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ESCAPING THE WESTPHALIAN TRAP: UNIONISM AND EQUALITY IN CHINA, MEXICO AND THE UNITED STATES

Michael J. ZIMMER*

Abstract. With increased economic globalization since the 1980s has come increased economic inequality and a decline in union density in most countries of the world, with one notable exception being the Peoples Republic of China. The decline in unionism contributes to increased inequality. This paper will try to begin to answer the question whether a revived unionism operating transnationally can do to help reduce inequality as it did during the industrial era following World War II. To do that, this paper will compare and contrast the union movements in China, Mexico and the U.S. Part I will set out the contours of the problems the union movement faces because many employers have been able to organize themselves to escape national labor laws and national labor unions. Unions, in these three countries as well as elsewhere, have not escaped the trap set up by the Westphalian-based system of sovereign nation states which use national law to regulate national economies. Part II will sketch out some of the ways the union movement might attempt to respond to the present situation, as well as some of the obstacles such action will need to overcome if the union movement is to escape the Westphalian trap. Part III concludes.

* Professor of Law, Loyola University Chicago School of Law. Copyright by Michael J. Zimmer. I want to thank Professors Roger Blanpain, Susan Bisom-Rapp, William R. Corbett and Hilary K. Josephs for their work in international and comparative employment law that has so aided my work. See Roger Blanpain *et al.*, *THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW – CASES & MATERIALS* (2007). Joe Mitzenmacher in the Loyola law library helped in ways too numerous to mention. As always, I thank Professor Margaret L. Moses. The Loyola Chicago law school provided financial and other support for this project. A version of this paper was presented at the U.C.L.A. conference, Work and Inequality in the Global Economy: China, Mexico, and the US, sponsored by its Institute for Research on Labor and Employment, Oct. 10, 2009.

I. INTRODUCTION

Economic globalization reduces barriers set by national laws and national economies and therefore allows many enterprises to locate parts of their operations transnationally to best serve their need. In general, unions continue to be bound by national laws and they principally operate within distinct national economies and cultures. Simply, employers have been better able to escape the Westphalian trap of nation-state delineation while unions have not. To regain leverage to fight unionism, the union movement must focus on following enterprise wherever it operates.

The basic structure of labor laws in the United States, Mexico and China are quite similar. But the unions in these countries operate very differently. The “bread and butter” U.S. unions primarily look to represent workers at individual workplaces, but those workplaces subject to outsourcing and offshoring can leave unions with few workers to represent. Bargaining has shifted focus to protecting earlier gains while confronting demands for “givebacks.” From the time of the Mexican Revolution, Mexican unions focused on playing a role in a corporatist system of governance in an economy with high barriers to globalized competition. When the government turned to a global, free market economy in the mid-1980s, these “establishment unions” lost purchase through politics. Hanging on to survive, they are paid for “protection” contracts that protect employers from having to deal with unions that desire to represent workers. While the U.S. and Mexico both are among the higher labor cost countries in the world, China is a low labor cost country and Chinese unions are growing quickly. But Chinese unions are an integral part of the structure of a one party government and are not the result of the free association of workers. Pursuant to government policy, unionization has recently and quickly expanded in the free market sector of the economy. Perhaps channeling the Wagner Act, the focus of union activity may be shifting from enforcing government policy in the workplace to representing employees vis-à-vis their employers in order to reduce strikes and other protests.

To regain purchase in the globalized economy, unions need to redirect their goals so that they can follow enterprise wherever it moves operations. There is now some transnational merger activity and some evidence of co-

operation among national unions in specific cross border disputes. But, there needs to be much more, starting with an increased focus on international cooperation leading up to true international unionism. While enterprise has reorganized transnationally quickly and comparatively easily where that proves profitable, the union movement faces enormous obstacles to do so. Being organizations bounded by national laws, cultures and economies, unions need to stand together internationally despite a tremendous collective action problem that pushes each national union movement toward protecting their own members at the cost of being in conflict with improving the lot of union workers in other countries. Unions and their members still identify themselves as being bounded nationally, even if transnational unity might better serve their long term collective interests. Somehow, workers need to identify with unionism at an international level, which would include empathy and support for the plight of workers all around the world. Further, the fundamentally different organization and operation of the union movements in these three countries poses obstacles to the achievement of an international union movement.

Much work in a large number of areas needs to be done, by unions but also other forces favoring social justice, if the union movement is to regain leverage against globalized employers. The range of activities discussed includes replacing free market ideology with new economic theory that values workers and equality. That theory needs a rallying cry more powerful than the neoliberal one, "the government is the problem, the free market is the solution." Though constructed of nation states, the vision of the International Labor Organization should be expanded to foster international unionism. National laws, including laws dealing with enterprise organization, independent contractor law, contract law and torts, need to be amended.

II. NATIONAL UNIONS IN AN ERA OF POST-WESTPHALIAN ENTERPRISE

Historically, the present nation-state system evolved from a 1648 treaty, the Peace of Westphalia, which established nation-state sovereignty in Eu-

rope.¹ Sovereignty is based on the idea of independent geographic territories with external actors excluded from domestic authority.² Thus, the nation-state system is the source of national laws, which laws have created the basis for separate national economies.³ Not surprisingly, business entities as well as labor unions originally formed within nation-states, subject to their respective domestic laws. They identified themselves nationally and principally operated within a national market. In the current era of heightened economic globalization, enterprises generally can more easily than unions escape the Westphalian world. Enterprises now have an expanded opportunity to operate transnationally, with a broad ability to establish different parts of the enterprise anywhere in the world to best serve their interests.⁴ National unions, weakened at home by that ability of enterprises to exit,⁵ have so far been stymied in following enterprises across borders. In short, unions appear trapped within the Westphalian system.

Free trade and new technological and transportation⁶ capabilities now allow the development of what Jacques Rojot calls “virtual enterprises.”⁷ An enterprise can slice and dice its components, outsource some of them using supply chains of independent contractors and offshore some. That would

¹ This interpretation is a contestable proposition; see Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. OF L. AND SOC. SCIENCE (2009) (nation state system preexisted and was not created by Peace of Westphalia).

² Medard Gabel & Henry Bruner, GLOBAL INC.: AN ATLAS OF THE MULTINATIONAL CORPORATION 2 (2003). This view is subject to substantial criticism. See R. H. Jackson & P. Owens, *The Evolution of World Society*, in THE GLOBALIZATION OF WORLD POLITICS: AN INTRODUCTION TO INTERNATIONAL RELATIONS 53 (John Baylis & Steve Smith eds., 2005).

³ Though cross-border trade has always played an important role in the world economy, the amount of that activity has varied substantially through history.

⁴ Katherine Stone, *To the Yukon and Beyond: Local Laborers in a Global Labor Market*, 3 J. SMALL & EMERGING BUS. L. 93 (1999). An example is the move by Halliburton from its Houston headquarters to Dubai. Brett Clanton, *Halliburton CEO says Dubai base the “right decision,”* HOUSTON CHRONICLE, May 21, 2008, <http://www.corpwatch.org/article.php?id=15046>.

⁵ See Stephen F. Befort & John W. Budd, INVISIBLE HANDS, INVISIBLE OBJECTIVES: BRINGING WORKPLACE LAW & PUBLIC POLICY INTO FOCUS 117 (2009).

⁶ James Surowieki, *The Box That Launched a Thousand Ships*, THE NEW YORKER, December 11, 2000, at 46 (discusses the development of the intermodal container system that allows these truck trailer sized containers to be transported safely and efficiently by ships, trains and trucks).

