COMMENT

Accommodating Labor and Community Interests in Mass Dismissals: A Transnational Approach

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American industry has witnessed a dramatic increase in the number of plant closings and other business decisions leading to mass dismissals of American workers. Little has been done at either the state or federal level to meet the needs of those affected. This Comment analyzes the developments in American law regarding the problem of mass dismissals and discusses the impact of marketplace globalization on that process. The authors conclude that the developing concepts of "transnational" labor relations may provide a basis from which to derive solutions to the problem. They explore the merits of existing transnational instruments concerning mass dismissals, and the desirability of incorporating them into national law on a multilateral basis.

INTRODUCTION ................................................. 452

I. THE CURRENT STATE OF PROVISIONS GOVERNING MASS DISMISSALS IN THE UNITED STATES .............. 456
   A. The National Labor Relations Act and the State of Collective Bargaining ..................... 456
      1. The Duty to Bargain .................................. 457
         a. Congressional Intent and Early Interpretations of the Duty to Bargain .................. 458
         b. Departure from Congressional Intent: Limiting the Duty to Bargain ................. 459
            (1) The Fibreboard Line: Effectuating the Purposes of the Act ......................... 460
            (2) Rejecting Fibreboard Analysis ............... 461

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### INTRODUCTION

Plant closings and other business decisions resulting in mass dismissals of workers are a problem of enormous proportion in the United States.¹ Millions of American jobs have been lost in recent years as a

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¹ When all of the principal ways capital is moved are accounted for, between 32 and 38 million jobs were lost in the 1970's. B. BLUESTONE & B. HARRISON, THE DEINDUSTRIALIZATION OF AMERICA 9 (1984). That includes much more than the runaway shop—the most dramatic form of capital shift—which accounted for less than one million of the jobs lost. Id. at 25. It includes
result of such decisions.2 Many more will be lost if, as predicted, the underlying forces responsible for the closings persist.3 In many cases the dismissals have been, and continue to be, carried out with apparent indifference toward the interests of those personally affected.4 How government intervention in the nation’s labor market could be secured to temper that indifference is the subject of this Comment.

Substantial interests compete when management considers a major business change which could affect the employment of a large number of workers. Management’s interests are clear and, as will be shown, have been controlling in the development of American policy. Owners and managers of capital have a strong interest in ensuring that the markets in which their capital is put to work operate free of government dictated forces. Such freedom from government restraint on capital flow has been described as “basic to a truly free society.”5 Similarly, employers may fairly claim the right to negotiate terms of employment that permit them maximum flexibility to alter the size of their workforce as needed.6

The competing interests of those who are adversely affected by management control over capital and employment are frequently ignored, however. A company decision to restructure operations and dismiss large numbers of workers often produces long-term unemployment7 which has costs extending well beyond lost wages and foregone produc-
tivity. Workers who have invested years of their working lives in the company lose accumulated seniority, pension and benefit rights, and the value of skills not conveniently marketable to other employers. In addition, dismissed workers and their families frequently suffer serious physical and emotional health problems.

Broader and often opposing societal interests are also implicated in business decisions which create mass dismissals of workers. Impeding the competitive market processes may divert resources from those firms which are most cost-effective and best able to meet consumer demand. Such market disruption not only disappoints consumers but also hampers competitiveness and the growth of the economy as a whole. However, the loss of revenues which often follow from the unregulated elimination of jobs and business investment may bring entire cities and towns to the "brink of bankruptcy." Plant closings can also destroy communities by increasing the incidence of drug and alcohol abuse, spousal and child abuse and criminal conduct.

The private efforts of labor and management could do much toward reaching the needed accommodation of these disparate interests. If, for example, advance notification of the contemplated decision were given, the proposal of measures such as reduced overtime, temporary reduction of hours worked, retraining of employees for other areas of the business and temporary wage concessions might alter the basis for the decision and avert dismissals. In the event that the decision was nevertheless deemed so crucial to productive gain that it needed to be made, its adverse effects upon employment stability could be minimized by early no-

8. Id. at 11. The authors provide a detailed analysis of these costs. See id. at chs. 1 and 3; see also Rhine, Business Closings and Their Effects on Employees—Adaptation of the Tort of Wrongful Discharge, 8 INDUS. REL. L.J. 362, 363-68 (1986); Note, Advance Notice of Plant Closings: Toward National Legislation, 14 U. Mich. J.L. Ref. 283, 285-86 (1981).


11. R. MCKENZIE, supra note 5, at 100.

12. TASK FORCE REPORT, supra note 3, at 17.

13. B. BLUESTONE & B. HARRISON, supra note 1, at 11. See also Note, supra note 8, at 287-88, explaining the ripple effects a plant closing may have on the surrounding community:

Local businesses lose profits because they depend on the plant and its workers to buy their goods and services. Their lost profits in turn cause more lost jobs. As people leave to find work elsewhere, property values decline. All of these events . . . cause the community's tax revenues to decline. The lost revenues, plus the increased public expenditures for terminated workers, lead to increased tax rates or reduced public services for all community residents. Moreover, the community may lose the spirit that holds it together.

Id. at 287 (citations omitted).

14. Rhine, supra note 8, at 367-68.

15. The benefits of advance notice and other "early warning systems" are described in B. BLUESTONE & B. HARRISON, supra note 1, at 242-43. See generally U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, PLANT CLOSING: ADVANCE NOTICE AND RAPID RESPONSE—SPECIAL REPORT, OTA-ITE-321 (1986) [hereinafter OTA SPECIAL REPORT].
tification and provisions for the orderly selection of employees to be terminated, staggered dismissals, paid or unpaid time off to seek alternative employment prior to termination, the retraining of employees for employment in other sectors of the economy and various forms of income protection.\textsuperscript{16}

Absent government intervention in the labor market, however, it is almost certain that few such efforts will be made and that managerial decisions will continue to be issued with only secondary regard to their dramatic social consequences.\textsuperscript{17} Recognition of the private sector's unwillingness to adequately account for worker and societal interest in maintaining stable employment was one of the main factors which led Congress to enact the National Labor Relations Act.\textsuperscript{18}

Substantial disagreement remains, however, over the propriety of government intervention directed toward working an accommodation of the competing interests which arise in connection with mass dismissals.\textsuperscript{19}

This Comment begins by describing the success opponents of government intervention have enjoyed. Transformations within the law of collective bargaining under the National Labor Relations Act are first analyzed and the provisions relating to mass dismissals in current collective bargaining agreements surveyed. The scant federal legislative and regulatory provisions applicable to both union and nonunion workers are then discussed. Part I concludes by examining how state legislatures have also failed to address the problem adequately.\textsuperscript{20}

Having described the inactivity of American lawmakers in the area of mass dismissal legislation, Part II turns to a discussion of the possible reasons for that inactivity. In this Part, the focus is upon the significance of the globalization of the marketplace. While this Comment does not attempt a complete economic analysis, the evidence it assembles is at least sufficient to suggest that the plant closing problem is closely tied to the worldwide change in the marketplace. This transformation is itself briefly traced and the consequent pressures on law and policymakers in the United States and abroad considered. Part II closes with an analysis of the role these pressures play in the theory behind the existing international or "transnational" approaches which have been developed to con-

\textsuperscript{16} OTA Special Report, supra note 15.

\textsuperscript{17} B. Bluestone \& B. Harrison, supra note 1, at 51.

\textsuperscript{18} J. Getman, 1983 LAB. REL. Y.B. (BNA) 75; see also Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 Harv. L. Rev. 1769, 1822-23 (1983).

\textsuperscript{19} Compare B. Bluestone \& B. Harrison, supra note 1, with R. McKenzie, supra note 5. See also OTA Special Report, supra note 5, at 1-4 (summary of the opposing arguments regarding mandatory advance notice).

\textsuperscript{20} This Comment does not detail the relatively recent trend toward using litigation to prevent and punish abuses in the plant closing process. For an analysis of that trend, see Arthurs, Citizens Sue to Forestall Plant Closings, Legal Times, Jan. 14, 1985, at 1. It should be noted, however, that such suits have met with little success. Id.
front the problems created by closings of multinational corporation subsidiaries.

Finally, in Part III, the premise that an international solution is needed for a problem created by international economic pressures is evaluated. The pertinent existing transnational instruments, enacted by the International Labour Organization, are first described as are their mechanisms for adoption. Because virtually all of the industrialized capitalist countries are members of this organization, the ultimate question raised is whether those mechanisms should be employed and, if so, how. This Comment concludes by arguing that they should be employed and that the coordinated efforts of all member nations are needed. Consideration is given to the question of how such coordination might be possible. The ultimate aim of this Comment is to focus attention on the relationship between the changing world marketplace and the resistance to plant closing legislation so that the potential benefits of a transnational approach to such legislation will be fully realized.

I
THE CURRENT STATE OF PROVISIONS GOVERNING MASS DISMISSALS IN THE UNITED STATES

At each level and in each branch of government in the United States, there has been a demonstrated unwillingness to impose obligations upon management to ensure that consideration is given the broader interests at stake when a business decision which could produce mass dismissals is contemplated. The federal law of collective bargaining is addressed first. Once embraced as the primary mechanism for working such an accommodation, it has since been largely abandoned.

A. The National Labor Relations Act and the State of Collective Bargaining

The importance of collective bargaining under the National Labor Relations Act (the "Act")21 has vastly diminished for American workers faced with management decisions which could produce mass dismissals. The most obvious reason is that the unionized sector of the workforce, already small, is shrinking.22 Of perhaps equal import is that where workers are represented by unions, the collective bargaining framework is no longer an effective means to protect them from the consequences of

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22. About 25% of the workforce were union members in 1980. See DIRECTORY OF U.S. LABOR ORGANIZATIONS, 1982-1983 EDITION 44 (C. Gifford ed. 1982). That rate has since dropped to around 18%. Id. at 46. The percentage of employees that are covered by collective bargaining agreements is only slightly higher. Id. See also UNION MEMBERSHIP SURVEY, SUMMARY OF DEVELOPMENTS, 117 LAB. REL. REP. (BNA) No. 9, at 1 (Oct. 1, 1984) (estimating rate of union membership at 17.9%).
such decisions. The employer's duty to bargain about decisions which lead to mass dismissals has been narrowed in scope. In addition, few provisions in collectively bargained agreements limit managerial discretion to effect such decisions.

1. The Duty to Bargain

The duty to bargain collectively "in good faith with respect to wages, hours, and other terms and conditions of employment" is found in sections 8(a)(5) and 8(d) of the Act. That duty has two primary aspects: the duty to bargain about certain subjects in contract negotiations and the derivative duty to bargain before taking action affecting one of those subjects. Although the standards for interpreting those sections have been developed almost exclusively in cases involving "unilateral action," they apply equally in contract bargaining. However, it is in the context of unilateral action that the duty has the greatest significance, for its application may prevent job loss and its breach may result in reinstatement of the aggrieved worker to her former job with whatever backpay is owing.

The duty to bargain about important decisions before taking unilateral action once represented a major source of protection for the interests of unionized workers because it obligated management to bargain in good faith with the workers' representatives before taking certain actions and to provide information relevant to those negotiations. Because the National Labor Relations Board ("Board") and courts eliminated much of that protection, some scholars have concluded that they have become "effectively hostile" to establishing a comprehensive system of collective bargaining and have come to rely on little more than their preference for the employers' interests in defining the duties imposed under the Act. Congressional unwillingness to repair the damage opens the legis-

27. Whether they should be applied equally is a separate question we do not here attempt to resolve. We only note that the duty to bargain prior to taking unilateral action should, perhaps, be somewhat narrower because of concerns about management's need to act quickly and decisively. See infra text accompanying notes 66-73 (discussing presumption analysis—an approach which accommodates those concerns).
29. Id. at 606-29.
relative branch to similar criticism.

a. Congressional Intent and Early Interpretations of the Duty to Bargain

In supporting mandatory bargaining about the type of decisions which generally lead to mass dismissals, early interpretations of the duty to bargain adhered closely to Congress' broader intent in enacting the Act. It was Congress' stated design to promote collective bargaining on subjects that are of such importance to labor and management that they may be the source of substantial dispute. In *Fibreboard Paper Products Corp. v. NLRB*, the Supreme Court relied upon this stated intent in determining whether an employer has a duty to bargain about a decision to replace union employees by subcontracting for nonunion replacements. The Court concluded:

To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace.

