

WAL-MART IS COMING, BUT IT'S NOT ALL BAD: WAL-MART AND LABOR RIGHTS IN ITS INTERNATIONAL SUBSIDIARIES

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This article uses Wal-Mart as a case study to examine the entry of multinational corporations into foreign markets, and the effect it has on foreign and domestic labor laws and organizations. It begins by examining Wal-Mart's routinely criticized labor practices within the United States, its country of origin. It contrasts this with Wal-Mart's entry into foreign markets, where Wal-Mart seems to be more respectful and compliant of labor laws and organizations. This seeming paradox is then examined in detail, explaining why Wal-Mart does not export its labor practices within the United States, but instead tends to comply with the local labor regulations of foreign countries in which it operates. It concludes by suggesting that Wal-Mart's expansion into foreign countries, while controversial, may not be a bad thing for domestic labor unions, suggesting that as Wal-Mart expands and complies with labor practices abroad, it might in turn improve Wal-Mart's labor practices within the United States.

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INTRODUCTION

“You can’t take it to Brazil, you have to adapt to Brazil.”

– David Glass, Former CEO, Wal-Mart¹

On August 6, 2007, Wal-Mart, the retailing giant from Bentonville, Arkansas, signed a joint venture agreement with the Indian company Bharti, paving the way for Wal-Mart’s entry into one of the fastest growing economies in the world.² While many middle class Indian consumers are looking forward to the greater convenience and lower costs that large format retail stores like Wal-Mart promise to bring to India, the company’s impending entry has raised alarm bells among scholars, unionists, small business owners, and social activists who ask what the impact of the world’s largest corporation will be on employment, labor rights, communities, traditional culture, and consumption patterns in a traditional society.³

These issues, of course, are not unique to Wal-Mart or to India. The relationship between large Multinational Corporations (“MNCs”), the host-countries in which they operate, and how they interact with domestic regulatory regimes are important subjects of academic debate and major objects of activist mobilization. Attracting foreign direct investment (“FDI”) has been a cornerstone of the development strategies in developing and emerging market countries, and has constituted a key foundation of the development

¹ *The Age of Wal-Mart: Inside America’s Most Powerful Company* (CNBC television broadcast Nov. 10, 2004).

² See Amy Yee, *Wal-Mart in Joint Venture for India*, FIN. TIMES, Aug. 7, 2007, at 19. The agreement provides: (1) for a 50–50 joint venture to open up ten to fifteen large wholesale stores; and (2) that Wal-Mart will provide logistical assistance to Bharti’s retail operations. Under existing Indian foreign direct investment (FDI) regulations, multi-brand foreign retail companies are not allowed yet to operate in India. But they are allowed to operate wholesale stores, known as “cash and carry” operations.

³ Indeed, soon after the announcement by Wal-Mart and Bharti, India FDI Watch, a coalition of trade unions, small businesses, environmentalists, and others who are skeptical of FDI, organized a demonstration to protest Wal-Mart’s arrival. See Amelia Gentleman, *Retailers Rally Against Wal-Mart as It Edges into India*, N.Y. TIMES, Aug. 10, 2007, at C3. FDI Watch is a coalition whose primary objective is to prevent FDI in India’s retail sector without sufficient guarantees that the retailers will abide by certain promises, which include to “protect communities; insure the stability of existing small businesses and traders; guarantee fair wages and working conditions for their own employees and source employees along with union protection and agreements; and insure that a significant percentage of sourcing derives from the Indian market.” See India FDI Watch, <http://indiafdiwatch.org/index.php?id=80> (last visited Mar. 21, 2004).

agenda.⁴ As countries have liberalized their FDI regulations, foreign MNCs have been rapidly increasing their investment and operations, particularly in emerging markets, such as China and India. But what is the impact of these large MNCs on domestic labor law regimes, and what is the impact of these regimes on the conduct of foreign corporations? Should the legal response to the regulation of MNCs and international capital take place at the transnational or the local level? Are domestic labor regulatory regimes increasingly irrelevant in the regulation of global capital, or is sovereignty challenged and regulatory capacity weakened through competition for FDI?⁵ Do MNCs conduct themselves differently in their foreign operations than they do their home operations?