⁷ Jacques Rojot, “Virtual Employers and Employment,” Lecture, Fondazione Marco Biagi Conference, Modena, Italy, March 19, 2007.

allow an enterprise to reduce to a comparatively small group of workers defined as its own “employees,” although still having the impact of a large corporation.⁸

National laws governing business relationships grant enterprises great freedom to privately order their relationships within any nation in which they operate.⁹ A recent example of the extent that enterprises can use traditional law to insulate themselves from liability for labor abuses comes from Wal-Mart. Though Wal-Mart is an employer with something like two million workers who are its “employees,” it nevertheless does business through supply chains with a large number of suppliers, many of them in developing countries. In *Doe v. Wal-Mart Stores, Inc.*,¹⁰ plaintiffs were employees of enterprises located around the world that make and sell goods to Wal-Mart. Wal-Mart’s contracts with plaintiff’s employers all incorporate Wal-Mart’s Code of Conduct obliging these suppliers to provide basic labor standard protections to their employees, allowing Wal-Mart to monitor compliance and to cancel contracts if the supplier “fails or refuses to comply.” Claiming injury from their employers’ mistreatment, plaintiffs sued Wal-Mart because it failed to either monitor or enforce Code compliance. The Ninth Circuit, applying traditional common law, rejected plaintiffs’ claims under the four theories presented. Thus, plaintiffs were (1) not third party beneficiaries of the contracts between plaintiffs’ employers and Wal-Mart; (2) Wal-Mart was not a joint employer of these employees with their employers; (3) Wal-Mart did not owe a duty to plaintiffs not to be negligent; and (4) Wal-Mart was not unjustly enriched by the employers’ mistreatment of the plaintiffs. In short, independent contractor, contract and torts law allowed Wal-Mart to

⁸ *Id.*

⁹ See Timothy P. Glynn, *Interjurisdictional Competition in Enforcing Noncompetition Agreements: Regulatory Risk Management and the Race to the Bottom*, 65 WASH. & LEE L. REV. 1381 (2008).

¹⁰ — F.3d —, 2009 WL 1978730 (9th Cir. 2009). See also, *Bauman v. DaimlerChrysler Corp.*, — F.3d — (9th Cir. 2009), where the court affirmed the dismissal of claims brought under the U.S. Alien Tort Claims Act and the Torture Victim Protection Act for the alleged kidnapping, torture and murder of 17 workers at a Mercedes Benz factory in Argentina. The court held that the federal courts lack personal jurisdiction over DaimlerChrysler, even though it does have jurisdiction over Mercedes Benz USA LLC. DaimlerChrysler lacked sufficient control over its American subsidiary to create an agency relationship sufficient to support jurisdiction over the parent company.

arrange its legal relationship with its supplier to cut off the claims of the employees of the suppliers.¹¹ Independent contractor law is the underpinning of outsourcing.¹² Outsourcing can be combined with offshoring to take advantage of different operating conditions, including different labor costs and standards, all around the world. To put it in economic terms, outsourcing and offshoring allow many employers to take advantage of the increased competition resulting from the huge expansion of a global labor market that comes with globalized economic activity.¹³

Assume a U.S. employer, Virtual Enterprises, Inc. (V.E.), reorganizes and relocates significant parts of its operations from the U.S. to Mexico and China. If the only employees of the enterprise left in the U.S. are managers, a U.S. union that had represented U.S. workers would no longer have a legal basis for their representation since managers are not considered employees for purposes of unionization.¹⁴ With few covered employees left in the U.S., the U.S. union that had represented V.E. workers would lack much interest in advancing the welfare of V.E.'s employees in foreign countries

¹¹ Section 1.01 of the evolving RESTATEMENT OF THE LAW THIRD EMPLOYMENT LAW, Tentative Draft No. 2 (April 3, 2009), sets forth the distinction between an employee and an independent contractor, with an independent contractor being an entity that "renders services as part of an independent business." Section 1.01 of the RESTATEMENT OF THE LAW THIRD AGENCY describes an "agent" as someone agreeing to act under the control of the principal. Thus, if the parties craft an agreement that maintains the two parties as independent businesses not subject to the control by each other, that relationship is likely to hold up as an independent contractor relationship.

¹² As with other business decisions, multiple factors can play a role in decisions of where to place operations and whether to outsource them, whether or not, they have been offshored. Japanese, German and Korean car companies sited assembly plants in the U.S., even though many other countries could offer more favorable labor costs. Boeing, for example, appears to have "bet the company" on its new model, the 787 Dreamliner. One aspect of the bet was to outsource much of the production to enterprises located around the world. That offshoring and outsourcing, and the limits that put on Boeing's ability to manage the operation, has been one cause of the extensive delays in the production of the new airplane. See David Greising, *Problems Lining up Against Boeing Chief*, CHICAGO TRIBUNE, Thursday, July 23, 2009, §1, at 27.

¹³ See Richard B. Freeman, AMERICA WORKS: CRITICAL THOUGHT ON THE EXCEPTIONAL U.S. LABOR MARKET 128-40 (2007) (noting that during the 1990s the world labor supply almost doubled, from 3.3 billion to 6 billion workers).

¹⁴ Unionization of all but the smallest private employers is governed by the National Labor Relations Act, 29 U.S.C. §§151-69. Managers are considered to be too closely aligned with the employer to enjoy the protections of the Act. Kenneth G. Dau-Schmidt *et al.*, LABOR LAW IN THE CONTEMPORARY WORKPLACE 183 (2009).

since it is organized to represent only U.S. members.¹⁵ Moreover, even if V.E. has a corpus of employees in the U.S. protected by the N.L.R.A., the union faces the challenge of organizing workers whose work can readily be offshored or outsourced whether or not the union makes strong demands on the employer.¹⁶ Thus, the union aiming to protect and advance the interests of the V.E. employees in the U.S. would lose leverage against the employer¹⁷ and would have little incentive to work on behalf of workers outside the U.S.

Suppose V.E. has offshored operations to Mexico, organizing a subsidiary. The employees of V.E. Mexico, have, under Mexican law, the right to organize a union for purposes of bargaining with their employer much like the statutory rights of U.S. workers.¹⁸ This right, however, has proved to be more abstract than real.¹⁹ Rather than organizing workers at particular work-

¹⁵ The national scope of unions has set a boundary of their operations: U.S. unions, even those characterizing themselves as “International,” has meant only that their focus of operation and representation of members includes Canada along with the U.S. One situation where a union has an incentive to pursue an enterprise that has escaped its home nation-state is if it was attempting to prevent one particular enterprise in an industry the union has targeted from gaining advantages by escaping unionization while the rest of the industry was unionized.

¹⁶ Before globalization reduced the barriers to the operation of a transnational enterprise, a union operating within a nation-state had leverage, through the use of “carrots” —e.g., industry-wide pattern bargaining that took labor costs out of price competition in the industry— or “sticks” —picketing, strikes and boycotts that imposed high costs on the employer’s resistance to unionization. If the industry has been globalized, one national union cannot offer that carrot because the industry has become global and the stick is much smaller because the employer has greater opportunities to escape the consequences of its use.

¹⁷ Incumbent unions in the U.S. have been fighting to maintain what benefits they had achieved and have frequently been put in the position of giving-back some of those advantages in order to save jobs for its members. Witness the givebacks by the United Autoworkers to the U.S. car companies.