While the Court's conclusion was expressly limited to the specific form of contracting at issue, the language upon which that conclusion was based provided broad support for a decisional framework within which the interests of those to be directly affected by the decision would be heard and accounted for.

The Board demonstrated its complete support of the principles enunciated in *Fibreboard* soon after that decision was issued. In *Westinghouse Electric Corp.*, the Board fashioned a five factor test for determining when a particular decision to subcontract work would not be subject to mandatory bargaining under the Act. Whether the decision would work a detriment upon bargaining unit employees was among those fac-

34. Id. at 204-05.
35. Id. at 210.
36. Id.
37. See Brockway Motor Trucks v. NLRB, 582 F.2d 720, 734 (3d Cir. 1978) (The theory of collective bargaining embodied in the Act, as articulated by the *Fibreboard* Court, is to provide a framework through which the interests of the participants to the bargaining relationship as well those of the nation as a whole are served.).
38. 150 N.L.R.B. 1574 (1965).
39. The *Westinghouse* factors were: (1) purely economic basis for the decision; (2) customary for employer to subcontract various kinds of work; (3) no substantial variance from established past practice; (4) no significant detriment to employees in the bargaining unit; and (5) union opportunity to bargain about change in existing subcontracting practices at prior regular negotiations. Id.
tors and, as the test was subsequently applied, generally was found to be the most important.

The Board and courts applied a similar analysis to an employer's duty to bargain about decisions to close part of an enterprise, another decision which typically results in the mass dismissal of workers. In *Ozark Trailers, Inc.*, the Board squarely addressed the question of whether a duty to bargain applies where a partial closing, rather than a decision to subcontract, is at issue. The Board, relying heavily upon the language in *Fibreboard*, concluded:

> The same may be said about a management decision to terminate a portion of the enterprise—termination, just as contracting out, is a problem of vital concern to both labor and management, and it would promote the fundamental purpose of the Act to bring that problem within the collective bargaining framework set out in the Act.

b. *Departure from Congressional Intent: Limiting the Duty to Bargain*

The source of the restrictions the Board and courts currently place on the duty to bargain is ironically the *Fibreboard* decision itself. The *Fibreboard* opinion, though clearly finding the importance of management's decision to those affected to be controlling in its analysis, was soon read as establishing a role for managerial freedoms in the analysis of the scope of the duty. That reading provided the "support" not found in the Act itself that those seeking to confine the scope needed.

The basis for that reading of *Fibreboard* is tenuous indeed. The *Fibreboard* majority merely noted, in dictum, that its holding did not violate significant managerial freedoms. It was because the majority gave so little weight to such considerations that Justice Stewart filed a concurring opinion which stated the view that impact on managerial freedoms is an integral part of the test for determining mandatory subjects for bargaining. In that concurring opinion, Justice Stewart struggled to give focus to managerial freedom while conceding that "the question of whether there is to be a job" is indeed a "condition of employment" under the language and meaning of section 8(d). Justice

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40. *See id.*
41. *See, e.g., Equitable Gas Co. v. NLRB, 637 F.2d 980, 989 (3d Cir. 1981); Olinkraft, Inc. v. NLRB, 666 F.2d 302, 306 (5th Cir. 1982). See also C. MORRIS, supra note 28, at 825.
42. 161 N.L.R.B. 561 (1966).
43. *Id.* at 567.
44. 379 U.S. at 213.
45. *Id.* at 217 (Stewart, J., concurring). Despite his objection to the majority's refusal to incorporate managerial freedoms in its holding, Justice Stewart concurred because the subcontracting at issue, which involved simply replacing one set of employees with another, involved no change in operations or capital investment.
46. *Id.* at 222 (recognizing NLRB v. Bachelder, 120 F.2d 574 (7th Cir. 1941); National Lico-
Stewart simply carved out a wholesale exception for decisions that go to "the core of entrepreneurial control"\(^{47}\) without reconciling that exception with the broadly stated purposes of the Act. Nevertheless, although raised only in dictum and in a somewhat strained concurring opinion, the question of the extent to which managerial freedoms should weigh against requiring bargaining divided the Board and lower courts.

\((1)\) \textit{The Fibreboard Line: Effectuating the Purposes of the Act}

As noted above, the Board adhered for some time to the \textit{Fibreboard} Court's analysis, which strove to effectuate the Act's purpose of promoting bargaining over subjects which may be the source of substantial dispute. In its \textit{Westinghouse} decision,\(^{48}\) for example, the Board rejected the notion that managerial freedoms need be considered in determining whether a decision to subcontract work would be a mandatory subject of bargaining. The Board did not list changes in capital or business operations among the factors to be considered when excepting a decision to subcontract from mandatory bargaining.

In \textit{Ozark Trailers},\(^{49}\) the Board broadly denied the significance of managerial freedoms where the decision at issue was one that vitally concerned labor. The Board recognized, but rejected, previous circuit court opinions holding that whether an employer is obligated to bargain with its union before deciding to subcontract work\(^{50}\) or partially close its business\(^{51}\) turns upon the further question of whether the action to be taken would involve capital investment or a change in basic operations.\(^{52}\) The Board concluded that, while decisions involving "major" or "basic" changes in the nature of the employer's business are of significance for the employer, they may also be of profound significance for employees affected by a change in the employment relationship and, therefore, must be a mandatory subject of bargaining.\(^{53}\) The Fifth and Sixth Circuits
subsequently adopted this same view in the context of decisions leading to partial closings.\textsuperscript{54}

(2) \textit{Rejecting Fibreboard Analysis}

Neither the courts nor the Board, however, demonstrated a firm and uniform commitment to interpreting the duty to bargain in light of congressional intent. The Board departed from the purposive analysis of \textit{Fibreboard} in \textit{General Motors Corp.}\textsuperscript{55} where a divided Board first distinguished \textit{Fibreboard} by characterizing the franchising of an employer's retail outlet as a sale rather than a subcontracting situation.\textsuperscript{56} Then, relying on Justice Stewart's \textit{Fibreboard} concurrence, the majority held that bargaining over the franchise should not be mandatory because an "elemental managerial decision" lying very much at "the core of entrepreneurial control" was at issue.\textsuperscript{57}

The dissenting members pointed out that "the concurrence in \textit{Fibreboard} and the [majority's] dicta with respect to managerial decisions are not the law of the case."\textsuperscript{58} The dissenters would, therefore, have relied on the principles embodied in the \textit{Fibreboard} holding as set forth in \textit{Ozark Trailers}.\textsuperscript{59} Nevertheless, subsequent Board decisions incorporated the notion of managerial freedoms in a form similar to that expressed by the \textit{General Motors} majority.\textsuperscript{60}
While at least two circuits interpreted the duty to bargain in a manner consistent with the *Fibreboard* Court's emphasis on congressional intent,61 most did not.62 In *Local 777, Democratic Union Organizing Committee v. NLRB*,63 the District of Columbia Circuit issued what was perhaps the clearest statement of the position many courts were taking with respect to interpreting the scope of the duty to bargain. There, the court explained that an employer may not be under a duty to bargain about a decision to convert his existing practice of paying taxi drivers by commission to a leasing arrangement—a form of subcontracting affecting the size of the bargaining unit.64 The court stated that, even if the decision were to have "profound effects" on "conditions of employment," and involve only a "small, but not insubstantial portion of the employer's business operation," bargaining would not be required by the Act so long as the decision could "be considered 'sufficiently fundamental' to be within entrepreneurial discretion."65

c. A Short-Lived Accommodation: Presumption Analysis

The sharpness with which the Board and courts divided over the proper reading of *Fibreboard* and interpretation of the duty to bargain demonstrated that, precedent aside, there are two compelling concerns at issue when management seeks to act unilaterally—the workers' rights to have a representative at the bargaining table when major business changes impacting upon job security are under consideration, and management's right to remain free to run the business effectively. The Third Circuit in *Brockway Motor Trucks*66 sought to accommodate those concerns through the use of a presumption analysis.68 Under that analysis,
a decision which would lead to the termination of employees would be initially presumed a mandatory subject of bargaining. That presumption, the court concluded, was "founded on [the Act's] statutory purposes and language." It could be rebutted by a showing that, under the particular circumstances of a given case, the combined interests of the employer and employees would not be served best by mandatory bargaining. For example, an employer would not have to bargain when in dire financial straits or in the midst of dealings with a third party where such dealings would likely be disrupted by obligatory bargaining.

The Brockway Motor Court's presumption analysis provided a workable approach to accommodating the divergent interests which arise when business decisions could lead to collective terminations. It advances the Act's purpose of promoting collective bargaining as a vehicle for making decisions of vital importance to both management and labor, while permitting exceptions to be made depending upon the circumstances.

Judicial recognition of the promise of presumption analysis was short-lived. In 1981, just three years after the Third Circuit adopted the use of presumption analysis, the Supreme Court rejected it in First National Maintenance Corp. v. NLRB.

\[ d. \text{ First National Maintenance: Rejecting the Collective Bargaining Framework} \]

In First National Maintenance the Supreme Court squarely rejected the utility of presumption analysis and its underpinnings. The Court embraced instead a broad per se denial of management's obligation

69. Brockway, 82 F.2d at 735.
70. Id. (citing Fibreboard, 879 U.S. at 214, and Ozark Trailers, 161 N.L.R.B. at 561). With respect to advancing the Act's purposes, the court explained: [T]he aims of collective bargaining would be furthered by requiring an employer to negotiate with a union before deciding irrevocably to close down a plant. Such a requirement would lead to some discussion—however brief it may be—between the parties, and [would permit the union to] seek to persuade the employer to alter its decision to close the plant. . . . Indeed, history is replete with instances where a union has cooperated actively with an employer to keep a company financially afloat and thus to prevent the closing of a facility and the loss of jobs. Id. at 734-36. With respect to the statutory language, the court stated that: [T]he act of closing a plant appears to come within the literal language of the [Act] in that it concerns "terms and conditions of employment" [because] it usually, and rather quickly, leads to the termination of at least some employees. . . .
71. Id. at 735.
72. Id.
73. 452 U.S. 666 (1981) (reversing NLRB v. First Nat'l Maintenance, 627 F.2d 596 (2d Cir. 1980)).
74. Id.
to bargain over any “economically motivated” decision to partially close an enterprise. In doing so, the First National Maintenance Court settled the ambiguity that remained in the wake of Fibreboard. It established an approach which gave little weight to the idea that matters of great importance to worker and employer alike should be brought within the collective bargaining framework.

Thus, the First National Maintenance Court dismissed the purposive analysis of Fibreboard. The Court freely admitted that jobs would be “inexorably eliminated by an employer’s decision to partially close an enterprise” and that, therefore, such decisions touch upon matters of “central and pressing concern to the union.” It concluded, however, that

in view of an employer’s need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit for labor-management relations and the collective bargaining process outweighs the burden placed on the conduct of the business.

The Act’s purpose in promoting collective bargaining on subjects of vital import was clearly not controlling within the language of the test.

Neither was it controlling in the Court’s application of that test. In its analysis of the benefit side of the balance, the Court attacked the worth of mandated bargaining in a manner broad enough to apply in virtually any case involving an employer’s unilateral action. The Court argued that it was “unlikely” that requiring bargaining over the decision would augment the flow of information and suggestions from the union, that management would nevertheless have an incentive to confer voluntarily if feasible alternatives to the decision existed, and that even good faith bargaining might be futile. These arguments are inherently weak. They also suggest an intent to drastically minimize the role of

75. Id. at 686.
77. 452 U.S. at 677.
78. Id. at 679 (emphasis added).
79. The Court’s holding was criticized as being drawn so broadly as to reach other kinds of decisions, see Barron, A Theory of Protected Employer Rights: A Revisionist Analysis of the Supreme Court’s Interpretation of the National Labor Relations Act, 59 Tex. L. Rev. 421, 438 n.79 (1981), and lacking in any principle to justify its limits, see Harper, supra note 31, at 1449.
80. 452 U.S. at 681.
81. Id. at 682.
82. Id. at 683.
83. First, the flow of information from the union can be increased by mandating bargaining as shown by example in the dissenting opinion filed by Justice Brennan. See First Nat’l Maintenance, 452 U.S. at 690 (Brennan, J., dissenting); see also Brockway Motor Trucks, 582 F.2d at 734-37. Second, the fallacy in the Court’s suggestion that the employer will have an incentive to suggest alternatives where possible may be seen from the employer’s failure to do so in the First Nat’l Maintenance case itself. 452 U.S. at 690-91 (Brennan, J., dissenting). Finally, the argument that the possible futility of bargaining justifies the Court’s refusal to mandate bargaining has been rejected
bargaining as a framework for accommodating the interests of those affected by management’s actions.