This article contributes to this discussion by examining how Wal-Mart, the largest corporation in the world, conducts itself in its foreign retail operations with respect to industrial relations practices and respect for labor rights—specifically the rights to freedom of association and collective bargaining. As Part I demonstrates, Wal-Mart is clearly a fierce opponent of unions at home in the United States, and it has displayed an extreme hostility in the United States towards its employees' rights to freedom of association and collective bargaining⁶—rights that are widely accepted to be basic human rights.⁷ Wal-Mart's approach to unions and collective worker action is not, however, completely aberrant in the regulatory environment of the United States, which grants a great deal of leeway to companies to fight unionization—so much leeway, in fact, that many analysts argue U.S. labor law violates international law.⁸ At the very least, the United States has weak protec-

⁴ See, e.g., THEODORE H. MORAN, HARNESING FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT: POLICIES FOR DEVELOPED AND DEVELOPING COUNTRIES 1-2 (2006).

⁵ See Katherine V.W. Stone, *A New Labor Law for a New World of Work: The Case For a Comparative-Transnational Approach*, 28 COMP. LAB. L. & POL'Y J. 565, 571 (2007).

⁶ See *infra* Part I.C.

⁷ For an introduction to the notion of labor rights as human rights, see, for example, Philip Alston, *Labour Rights as Human Rights: The Unhappy State of the Art*, in LABOUR RIGHTS AS HUMAN RIGHTS 1 (Philip Alston ed., 2005). Freedom of Association and collective bargaining are also constitutive of the core labor rights identified by the International Labor Organization (ILO). See ILO Declaration on Fundamental Principles and Rights at Work, June 18, 1998, 37 I.L.M. 1233, available at http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT.

⁸ See, e.g., LANCE COMPA, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (2000); James A. Gross, *A Long Overdue Beginning: The Promotion and Protection of Workers' Rights as Human Rights*, in WORKERS' RIGHTS AS HUMAN RIGHTS 1 (James A. Gross ed., 2003); Lee Swepston, *Closing the Gap Between International Law and U.S. Labor Law*, in WORKERS' RIGHTS AS

tions for union organizing in comparison to other similarly situated countries. Analytically, then, with regards to the rights to freedom of association and collective bargaining, we can understand Wal-Mart to be a “low standard” company that is headquartered in a “low standard” country. Therefore, there might be natural cause for concern that when Wal-Mart enters a foreign market, it will bring its home-country practices with it.

Yet, as Part II shows, while Wal-Mart is fiercely anti-union in its home operations, its subsidiaries do not necessarily act the same way abroad. Rather than simply exporting its rather distinct animus towards unions and collective bargaining, Wal-Mart is surprisingly sensitive and responsive to domestic institutional, political, and regulatory environments. This means that Wal-Mart, with degrees of nuance and variation, peacefully co-exists with unions and engages in collective bargaining in most countries outside of North America.⁹ Part III tries to make sense of this apparent paradox and shows that Wal-Mart’s conduct is in fact consistent with a growing body of industrial relations and human resources literature that looks at the conduct of MNCs in their foreign operation. It proposes several regulatory dynamics that help explain and predict Wal-Mart’s conduct. These include the particularities of the domestic political, public, and private regulatory regimes, as well as the presence of what I term “tempering effects.” Looking again at India, we then use this descriptive framework to predict the conduct of Wal-Mart in India with regards to freedom of association and collective bargaining. This Part concludes from the Wal-Mart case study that, contrary to reports of their growing irrelevance, domestic labor regulatory regimes appear to remain a significant factor in the regulation of foreign MNCs.

Part IV pushes this analysis further by somewhat controversially suggesting that not only is Wal-Mart constrained by domestic regulatory and industrial relations frameworks, but that the diffusion of Wal-Mart could paradoxically serve as a catalyst that can lead to improved labor conditions and regulatory regimes in host countries, and possibly in home countries as well. Labor advocates and transnational labor lawyers have an unexpected opportunity to leverage the entry of foreign capital for beneficial ends, and perhaps should even welcome the entry of Wal-Mart into certain markets.