¹⁸ The active involvement of workers and unions in the Mexican Revolution was reflected in the strong labor standards, including the right to organize and to bargain, in the Constitution and in the Federal Labor Law. Article 123, Part A § XVI of the Mexican Constitution provides: “Both employers and workers shall have the right to organize for the defense of their respective interests, by forming unions, professional associations, etc.” See <http://www.ilstu.edu/class/hist263/docs/1917const.html#TitleVI>. Article 357 of the Federal Labor Law allows unions to be established without prior government approval. <http://www.mexicanlaws.com/STPS/laborlawindex.htm>.

¹⁹ The same issue can be raised in the U.S. In the present debate about the Employee Free Choice Act, one of the issues is whether worker rights to organize have ceased to be real be-

places and seeking better wages and benefits for them through collective bargaining —the “bread and butter” unionism of U.S. unions— the union movement in Mexico historically focused on national politics by participating in the national government’s corporatist system that emerged from the Revolution.²⁰ Mexican corporatism has been described as:

[A] strong federal government dominated by a civilian president and his loyalists within the ruling party, a symbiotic relationship between the state and the official party, a regular and orderly rotation of power among rival factions within a de facto single-party system, and a highly structured corporatist relationship between the state and government-sponsored constituent groups.²¹

Unions became powerful by joining the “establishment” as one of the constituent groups involved in setting government policy, including labor policy, all within the control of one political party, the PRI,²² under one leader, the President. This corporatist system relied on an “import substitution” economic model²³ that built walls around the national economy and kept Mexico largely out of the worldwide economy. Union leaders negotiated with the President and the major leaders of business to set economic policy, including labor policy. Until the mid-1980s, organized workers made substantial economic gains.²⁴ After the Mexican government abandoned the import substitution model in favor of entry into the global economy, the strategy of the establishment unions became obsolete. They lost power be-

cause of the ability of employers to avoid unionization. See Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, Economic Policy Institute (2009).

²⁰ Unions in some other countries, such as France, focus more on national politics than on direct worker representation. See Marie Mercat Bruns, *Worker Representation at the Enterprise Level in France*, COMP. LAB. L.J. 15 (1993).

²¹ <http://countrystudies.us/mexico/80.htm>.

²² The PRI is the Partido Revolucionario Institucional.

²³ Import substitution industrialization is a trade and economic policy based on the premise that a country should attempt to reduce its foreign dependency through the local production of industrialized products. See, Werner Baer, *Import Substitution and Industrialization in Latin America: Experiences and Interpretations*, 7 LATIN AMERICAN RESEARCH REV. 95-122 (Spring 1972).

²⁴ See David Fairris, *Unions and Wage Inequality in Mexico*, 56 INDUS. & LAB. REL. REV. 481 (2003).

cause, to stay part of the establishment, they accepted neoliberal policies that undermined and eroded the earning power of workers.²⁵ Without high national barriers to global economic activity to protect workers from foreign competition, the unions lost the support of workers, which meant they lost the ability to bring workers to the polls to support the PRI party. That meant the unions lost leverage with a party and a government that had surrendered strong economic regulation to the free market.²⁶ While not all unions had joined the establishment, independent unions, including recently organized ones, have been, and continue to be, marginalized.²⁷

In setting up its Mexican operation, V.E. Mexico likely will be advised to contract with one of the established unions to represent its employee even before the first worker is hired.²⁸ These unions, however, are called “ghosts” because they do not actually represent the workers. Instead they agree to “protection” contracts that shield employers from unions that would bargain for the benefit of the workers.²⁹

At this time, establishment unions are not likely to help address economic inequality by helping workers. In order to maintain what power they can, however, the established unions have used their influence with the government to forestall the emergence of independent unions. Should the workers at V.E. Mexico desire to organize or join an independent union, that union faces a system of regulation administered to maintain the established unions even as Mexico may be moving away from the one party system that dominated Mexican life up to the year 2000.³⁰ The Federal Labor

²⁵ See Katrina Burgess, *Mexican Labor at a Crossroads*, MEXICO'S POLITICS AND SOCIETY IN TRANSITION 93 (2003) (*Mexican Crossroads*).

²⁶ In 2000, the PRI Party lost the Presidency with PAN candidate, Vicente Fox, winning. PAN also won the 2006 election with Felipe Calderón as President. At the present time, the PRI has regained control of Congress, leaving the government divided between the PAN President and the PRI national legislature.

²⁷ See *Mexican Crossroads*.

²⁸ LANCE COMPA, JUSTICE FOR ALL: IN MEXICO 15 (2003).

²⁹ U.S. Department of State's Country Report on Human Rights Practices — Mexico 2004, at 18-19, www.state.gov/g/drl/rls/brrpt/2004/41767.htm. “The Mexican Secretary of Labor (STPS) reported in March 2007 that of the 5,774 union contracts registered with his department, only 158 were active, and that those covered only about two million workers.” http://www.ueinternational.org/Mexico_info/mlna_articles.php?id=138#914.

³⁰ For an interesting history of the emergence of a more democratic Mexico, which in-

Law is enforced by tripartite state and local Conciliation and Arbitration Boards (CAB) with jurisdiction divided geographically: One member represents the government, another employers and the third the employees. The established unions continue to dominate the selection of the employee representatives for these CABs.³¹ Given the CABs membership, it is no surprise that they put many obstacles in the path of independent unions.³² The interference starts when a new union attempts to register with the CAB, a legal requirement before a union can act. While registration appears to be merely ministerial, hostile CABs commonly reject the paperwork on hyper technical grounds thereby preventing independent unions from beginning lawful activity. When an independent union does attempt to replace a ghost union, the CABs interfere with and upset the election process that the Federal Labor Law provides to determine which union should represent the workers. Even the right to strike is subject to control by these CABs.

Even if independent unions were freed of the obstacles put in their path by the administration of labor law, they would face similar challenges flowing from globalization that U.S. unions face. Since Mexico is not a low labor cost country, its economy faces competition from lower labor cost countries,³³ including China. As is true for U.S. unions, Mexican unions have lost leverage to be able to extract substantial gains for workers if employers can offshore operations to lower labor cost countries.

If V.E. sets up an operation in China, that brings its unions into the picture. As a one party state, China requires all unions to be affiliated with the All-China Federation of Trade Unions (ACFTU). Historically, China's ur-

cludes descriptions of the role of unions, see Julia Preston & Samuel Dillon, *OPENING MEXICO: THE MAKING OF A DEMOCRACY* (2004) (OPENING MEXICO).

³¹ Roger Blanpain *et al.*, *THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW – CASES & MATERIALS* 227-233, 236-240 (2007) (GLOBAL WORKPLACE).

³² See Public Report of Review of NAO Submission No. 9792 (Han Young), U.S. National Administrative Office, April 28, 1998, <http://www.dol.gov/ilab/programs/nao/status.htm#ia7>. The U.S. body that enforces the labor side agreement to NAFTA found that the CAB had not acted impartially by interfering in an organization drive by an independent union at an employer that had a "protection" contract with a "ghost" union.