In its analysis, the Court relied upon the existence of other sources of protection which are clearly inadequate for bringing the interests of labor into management’s decisionmaking process. The Court first argued that provisions implementing union rights to notice, information and fair bargaining can be secured in contract negotiations\(^\text{84}\) though it recognized the relative scarcity of such provisions.\(^\text{85}\) The Court also noted that the Act prohibits decisions made for antiunion reasons,\(^\text{86}\) though that logic misses the point of mandating bargaining. A decision that is not motivated by antiunion aims may still be of vital significance to both labor and management and amenable to change if properly brought within the collective bargaining framework. Finally, the Court suggested that required bargaining about the effects of the decision may “indirectly” ensure that the decision itself is deliberately considered.\(^\text{87}\) Again, this ignores the fact that bargaining is intended to increase the flow of information and suggestions from the union regarding the decision, and to focus management’s attention on that communication. Promoting effects bargaining is also inadequate because it leaves the union to bargain only when circumstances have left the union virtually powerless to extract any concession.\(^\text{88}\)

In finding that the burden mandatory bargaining would place upon the employer’s business outweighed the benefits of such bargaining, the Court rejected use of a presumption analysis with its provision for exceptions to the duty as a means of lessening that burden. To find the duty per se inapplicable the Court relied upon the same “need for speed and secrecy” arguments heard and rejected by the Third Circuit in *Brockway Motor Trucks.*\(^\text{89}\) Rather than viewing a presumption-based approach as ideally suited to accommodate such needs as they arise in a given case, the Court concluded that such an approach seemed “ill-suited to advancing

generally, see Harper, *supra* note 31, at 1459; and, specifically, as support for the kind of per se rule against mandating bargaining applied in *First Nat’l Maintenance.* See *Fibreboard*, 379 U.S. at 214 (so long as there remains even a “remote chance” of arriving at a feasible solution in the particular case, bargaining should be mandatory given the subject otherwise falls within the terms of \(§ 8(d)\)). The facts of the *First Nat’l Maintenance* case also argue against the Court’s logic. See 452 U.S. at 690-91 (Brennan, J., dissenting) (cancelled customer contract which constituted partial closing could have been preserved had the union been given an opportunity to offer wage concessions).

\(^{84}\) 452 U.S. at 682.

\(^{85}\) *Id.* at 684.

\(^{86}\) *Id.* at 682.

\(^{87}\) *Id.*

\(^{88}\) Aaron, *Plant Closings: American and Comparative Perspectives*, 59 *Chi-Kent L. Rev.* 941, 963 (1983). Prof. Aaron explains: “At the time bargaining [over the consequences of a plant closure or removal] takes place, the union is usually in a position of great weakness relative to the employer, who has, figuratively, packed his bags and is now half-way out the door.” *Id.*

\(^{89}\) *First Nat’l Maintenance*, 452 U.S. at 682-83.
ing harmonious relations between employer and employee." The Court was apparently of the view that leaving management free to act with disregard for the interests of its employees was a means better suited to the promotion of labor-management harmony.

e. **The Impact of Change in the Scope of the Duty to Bargain**

The duty to bargain has, through a process of steady departure from Congress' expressed aims in enacting the National Labor Relations Act, been limited to the point of virtual insignificance as a means to ensuring that the substantial interests of those affected by a business decision possibly producing mass dismissals are accounted for in management's decisionmaking process. The Court has demonstrated that protecting management's interest in acting unilaterally has become the overriding policy in determining the scope of the duty and the current Board has followed suit. Both have grown increasingly willing to allow decisions having a tremendous impact on job security to be made without bargaining in order to advance that policy. For this reason, they have been criticized as acting on sheer preference for protecting management's interests alone. Because Congress has failed to restore meaning to the Act, it too is subject to that same criticism.

2. **The Outcome of Collective Negotiations**

The limits of collective bargaining as a mechanism for accommodating the interests of those affected by mass dismissals is further seen in the failure of unions to secure through collective negotiations provisions limiting management discretion. Statistical analyses of the results of bargaining for restrictions on management's rights to effect dismissals illustrate that failure. For example, the decision to subcontract was addressed in only 54% of the contracts examined in a recent study.

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90. The Court explicitly rejected use of a presumption analysis because it would (1) produce uncertainty as to when bargaining must start, (2) expose an employer to claims of surface bargaining, (3) subject employers to harsh remedies upon breach of the obligation, and (4) be unhelpful where labor costs are not at issue. *First Nat'l Maintenance*, 452 U.S. at 684-86. Yet, the problems of uncertainty as to when bargaining must begin, what constitutes surface bargaining and whether an employer is subjected to harsh remedies upon breach of the duty are inherent in unilateral decision-making regardless of the form of analysis adopted by the Court. Furthermore, a presumption analysis would take account of the fact that labor costs may not be at issue when considering the feasibility of resolution through collective bargaining.

91. See Otis Elevator Co., 269 N.L.R.B. 162 (1984). There, the Board held:

Despite the evident effect [of closing part of the enterprise] on employees, the *critical factor* to a determination whether the decision is subject to mandatory bargaining is the essence of the decision itself, i.e., whether it turns upon a change in the nature or direction of the business, or turns upon labor costs, not its effect on employees nor a union's ability to offer alternatives. *Id.* (emphasis added).

92. See *supra* text accompanying note 31.

93. *BUREAU OF NATIONAL AFFAIRS, INC., COLLECTIVE BARGAINING NEGOTIATIONS AND*
Slightly more than 1% prohibited it entirely; 24% required advance notice of, or discussion with, the union; 13% prohibited subcontracting where layoffs already existed or would result from the employer's action; 16% limited subcontracting to cases where the bargaining unit lacked the necessary skills or equipment; 11% required that workers hired through subcontracting be afforded the same contract terms as members of the bargaining unit; and 19% required that future subcontracting be in accord with the employer's past practice.\textsuperscript{94}

While the provisions restricting management's rights in connection with subcontracting practices are limited, those regarding plant closings are even more so. Provisions limiting an employer's freedom to close an enterprise appeared in only 26% of the agreements analyzed in that same study and only 13% required advance notice to, or discussion with, the union.\textsuperscript{95} The provisions regarding plant closing focused somewhat more upon the consequences of the decision than did the subcontracting clauses, as approximately 12% provided displaced employees with transfer rights to a new location, 4% provided for job placement and retraining programs, and 11% provided for some other form of job security.\textsuperscript{96}

The scarcity of such provisions does more than simply demonstrate that collective negotiations have failed to bring workers' interests into management's decisionmaking process. Because this scarcity is a direct result of the legal structure governing the unionized sector of the labor market,\textsuperscript{97} it also suggests that congressional failure to press for reform of that structure is largely to blame for the present inefficacy of collective bargaining.

\section*{B. Legislation in the United States Covering Both Union and Nonunion Workers}

The failure of collective bargaining to provide the needed framework for bringing the interests of labor into management's decisionmaking process is manifest. This section questions whether that need has been fulfilled through other legislative means.

\textsuperscript{94} Id. at 80.
\textsuperscript{95} Id. at 81.
\textsuperscript{96} Id. at 81-82.
\textsuperscript{97} Labor's success at the bargaining table has been said to depend upon its strength and ability to back up its position which, in turn, depends upon the labor laws which define the economic powers of labor and management. \textit{See} Feller, \textit{The Structure of Post-War Labor Relations}, 11 N.Y.U. REV. L. & SOC. CHANGE 136, 139 (1983). \textit{See also} Weiler, \textit{Striking a New Balance: Freedom of Contract and the Prospects for Union Representation}, 98 HARV. L. REV. 351, 382-404 (1984). An example is the Supreme Court's ruling in NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938), which established an employer's right to permanently replace strikers.
1. Federal Legislation

While a number of congressional bills have proposed comprehensive provisions addressing the interests of those affected by mass dismissals, none have been enacted. A 1974 House bill proposed a National Employment Priorities Act which empowered a National Employment Relocation Administration to investigate "arbitrary and unnecessary closings and transfers . . . which cause irreparable social and economic harm to employees, local communities and the nation." Under the proposed scheme, if the Administration found that the closing was unjustified, the employer would have become ineligible for various tax benefits. No action was taken on the bill.

The National Employment Provision Act of 1979 also proposed standards governing the manner in which management could effect collective dismissals. It required employers to give employees six months' to two years' notice of an intent to close a plant and provided for other forms of employee-community protection. It, too, failed to gain passage.

More recent legislation proposed in Congress on this subject was the Labor Management Notification and Consultation Act of 1984. The bill proposed that an employer be required to give its employees' bargaining representative ninety days' notice of a plant closing or mass layoff involving at least fifty employees within a thirty day period, during which time the employer would be obligated to consult the union and provide relevant information about the proposed decision. The bill underwent several revisions weakening its requirements before ultimately being defeated in the House.

Most federal legislation aimed at protecting both union and nonunion workers against mass dismissals is limited in that it focuses exclu-
sively on mitigating the adverse consequences of the dismissals. That holds true for the few provisions applicable to industries that are not federally regulated. For example, the Job Training Partnership Act\textsuperscript{109} has as its primary purpose the retraining of dismissed workers and provides for programs to help them secure new work.\textsuperscript{110}

Support has waned even for these limited protections. The support given the Job Training Partnership Act has substantially declined,\textsuperscript{111} as has the support for most such programs.\textsuperscript{112}

Even in federally regulated industries, where the greatest attention has been given the problems workers face with respect to mass dismissals, the vast majority of extant provisions focus solely upon ameliorating the harsh consequences of the decision.

In the railroad industry, for example, an early Interstate Commerce Commission regulation, providing that railroad mergers would have to be “fair and equitable” and in “the interests of the railroad employees affected” to be approved,\textsuperscript{113} only required that affected employees be assured of a job for a period of four years following the merger.\textsuperscript{114} Similarly, the Rail Passenger Service Act, a later regulatory measure in the railroad industry, guaranteed dismissed employees severance pay in the amount of their former salary for a period of six years.\textsuperscript{115} In both provisions, the focus was apparently on easing the relatively short-term impact of the decision rather than on probing the equities and overall efficiency of, and alternatives to, the employer’s decision.

Such is the pattern of the provisions governing other federally regulated industries. In the airline industry, for example, the primary source of protection for workers has been the Labor Protective Provisions (“LPPs”) required initially by the Civil Aeronautics Board\textsuperscript{116} as a condition to approving proposed mergers or other financial transactions likely to produce mass dismissals of airline employees.\textsuperscript{117} The LPPs were essentially limited to curbing the losses suffered by employees in connection with the transaction.\textsuperscript{118}

\textsuperscript{110} OTA SPECIAL REPORT, supra note 15, at 24.
\textsuperscript{111} Id.
\textsuperscript{114} Id. See also Aaron, supra note 88, at 945.
\textsuperscript{116} The Civil Aeronautics Board is now defunct. It was replaced by the Department of Transportation (“DOT”). Airline Unions Attack Tough DOT Standard For Imposing Labor Protective Provisions, DAILY LAB. REP. (BNA) No. 226, A-8, D-3 (Nov. 22, 1985).
\textsuperscript{117} Id. at D-2. Congress also authorized the Interstate Commerce Commission to impose LPPs for the benefit of railway employees. Id. at D-4. See also United States v. Lowdes, 308 U.S. 225, 238 (1939).
\textsuperscript{118} Standard LPPs, which apply in cases where employees are adversely affected by a commer-
In addition to this effects orientation, there are indications that a broader movement away from labor protections against mass dismissals is developing within the regulated industries. The Department of Transportation's current position on LPPs exemplifies that movement. The Department has virtually abandoned the requirement that LPPs be used, even where substantial dismissals will likely follow a given managerial decision. The basis for so radical a change in policy is the Department's view that the sole purpose of the provisions, to assure the continued operation of the airlines following the decision, no longer justifies their implementation given the current deregulation of the industry. The advancement of "employee welfare" was expressly rejected by the Department as a further goal underlying their use, notwithstanding substantial precedent to the contrary. This trend in the context of federally regulated industries is part of the larger, continuing departure from an earlier commitment by administrations to the interests of American workers and the security of their employment.