HUMAN RIGHTS, *supra*, at 53.

⁹ See *infra* Part II.

I. THE WAL-MART EFFECT AT HOME: POOR LABOR PRACTICES

A. *The Wal-Mart Effect*

Wal-Mart is more than just a retail chain—it is an institution whose sheer size and tenacious business practices means that it has a unique economic impact all its own—an impact that has been often called the “Wal-Mart Effect.”¹⁰ Wal-Mart was founded in Bentonville, Arkansas by entrepreneur Sam Walton in 1964. Despite the company’s humble beginnings, Wal-Mart has emerged from its small town origins to become both the largest private employer in the world with 1.9 million employees and the number one company on the Fortune 500 with over \$351 billion in revenue during the fiscal year ending January 31, 2007.¹¹ As of April 2007, it had 6,930 stores worldwide.¹² According to one study, 53% of the U.S. population lives within five miles of a Wal-Mart store, and 97% lives within twenty-five miles of one.¹³

Its size and reach means that Wal-Mart exerts an unusual economic impact on both the United States and the world. For example, Wal-Mart has an extraordinary effect on prices and inflation. One study argues that for a range of staple products, Wal-Mart exerts a downward price effect of 1.5–3% in the short term and up to four times as much in the long term.¹⁴ In another study, economists argue that the Consumer Price Index is overstated because the government does not adequately take into account Wal-Mart’s downward price effects.¹⁵ The company also has potential macro-impacts on employment levels, with some studies finding positive retail employment ef-

¹⁰ See e.g., CHARLES FISHMAN, *THE WAL-MART EFFECT: HOW THE WORLD’S MOST POWERFUL COMPANY REALLY WORKS—AND HOW IT’S TRANSFORMING THE AMERICAN ECONOMY* (2006); David Karjanen, *The Wal-Mart Effect and the New Face of Capitalism: Labor Market and Community Impacts of the Megaretailer*, in *WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM* (Nelson Lichtenstein ed., 2006); Bradford C. Johnson, *Retail: The Wal-Mart Effect*, 2002 MCKINSEY Q., Number 1, at 40, 41 (suggesting over one-half of the productivity increase in general merchandise retailing is due to Wal-Mart).

¹¹ See *Fortune 500*, FORTUNE, 2007, available at <http://money.cnn.com/magazines/fortune/fortune500/2007/snapshots/1551.html>.

¹² See Wal-MartFacts.com, United States Operational Data Sheet—April 2007, <http://www.walmartfacts.com/articles/4943.aspx> (last visited Mar. 21, 2007).

¹³ FISHMAN, *supra* note 10, at 213.

¹⁴ Emek Basker, *Selling a Cheaper Mousetrap: Wal-Mart’s Effect on Retail Prices*, 58 J. URBAN ECO. 203, 204 (2005).

¹⁵ See Jerry Hausman & Ephraim Leibtag, *CPI Bias from Supercenters: Does the BLS Know that Wal-Mart Exists?* 1-3 (Nat’l Bureau of Econ. Research, Working Paper No. 10712, 2004), available at <http://www.nber.org/papers/w10712.pdf>.

fects when Wal-Mart enters a local market, but others finding negative employment impacts.¹⁶ In addition, Wal-Mart is obsessed with productivity and efficiency, and its productivity levels have been estimated to be 48% greater than its competitors.¹⁷ The company has had industry-wide productivity effects, with one study suggesting that Wal-Mart has been responsible for a disproportionate share of what was a major industry-wide increase in retail productivity starting in the late 1990s.¹⁸

Wal-Mart also has a significant impact on current account balances and international trade. It is the largest importer in the United States, and in 2006 its imports from China alone were valued at almost \$27 billion. Between 2001 and 2006, Wal-Mart imports constituted 9.3% of all U.S. imports from China.¹⁹ Its impact on the overall economy is such that when in 2006 it aimed to cut its inventories by \$6 billion in 100 days, it sent tremors across shipping and logistics companies.²⁰