³³ The World Bank ranks Mexico among the "upper middle income" countries. See *GLOBAL WORKPLACE* 209.

ban economy was based on state owned enterprises (SOE).³⁴ During that period, the union was more of “transmission belt” imposing policy from the government to the workplace and the workers rather than a protector of workers.³⁵ With the opening to the world economy in the late 1970s, unionization initially languished along with the SOEs because there was little unionization in the emerging private sector. Very recently, the government began a push to unionize all businesses and to have the unions act to advance workers’ established rights.³⁶ The ACFTU unions, however, continue to play “a dual role in the transition towards a market economy” by protecting employee interests but also by advancing government economic policy, including the maintenance of social stability.³⁷ In the past, the social stability goal trumped the worker representation goal, so that unions were supposed to help suppress unrest and avoid strikes and protests. Nevertheless, there has been, and continues to be, a huge number of “mass protests” that include labor protests by workers.³⁸ It has been argued that the purpose for the recent push to unionize Chinese workplaces is that unions, rather than trying to suppress protest, will actively represent workers, perhaps through real collective bargaining, to reduce disputes before they erupt in strikes and other labor protests.³⁹

Chinese law recognizes the right of workers to unionize. Article I §7 of the 1994 Labor Law provides that, “Employees have the right to join and organize trade unions according to law. The trade union represents and supports the lawful rights and interests of employees; it conducts its activities independently and autonomously according to law.”⁴⁰ In 2004, Provi-

³⁴ Ronald C. Brown, *China’s Collective Contract Provisions: Can Collective Negotiations Embody Collective Bargaining?*, 16 DUKE J. OF COMP. & INT’L. L. 35, 48 (2006) (*China’s Collective Contract Provisions*).

³⁵ *Id.* at 65.

³⁶ *Id.* at 51.

³⁷ *Id.* at 52.

³⁸ *Id.* at 45.

³⁹ *Id.* at 52. This channels one of the purposes set forth in Section 1 of the N.L.R.A. in U.S. law. See 29 U.S.C. §151.

⁴⁰ HILARY K. JOSEPH, *LABOR LAW IN CHINA* (2nd ed. 2003) (translation of the law which was approved by the Standing Committee of the National’s People’s Congress, July 5, 1994; effective January 1, 1995).

sions on Collective Contracts became effective which regulate “collective negotiation,” the “signing of the collective contract,” and the protection of the “legal rights and interests of laborers and employing units.”⁴¹ Effective January 1, 2008, the Chinese Labour Contract Law, primarily enacted to expand the individual contract rights of employees, also bolsters the role of unions, including providing for collective agreements of substance. Article 51 provides: “A collective contract shall be concluded by the labor union, on behalf of the enterprise’s employees, and the employer.”

With the newly bolstered labor law and the need to tamp down protest,⁴² the ACFTU undertook a campaign to organize enterprise unions at all employers, particularly those involved in export business.

At the end of 2008, the All-China Federation of Trade Unions announced that it had increased union membership to 212 million, including about 70 million migrant workers. There were 1,725,000 grassroots unions across the country and 77.2 percent of the workforce were unionised, the ACFTU claimed. This represented a remarkable achievement in terms of union organizing. Just five years earlier in 2003, the number of grassroots unions was 906,000 with 124 million members.⁴³

Further, in June, 2008, the ACFTU announced that it would organize all the Chinese operations of Fortune 500 companies operating in China. By the end of the year, the ACFTU announced that 313 out of the 375 Fortune 500 companies operating in China had been unionized.⁴⁴ Even Wal-Mart, after a bottom-up organizational effort among the employees, has recognized ACFTU unions at all of their operations and agreed to a national collective bargaining agreement.⁴⁵

With the exception of Wal-Mart, this amazing progress was mostly the result of top-down efforts with the unions being imposed on enterprises

⁴¹ *China Collective Contract Provisions*, at 38.

⁴² *Id.* at 32. “Unofficial figures put the number of mass protests in 2008 at 127,000, almost 50 percent higher than the last officially released figure of 87,000 in 2005.”

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Membership Required: Trade Unions in China*, THE ECONOMIST, July 31, 2008, www.economist.com/business/PrinterFriendly.cfm?story_id=1184896.

rather than the result of the organization of workers at workplaces seeking representation. Creating ACFTU affiliated unions at each enterprise, however, allows the employer to have considerable influence on the union. For example, union officials are frequently appointed by management and even hold management positions.⁴⁶

The ACFTU, however, has begun efforts to professionalize its staff in order to better represent workers.⁴⁷ Further, it has begun a dialogue with several labor organizations outside China. ACFTU has met with officials of the International Trade Union Confederation,⁴⁸ a delegation of ACFTU officials met with AFL-CIO labor council officials in the U.S. and Change to Win representatives met with ACFTU officials in China.⁴⁹ While still not allowing independent unions that are organized and created by the workers themselves and without a clear right to strike,⁵⁰ China may, nevertheless,

⁴⁶ Going It Alone: The Workers' Movement in China (2007-2008), CHINA LABOR BULLETIN 45 (July 9, 2009), http://www.clb.org.bk/en/files/share/File/research_reports/workers_movement_07-08.pdf (Going It Alone):

In establishing these enterprise unions, the ACFTU rarely organised, or even consulted, the workers concerned, rather it went directly to the managements and demanded that they set up a union. As a result, these union branches are now largely controlled by or are subservient to managements, to the extent that they have been known to represent the management in labour arbitration and litigation proceedings. Many workers do not even know if their enterprise has a trade union or if they are members.

In the U.S., such unions would be prohibited by §8(a)(2) of the N.L.R.A. which prohibits "company unions." The Chinese Provisions on Collective Contracts also appears to prohibit managers from serving as union officials. See *China Collective Contract Provisions*, at 38.

⁴⁷ *Id.* "The ACFTU also sought to "professionalise" enterprise union officials by recruiting "better qualified" candidates from outside the enterprise to replace them, and to protect these new officials from management reprisals."

⁴⁸ John Vandaele, *International Union Sets Up Chinese Link*, <http://ipsnews.net/print.asp?idnews=40871> (April 18, 2009). Previously, the international confederation had refused contact because it did not consider the ACFTU to be an independent trade union because of its links to the Communist Party and the Chinese government.

⁴⁹ Carl Finamore, *China in the Spotlight*, <http://www.counterpunch.org/finamore0825008.html>; Paul Garver, *Closer Ties between Change to Win and ACFTU*, <http://talkingunion.wordpress.com/2009/08/28/closer-ties-between-change-to-win-and-aftu>. Further, a delegation, headed by Zheng Yiyao, from the Gaungzhou Federation of Trade Unions, attended the U.C.L.A conference at which this paper was delivered.

⁵⁰ Going It Alone at 32: The right to strike was removed from the PRC Constitution in 1982, ten years before the advent of the "socialist market economy," on the grounds that it was not necessary under China's socialist system. Since then the status of strikes in China has been a legal grey area — they are neither legal nor illegal.

now be entering a period when the ACFTU unions will more actively represent employees. Further, all this may signal that the government is open to the development of coordinated activity by the ACFTU with unions outside China.⁵¹

Assuming V.E. sets up a subsidiary in China and the ACFTU followed its policy of organizing foreign investor operations, V.E. China would be subject to government pressure to recognize an enterprise union at V.E. China. V.E. China might be able to maintain considerable influence over the union but the union's ACFTU affiliation also allows considerable influence by the government and the Party on the enterprise.⁵²

While offshoring presents challenges to national unions, outsourcing to supply chains and other independent contractors only add to those challenges. As the decision in *Doe v. Wal-Mart* shows, the law that applies to these relationships insulates the core enterprise from the labor practices of its contracting partners. Further, even if those legal obstacles could be overcome, practical problems remain because it is very difficult to trace these supply chains in part because they are continually changing and being reorganized.. In other words, offshoring by itself raises serious issues for unions but those issues are compounded if that offshoring is done through outsourcing.⁵³

In sum, the national unions in these three countries all face significant challenges if the union movement is to be able to help reduce economic inequality. U.S. unions face challenges because the U.S. is a high labor cost country. To the extent the enterprises that unions seek to organize have options to outsource and offshore to attain more favorable labor conditions and costs, U.S. unions have lost leverage against employers even with respect to employees it continues to represent. Unions that continue to do

⁵¹ An alternative explanation may be that the Chinese government, as it has done in other areas of law, has made transnational contacts simple to reduce its learning curve about unions. There may be no intent to build bridges abroad.