2. State Legislation

Few states have legislation imposing upon employers even minimal
obligations to their workforce when a decision which may lead to mass dismissals is being considered. While a number of states have had such legislation introduced, only Maine and Wisconsin have actually seen those proposals pass.\textsuperscript{124} Even those provisions have been characterized as "uneven and very limited,"\textsuperscript{125} although they have benefited covered employees.

The Maine statute, as amended,\textsuperscript{126} provides protections relating both to the decisionmaking process and to the impact of the decision. With respect to the decisionmaking process, an employer proposing to close or relocate a covered enterprise must first give the employees and the officers of the municipality where the plant is located at least sixty days' notice prior to implementing the decision to facilitate the discussion of alternatives to the decision. If the employer fails to do so, and such failure does not fall under an enumerated exception,\textsuperscript{127} a maximum fine of five hundred dollars may be imposed. In addition, the statute provides for severance pay at the rate of one week's pay for each year of employment plus any final wage payment due, subject to the same exceptions as the notice requirement.

Compliance with the Maine statute has been poor. An investigation of its application during the period from 1971 to 1981 found that thirty plants employing more than one hundred workers had closed, but only

\textsuperscript{124} See Bureau of Labor Statistics, supra note 103. See also Millspaugh, The Campaign for Plant Closing Laws in the U.S.: An Assessment, 5 Corp. L. Rev. 291 (1982). The experience of other states attempting to procure such legislation is outlined in Lynch, Restrictions on Management's Right to Dismiss Workers By Means of Plant Closings or By Workforce Reductions, The Relations Between Employers and Public Authorities and the Role of Collective Bargaining in the United States, 16 Ga. J. Comp. L. 227, 229-30 (1986). Two states have legislation indirectly relating to decisions leading to mass dismissals. South Carolina enacted a statute requiring employers to prenotify employees before effecting any decision that will lead to terminations where employees are similarly obligated by their employer to give notice before quitting. (S.C. Code Ann. § 109.07 (West 1976)). Massachusetts enacted a statute establishing programs designed to target industries likely to experience employment cutbacks, and to provide financial assistance to avoid the cutbacks and reemployment service where the terminations are effected. Daily Lab. Rep. (BNA) No. 146, E-1 (July 30, 1984).

There are also programs which go exclusively to the effects of a decision leading to mass dismissals, rather than to the decisionmaking process itself. California and Connecticut both have such programs. See Folbre, Leighton & Roderick, Plant Closings and Their Regulation in Maine: 1971-82, 37 Ind. & Lab. Rel. Rev. 185, no. 5 (1984).

\textsuperscript{125} Aaron, supra note 88, at 950.


\textsuperscript{127} An employer may be excused from the notice requirement where the decision at issue is made necessary by a physical calamity or if unforeseen circumstances make giving notice unduly difficult. Id.
seven notified the municipality of their decision to close.\textsuperscript{128} Only nine provided the terminated employees severance pay as required.\textsuperscript{129} Nevertheless, the study did find that where prenotification was provided, it reduced the number of terminations that otherwise would have occurred.\textsuperscript{130}

The Wisconsin statute\textsuperscript{131} is more specific than the Maine statute in terms of the kinds of restrictions imposed, and more limited in the remedy available for noncompliance. Its restrictions on employer discretion are limited to prenotification in cases where an employer of over one hundred employees makes a decision leading to cessation of business that affects the employment of ten or more workers. That notice must be given to the state's Department of Industry, Labor and Human Relations, affected employees, employee collective bargaining representatives and the clerk of the town in which the terminated employees work, at least sixty days before implementing the decision. The notice must include information such as the payroll of the affected employees, the identity of employees who will be affected, and the wages and other remunerations owed those employees. The fine for breach of the prenotification obligation is, however, a mere fifty dollars per employee.

The dearth of state provisions concerning management's obligations in connection with the effectuation of mass dismissals demonstrates that the present deficiencies at the federal level are not being met by the states. That the failure to secure legislation governing mass dismissals has been uniform at both levels of government is not surprising given what may be the primary source to which that broad deficiency can be attributed—the emergence of highly competitive international markets.

\section*{II \hfill \small Structural Constraints}

Before Congress or the states can successfully hurdle the obstacles to securing mass dismissal legislation, the principal obstacles must be identified and fully understood. This Comment takes issue with views attributing legislative resistance to a business "ethos" or philosophy which is hostile toward government intervention in the private economy\textsuperscript{132} or to an acceptance of the notion that the workers are themselves

\begin{footnotesize}
\textsuperscript{128} Folbre, Leighton & Roderick, supra note 124, at 190.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{132} See Aaron, supra note 88, at 963. Prof. Aaron therefore concluded that:

The success of efforts to improve the existing situation [in the laws governing mass dismissals] is dependent, therefore, on a change in the attitude of business generally toward some government regulation of both the procedures to be followed regarding plant closings or removals, and the minimum employee protective provision to be provided.

\textit{Id.}
\end{footnotesize}
responsible for the dismissals. Business resistance is an important aspect of the problem, but fundamental economic forces rather than management philosophy or ethos more likely drive business and therefore legislative resistance. These forces are structural constraints on legislators, and their international character suggests that an international approach may be the way to overcome them.

A. The Internationalization of the Marketplace

An analysis of those constraints necessarily begins with a brief recounting of how the marketplace became globalized in the postwar period. From the late 1940's through the 1960's, the United States was enjoying what has been described as the "heyday of modern American capitalist growth." American companies came to dominate world trade by a process of unprecedented global expansion which allowed them to capture foreign markets. An ongoing process of rebuilding following the war preoccupied the other major capitalist countries and left "a substantially clear field" for American firms to pursue such expansion.

However, such American predominance did not last. Direct overseas investment by European and Japanese businesses began and rapidly accelerated in the 1960's. International competition grew fierce as foreign-based corporations challenged American enterprises throughout the

133. See B. BLUESTONE & B. HARRISON, supra note 1, at 111-12, where the authors reiterate the views of such commentators as George Gilder, Jude Wanniski, Arthur Laffer, Amitai Etzioni, David Stockman, Jack Kemp, and "to some extent" Lester Thurow. Bluestone and Harrison write: "In one way or another, most of the existing explanations of deindustrialization . . . revert to the time-honored practice of blaming the victim. [Current capital restructuring is] all too often . . . attributed to the selfishness, impecunity, or just plain lack of motivation of American workers . . . ."

134. Id. at 112.

135. Id. American corporate expansion abroad was made possible, according to University of Michigan economist Daniel R. Fuseld, by the Bretton Woods agreement on fixed exchange rates which obligated other countries to purchase U.S. dollars and thereby provide American investors with the European currencies necessary to buy assets in their countries. Id. at 113 (citing Fuseld, Fascist Democracy in the United States, in CONFERENCE PAPERS OF THE UNION FOR RADICAL POLITICAL ECONOMICS, Reprint No. 2 (1968)). American corporations were thus enabled to make massive investments abroad in new plants and equipment, producing commodities for foreign markets and for "reimporting" to the United States. B. BLUESTONE & B. HARRISON, supra, note 1, at 113. Of course, advances in transportation and communication technology also facilitated this internationalization of markets, id. at 115, as did the concentration and centralization of control over management. Id. at 121.

136. Id. at 141.

137. Id. In fact, by the 1970's, the share of direct foreign investment flows among the 13 countries in the Organization for Economic Cooperation and Development ("OECD") attributable to United States corporations fell by one-half between 1961 and 1978. B. BLUESTONE & B. HARRISON, supra note 1, at 142 (citing OECD, COMMITTEE ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES, RECENT INTERNATIONAL DIRECT INVESTMENT TRENDS 34 (mimeographed Feb. 13, 1980).
The emergence of intensified international competition among many of the world's capitalist nations and an increase in their worldwide productive capacity set in motion international economic forces which appear to lie at the heart of the mass dismissal problem in the United States and abroad.

B. Repercussions in the United States

Numerous repercussions followed, of course, from the globalization of the marketplace. Two are essential to an understanding of the current state of the law regarding mass dismissals in the United States.

The first such repercussion was American management's response to the threat of being outperformed by competitors abroad. Certainly managers in every major industrial nation were forced to restructure operations more effectively for enhanced efficiency and growth once the marketplace globalized. But American managers took that notion a step further, creating a condition of capital "hypermobility." That pace of capital mobility produced, and continues to produce, massive changes which mean substantial loss of jobs. Nevertheless, administrations have consistently opposed restrictions on that rate of mobility for fear that productivity and overall economic performance would be dampened relative to that of nations that permit unfettered mobility.

138. B. BLUESTONE & B. HARRISON, supra note 1, at 141-42.
139. See generally L. THUROW, THE ZERO-SUM SOCIETY 90-95 (1980) (A nation's international competitiveness is dependent upon advancing that nation's level of production which, in turn, is dependent upon accelerating disinvestment.). See also C. GRUNFELD, THE LAW OF REDUNDANCY 1 (1980) (A nation that depends on success in international trade must now be prepared to continuously adapt to technological and organizational changes of a kind and tempo without parallel in history.). Even Bluestone and Harrison seem to agree, taking issue only with the question of "capital velocity." See B. BLUESTONE & B. HARRISON, supra note 1, at 150. Historically, this principle has also proved true. It was noted in a BUSINESS WEEK report on capital mobility between regions in the United States, that:

[W]hatever tensions it may create domestically, the tide of [capital] migration [between regions] is making U.S. exports more competitive in international markets. In the early postwar years, Germany and France were able to achieve huge productivity gains relative to the U.S., largely as a result of the migration of low-wage workers from the farm to the city.

Special Report: The Second War Between the States, BUS. WK. 92, 95 (May 17, 1976) [hereinafter The Second War].

140. B. BLUESTONE & B. HARRISON, supra note 1, at 231. The authors use the term "hypermobility" to indicate American management's "urge to take advantage of every possibility for squeezing out an extra ounce of profit by shifting resources from one activity or location to another", id., at a rate which does not allow sufficient time for the effects of capital disinvestment to dissipate or the effects of the new investment to be absorbed." Id. at 105. Many viable and profitable businesses were destroyed in this process. Id. at 148-51.

141. See supra text accompanying note 1.

The second repercussion from globalization of the marketplace was that American managers could realistically threaten to shift production and jobs abroad to gain concessions from workers at home. With the intensification of international competition, labor costs became the critical factor in American management's restructuring calculus.°⁴³ Purely domestic American businesses used their ability to move operations to another state or region—or to differentially expand production between multiregional plants—to force wage and benefit concessions from workers.°⁴⁴ Such businesses could even move their capital abroad when labor nationwide grew too costly.°⁴⁵ The threat of capital and job flight beyond the nation's borders was a particularly acute problem where a multinational enterprise was involved since differential expansion could readily be undertaken across an international system of operations.°⁴⁶

Like the question of comparative economic performance, management's desire to retain the freedom to move operations interregionally or internationally had a profound effect on the nation's laws. Because state plant closing laws would limit that freedom and, therefore, drive businesses to establish and expand operations in other states, the vast majority of states refused to enact them.°⁴⁷ That the absence of federal plant closing restrictions at home is largely attributable to congressional and administrative acquiescence to congressional and administrative acquiescence to similar industry demands has also been documented.°⁴⁸

To the extent that the analysis holds thus far, it gives rise to a number of questions. Have other capitalist nations felt similar economic political pressures against restricting capital mobility? If so, why do so many have far more progressive plant closing laws than those found in

J. INT'L & COMP. L. 255 (1986) (quoting U.S. Secretary of Commerce Malcolm Baldridge at a 1985 meeting of the Organization for Economic Cooperation and Development: "[O]ne of the reasons that European companies lag behind their counterparts in the United States [is] the existence of powerful barriers to reducing or even moving the workforce [in those countries].").