Wal-Mart is also increasingly becoming a major global economic player in its retail operations. In part to compensate for slowing sales in the United States, Wal-Mart has been rapidly increasing its foreign retail presence.²¹ Of its 6,930 total stores, 2,884 were in foreign locations as of April 12, 2007.²² This marks a growth of 599 stores in less than four months since

¹⁶ See Emek Basker, *Job Creation or Destruction? Labor Market Effects of Wal-Mart Expansion*, 87 REV. ECON. & STAT. 174, 175 (2005) [hereinafter *Job Creation*] (finding that over a period of five years there was a net increase of fifty retail jobs, but a net decrease of twenty jobs in wholesale employment, due to the level of Wal-Mart's vertically integrated distribution); David Neumark, Junfu Zhang & Stephen Ciccarella, *The Effects of Wal-Mart on Local Labor Markets* 20-21 (Nat'l Bureau of Econ. Research, Working Paper No. 11782, 2005), available at <http://www.nber.org/papers/w11782.pdf> (finding that the opening of a Wal-Mart store leads to a decrease in county-wide retail employment of 2.7%).

¹⁷ Johnson, *supra* note 10, at 41 (noting that Wal-Mart's productivity was 48% higher than competitors in mid-1990s).

¹⁸ See *id.* (arguing that more than half the productivity increases in the retail sector were due to Wal-Mart).

¹⁹ ROBERT E. SCOTT, ECONOMIC POLICY INSTITUTE, THE WAL-MART EFFECT: ITS CHINESE IMPORTS HAVE DISPLACED NEARLY 200,000 U.S. JOBS 2 (2007), <http://www.epi.org/issuebriefs/235/ib235.pdf>. For a discussion of the role of Wal-Mart in U.S.-China trade, see Emek Basker & Pham Hoang Van, *Putting a Smiley Face on the Dragon: Wal-Mart as Catalyst to U.S.-China Trade* (Univ. of Mo. Dep't. of Econ., Working Paper No. 0506, 2005), available at http://economics.missouri.edu/working-papers/2005/wp0506_basker_pham.pdf.

²⁰ See William Cassidy, 'The Wal-Mart Effect'; *Suppliers, Carriers Are Squeezed as Retailers Try to Slash Inventories*, 7 J. COM. 28, 28 (2006).

²¹ See David Barboza, *Wal-Mart Expands in China as Its Growth Slows in U.S.*, N.Y. TIMES, Feb. 28, 2007, at C10.

²² Wal-MartFacts.com, *supra* note 12.

the end of 2006. Its 2006 foreign sales came to approximately \$77 billion, which accounted for about 22% of its total sales and marked a 30% increase from the prior year.

B. Critiques of Wal-Mart: Dickensian Labor Practices

Criticisms of Wal-Mart and its impacts are copious. The company has been accused of having a number of negative impacts, including *inter alia*, harming rural communities,²³ suppressing wages,²⁴ and causing environmental harm,²⁵ to name but a few. But the loudest cries against Wal-Mart tend to focus on what critics claim are almost Dickensian employment practices.²⁶ Lawsuits brought against Wal-Mart have alleged employment discrimination²⁷ and wage and hour violations;²⁸ and lawyers have brought suit under the RICO statute alleging that Wal-Mart conspired with its janitorial service contractors to violate immigration laws to force its janitors to work extra hours.²⁹ The company has also been accused of abusive labor practices,

²³ See Kenneth E. Stone, *Impact of the Wal-Mart Phenomenon on Rural Communities*, FARM FOUNDATION: INCREASING OF PUBLIC PROBLEMS AND POLICIES 189 (1997), available at <http://www.farmfoundation.org/pubs/increas/97/stone.pdf> (finding a loss of retail trade from small rural communities without Wal-Mart stores to towns with Wal-Mart stores); *but see* Basker, *Job Creation*, *supra* note 164, at 181 (suggesting it is impossible at the nation-wide level to determine if there are negative effects of the opening of a Wal-Mart on neighboring counties).