⁵² *Protecting Workers' Rights or Serving the Party: The Way Forward for China's Trade Unions*, Research Report, CHINA LABOUR BULLETIN, www.dlb.org.hk (March, 2009), at 33.

⁵³ Elizabeth Umlas, *Investing in the Workforce: Social Investors and International Labour Standards*, ILO Employment Sector, Employment Working Paper No. 29 (2009), http://www.ilo.org/wcms/sp5/groups/public/---ed_emp/documents/publication/wcms_108530.pdf (Reviewing the effects of social investing with one conclusion that supply chains present extreme challenge since there is little compliance by contractors, even if they have agreed to corporate codes of conduct).

what they have always done are not likely to have more success. Mexican unions, operating in a country with labor standards that are formally quite high⁵⁴ and with middle level labor costs, operate in a similar economic environment as do U.S. unions. They face the same challenges as U.S. unions but also some unique to Mexico. The establishment unions lack a history of true representation of workers vis-à-vis employers and independent unions face challenges to get to a position to be able to represent workers at Mexican workplaces. While China is not the lowest labor cost country, cheap labor continues to be important to its attractiveness as a place to do business. With 1.3 billion people, China has a huge potential national economy that might allow it to resist some of the pressures of globalization that erode actual labor standards and weaken the potential leverage of unions.⁵⁵ The recent enactment of the Labour Contract Law shows that labor standards can be improved and union membership grow even in a globalized economy. Presumably, the government and the Party view the need to maintain social stability through an invigorated union movement as outweighing the risk that some enterprises would offshore from China to lower labor cost countries. The close identity of the ACFTU with the government and the Party make decisions about the future role of unions to be more a matter of government policy than of the choice of workers.

III. CHALLENGING THE WESTPHALIAN TRAP

How can unions in China, Mexico and the U.S. develop transnational impact to help unions escape the Westphalian trap? That large question is beyond this paper to address in any complete way, but some possibilities can be sketched.

Starting at an intellectual and rhetorical level, the neoliberal theory that is predominant in the U.S. has to be challenged because unionization is disfa-

⁵⁴ Given the huge portion of the Mexican workforce that is in the informal economy, outside the protection of the labor laws, it is difficult to conclude that high labor standards are in fact the norm for workers.

⁵⁵ Joseph E. Stiglitz, *GLOBALIZATION AND ITS DISCONTENTS* (2002), argues that China has been successful in its economic development because it was able to resist opening its economies to free trade as extensively as had other countries, such as Mexico.

vored by its tenets. In the U.S. in the late 1960s, a tremendous investment was made by those committed to free market economics, under the leadership of Milton Friedman, to replace the then-prevailing Keynesian economic theory with free market theory.⁵⁶ That effort has been amazingly successful in the U.S. and has had impact in other parts of the world. Even in face of the present Great Recession, it still is the predominant way of analyzing current economic policy. Neoliberalism can be summed up in one of President Ronald Reagan's statements, which has become a mantra for free traders: "The government is not the solution to our problems, government is the problem."⁵⁷ In the context of international economic policy, the idea that the free market is the solution to economic problems has been so pervasive in the U.S. that it came to be called "the Washington consensus."⁵⁸ That consensus included the U.S. government, the World Bank and the International Monetary Fund. Requiring nations receiving economic aid, particularly in Latin America, to adopt free market economic policies was for a long time standard operating procedure by all these agencies. While neoliberalism has not been adopted as the prevailing economic theory everywhere, it has had considerable influence in many parts of the world.⁵⁹ Given the present global economic crisis, the time may be right to develop a more balanced view of economic policy that could recognize the need to redress economic inequality along with the promotion of overall economic growth.⁶⁰ Even strong advocates of economic globalization might find a

⁵⁶ See Paul Krugman, *Who Was Milton Friedman?*, NEW YORK REV. OF BOOKS, February 15, 2007.

⁵⁷ <http://www.quotedb.com/quotes/3261>.

⁵⁸ The term was coined by economist John Williamson, *What Washington Means by Policy Reform*, in LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED? (1990), <http://www.iie.com/publications/papers/print.cfm?doc=pub&ResearchID=486>: "The Washington of this paper is both the political Washington of Congress and senior members of the administration and the technocratic Washington of the international financial institutions, the economic agencies of the US government, the Federal Reserve Board, and the think tanks."

⁵⁹ For a description and strong critique of the worldwide effect of Milton Friedman's neoliberalism, see Naomi Klein, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* (2007).

⁶⁰ See Joseph E. Stiglitz, *GLOBALIZATION AND ITS DISCONTENTS* (2002). See also Paul Krugman, *How Did Economists Get It So Wrong?* (September 6, 2009), <http://nytimes.com/2009/09/06/magazine/06Economic-t.html?em> (*Economists Get It Wrong*).

more balanced approach acceptable, if only as an alternative to the threat of “deglobalization.”⁶¹

The union movement and others have called for “fair trade,” in contrast to “free trade.” That call to action has so far not captured the imagination of the public necessary to overturn the neoliberal assumption that unfettered free market policy is necessary for continued economic growth. More compelling rhetoric needs to be articulated. New approaches might be to identify basic labor rights, such as the right to a living wage, as a fundamental human or civil right.⁶² Doing that requires the acceptance of collective and positive rights, not just individual liberties. Some claim that lonely individualism has replaced community organization as the basic way for people to interact in society. The title of the book, “Bowling Alone,”⁶³ captures the notion of isolated individualism that fails to recognize that individual achievement requires appropriate community conditions and effective collective action. Excessive and exclusive focus on individualism, particularly in terms of economics, masks the need for micro- and macroeconomics to take a broader view in order to develop useful economic theory.⁶⁴

Articulating a compelling intellectual and rhetorical foundation for new efforts to confront economic inequality should not be left to the union movement. A more practical focus would be law reform. Just as the law now provides a structure that can be used by an enterprise to shield itself

⁶¹ See Dimitry Orlov, *Definancialisation, Deglobalisation, Relocalisation*, New Emergency Conference, Dublin, June 11, 2009, <http://www.energybulletin.net/node/49243>.

⁶² For a recent review and critique of the issue of labor rights as human rights, see Kevin Kolben, *Labor Rights as Human Rights?* 50 VA. J. INT'L. L. (2009), <http://ssrn.com/abstract=1467127>. See also Michael J. Zimmer, Decent Work with a Living Wage, in *The Global Labour Market: From Globalization to Flexicurity*, 65 BULLETIN FOR COMPARATIVE INDUSTRIAL RELATIONS 61 (2008).

⁶³ Robert D. Putnam, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (pressures of time and money—the result of increasing inequality that requires more people to work multiple jobs or to work longer and harder on one job—is one cause of the severe decline in collective action).

⁶⁴ See, *Economists Get It Wrong*. In 1914, Henry Ford more than doubled the daily wage rate for his workers to \$5.00 per day. While Ford may have been motivated by the desire to save money spent because of high employee turnover, there is a macroeconomic effect if more workers earn more money. Employees are also consumers so that the more money they have to spend increases the overall size of the economy.

from workers rights and unionization, changes in the law could be enacted to make efforts to confront economic inequality more likely to be successful. Since Samuel Gompers, U.S. unions have put “bread and butter” unionism ahead of political involvement. It may be time for American unions to redouble their efforts to reform U.S. law, even beyond basic labor law.⁶⁵ *Doe v. Wal-Mart* involved the legal consequences for workers of independent contractor law and that decision shows that these laws need to be updated to reflect the reality of employment in this era. Because of the increasing prevalence of the use of contingent labor —temporary, part-time, “permatemp”⁶⁶ workers, etc.— and outsourcing through the use of employment agencies and supply chains, a broad-based campaign needs to be mounted to change independent contractor law so that the union movement can gain greater purchase to represent workers. The enterprise creating all of these contractual relationships could be treated, for the purposes of labor law, as the employer or the joint employer of all the workers contributing to the operation of the enterprise.⁶⁷

Laws could be enacted like the ones in some countries that treat some of these workers as employee-like, even if they are in other ways still treated as independent entrepreneurs.⁶⁸ Unfortunately, these types of legal reform may be too technical to be the basis of an organized political campaign. Proposals like these are likely to evoke enormous backlash by enterprise and may, absent some unusual situation, be unlikely to be enacted in any one country, much less in enough countries with economies open to free trade to make a difference.

⁶⁵ Enactment of the Employee Free Choice Act is the primary political goal of organized labor in the U.S. By itself, enactment of EFCA is unlikely to make sufficient change in the legal environment of unions to be the basis for their renaissance.

⁶⁶ For workers who were characterized as “permatemps” but who were found to be employees, see *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187(1996), *aff’d*, 120 F.3d 1006 (9th Cir. 1997) (en banc).

⁶⁷ If adopted, such laws would overturn at least some parts of *Doe v. Wal-Mart*.

⁶⁸ Germany treats some workers, who have some degree of independence from the entity they work for, as employee-like persons. They are not protected by the general job security provisions of the law but are entitled to other labor standard protections. Manfred Weiss, *Labor Law*, INTRODUCTION TO GERMAN LAW 327 (Matthias Reimann & Joachim Zekoll eds., 2005).

Altering the legal terrain for unions to be able to better challenge economic inequality in all the countries that participate in the globalized economy is a daunting task. Even if ultimately successful, it would take an enormous amount of time, energy and resources. One forum for advancing anew the value of collective action, but now aimed at international unionization, is the International Labour Organization. It is the one public international organization focused on workers.⁶⁹ The ILO has taken some action to address globalized employment problems. In 1977, the ILO promulgated a Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,⁷⁰ and in 2008 adopted a Declaration on Social Justice for a Fair Globalization.⁷¹ The 2008 Declaration articulates a goal for each of its member nations to provide a living wage, which might be used as a shorthand articulation to challenge at least the worst aspects of economic inequality. Having an international forum is useful, but, again, the road to reforming national laws to aid unions in their campaign to decrease economic equality seems long and hard with success problematic.

Just as law reform may prove useful to the future of unionism in the U.S., the establishment unions in Mexico might use their connections with the government to push for improvements in labor law, even though no single political party currently controls the government. Independent unions could use law reform as part of their campaign to become more successful. In China, on the other hand, the government and the Party so dominate power, that whatever comes to pass is the result of their decision, with the ACFTU following, not leading.⁷²

⁶⁹ This is not to say that other public international bodies, such as the United Nations, cannot be useful forums useful to this effort.

⁷⁰ *Vid.* http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_094386.pdf (as amended 2006) (two paragraphs —45 and 48— are the only ones addressing transnational unions, but both are directed at governments to not interfere with transnational union activity; nothing supports the organization of international unions).

⁷¹ http://www.ilo.org/public/english/bureau/dgo/download/dg_announce_en.pdf (recognizing the importance of “social dialogue and the practice of tripartism between governments and the representative organizations of workers and employers within and across borders”).

⁷² Getting governments to impose unionization on employers whether as a matter of law or of policy is antithetical to the conception of what a union is as set forth in Article 3 of the ILO Convention 87.

Developing intellectual foundations and undertaking law reform are important, but what can unions do more directly to be better able to attack economic inequality? Presumably, the most immediate and direct way to do so is to seek each other's help in specific disputes with specific employers that have a transnational dimension.⁷³ National unions can try to refocus their efforts abroad to follow an enterprise's offshoring and outsourcing of parts of its operations. If successful, that can help them regain the leverage they had when national economies had more effect on enterprise.⁷⁴ Finding common ground with unions in countries where operations have been offshored in a specific dispute that affects both unions allows coordination without the need to resolve difficult issues arising from the different forms and legal structures of the union movement in these different countries. There has always been some transnational coordination with the leaders of national union confederations coordinating efforts at the ILO Annual Conference in Geneva and in other ILO work. Working together to resolve disputes that directly affect their members may help unions in different countries to develop stronger and deeper relationships across national boundaries.

Having each national union engage in traditional actions in their respective countries to pressure employers would maximize the leverage of unions overall. There are, however, some risks to the use of strikes and picketing because they may be subject to attack as illegal in some countries under national labor law. In the well-noted case of transnational union cooperation involving the ship *Neptune Jade* and a protest that its cargo had been loaded by nonunion workers, the action taken by national unions in a number of different countries as the ship sailed around the world appeared to be illegal in each country where a union acted out of solidarity.⁷⁵ Another cautionary comes from two recent decision of the European Court of Justice construing the effect of EU law on the legality of traditional national labor laws in member states. Granted that these decisions involve the supranational free

⁷³ Some criticize such *ad hoc* action as inadequate. See Alan Hyde & Mona Ressaissi, *Unions Without Borders: Recent Developments in the Theory, Practice and Law of Transnational Unionism*, <http://ssrn.com/abstract=1323807>.

⁷⁴ Unions are already joining forces with NGOs that share interests in particular situations.

⁷⁵ James Atleson, *The Voyage of the Neptune Jade: The Perils and Promises of Transnational Labor Solidarity*, 52 BUFF. L. REV. 85 (2004).

market established by the European Union, nevertheless, the recent decisions in *Viking*⁷⁶ and in *Laval*⁷⁷ show how laws protecting the free market for the operation of business can trump traditional union action that was otherwise legal under the applicable national labor laws. In *Viking*, a Finnish ferry line wanted to reflag one ferry in Estonia to be able to replace the more expensive Finnish crew with Estonians. The International Transport Workers' Federation (ITF) and the Finnish seafarers' union threatened a strike to try to stop the reflagging. Even though the court recognized the right based on national, international and EU law for the unions to use economic weapons to protect the interests of their members, the court found that the right of the enterprise to do business by moving freely across national borders within the EU trumped the right under national law for the unions to undertake this industrial action. In *Laval*, a Latvian company set up a subsidiary in Sweden with Latvian workers represented by a Latvian construction union posted in Sweden to build a school. The Swedish construction union picketed the construction site, blocking entry and exit. The court here found that the right of the Latvian company to operate in Sweden and the free movement of the Latvian workers within the EU trumped the industrial action, so that Sweden could not, consistent with its obligations as an EU member, allow the union to engage in picketing activity, even though the union's conduct would not be illegal under Swedish law. Thus, the national labor laws of both Finland and Sweden allowed conduct that was ultimately found to be illegal because of the obligations these countries had as member states of the EU.

Ironically, unions seeking to undertake coordinated transnational actions may need to look more broadly to find actions that are outside traditional union activity in order to be effective. For example, campaigns aimed directly at consumers through the media rather than on the street may be useful to put pressure on an enterprise to agree to a code of conduct to protect workers of the enterprise. These campaigns can attempt to reach offshored

⁷⁶ Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line* (December 11, 2007).

⁷⁷ Case C-341/05 *Laval un Parneri Ltd v. Svenska Byggnadsarbetareförbundet* (December 18, 2007).

as well as and outsourced operations.⁷⁸ There is some history of such cooperation leading to positive results.⁷⁹ Thus, when a labor dispute breaks out in one of these countries, the national union involved should look to determine if the enterprise has transnational operations, even if those operations are in the form of independent contractor supply chains. An advantage of focusing on individual disputes where national unions share interest, is that it is not necessary for these unions to address the serious issues that might arise because of different laws, cultures and economies, in order to coordinate their activities. This situation is not different from the ability of unions to join forces on specific issues and disputes of common concern just as they have joined with NGOs with whom they share interests.⁸⁰

Such ad hoc joining of forces could lead to coordination as a regular matter. Greater coordination may, however, lead to conflicts among very different union movements operating in very different situations. Cooperation may be especially difficult if the wages and labor conditions differ drastically, as they typically do when one operation is in a developed country and the other is in a developing country.⁸¹ Differences in how unions are organized and regulated by national law may impede cooperation. The differences between the ACFTU, U.S. and Mexican unions and the environments in which they respectively operate give some good examples. The establishment unions in Mexico, with their close ties to the PRI, and their history of involvement in government policy are closer to the ACFTU model of government unions than to the U.S. model of membership un-

⁷⁸ See Michael Posner & Justine Nolan, *Can Codes of Conduct Play a Role in Promoting Workers' Rights*, in INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE AND PUBLIC POLICY 207 (Robert J. Flanagan & William B. Gould IV, eds., 2003).

⁷⁹ The most noted is described by James Atleson, *The Voyage of the Neptune Jade: The Perils and Promises of Transnational Labor Solidarity*, 52 BUFF. L. REV. 85 (2004) (tracing labor protests at different ports around the world involving cargo loaded on the ship by nonunion stevedores; all of the protests were illegal under the applicable national laws).

⁸⁰ Even where the jobs at stake cannot be offshored, transnational union cooperation can increase leverage against multinational enterprises. For example, the SEIU has undertaken to coordinate its activities with unions in other countries against multinational hotel chains.

⁸¹ If national unions conceptualize and organize themselves as representing only members in their country of national identification, then it would be difficult for them to act to impose restrictions on an enterprise benefiting employees in a second country. To the extent a union would benefit workers in another country, it might lose member support at home.

ions. But these Mexican unions have lost their effectiveness since the government chose to side with business over labor. The independent unions in Mexico are closer to the U.S. model but are hobbled by the embedded power of the establishment unions as well as the lack of leverage against employers. The ACFTU model of government affiliated unions runs counter at least to the ideology of American unionism if not always its practices.⁸² It may prove difficult for unions closely affiliated with governments to be free to engage with member-focused unions, and vice versa, even in situations where a dispute raises issues common to all unions.

The next step beyond coordination would be a close confederation or even merger. In reacting to globalization and the decline in unionization, unions have been merging at the national level.⁸³ A recent example of a transnational merger is the July, 2008, decision of Unite, Britain's biggest union, to join with the United Steelworkers Union of the U.S. to form Workers Uniting, a union representing three million people not only in the U.K. and the U.S. but also Ireland, Canada and the Caribbean.⁸⁴ The merger is a response to economic globalization.⁸⁵ There are other examples of cross border mergers.⁸⁶ If the merged union can operate where the enter-

⁸² During the Cold War, the AFL-CIO's American Institute for Free Labor Development was closely affiliated with and may have been an agent of the U.S. government, including the CIA, and was involved in implementing U.S. foreign policy through interference with unions, particularly in Latin America. See Kim Scipes, *It's Time to Come Clean: Open the AFL-CIO Archives on International Labor Operations*, 25 LABOR STUDIES J. 2, at 4 (2000), www.labournet.de/diskussion/gewertschaft/scipes2.html.

⁸³ E.g., Roger Undy, *TRADE UNION MERGER STRATEGIES: PURPOSE, PROCESS, & PERFORMANCE* (2008) (tracing union mergers in the U.K.).

⁸⁴ *Merger forms transatlantic union*, B.B.C. News, <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.uk/2/hi/business/7484639.stm>. Workers Uniting claims it "will be a fully functional and registered trade union in the UK, US, Ireland and Canada." The unions will maintain separate identities, however, but Workers Uniting "will be governed by a Steering Committee with equal membership from each participating union." <http://www.workersuniting.org/default.aspx?page=281>.

⁸⁵ Derek Simpson, Joint General Secretary of Unite said: "The political and economic power of multinational companies is formidable. They are able to play one nation's workers off against another to maximize profits. They do the same with governments hence the growing gap between the rich and the rest of us." <http://www.workersuniting.org/default.aspx?page=281>.

⁸⁶ The U.S.'s U.E. union claims to have made labor history with "its pioneering Strategic Organizing Alliance with the leading Mexican confederation of independent unions, the Au-

prise has its major operations, then a goal would be to coordinate bargaining in order to increase leverage by seeking collective agreements at the same time across the entire enterprise wherever it operates.⁸⁷ Without that coordination, however, the basic conflict among the immediate interests of union members in the different countries might be hard to resolve. One advantage that might result is if the merged union managed to represent the workers at all of the enterprises in a particular sector. Transnational bargaining with representatives of all the employers in the industry would allow the union to offer the “carrot” of uniform labor costs among all the industry participants.⁸⁸ That would take labor costs out of price competition in that economic sector. The challenges of developing such expansive bargaining, however, become ever more daunting.

A problem underpinning all attempts of national unions to coordinate or merge is that they face a difficult collective action problem.⁸⁹ All the unions and all the workers in any particular enterprise or business sector (or, indeed, all unions and all workers generally) would be best off if the unions would stand united against employers since that would result in the maximum leverage.⁹⁰ Each union, however, might be better off if it acted indi-

thentic Labor Front, the Frente Autentico del Trabajo (FAT),” <http://www.ueinternational.org>. “We joined together with the goals of organizing, educating, promoting contact, and building cross-border solidarity between rank and file workers employed by the same transnational corporations in the United States and Mexico; promoting the organization of independent unions; protecting the human and labor rights of Mexican and U.S. workers; and working together to improve wages, benefits, and working conditions on both sides of the border.”

⁸⁷ Harold Myerson, *Globalism for the Rest of Us: With the Birth of a Global Union, the World May Be Flat, but Wages Don't Have to Be*, AMERICAN PROSPECT (August 30, 2005), http://www.prospect.org/cs/articles?article=globalism_for_the_rest_of_us.

⁸⁸ Because of substantial differences in cost of living among all the nations in which these enterprises operate, it might be very hard to calibrate the levels of compensation to be paid to workers in each country. Further, substantial differences in how the different countries structured benefits and impose various labor standards might prove difficult to deal with in an agreement that applied so broadly. There are, however, ways to address these problems. In the U.S., the U.A.W. bargains on an enterprise-wide basis with each American auto company but that agreement allows local bargaining at each workplace so that local issues can be addressed effectively within the framework of a national agreement.

⁸⁹ See Mancur Olson, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (2nd ed. 1971).

⁹⁰ Karl Marx & Frederick Engels, *THE COMMUNIST MANIFESTO* (1848) set forth the goal in slightly different words in a very different time and context: “The proletarians have nothing

vidually to benefit only its own members rather than to hold out for better treatment of all workers. The fact that unions are nationally organized, with their respective national memberships, creates great incentives to break from transnational unity. A national union acting to protect the jobs and benefits of its members in its home country by keeping work at home typically means that the opportunities of workers in other countries are diminished. Whether or not a union has a protectionist intent,⁹¹ effective domestic union representation is likely to have a protectionist effect. So, what is good for a union's members at home may be bad for workers in other countries and vice versa. It may be very hard for one national union to hold out from an agreement that would benefit its members in order to stand united with unions in other countries so that those unions could reach favorable agreements benefitting their members.⁹²

So, is the answer to have truly international unions?⁹³ To go back to the beginning, if the Westphalia treaty had divided the world by function,⁹⁴ rather than by geography, unions, when they evolved, would likely have been organized to follow a particular function, or business, wherever in the world that business was being pursued.⁹⁵ Thus, unions, like the enterprises

to lose but their chains. They have a world to win. Working Men of All Countries, Unite!" Idealistic or philosophical Marxism, of course, has never gotten far off the ground in the real world.