143. R. MCKENZIE, RESTRICTIONS ON BUSINESS MOBILITY 42 (1979).

144. B. BLUESTONE & B. HARRISON, supra note 1, at 165-66. The authors explain that in order for "long-term dents" in labor costs to be made, "workers would have to be made so insecure and desperate for work that they would be forced to become more 'flexible' . . . ." Id. at 180.

145. Id. at 164.

146. Id. at 170.

147. Because a business's decision where to locate turns largely on "the extent to which the policies of [a given] state or local government promote or retard capital's ability to locate where they prefer," elected state and local government officials have "at best felt helpless before these demands." B. BLUESTONE & B. HARRISON, supra note 1, at 181-82. In considering where to locate, businesses also consider such questions as a location's tax structure and environmental and safety restrictions on production. Id. at 181. The constraint legislators face, of course, is the prospect of losing essential job-creating and taxable economic activity by not meeting industry demands. The Second War, supra note 139, at 92; see also Comment, Plant Closings and the Duty to Consult Under Britain's Employment Protection Act of 1975: Lessons for the United States, 5 B.C. INT'L & COMP. L. REV. 195, 197 n.17 (the mere introduction of a plant closing bill can have a dampening effect on a state's economy).

148. B. BLUESTONE & B. HARRISON, supra note 1, at 19.
the United States? How have they fared under such regimes? Ultimately, the evidence which bears on these questions leads to a further question—would an international legislative solution alleviate these pressures so that all capitalist nations might secure necessary plant closing provisions without incurring unacceptable costs by doing so?

C. The Experience with Plant Closings Abroad

As noted above, corporations based abroad, like American corporations, expanded their productive facilities throughout the world and became embroiled in international competition and the race to restructure in the postwar era. This section briefly surveys the plant closing provisions nevertheless enacted by governments of some of the major industrialized nations abroad—those in Western Europe and Japan—and questions whether those provisions have produced the kind of productivity and capital loss American lawmakers fear.

1. Western Europe

Western European nations have taken a fairly uniform approach to the problem of plant closings and mass dismissals. Each of their regimes conforms roughly to the following three-pronged approach: (1) submission of planned workforce reductions to procedures of prior consultation with workers’ representatives and prior notification to public authorities; (2) attention to the possibilities of averting or minimizing a projected workforce reduction with different types of public assistance where necessary (such as subsidies for short-time work); and (3) attention to special measures to help to mitigate the negative effects of a workforce reduction on the workers concerned, including income protection measures and financial and other assistance to promote occupational and geographic mobility.149

Emphasis has been given in Western Europe to the procedural obligations of consultation with workers’ representatives and notification to public authorities.150 The adoption of such measures was based on a number of factors including the “crisis and contraction” important European industries suffered as a result of rising international competition in

149. INTERNATIONAL LABOUR OFFICE, WORKFORCE REDUCTIONS IN UNDERTAKINGS 33 (E. Yemin ed. 1982) [hereinafter WORKFORCE REDUCTION IN UNDERTAKINGS]. This report was limited to a survey of the following Western European nations: France, West Germany, Great Britain and Italy. That the same holds true for other Western European nations is evident from several papers collected in Roundtable on Comparative Labor Relations Law: The Law and Measures Affecting Workers in the Context of Voluntary Plant Closings and Workforce Reductions, 16 GA. J. COMP. & INT'L L. 219, 235-59 (1986) (surveys plant closing laws in the Netherlands and Belgium and the efforts at harmonizing such laws throughout the European Community).

150. WORKFORCE REDUCTIONS IN UNDERTAKINGS, supra note 149, at 33.
the 1970's.\footnote{151}  
The West German response to the problem of plant closings closely resembles this three-part scheme and the role unions play in its political power structure helps explain its adoption.\footnote{152}  It is, therefore, instructive to briefly analyze the West German approach.

West German legislation is based on the principles of "codetermination"\footnote{153} as reflected in its three primary statutes dealing with mass dismissals: The Protection Against Dismissals Act ("PADA"),\footnote{154} the Works Constitution Act ("WCA")\footnote{155} and the Works Promotion Act ("WPA").\footnote{156}

The PADA provides broad substantive and procedural protections against an employer's discretion to dismiss workers. Substantively, the PADA requires that individual or collective dismissals of workers who have been with the employer more than six months must be "socially justified."\footnote{157} To be socially justified, the decision that leads to dismissal must either be rooted in the dismissed employee's behavior or in some "urgent" business need.\footnote{158} The dismissed employee may challenge the basis of the decision before the labor courts in hope of gaining either reinstatement or, if further cooperation between the employee and employer is unlikely, continued salary payments for some specified period.\footnote{159}

The procedural requirements apply primarily in the context of mass dismissals. Article 17 of the PADA requires that a special dismissal procedure be followed where certain collective dismissals are effected.\footnote{160} That procedure involves consultation with the plant "works council"\footnote{161}

\footnote{151} Id. at 3. Other factors included job loss through severe recessions experienced in the 1970's and the threat of further job loss due to technological innovation. Id.  
\footnote{152} West German unions are strong in number and political influence. While only 40% of West Germany's workers are actually union members, more than 90% of all German workers are covered by the collective agreements negotiated. German unions function primarily at the national level, negotiating contracts with an awareness of their impact on national policy. They seek to represent the working class as a class, and have been successful in gaining legislation to effect their political and social goals. Summers, supra note 30, at 1411-17. Union representation is, therefore, both a direct and an indirect factor in management's decisionmaking processes.  
\footnote{153} NIPPERDAY I, ARBEITSRECHT, TESTSAMMLUNG (Verlag C.H. Beck ed. 1984).  
\footnote{156} Arbeitsförderungsgesetz, BGB1 I.S. 582 (W. Ger.).  
\footnote{157} See Int'l Lab. Org. Legis. Series, supra note 154, art. 9.  
\footnote{158} Id.  
\footnote{159} Id.  
\footnote{160} See id. at art. 17. The dismissals included are those involving (1) at least six employees in a firm employing between 20 and 60 workers (or at least 10% of the workforce), or (2) more than 25 employees in a firm employing between 60 and 500 workers, or (3) at least 30 workers in a firm employing at least 500 workers. Id. See also DER BUNDESMinISTER FÜR ARBEIT UND SOZIALORDNUNG, ÜBERSICHT Rechter der arbeit 132 n.500 (1981) [hereinafter ÜBERSICHT].  
\footnote{161} See Int'l Lab. Org. Legis. Series, supra note 154. All firms with at least five workers are required to establish a "works council." Id. at art. 1 WCA. Nevertheless, many middle-sized firms
and notification of both the regional and local labor offices. These obligations are treated in more detail by the Works Promotion Act and the Works Constitution Act. The remedies available for their breach by an employer are invalidation of the dismissals or compensatory payments.

The WPA supplements the PADA by detailing the notice requirements and establishing prophylactic protections against the occurrence of dismissals. The WPA notice provisions require, for example, an employer to inform both the plant works council and the Regional Labor Office of mass dismissals which might foreseeably take place within the following twelve months, so that each may consider the possible ways in which the dismissals might be avoided or their effects alleviated.

The Act also requires that consideration be given the employer's interest in keeping the plan secret.

The prophylactic measures in the WPA include subsidies to employers to offset the costs of retaining rather than dismissing workers. These subsidies have, for the most part, been applied only to industries with the least stable employment.

The WCA details the procedures an employer must follow at the works council stage of the PADA's procedural process. It requires employers in plants with a works council to inform the council about "proposed alterations which may entail substantial prejudice to the staff or a large sector thereof . . ." The statute enumerates five kinds of business changes for which such information is required.

When the employer meets with the works council, it must not only discuss the planned change and the possibility of alternatives, but also a "social compensation plan" for mitigating the consequences for affected

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162. Id. at art. 18.
163. See infra text accompanying notes 166-75.
164. ÜBERSICHT, supra note 160, at 132 n.502. See also Heinze, Job Security and Industrial Relations, Germany, 11 BULL. OF COMP. LAB. REL. 65 (1980).
165. ÜBERSICHT, supra note 160, at 132 n.502.
166. Arbeitsförderungsgesetz, supra note 156, § 8 WPA. The difficulty of proving that the dismissals were "foreseeable" has led some to criticize the effectiveness of § 8 WPA. See Heinze, supra note 164, at 66.
167. Arbeitsförderungsgesetz, supra note 156, § 8 WPA.
168. Id.
169. Id. §§ 63-99 WPA. See also Heinze, supra note 164, at 68.
170. Heinze, supra note 164, at 68.
172. The WCA lists the following as major business decisions: (1) total and partial shutdowns, (2) total and partial plant removals, (3) mergers between different plants, (4) basic changes of the plant's organization, goals or facilities and (5) the introduction of basically new work methods and manufacturing procedures. Id.
employees.\textsuperscript{173} The social compensation may include some combination of severance pay, pension pay, retraining measures, transportation and moving allowances, reinstatement clauses and employer loans.\textsuperscript{174} Failure to agree on a satisfactory social plan confers jurisdiction first upon the Regional Labor Court to help the parties to reach agreement and, if that too fails, upon the Mediation Board, which can establish a social plan of its own.\textsuperscript{175}

2. Japan

Japan has taken an approach that is largely analogous to the three-pronged approach found in the legislation of nations throughout Western Europe.\textsuperscript{176} One variation is that the Japanese system emphasizes the second prong—efforts aimed at averting or minimizing a projected workforce reduction—as opposed to the European focus on the notice procedures of the first prong.\textsuperscript{177} These features are evident from a brief description of that system.

Japanese employees in “large companies”\textsuperscript{178} enjoy numerous protections against mass dismissals. These protections range from lifetime employment to a number of less extreme procedural and substantive protections. They include protections gained purely as a matter of custom as well as through the more common sources: collective bargaining and legislation.

One customary protection is “shushkin koyo”—lifetime employment.\textsuperscript{179} Lifetime employment guarantees employment to the age of fifty-five or sixty for about twenty percent of the Japanese workforce.\textsuperscript{180}

Employees in Japan’s large companies who do not enjoy the privilege of lifetime employment generally receive protections against managerial discretion through a second customary source—the Japanese practice of “consensus decisionmaking.”\textsuperscript{181} Consensus decisionmaking is a cooperative effort by all parties involved to find ways to either avert the dismissals or, at the very least, to mitigate their consequences.\textsuperscript{182} Efforts to avert dismissals involve the examination of alternatives such as reduc-

\textsuperscript{173} Int’l Lab. Org. Legis. Series, \textit{supra} note 155, art. 112.
\textsuperscript{174} ÜBERSICHT, \textit{supra} note 160, at 291 n.167.
\textsuperscript{175} Int’l Lab. Org. Legis. Series, \textit{supra} note 155, art. 112 II, III and IV WCA.
\textsuperscript{176} WORKFORCE REDUCTIONS IN UNDERTAKINGS, \textit{supra} note 149, at 32-33.
\textsuperscript{177} Id.
\textsuperscript{178} Companies that are considered large in Japan are those with more than 500 workers. W. Gould, \textit{Japan’s Reshaping of American Labor Law} 11 (1984).
\textsuperscript{179} Id. at 9.
\textsuperscript{180} Id. at 9-10.
\textsuperscript{182} Matsuda, \textit{Japan}, 11 BULL. COMP. LAB. REL., 133, 139-40 (1980).
tion in the volume of work contracted out, reduction of overtime and temporary workers, and transfers both within and without the company.\(^{183}\)

Beyond these customary sources of protection, the employees in Japan's large companies enjoy strong union representation in management's decisionmaking process.\(^{184}\) Collectively bargained provisions frequently require negotiation about contemplated decisions upon union demand,\(^{185}\) the establishment of "joint consultation committees" through which union representatives become integral players in management's decisionmaking process\(^{186}\) and other checks on management's freedom to dismiss employees.\(^{187}\)

While Japanese legislation addressing collective bargaining is relatively scarce, the Japanese Labor Standards Act provides for direct intervention in management's decisionmaking process. The Labor Standards Act requires thirty days' notice of planned dismissals so that management can demonstrate "just cause" for effecting them.\(^{188}\) In addition to the notice provision, Japanese legislation also provides for government subsidies to employers in industries compelled to cut back on operations as a result of structural shifts in the economy.\(^{189}\)

3. **Repercussions Within Western Europe and Japan**

Even from the brief survey above, the essential likeness between the plant closing problem in the United States and that in other industrialized capitalist nations is clear. At the same time, such a comparison gives some indication of the strikingly different remedial approaches that have been taken. The question these comparisons raise is whether the nations adopting more progressive plant closing legislation are paying a price in terms of lost capital investment and productivity gain by doing so. There is evidence to suggest that they are.

The losses suffered by European nations appear particularly acute. First, as corporations find European plant closing obligations prohibitively costly, the problems of capital deterrence and flight as well as those

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183. Id. Should those efforts fail, efforts aimed at ameliorating the consequences are made. They may include offers of voluntary retirement with generous conditions such as compensation beyond the severance pay due, and the establishment of a system by which employees to be dismissed are selected, which includes such criteria as competence and familial responsibilities. Id.


185. Matsuda, supra note 182, at 139.

186. W. Gould, supra note 178, at 99-100. Prof. Gould notes that the ultimate right to decide nevertheless stays with management.

187. Matsuda, supra note 182, at 140.

188. Id. at 135. See also T. Hanami, International Encyclopedia of Labor Law and Industrial Relations 87-90 (1984).

189. Matsuda, supra note 182, at 136. Such subsidies may take the form of employment and training adjustment grants. T. Hanami, supra note 188, at 84.
of disproportionate expansion of productive facilities outside of Europe arise. Overall, the performance of the Western European economies appears to have paled in comparison to that of the United States—a fact which has been tied to the greater mobility of American workers as to both location and job. Even West Germany, perhaps the strongest of the Western European economies, is suffering a downturn in expansion of its industrial capacity and trails the United States badly in job creation, in part as a result of its restrictions on dismissing workers. The greater mobility of capital in the United States even brought European investment to its markets.

Japan also seems to have incurred substantial—perhaps unacceptable—costs by providing measures aimed at minimizing mass dismissals. Possibly in an effort to preserve Japan's attractiveness to investors, Japanese managers have been permitted to deny the beneficiaries of these provisions basic benefits such as social security as a tool to "discipline" them. Along those same lines, the Japanese have created a second class of workers who are generally excluded from job security provisions. In addition, the job security provisions granted the upper class worker are gradually being whittled away as the growth of Japan's economy has slowed. In a further response to economic pressure, Japanese

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192. Over the last decade, Western Europe lost 2 million jobs while the United States gained 20 million.
193. United States unemployment was down to 7.4% while for Western Europe as a whole, unemployment was at 10.3% at the time this article was prepared. Princeton University economics professor Orley C. Ashenfelter explained that the difference was due to the far greater mobility of American workers.
194. Japan also seems to have incurred substantial—perhaps unacceptable—costs by providing measures aimed at minimizing mass dismissals. Possibly in an effort to preserve Japan's attractiveness to investors, Japanese managers have been permitted to deny the beneficiaries of these provisions basic benefits such as social security as a tool to "discipline" them. Along those same lines, the Japanese have created a second class of workers who are generally excluded from job security provisions. In addition, the job security provisions granted the upper class worker are gradually being whittled away as the growth of Japan's economy has slowed.
195. See E. Vogel, Japan As Number One 149 (1979).
196. Thailand has been accused of operating a "dual economy" wherein one class of workers is the almost exclusive beneficiary of the legislative and collectively bargained for provisions at the expense of another. See W. Gould, supra note 178, at 2. This second class is comprised of temporary workers and workers in Japan's smaller companies. Id. at 2-3. Because they generally receive none of the protections afforded the first class of Japanese workers (longer term workers in Japan's larger companies), they are frequently used as an employment valve—subcontracted and dismissed freely according to changing business needs. Scott-Stokes, Workers Untouched by Japan's Magic Wand, N.Y. Times, July 4, 1982, at E3, col. 1.
197. This dual structure has been characterized as a "two-edged sword" because the price paid for economic prosperity and social progress for some is "institutional inequality" for others. B. Blue-Stone and B. Harrison, supra note 1, at 220. This second class within the workforce is not insubstantial as is demonstrated by the fact that Toyota, a major Japanese automobile manufacturer, uses such workers for 80% of its work. Id. at 219.
production is beginning to move abroad.\footnote{198}

In sum, it is evident that the economies of Western Europe and Japan have not been immune to the pressure globalization of the marketplace has placed on governments to allow businesses and industries to freely restructure. While those nations have nevertheless enacted more comprehensive plant closing legislation than nations like the United States or Canada,\footnote{199} they apparently have paid dearly for doing so. They have lost productive capacity, jobs and productivity relative to nations like the United States where there are no such laws. The potential for such loss is precisely the reason the Common Market countries decided to harmonize their plant closing laws.\footnote{200} Eliminating the adverse effects from divergent national standards governing plant closings and mass dismissals of workers was also the basis for the international codes governing such conduct by the multinationals. This Comment therefore turns to a discussion of those codes and the theories underlying their adoption.

\section*{D. Transnational Codes Governing Plant Closings by Multinationals}

Standards governing multinational management obligations to workers affected by decisions which may lead to mass dismissals have been, and continue to be, developed at the international level. The International Labor Organization ("ILO")\footnote{201} and the Organization for Eco-

\footnote{An example of this erosion is the emergence of new practices such as "management-encouraged voluntary retirement" by those otherwise holding the privilege of lifetime employment. See W. Gould, \textit{supra} note 178, at 11.}{York University, Thirty-Sixth Annual National Conference on Labor 2-14 (R. Adelman ed. 1983). An example of this erosion is the emergence of new practices such as "management-encouraged voluntary retirement" by those otherwise holding the privilege of lifetime employment. See W. Gould, \textit{supra} note 178, at 11.}}

\footnote{B. Bluestone & B. Harrison, \textit{supra} note 1, at 176-77 (Japanese automobile manufacturers departing from "traditional home based production strategy" partly in response to the entrance of the American automobile manufacturers into the small car market). \textit{See also The Second War, supra} note 139, at 95 (movement of Japanese production to Georgia because of favorable American laws governing capital mobility).}{B. Bluestone & B. Harrison, \textit{supra} note 1, at 176-77 (Japanese automobile manufacturers departing from "traditional home based production strategy" partly in response to the entrance of the American automobile manufacturers into the small car market). \textit{See also The Second War, supra} note 139, at 95 (movement of Japanese production to Georgia because of favorable American laws governing capital mobility).}

\footnote{Canada's approach to the plant closing problem is largely analogous to that of the United States. \textit{See} Christie, \textit{Voluntary Plant Closings and Workforce Reductions in Canada}, 16 Ga. J. Int'l \& Comp. L. 249-54 (1986) (while the provisions vary between provinces, few are comprehensive; the more industrialized such as Ontario have essentially the same provisions as the United States and progress nationwide toward a more comprehensive legislative scheme has been arrested since 1982).}{Canada's approach to the plant closing problem is largely analogous to that of the United States. \textit{See} Christie, \textit{Voluntary Plant Closings and Workforce Reductions in Canada}, 16 Ga. J. Int'l \& Comp. L. 249-54 (1986) (while the provisions vary between provinces, few are comprehensive; the more industrialized such as Ontario have essentially the same provisions as the United States and progress nationwide toward a more comprehensive legislative scheme has been arrested since 1982).}

\footnote{Pipkorn, \textit{Voluntary Plant Closings and Workforce Reductions in the European Communities}, 16 Ga. J. Int'l \& Comp. L. 259 (1986). Dr. Pipkorn, recapitulating the debates in the European Parliament over the question of plant closing laws of the Common Market countries, stated: \textit{[T]he divergences in the legislation in the member states could affect the functioning of the Common Market and lead to production shifts from one country to another. This is the so-called "Delaware effect" [and] such legal incentives on shifts in production had to be eliminated; everybody agreed this should be effected under rules on the approximation of legislations in the EEC. Id. at 260-61 (citing \textit{JOURNAL OFFICIAL EUR. COMM. (Supp.)} (No. 148) (1972) (Debates of European Parliament)) (emphasis added).}}{Pipkorn, \textit{Voluntary Plant Closings and Workforce Reductions in the European Communities}, 16 Ga. J. Int'l \& Comp. L. 259 (1986). Dr. Pipkorn, recapitulating the debates in the European Parliament over the question of plant closing laws of the Common Market countries, stated: \textit{[T]he divergences in the legislation in the member states could affect the functioning of the Common Market and lead to production shifts from one country to another. This is the so-called "Delaware effect" [and] such legal incentives on shifts in production had to be eliminated; everybody agreed this should be effected under rules on the approximation of legislations in the EEC. Id. at 260-61 (citing \textit{JOURNAL OFFICIAL EUR. COMM. (Supp.)} (No. 148) (1972) (Debates of European Parliament)) (emphasis added).}}

nomic Co-operation and Development ("OECD")202 have been at the forefront of that development.

1. The Impetus for Transnational Regulation of the Multinational Enterprise

The primary impetus for developing transnational codes was the recognition that multinational management had come to wield a disproportionate amount of power as against that of the governments of individual nations203 and their labor forces.204 Its exercise by multinational management severely limited the ability nations had to establish a more satisfactory system of labor relations that would extend to those employed by the multinational.

The power and influence of the multinational stems from both its structure and its manner of operation. The multinational is guided by a highly centralized decisionmaking structure removed from the location of its subsidiary operations.205 As a result, when subsidiaries are moved, huge numbers of host country workers are dismissed by managers relatively immune to the effects.206 That movement is frequent because multinational management is guided by the pursuit of productive cost advantage wherever such advantage may be found.207 The freedom to make such productive shifts is highly valued by managers;208 therefore, those countries which limit that freedom in the interest of affected workers lose investment.209 Few nations are willing to risk that loss.210

By the early 1970's, the problems created by multinational mobility had become unmanageable and support grew for some form of "transnational labor relations" as a channel for controlling its abuses.211 Many believed that international standardization of the rules governing the multinationals' labor practices would eliminate the problems nations

202. The OECD is a body for intergovernmental cooperation established in 1960 for the purpose of enhancing the economic and social benefits which may be derived from international economic interdependence. R. BLANPAIN, THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES AND LABOUR RELATIONS, 1976-1979: EXPERIENCE AND REVIEW 25-26 (1979). The United States holds membership in the organization, id. at 25, and therefore is represented on its central decisionmaking body. Id. at 28-29.


204. R. BLANPAIN, supra note 202, at 17.

205. Id.


208. See supra text accompanying notes 133-40.


210. R. BLANPAIN, supra note 202, at 18. Even the “bigger countries” are discouraged because “[t]hey need the investment, [and] especially the technology.” Id.

211. Blanpain, supra note 209, at 909.
were facing in acting independently.\textsuperscript{212} By eliminating the possibility that multinational management could find locations where unfettered discretion to move was permitted, the threat of losing investment by limiting that discretion was negated. A transnational approach would thereby promote both social progress\textsuperscript{213} and a more stable international investment climate.\textsuperscript{214}

Given the demonstrated failure of the international confederations and international collective bargaining, support grew for codified international standards.\textsuperscript{215} Two principal transnational codes governing the conduct of the multinational enterprise emerged: the OECD Guidelines for Multinational Enterprises (the "Guidelines")\textsuperscript{216} and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (the "Tripartite Declaration").\textsuperscript{217}

2. The OECD Guidelines

The OECD Guidelines represent a "morally obligatory" code of conduct for multinational enterprises.\textsuperscript{218} They were intended as a supplement to, rather than a replacement for, national law so that the multinational would remain obligated to observe both national and international standards.\textsuperscript{219} The Guidelines govern many aspects of the multinational's undertaking, with one section specifically treating matters of industrial relations.

The section of the Guidelines relating to industrial relations promotes dispute resolution through collective bargaining.\textsuperscript{220} To that end, the Guidelines obligate the multinational to respect the right of employees to bargain collectively.\textsuperscript{221} While there is no obligation to bargain

\begin{footnotesize}
\begin{itemize}
\item[212.] R. BLANPAIN, supra note 202, at 18.
\item[213.] Gunter, supra note 201, at 7. The author notes the consistency of these aims with those stated by the United Nations in its support for a New International Economic Order ("NIEO"). \textit{Id.} at 7 n.13.
\item[214.] R. BLANPAIN, supra note 202, at 18.
\item[215.] \textit{Id.} at 20. Efforts have been made at the international level by both trade union confederations, Meichling, \textit{Can Labor Cope With Multinationals?: An Interview with Labor Leader William Winpisinger}, 34 BUS. & SOC. REV. 4, 6 (1980), and employees within the same multinational enterprise worldwide. R. BLANPAIN, supra note 202, at 19. These efforts have been described as "not of a calibre to greatly influence managerial decisionmaking." \textit{Id.} at 19. There are numerous reasons for their failure, including ideological differences, an unwillingness by the national union to relinquish autonomy to the international confederation and the conflicting interests of workers pursuing the same jobs. \textit{Id.} at 259.
\item[216.] Full text of OECD Guidelines is set out in Blanpain, supra note 209, at 940.
\item[217.] INTERNATIONAL LABOUR OFFICE, TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (1977).
\item[218.] Blanpain, supra note 209, at 913. \textit{See also} R. BLANPAIN, supra note 202, at 30-31. Were the code the product of a "Council decision", each member country would be legally obligated to put the decision into effect according to its particular legislative procedures.
\item[219.] Blanpain, supra note 209, at 914.
\item[220.] \textit{Id.} at 946 (Guideline 1).
\item[221.] \textit{Id.}
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with unions on a multilateral basis, the provisions establish rules to facilitate meaningful negotiations within the individual countries. The Guidelines, for example, explicitly require the multinational to engage in "constructive negotiation" with a view to reaching agreements on employment conditions, refrain from coercive techniques such as threatening to move subsidiaries or relocate employees and provide the employees and their representatives with access to the multinational's real decisionmakers.

To facilitate meaningful negotiations, the Guidelines have broad provisions granting employee representatives access to important information about the enterprise. Information about the enterprise must be provided where it is needed either for meaningful negotiations on conditions of employment or in order to enable employee representatives to obtain a "true and fair view of the performance of the entity."

The importance of the information requirements was stressed by the Organization's Committee on International Investment and Multinational Enterprises ("IME") in the Poclain case. In that case, Poclain SA, a manufacturer of heavy industrial equipment, faced financial problems which led to the dismissal of numerous workers in its French and Spanish subsidiaries. The union had been kept "in the dark about the financial and economic situation, prospective orders, work on hand and management's basic intentions," and requests for information about the state of Poclain's accounts were refused. The IME determined that a demand by employee representatives for that information was in conformity with the principles contained in the Guidelines.

Reasonable advance notice about changes in operations under consideration by management that "would have major effects upon the livelihood of [employees]" is also required so that meaningful discussion about possible alternatives to the decision can take place. Following

222. Id.
223. Id.
224. Id. at 947 (Guideline 8).
225. Id. at Guideline 9.
226. Id. at 946 (Guidelines 2b, 3 & 6).
227. Id. at 946-47 (Guideline 2b).
228. Id. at Guideline 3.
229. See R. BLANPAIN, supra note 202, at 200-01. The IME, in addition to drafting the Guidelines, is responsible for issuing opinions as necessary to clarify their meaning as cases arise which illustrate that need. Because the IME "was not seen as a judicial or quasi-judicial forum" it has "avoided drawing any conclusions as to the conformity or non-conformity of a certain behavior with the Guidelines", using the specific cases only as "illustration of issues arising under the Guidelines." Id. at 260-61.
230. Id. at 200.
231. Id. at 201.
232. Blanpain, supra note 209, at 946 (Guideline 6). Prof. Blanpain has emphasized that this consultation should address both "ways to avoid dismissals" and "otherwise, ways to mitigate their adverse effects." Blanpain, supra note 142, at 257.
notification, the employer must cooperate with employee representatives and appropriate governmental authorities in conducting that discussion.\textsuperscript{233} To ensure that meaningful discussion takes place, the IME explained that, for the notice to be “reasonable,” it must either be “sufficiently timely for the purpose of mitigating action to be prepared and put into effect” or, if circumstances are prohibitive, at least given “prior to the final decision being taken.”\textsuperscript{234}

Management interests are also specifically accounted for by the Guidelines. The IME has relaxed the prenotification requirement in cases where compelling reasons such as business confidentiality are present.\textsuperscript{235} Moreover, the ultimate decision rests with the multinational manager.\textsuperscript{236}

The Guidelines have met with some success. Despite their purely voluntary nature, most governments do not take the view that the Guidelines can be ignored at will—the moral obligation is taken seriously.\textsuperscript{237} Some observers believe that the Guidelines have had a “real impact on labor relations and may be the beginning of an elaboration of an international labor relations system.”\textsuperscript{238}

3. The ILO Tripartite Declaration

The International Labor Office Tripartite Declaration, which was adopted one year after passage of the OECD Guidelines,\textsuperscript{239} differs somewhat from the OECD instrument as a result of the structural differences between the organizations. The Tripartite Declaration is, for example, limited to the labor relations aspect of the multinational’s behavior rather than extending, as do the OECD Guidelines, to all aspects of the multinational’s conduct.\textsuperscript{240} More importantly, the ILO’s tripartite member-

\begin{itemize}
\item \textsuperscript{233} Id.
\item \textsuperscript{234} R. BLANPAIN, supra note 202, at 216. The reasonable notice provision has been “one of the most invoked paragraphs of the Guidelines.” Id.
\item \textsuperscript{235} Blanpain, supra note 209, at 915.
\item \textsuperscript{236} See, e.g., the Batco case, where the IME determined that even a profitable subsidiary could be closed under the Guidelines once adequate notice was given and negotiations were pursued. R. BLANPAIN, supra note 202, at 146.
\item \textsuperscript{237} Blanpain, supra note 209, at 913. Prof. Blanpain, stressing the weight of that moral obligation, explained:
\begin{quote}
[I]f morality is abiding by the principles of obligatory behavior, which society at large recommends enterprises follow, and if society is represented by democratically elected governments, consisting of the business community and trade unions, then we have to act according to rules that are morally obligatory.
\end{quote}
Id. at 913-14.
\item \textsuperscript{238} Id. at 920.
\item \textsuperscript{239} Gunter, supra note 201, at 19.
\item \textsuperscript{240} See ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, REVIEW OF THE 1976 DECLARATION AND DECISIONS ON GUIDELINES FOR MULTINATIONAL ENTERPRISES’ NATIONAL TREATMENT, INTERNATIONAL INVESTMENT INCENTIVES AND DISINCENTIVES, CONSULTATION PROCEDURES 27 (1979).
\end{itemize}
ship—composed equally of governments, employers' associations and trade union organizations—provides the basis for a different approach than that taken by the OECD, whose membership is limited to governments.  

This tripartite structure is integral to advancing the primary purpose of the Tripartite Declaration, which is to ensure that interests beyond those of management are accounted for in management's decisionmaking process. The Declaration is premised on the belief that "a continuous dialogue between the parties concerned... fosters effective, flexible, situation-specific solutions." This dialogue, coupled with the generality of most of the Declaration's provisions, is also intended to produce a code of conduct that is universally meaningful, notwithstanding the tremendous economic and social differences among member countries.

The importance placed on fostering dialogue as a means of harmonizing the relationship between multinational management and the host country's workers is further reflected in the Declaration's promotion of collective bargaining. The principles of freedom of association and the right to organize are emphasized in the Declaration. The Declaration specifically discourages host countries from providing multinationals with incentives to invest by limiting workers' freedom to associate, organize and bargain collectively. It also states that multinational management should provide workers' representatives with information required for meaningful negotiations with management.

The Tripartite Declaration enumerates more specific actions multinational management should take within that tripartite framework. Tripartite consultations should, for example, be engaged in prior to commencement of the subsidiary's operations so that employment policies and objectives of the host country can be considered when formulating its business objectives. Once operations have begun, the multinational should expect to give notice of changes in operation which would have a "major impact" on employment to both labor and government representatives at a point early enough in the decisionmaking process that the decision may be examined and, if necessary, mitigating actions

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241. R. BLANPAIN, supra note 202, at 31. In the OECD, the Business Industry Advisory Committee and the Trade Union Advisory Committee do have "consultative status" for purposes of representing the interests of employers and workers respectively. Id.
242. Gunter, supra note 201, at 11.
243. Id.
244. Id. at 11-12.
245. Id. at 11.
246. Id.
247. Id.
248. Id. at 9.
249. Prof. Blanpain explained that, because workers want to influence "coming decisions" the
planned. Finally, where dismissals will be effected, the multinational management is expected to work with government representatives to provide income protection to terminated workers.

E. Summary

The problems created by plant closings and mass dismissals of workers confront every capitalist country. The marketplace became truly global in the postwar period as productive capacity developed worldwide and international competition grew fierce. To remain competitive, businesses around the world began to restructure at unprecedented rates. Some national governments chose not to constrain such capital mobility for fear of driving investment away and losing comparative productivity; others enacted constraints and, to some extent, suffered the consequences. Concern about the possible effects of differing approaches among nations to restricting capital led to harmonization of plant closing laws within the Common Market. It also led transnational organizations to enact voluntary codes governing the conduct of multinationals. The question now is whether the ideas underlying those limited transnational measures warrant broader and more serious application.

III

A Transnational Approach to Accommodating Labor and Community Interests in Mass Dismissals

In this concluding part, consideration is given to a pair of instruments enacted in 1982 by the ILO to meet the growing problem of plant closings worldwide. The instruments are analyzed and a case is made for incorporating them into the laws of member nations such as the United States.

A. The Instruments

Since 1963 the ILO has promulgated recommended standards governing the manner in which most employers within the organization’s member nations should proceed when carrying out collective terminations of workers. Those standards, as initially set out in the 1963 Ter-

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250. Gunter, supra note 201, at 9.
251. Id.
252. B. BLUESTONE & B. HARRISON, supra note 1, at 237.
mination of Employment Recommendation, were substantially reformulated at a 1982 convening of the ILO General Conference. While even the former represented vastly more comprehensive provisions than those currently found in the United States, the current changes reflect the ILO’s readiness to keep pace with the problem as it escalates.

The 1963 Recommendation established substantive and procedural standards governing employer initiated terminations whether individual or collective in nature. Such measures included the provision that the employer should have a “valid reason” for terminating an employee—a reason “connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking.” The Recommendation’s provision for either “a reasonable period of notice or compensation in lieu thereof” for employees to be terminated similarly applied regardless of the number of employees terminated. During that notice period, the Recommendation provided that terminated workers should, “as far as is practicable,” be allowed a “reasonable amount” of paid time off to seek other employment. Provision for some form of income protection was also, as a general matter, urged upon the employer.

The 1963 Recommendation also included supplemental provisions covering terminations made specifically in the context of a larger reduction in the employer’s workforce. As a general policy matter, the Recommendation stated:

Steps should be taken by all parties concerned to avert or minimize as far as possible reductions of the workforce by the adoption of appropriate measures, without prejudice to the efficient operation of the undertaking.

254. Id. at 1060. The General Conference may codify its resolutions as either “conventions” or “recommendations.” The choice affects the obligations that follow for member countries. Where a convention is issued, member countries generally must bring the convention before the nation’s authorities for possible ratification and incorporation into that nation’s law within a year of the session held in which the convention was adopted. Id. at iv-v (Preface). Where a recommendation is adopted, there is no required ratification process and the member countries are merely expected to bring the matter before the authorities for their consideration. Id. at v-vi.


256. Conventions and Recommendations, supra note 253, at 1060 (see ¶ II(2)(1)).

257. Id. The precise interpretation given that standard was to be provided by the entity responsible for giving effect to the Recommendation. Id. The relevant entity may be any of those responsible for administering an approved method for implementing the Recommendation which include the “national laws or regulations, collective agreements, work rules, arbitration awards or court decisions.” Id. at ¶ I(1).

258. Id. at 1061, ¶ II(7)(1).

259. Id. at ¶ II(7)(2).

260. Id. at ¶ II(9).
To that end, the Recommendation provided that the employer should consult the workers' representatives "as early as possible on all appropriate questions," including measures to avoid terminations where possible.

The Recommendation also obligated the employer to work to mitigate the effects of terminations where possible. Along with the general provision made for income protection, the Recommendation stated that a fair and systematic approach to both selecting employees for termination and re-engaging them should be established from the outset.

Finally the Recommendation encouraged the parties to "bear in mind that there may be public authorities which might assist the parties to such consultation." Consultation with the authorities was particularly emphasized in the event that the contemplated terminations were substantial enough in number to have a "significant bearing on the manpower situation of a given area or branch of economic activity." The recommended remedy for the breach of this or any other provision of the instrument was reinstatement with backpay or adequate compensation, whichever appeared most appropriate.

In 1982, the ILO adopted the Termination of Employment Convention and the 1982 Termination of Employment Recommendation which, together, have given new meaning to the international standards governing terminations at the employer's initiative. The instruments were both passed in response to what the conference viewed as "significant developments" in the law and practice of the member states since 1963 and to the recent "economic difficulties and technological changes" they had come to face. That the General Conference replaced the existing standards of the 1963 Recommendation with both a convention and supplemental recommendation suggests it perceived those economic and technological changes to be weighty.

261. Id. at 1062, ¶ III(12).
262. Id. at ¶ III(13)(1). Note that the consultation in the case of individual terminations was not affirmatively provided for; rather, such was a matter to be decided by the entities authorized to give effect to the Recommendation. Id. at 1061, ¶ II(10).
263. Id. at ¶ III(13)(2).
264. Id. at ¶ III(13)(3).
265. Id. at ¶ III(15)(1). The Recommendation encouraged the use of "precise criteria" to be established, where possible, in advance of the terminations. Id. Examples given of appropriate criteria were ability, length of service, age and family situation. Id. at ¶ III(15)(2)(a)-(f).
266. Id. at 1063, ¶ III(16)(1)-(4).
267. Id. at 1062, ¶ III(12)(3).
268. Id. at ¶ III(14).
269. Id. at 1061, ¶ III(6).
271. Id. at 78.
272. Id. at 72, 78.
The 1982 Convention and related Recommendation maintain the same broad coverage of the 1963 Recommendation and preserve many of the provisions applicable to both individual and collective terminations. Among those standards elevated to the status of "convention" were the requirements that terminations be made for "valid reasons," that the employees be entitled to a "reasonable period of notice [of termination] or compensation in lieu thereof" and that the employer be obligated to provide some form of separation pay to terminated employees. The 1982 Recommendation preserved the employees' right to a reasonable amount of paid time off for the purpose of seeking alternative employment and to receive a written evaluation of the employee's conduct and performance from the employer.278

The 1982 instruments also provided specifically for standards governing collective terminations, although that class of cases was couched more precisely as "terminations for reasons of an economic, technological, structural or similar nature."279 The determination of whether the dismissals must reach some specified percentage of the workforce before these provisions would apply was left to the entity implementing the instruments.280

Many of the provisions of the earlier instruments were kept. The 1982 Recommendation maintained the earlier Recommendation's policy statement that collective terminations should be avoided or minimized where possible. The 1982 Convention preserved the employees' representatives' right to a consultation with the employer about ways to minimize the terminations and mitigate their adverse effects "as early as possible." It also preserved the remedies of reinstatement and adequate compensation.

In addition, a number of significant provisions were added in draft-
ing the new instruments. First, the 1982 Convention specifically obligates the employer to provide the workers' representatives in "good time" with information concerning the reason for the terminations, the number and categories of workers to be affected and the period over which they would be carried out.第二, the 1982 Recommendation offers a more detailed treatment of how terminations may be averted or minimized and how their effects may be mitigated. Finally, the 1982 Convention requires the employer to notify the competent authority of the proposed terminations, the reasons for effecting them and other relevant matters "as early as possible," regardless of their significance to a given area of economic activity.

The 1982 reformulation of the ILO standards governing employer initiated terminations adds substantially to the existing standards provided by that organization. Essential protections such as the advance notice of termination provision were raised from recommendation to convention status, increasing the chance that they would be incorporated into the laws of the member nations. Moreover, new provisions, such as enhanced content requirements for notice, were added by the Convention. Further, the 1982 Recommendation supplements the Convention in important ways such as offering more detailed measures for averting or minimizing terminations and mitigating their effects.

B. A Case for Incorporating the ILO Measures into American Law

By virtue of its membership in the ILO, the United States has been presented with what is essentially a proposal for comprehensive legislation establishing international standards for management conduct when collectively dismissing employees. The 1982 Termination of Employment Convention was, like all ILO conventions, designed to be brought before each member nation's authorities for ratification and incorporation into their national laws. Yet, unlike the furious debate which sur-

284. Id. at art. 13(1)(a).
285. Id. at 82, ¶ III(21) & (22). The Recommendation explains that such measures might include restrictions on new hiring, spreading the workforce reduction over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retraining, voluntary early retirement with appropriate income protection, restriction on overtime and reduction of the normal work hours with partial compensation where possible. Id.
286. Id. at 83, ¶ III(25) & (26). To mitigate the adverse effects of the terminations, the Recommendation provides that the employer, together with the competent authority, should help the terminated employees find suitable alternative employment, provide training and retraining as needed and some form of income protection during the transition period. Id.
287. Id. at 76 (art. 14(1)).
288. See supra note 254 (brief description of the intended procedure for member ratification of ILO conventions). Only a small number of the approximately 160 ILO conventions have been ratified by the United States. Blanpain, supra note 142, at 272. Those ratifications occurred during the "Roosevelt era." Id.
rounds the bills concerning mass dismissals proposed in Congress each year, the ILO instrument has gone virtually unnoticed.

This treatment is misguided. Serious consideration should be given by Congress and the Administration to the idea of ratifying the ILO Convention on employer initiated terminations.

The need clearly exists for a new approach to the competing interests which arise when management contemplates a collective termination of workers. At present, it appears that the majority of American legislators do not fully appreciate the importance of the individual and societal interests in conflict with management's interest in retaining the freedom to pursue maximum profits. Thus, no real movement has been made toward accommodating those competing interests.

That failure is evident in both the unionized and nonunionized sectors of the American labor market. In the unionized sector, the diminishing number of workers represented by unions is losing protection as the duties under the National Labor Relations Act are being sharply curtailed by the National Labor Relations Board and the courts. The lack of union bargaining power—which may be attributed to the way American labor law defines the respective power of the bargaining parties—has also left represented workers unable to secure provisions curtailing management rights through collective negotiations. Neither Congress nor the Administration has, however, stepped in with needed labor reform either to reassert the primary aims of the Act or to remedy the power imbalance between union and management. In the nonunionized sector of the workforce, too, neither Congress nor the state legislatures have managed to provide needed reform, though various bills recognizing the need for more comprehensive provisions governing mass dismissals have been proposed.

If there is to be greater progress toward reaching that accommodation, an approach must be taken which confronts the primary underlying forces which have served as a barrier to state and congressional action. Those forces, as described in Part II of this Comment, have emerged with the changes in the world market that created more competitive international markets and, consequently, new concerns for American management. Those concerns prompt managers to retain total discretion to restructure capital and effect mass dismissals as needed. The opposition by American legislators to placing restraints on that discretion grew out of a concern that businesses hampered by legislatively imposed obligations could not compete and that some might move abroad. In either case American jobs would be lost. Legislators rightly fear the loss of existing jobs and opportunities to create new ones.

The adverse effect that plant closing restrictions appear to have had on the economies of nations which have enacted them, as discussed in
Part II, calls into serious question the ability of nations acting independently to apply such restrictions successfully. The economies of Western Europe, such as that of West Germany, have reportedly begun to trail American economic performance as businesses tire of the high costs of restructuring. Japan has also paid in many ways for its provisions for employment security, and the indications are that those provisions will not be maintained in their entirety.

These key constraints on the ability of national governments to gain some measure of control over plant closings and restructurings suggest that one viable approach to the problem may be found at the international level. Clearly, an important reason for the hesitancy of American legislators to approve plant closing regulation and the difficulties encountered by the European and Japanese regimes is the ready access multinational businesses have to foreign productive capacity. So, too, is the growing importance of relative business productivity between nations as international competition intensifies. Both capital flight and relative productivity loss gut an economy of jobs, technology and tax revenues. Plant closing restrictions place a nation in the unenviable position of risking such loss.

These economic forces were recognized by the drafters of the voluntary transnational codes governing plant closing operations by multinationals, as outlined above in the close of Part II. Both home and host countries have risked losing multinational investment by limiting the multinational's freedom to move capital. A transnational approach to facilitating control of the multinational’s labor practices has been designed to alleviate the problems nations face in securing needed reform. Such an approach can provide a uniformity of rules among the nations in which multinational management considers establishing operations. If the principles of transnational regulation were faithfully applied, national governments would no longer feel compelled, and indeed would not be able to risk the health of their labor forces by permitting multinational management unfettered discretion in exchange for multinational investment. The increasing acceptance of the instruments governing the multinational suggests that the ideal of a transnational approach may be realized in practice.

A transnational approach would serve equally well as a means to address the problems currently faced by American legislators seeking broader reform of the laws governing mass dismissals. Transnationally based legislation would facilitate such reform by removing the high costs otherwise associated with more stringent measures. By providing uniformity among the laws governing mass dismissals in the nations whose industries compete with those of the United States and who themselves compete for business investment, a major source of the present opposi-
tion by legislators to reform would be eliminated. There would no longer be an opportunity for relative productivity loss as a result of the newly imposed obligations. Neither would plant closing restrictions be an incentive for business expansion and investment to take place elsewhere.

The specific rules that would govern have already been carefully provided for in an instrument drafted by an organization to which the United States holds membership. The 1982 Termination of Employment Convention, adopted by the International Labor Organization, provides important requirements: the bases for a decision which could produce mass dismissals must conform to acceptable standards, management must provide workers with certain information when such a decision is under consideration, consultations must be held prior to the making of the final decision, income protection must be afforded affected workers and, upon a breach of the rules by management, a defined remedy will be applied. The supplemental Recommendation would serve an informational function, detailing the basic policies of the Convention and the manner in which its requirements might be met.

An important aspect of these regulations is the consideration given management's interests and the assurance that accommodation remains the goal. The ILO instrument permits the entity whose responsibility it is to implement the ratified measures to set the size of the workforce that, upon termination, will trigger the instrument's standards. The result is increased national control over the frequency with which the regulations apply. More importantly, no provision denies management the ultimate right to implement a decision based on the needs of the business without penalty so long as its obligations are faithfully carried out. The point is merely to ensure that, since management is permitted to pursue its profit-maximizing course, the legitimate interests of those affected by its decisions will be fairly recognized and provided for.

For the ILO instrument to be truly transnational, however, it must be implemented by each of the nations competing in the international markets and for foreign investment. For that reason, it seems essential that ratification take place through the coordinated efforts of the ILO member nations. Without such coordination, each member will continue to confront the same limiting forces that obstruct independent action since there would be no assurance that the instrument would be effectively transnational in scope. That coordination should be attainable as nations like West Germany and Japan, currently struggling independently to accommodate their need to generate investment and maintain competitive industrial performance with their desire to create a humane system of labor relations, come to understand the potential benefits of such an approach.  

289. Coordinated ratification raises the important question of whether the developing nations of
CONCLUSION

The time has come to look beyond the capabilities of individual nations in seeking needed reform of the laws addressing the problem of mass dismissals. To the extent that the problem has its origins in the changing international marketplace, a solution which is international in nature most directly addresses the source of that problem. This Comment therefore urges a closer examination of the possible solution that a transnational approach to reform can achieve.

The world could be persuaded to join these efforts. One could, of course, argue with some force that they would have no interest in doing so because they would be the direct beneficiaries of such action by the industrialized nations. Moreover, even if their support could be obtained, it may be difficult to enforce international regulations in developing nations as many lack formal mechanisms to restrain corporate behavior and punish transgressions. While this problem is beyond the scope of this Comment it should be noted that participation by such nations could perhaps be encouraged by making their cooperation a condition to loan monies provided by international lending institutions. Furthermore, the problem may not be as great as it perhaps seems since a flood of corporate investment could drive wages up in those countries and itself provide a disincentive to further investment.