²⁴ See Arindrajit Dube, Barry Eidlin & T. William Lester, *Firm Entry and Wages: Impact of Wal-Mart Growth on Earnings Throughout the Retail Sector* (Inst. for Research on Labor and Employment, Working Paper No. 126-05, 2005), available at <http://repositories.cdlib.org/iir/iirwps/iirwps-126-05>. According to the study, the opening of a Wal-Mart in an urban community, which constitutes the bulk of Wal-Marts, is correlated with a drop in wages for grocery and general merchandise workers, while in rural areas wages marginally increased for general merchandise workers but decreased for grocery workers. *Id.*

²⁵ Most opposition to Wal-Mart entry tends to revolve around issues of traffic and pollution. See William Beaver, *Battling Wal-Mart: How Communities Can Respond*, 110 BUS. & SOC'Y REV. 159, 160-61 (2005).

²⁶ See, e.g., Ellen Israel Rosen, *How to Squeeze More out of a Penny*, in WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM, *supra* note 10, at 243.

²⁷ See, e.g., Brad Seligman, *Patriarchy at the Checkout Counter: The Dukes v. Wal-Mart Stores, Inc., Class-Action Suit*, in WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM, *supra* note 10, at 231.

²⁸ See, e.g., Steven Greenhouse, *Wal-Mart Settles U.S. Suit About Overtime*, N.Y. TIMES, Jan. 28, 2007, at C7; Molly Selvin & Abigail Goldman, *Wal-Mart Workers Win Suit*, L.A. TIMES, Dec. 23, 2005, at A1.

²⁹ See Second Amended Class Action Complaint and Jury Demand, Victor Zavala et al. v. Wal-Mart Stores, Inc., No. 03-Civ.-5309 (D.N.J. Nov. 21, 2005), available at http://www.walmartjanitors.com/staticdata/Second_Amended_Complaint.pdf.

such as locking employees in stores overnight to ensure, in part, that they would not steal merchandise;³⁰ and in 2005, Wal-Mart was fined \$135,540 by the U.S. Department of Labor for allowing teenage workers to operate hazardous equipment.³¹

Wal-Mart's business model of "everyday low prices" means that it is a fanatical price cutter in almost every realm apart, perhaps, from executive salaries.³² This ethos is even reflected in the furniture choices of senior vice presidents who use discarded lawn chairs as their office furniture.³³ But it is also felt in the more serious issues of worker compensation and benefits. Wal-Mart claims on its website that its average full-time hourly wage is \$10.83 per hour, but it does not make immediately clear what percentage of employees are full time, and what the average part time wage is.³⁴ Some scholars have also argued that Wal-Mart's wages are significantly lower than its competitors in the retail sector, particularly its unionized competition.³⁵ In contrast, Wal-Mart CEO H. Lee Scott, Jr. received over \$29 million in compensation in 2006.³⁶

Wal-Mart's health benefits also have been critiqued for being expensive and out of reach for many of its employees, with only about 47.4% of employees enrolled in the health care plan.³⁷ However, this level of coverage is

³⁰ Steven Greenhouse, *Workers Assail Night Lock-Ins by Wal-Mart*, N.Y. TIMES, Jan. 18, 2004, at N1.

³¹ Steven Greenhouse, *Wal-Mart Agrees to Pay Fine in Child Labor Cases*, N.Y. TIMES, Feb. 12, 2005, at A9.

³² Jeffrey Goldberg, *Selling Wal-Mart*, NEW YORKER, Apr. 2, 2007, at 32.

³³ FISHMAN, *supra* note 10, at 132.

³⁴ Wal-MartFacts.com, Fact Sheet: Economic Opportunities, http://www.walmartfacts.com/FactSheets/Economic_Opportunities.pdf (last visited Mar. 21, 2008).

³⁵ See Karjanen, *supra* note 10, at 154 (citing various sources analyzing Wal-Mart wages, including a 2004 study showing that in California, Wal-Mart employees earned 31% less than workers in other large retail companies).

³⁶ *Wal-Mart Reports Its Chief Was Paid \$29.7 Million in 2006*, N.Y. TIMES, Apr. 20, 2007, at C5. Scott earns about two thousand times the salary of the average Wal-Mart Worker. Goldberg, *supra* note 32, at 35.

³⁷ See Wal-MartFacts.com, Fact Sheet: Health Care, http://walmartfacts.com/FactSheets/3232007_Health_Care.pdf. Wal-Mart claims that while only 47.4% of its U.S. associates receive Wal-Mart healthcare, about 90.4% of its employees receive coverage from some source, with 22% receiving it from a spouse. *Id.* In an interesting development, Wal-Mart has recently joined with a range of unions and progressive organizations to lobby for universal health care coverage. See Kris Maher, *Politics & Economics: Wal-Mart Joins Health-Care Call; Unlikely Coalition Of Labor, Business Pushes for Overhaul*, WALL ST. J., Feb. 8, 2007, at A6.

reportedly higher than the national average for the national retail industry, which stands at about 43%.³⁸ Wal-Mart recently got itself into a public relations quagmire when one of its senior executives released a memo suggesting, among other things, that Wal-Mart makes hiring choices based on the health levels of applicants to weed out workers who would be more costly for its health care plan.³⁹ Wal-Mart's low wages and poor health benefits also mean, according to some critics, that an unusually large number of Wal-Mart employees draw on state benefits programs, creating extra costs for local and state governments.⁴⁰

C. *Wal-Mart and Trade Unions in the U.S.*

But it is in the realm of trade union rights that Wal-Mart brings with it a history and philosophy that puts it at major odds with labor rights advocates as well as with international and, oftentimes, U.S. law.

1. Weak Protections for Freedom of Association and Collective Bargaining in U.S. Labor Law

Wal-mart's conduct must be placed in the context of American labor law. Labor law in the United States is characterized by a pluralist, decentralized system of industrial relations in which unionization is not the norm. While it is not mandatory to conduct an election to form a union in the United States, it is the default method and by far the most common means of obtaining union recognition. Success rates, however, using election procedures are less than 46%, while success rates when unions and employers agree to use card check methods, and especially when combined with neutrality agreements, are significantly higher.⁴¹

³⁸ Gary McWilliams, *Wal-Mart's Workers Increase Health-Plan Use After Benefits Overhaul*, WALL ST. J., Jan. 11, 2007, at A10.

³⁹ Steven Greenhouse & Michael Barbaro, *Wal-Mart Memo Suggests Ways to Cut Employee Benefit Costs*, N.Y. TIMES, Oct. 26, 2005, at C1. The memo also acknowledged that its health care plans are costly for low-income workers and that a significant number of Wal-Mart employees receive public assistance. *Id.*

⁴⁰ Karjanen, *supra* note 10, at 155. One study argues that Wal-Mart workers in California use \$86 million per year of health-related and other kinds of state assistance. See Arindrajit Dube & Ken Jacobs, *Hidden Cost of Wal-Mart Jobs: Use of Safety Net Programs by Wal-Mart Workers in California* 8 (UC Berkeley Labor Ctr., Briefing Paper Series, Aug. 2, 2004) available at <http://laborcenter.berkeley.edu/retail/walmart.pdf>.

⁴¹ See Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 51-52 (2001) (reporting that when card check is used, union success rates are 62.5%, and when a neutrality agreement is signed, success rates are 78.2%).

It is ostensibly illegal to discriminate against workers for engaging in “concerted activities,” as the National Labor Relations Act describes union organizing.⁴² In practice, however, workers who seek to organize unions are often discriminated against in their efforts to do so,⁴³ making union formation particularly difficult without neutrality agreements and card check provisions. While there is a broad range of legal conduct that employers are allowed to engage in to prevent unions from organizing under U.S. law, employers are also emboldened to engage in illegal conduct because, in part, of relatively weak remedies for legal violations.⁴⁴ This legal environment, combined with a weak union culture in the United States, creates a space where employers oppose unionization in a way that “has no parallel in the Western industrial world.”⁴⁵

2. Wal-Mart’s Anti-Union Conduct

It is within the realm of trade union rights that Wal-Mart, with its corporate culture rooted in agrarian populist ideology,⁴⁶ is an ideologically committed and ferocious opponent of unionization and has earned a reputation for aggressively fighting the organizing efforts of its employees. The roots of this opposition go back to Wal-Mart founder Sam Walton, who intentionally organized his corporate structure to help deter union organizing and to evade the minimum wage requirements of the Fair Labor Standards Act.⁴⁷ One former anti-union consultant to Wal-Mart reportedly said that he had never seen a company go to Wal-Mart’s lengths to fight unions, and that it has “zero tolerance” for union activity among its employees.⁴⁸

As Thomas Jessen Adams has noted, Wal-Mart is by no means the only

⁴² 29 U.S.C. § 157 (2000).

⁴³ COMPA, *supra* note 8, at 71-74.

⁴⁴ *See id.* at 67-68.

⁴⁵ *Id.* at 71 (quoting Theodore St. Antoine, *Federal Regulation of the Workplace in the Next Half Century*, 61 CHI.-KENT L. REV. 631, 639 (1985)).

⁴⁶ *See* Bethany E. Moreton, *It Came from Bentonville: The Agrarian Origins of Wal-Mart Culture*, in WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM, *supra* note 10, at 57, 65-66.

⁴⁷ *See* Thomas Jessen Adams, *Making the New Shop Floor: Wal-Mart, Labor Control, and the History of the Postwar Discount Retail Industry in America*, in WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM, *supra* note 10, at 213, 218-19. In the 1960s, Wal-Mart was organized into separate companies, although sharing majority shareholders. This structure brought it outside of the coverage of the Fair Labor Standards Act’s minimum wage requirements. Unions were also therefore forced to organize store by store, rather than aiming to achieve a companywide collective bargaining agreement. *Id.*

⁴⁸ *See* Karen Olsson, *Up Against Wal-Mart*, MOTHER JONES, Mar.-Apr. 2003, at 54, 56.

tenaciously anti-union discount retailer, and “Wal-Mart’s difference from the discount retail industry—and quite probably the low wage service industry in general—is not a difference in kind, but in degree.”⁴⁹ Wal-Mart combats organized labor with a zeal seldom found outside of political organizations and evangelical churches. According to some analysts, the degree to which Wal-Mart is committed to fighting union organization is such that it reaches the realm of the irrational and even has negative economic impacts on the company.⁵⁰

Wal-Mart’s battle with U.S. unions is so *sui generis* that it has merited its own regular subject column in the newsletter “Management Report for Non-Union Organizations,” a monthly trade publication that provides advice and information for consultants and managers who work to prevent unions from organizing.⁵¹ Wal-Mart has also attracted the attention of human rights groups. In May 2007, for example, Human Rights Watch (“HRW”) released a 210-page report detailing the ways in which Wal-Mart’s anti-union conduct violates international standards on the right to freedom of association and collective bargaining.⁵²

Wal-Mart’s anti-union animus is evident at the beginning of the employee’s tenure when she receives the employee handbook, which provides that “[w]e are not anti-union; we are pro-Associate. It is our position that every Associate can speak for himself or herself without having to pay hard-earned money to a union in order to be listened to and have issues resolved.”⁵³ The HRW report cites another document in which Wal-Mart describes itself as “strongly opposed to third party representation.”⁵⁴ New hires are also exposed to a range of other anti-union messages, including anti-union videos and lectures from managers geared towards convincing employees that they do not need a union.⁵⁵

⁴⁹ Adams, *supra* note 50, at 214.

⁵⁰ David Strasser, a Bank of America securities analyst, noted that “[t]his union fixation has cost Wal-Mart real estate sites in key locations, adversely impacted comp [sic] store sales to some degree, and has distracted management from focusing on its retail strategy.” *Corporate Campaign Affects Wal-Mart*, MGMT. REP. FOR NON-UNION ORGS., May 2007, at 6-7.

⁵¹ See, e.g., *id.*

⁵² See HUMAN RIGHTS WATCH, DISCOUNTING RIGHTS: WAL-MART’S VIOLATION OF US WORKERS’ RIGHT TO FREEDOM OF ASSOCIATION (2007), available at <http://www.hrw.org/reports/2007/us0507/us0507webwcover.pdf>.

⁵³ *Id.* at 75 (quoting WAL-MART STORES, INC., MY BENEFITS: 2005 ASSOCIATE GUIDE 11 (2005)).

⁵⁴ *Id.*

⁵⁵ *Id.* at 83-87; see BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA 144-45 (2001). Ehrenreich describes a video in which new employees are told that

To prevent unionization, the company also tracks, on a store-by-store basis, the probability that workers will choose to unionize by maintaining a “Union Probability Index.”⁵⁶ Managers are armed with anti-union manuals, such as “A Manager’s Toolbox to Remaining Union Free,” in which managers are informed to look out for signs of union activism and potential union activities.⁵⁷ Should they witness any such union activities, they are to call a special “union hotline.”⁵⁸ Wal-Mart has developed a well-honed anti-union operation that it is ready to mobilize as soon as a phone call comes in from a store manager or employee.⁵⁹ Wal-Mart collects data from the hotline and inputs it into its “Remedy System,” where it is then analyzed to ascertain information about organizing activities in its stores.⁶⁰ Wal-Mart then sends out members of its labor relations team to the stores, where the team engages in intensive anti-union campaigning, talking to employees in groups as well as individually about why unions are not beneficial to employees.⁶¹ In addition, the company conducts tried and true divide and conquer activities among workers, pitting anti-union employees against pro-union employees.⁶²

While many of Wal-Mart’s tactics are legal under the relatively permissive U.S. labor laws, the National Labor Relations Board has found that Wal-Mart has committed a number of Unfair Labor Practices in violation of the National Labor Relations Act.⁶³ These violations, as well as those found

unions are in decline in America and no longer relevant; and that unions will: (1) take your money through union dues; (2) take your voice by requiring that the union be the sole representative; and (3) potentially put your wages and benefits at risk at the bargaining table. *See id.* These claims are common claims by employers in anti-union campaigns.

⁵⁶ *See* ERIN JOHANNSON, AMERICAN RIGHTS AT WORK, WAL-MART: ROLLING BACK WAGES, WORKERS’ RIGHTS, AND THE AMERICAN DREAM 9 (2005), available at http://www.americanrightsatwork.org/dmdocuments/ARAWReports/WalmartReport_lowres.pdf. This name has now been changed to “Unaddressed People Issues.” *Id.*

⁵⁷ *See* ORSON MASON, LABOR RELATIONS AND YOU AT THE WAL-MART DISTRIBUTION CENTER #6022 (1991), available at <http://www.ufcw.org/docUploads/Wal%2DMartAnti%2DunionManuals%2EPDF?CFID=1738672&CFTOKEN=51300605>. In one document, several organizer archetypes are identified as well as types of employees attracted to unions, including the “inefficient, low productive associate,” or the “cause oriented associate” who will “jump on any bandwagon that comes through his area.” *Id.* at 9, 10; *see also* HUMAN RIGHTS WATCH, *supra* note 52, at 76-78 (describing the contents of the Toolbox).

⁵⁸ HUMAN RIGHTS WATCH, *supra* note 52, at 91-92.

⁵⁹ *See id.* at 75, 91-93.

⁶⁰ *Id.* at 92-93.

⁶¹ *Id.* at 93-96.

⁶² *Id.* at 96-98.

⁶³ Human Rights Watch [hereinafter HRW] has found that 292 cases were filed against Wal-

by HRW, constitute a range of anti-union activities that contravene domestic and international law. The abuses include discriminatory hiring and firing,⁶⁴ surveillance of union activity,⁶⁵ transferring known anti-union workers into bargaining units to impact union votes,⁶⁶ changing work conditions to discourage union activity,⁶⁷ threatening loss of benefits should workers organize,⁶⁸ interrogating workers about their union activities,⁶⁹ prohibiting legally protected communications between workers,⁷⁰ illegal and discriminatory application of no-solicitation rules,⁷¹ and confiscating union literature.⁷² Such tactics would be illegal, and/or socially and politically unacceptable in many other countries.

As a result of Wal-Mart's tenacious anti-union practices, in combination with the inherent difficulty in organizing groups of low-wage workers in which there is high turnover, the U.S. labor movement has been notably unable to make any progress in its efforts to organize Wal-Mart employees. In only one instance have Wal-Mart workers managed to win union recognition through an election overseen by the National Labor Relations Board. A group of Wal-Mart meat cutters in Jacksonville, