' use of competitive disadvantage rhetoric to justify deregulation was merely a case of political expediency:

[I]f you wished to deregulate for reasons that had nothing to do with international competition (e.g., if cost-benefit analysis implied there was too much regulation, or if there was an ideological preference for deregulation), the smart thing nonetheless was to say that you were suffering from competition from rivals elsewhere who were less regulated.

JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 128 (2004) (hereinafter Bhagwati, IN DEFENSE OF GLOBALIZATION).

Bhagwati argues that there has been no "race to the bottom" in the United States because the economic pressures from globalization are not significant enough to reverse the gains in labor standards made and continually defended by unions, the Democratic Party, and pro-regulatory groups in general. In fact, he maintains that the pressure runs in the other direction toward a "race to the top." Organized labor in developed countries, fearing the undermining of labor standards at home, agitates for raising labor standards in poor countries. *Id.* at 131. Professor Bhagwati is correct that there are such campaigns aimed at developing nations by unions and other nongovernmental organizations (NGOs). How might developing nations react to demands that they give up their comparative advantage in lower labor costs?

The empirical evidence on whether countries do or can attract and retain investment by downgrading or failing to enforce labor and employment law is controversial and mixed. The Organisation for Economic Cooperation and Development (OECD), an intergovernmental policy forum for discussion and research on globalization, in 1996 produced a groundbreaking study on trade, labor standards, and employment. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, TRADE, EMPLOYMENT AND LABOUR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE (1996). Both that study and a subsequent policy brief found that in general, "countries where core labour standards are not respected continue to receive a very small share of global investment flows." ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, INTERNATIONAL TRADE AND CORE LABOUR STANDARDS 3 (2000), <http://www.oecd.org/dataoecd/2/36/1917944.pdf>. An exception to that conclusion is the case of China. *Id.* Moreover, research indicates that some non-OECD countries create export-processing zones (EPZs) that are exempt from national workplace law in the hope of

luring investment from developed countries. *Id.* Working conditions in some EPZs are notoriously oppressive. HILARY K. JOSEPHS, *LABOR LAW IN CHINA* 111 (2d ed. 2003).

There is some evidence that U.S. TNCs' production location decisions are in fact influenced in part by industrial relations environments and wage rates, factors that are distinct from but related to workplace law. One recent study found that U.S. TNCs prefer to locate in countries with decentralized bargaining and few restrictions on layoffs. U.S. TNCs also prefer to locate in low-wage countries. Mario F. Bognanno, Michael P. Keane & Donghoon Yang, *The Influence of Wages and Industrial Relations Environments on the Production Location Decisions of U.S. Multinational Corporations*, 58 *INDUS. & LAB. REL. REV.* 171 (2005). As noted, it is clear that many low-wage countries are not able to attract FDI. What other factors might determine TNCs' location decisions?

Professor Brian Langille observes that whether TNCs are actually lured to countries that actively downgrade or undermine their employment laws is really beside the point. Empirical evidence aside, international competitiveness is an important part of political debates about labor law reform. In Canada, for example, labor law reform efforts in Ontario in the 1990s were driven by discussions of the need to attract foreign investment. Brian A. Langille, *Global Competition and Canadian Labor Law Reform: Rhetoric and Reality*, in *GLOBAL COMPETITION AND THE AMERICAN EMPLOYMENT LANDSCAPE: AS WE ENTER THE 21ST CENTURY* 621–43 (Samuel Estreicher, ed., 2000). Unlike Professor Bhagwati, who sees such rhetoric as relatively inconsequential, Langille argues that “it is not actual divestment or investment which is the real key; it is the credible threat of such actions” that can drive policy discussion and outcome. Brian A. Langille, *Eight Ways to Think About International Labour Standards*, 31 *J. WORLD TRADE* 27, 43 (1997).

Thus far our discussion begs an important question: Why do nation states regulate the employment relation? Many scholars and policy makers fret about the effectiveness of legal regulation in the face of globalization. Such concern makes little sense, however, if the market produces optimal outcomes. With these points in mind, it makes sense to pause and consider why governments adopt labor and employment laws.

The answer to this foundational question may vary depending on the national jurisdiction one considers. Most continental European policy makers would no doubt find sufficient justification for regulation in the inherent inequality between employers and employees. Lord Wedderburn, *Common Law, Labour Law, Global Law*, in *SOCIAL AND LABOUR RIGHTS IN A GLOBAL CONTEXT* 27 (Bob Hepple, ed., 2002). Some Anglo-Saxon commentators, by contrast, would find unequal power relations as a necessary but insufficient rationale for placing limitations on the employment relation. *Id.* The adherents of this school would in addition require demonstration of economic market failures or vastly skewed distributive outcomes before formal law could be brought to bear on the workplace. *Id.*

A look at employment regulation in the United States serves as an example of the latter approach. U.S. law historically did not recognize the potential for abuse in employment relationships. The 1935 Wagner Act, organized labor's Magna Carta, takes a step toward acknowledging workplace reality by referencing the disparity in bargaining power between employers and employees. Rather than base the statute on a conception of social justice, however, Congress tied its observations on inequality to economic concerns. Moved by the very real and practical need to ensure the constitutionality of the legislation, Congress passed the Wagner Act by invoking the Commerce Clause of the U.S. Constitution, and referencing the goal of reducing strikes and industrial unrest. Lance Compa, *The ILO*