⁹¹ Protectionism is generally used to mean legal measures, such as tariffs, that impact the free flow of economic activity. See Paul R. Krugman, *Is Free Trade Passé?*, 1 THE JOURNAL OF ECONOMIC PERSPECTIVES 2, at 131-144 (1987). Collective activity, such as union bargaining, can have protectionist effects, even if not legally mandated. Allegedly, unions sometimes work to establish protectionist laws. See Jagdish Bhagwati, *Obama and Trade: An Alarm Sounds*, FINANCIAL TIMES, January 9, 2009.

⁹² Enterprise owners, including shareholders, are likely to focus on profits (and stock prices) and less so on where the profits come from. Workers seem more likely to identify themselves, and their union, nationally. Much work needs to be done to develop solidarity across national borders.

⁹³ Jacques Rojot has suggested that the logical end of "virtual enterprises" is that they completely lose any identity with any particular nation. They would be virtual, but global, enterprises.

⁹⁴ Think of a worldwide King of pins and needles, Queen of jewelry, a Prince of horses, Princess of farmers, etc.

⁹⁵ Essentially, enterprise today can spread their functions around the globe to locate operations where they best suit the goals of the enterprise.

in all the different businesses, would be international from their inception.⁹⁶ While there has long been an international dimension to unionization, for example the activities of the ILO and Global Union Federations, labor law and labor unions have remained paradigmatically national.⁹⁷ The one exception is the International Transport Workers' Federation (ITF), which is a "unique example to date of a functioning international trade union."⁹⁸ It has essentially displaced national maritime unions in the representation of transnational seafarers working on flag-of-convenience ships.⁹⁹ The industry was able to escape the Westphalian trap of any particular nation's unions and labor laws because of the ready availability of crews from low wage countries where the ships could be flagged. The only way for any union to represent any transnational seafarers is if that union is mobilized at the international level.¹⁰⁰

Just as the International Transport Workers' Federation has followed transnational shipping as the business offshored crewing, it would seem in the interest of the union movement generally if unions could follow enterprises wherever they locate operations, whether the enterprise outsourced using a supply chain or offshored enterprise subsidiaries. Creating truly international unions may be the best way to escape the Westphalian trap in sectors that have the option of offshoring and outsourcing. But organizing at the international level presents tremendous challenges, including gaining the loyalty of workers in a number of different countries to a union not identified with their particular nation as well as the legal, cultural and social

⁹⁶ Think the Pin Makers Union, the International Jewelry Workers Union, etc.

⁹⁷ Union activity at the international level is quite thin. The International Trade Union Confederation (ITUC) claims to represent 168 million workers in 155 countries and territories and has 311 national affiliates. But its principal function has been to represent workers at the ILO and not to represent them vis-à-vis employers. Global Union Federations link national unions that focus on particular industries. See Alan Hyde & Mona Ressaissi, *Unions Without Borders: Recent Developments in the Theory, Practice and Law of Transnational Unionism*, <http://ssrn.com/abstract=1323807>.

⁹⁸ *Id.*

⁹⁹ Nathan Lille, *A GLOBAL UNION FOR GLOBAL WORKERS: COLLECTIVE BARGAINING AND REGULATORY POLITICS IN MARITIME SHIPPING* (2006).

¹⁰⁰ To be effective, however, the ITF needs to be able to call on the support of the national unions involved in maritime shipping all around the world. The *Viking* case decided by the European Court of Justice involved the cooperative effort of the ITF with the Finnish national seafarer's union.

differences among the countries involved. The sheer size the organization would need to be in order to be effective is daunting but it may not be impossible.

It may be time to try to create international unions and use the ILO to organize the effort.¹⁰¹ So far, the ILO has not focused on the development of international unions or a union movement operating transnationally.¹⁰² Instead, its focus is on getting each Member State, the employers in each country and the national unions to provide all workers with the protective labor standards articulated in the ILO Constitution, Declarations and Conventions. Its 1998 Declaration set forth four core principles that are to be universally applied. Its 2008 Declaration adds to those four with a call for decent work, with a living wage for all.¹⁰³ It does not call for the creation of international unions. Within its heritage, however, the ILO has set the groundwork that could be used to develop an internationalized union movement. Article I of its 1944 Declaration provides: "The Conference reaffirms the fundamental principles on which the Organization is based and, in particular, that: (a) labour is not a commodity." The human beings who participate in a labor market are not fungible goods, as is rice or grain. Each person has her own values, talents, interests and ambitions that affect how much labor and what kind of labor she is willing and able to provide employers. Neoliberal theory, however, assumes workers are a commodity that is to be utilized to do business.¹⁰⁴ The idea of collective rights to unionize

¹⁰¹ Alan Hyde, *The International Labor Organization in the Stag Hunt for Global Labor Rights*, 3 L. & ETHICS OF HUMAN RTS. 2 (2009), <http://ssrn.com/abstract=1443978>, calls for the ILO to redirect its efforts to be more effective by focusing on efforts to implement its Conventions that do not threaten any member state's comparative advantage, such as those that deal with child labor. While he calls for change, as does this paper, he would not likely agree that the proposals for the ILO sketched out here would be effective precisely because they would be seen as impinging on comparative advantage of some countries where economic inequality is the most extreme.

¹⁰² This is understandable because it is made up of nations and national law provides the legal framework for unionization.

¹⁰³ The thrust of the Declaration is, however, aimed at the Member States. Each Member States is called upon to develop "policies in regard to wages and earnings, hours and other conditions of work, designed to ensure a just share of the fruits of progress to all and a minimum living wage to all employed and in need of such protection."

¹⁰⁴ See Bruce E. Kaufman and Julie L. Hotchkiss, *THE ECONOMICS OF LABOR MARKETS* (6th ed. 2003).

should be further articulated as a universal human and civil right to supplant the prevailing notion, at least in the U.S., that employment is simply a market-based exchange of labor for income.¹⁰⁵ The enormous challenge will be to make this so compelling that the workers of the world will be willing to unite in universal unions or at least transnational cooperating and coordination.

IV. CONCLUSION

Economic inequality has increased globally almost in lock step with economic globalization. In the context of globalization, the union movement in China, Mexico, and the U.S. each face their own challenges to survive, much less to be able to undertake action that will redress inequality on a worldwide scale. In order to follow an enterprise as it escapes the Westphalian trap of national laws and national economic markets, national unions have to take more steps to coordinate their actions with unions in other nations. The idea of transnational cooperation has already led to some transnational union mergers. To try to overcome the collective action problem resulting from the traditional organization of the union movement in national unions, it may become necessary to reform laws and to reformulate the union movement to become much more internationalized in scope and operation. Many steps must be taken in many ways to achieve this. But the first step is to recognize the necessity for the union movement to escape the Westphalian trap.

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¹⁰⁵ See Stephen F. Befort & John W. Budd, INVISIBLE HANDS, INVISIBLE OBJECTIVES: BRINGING WORKPLACE LAW & PUBLIC POLICY INTO FOCUS 117 (2009).

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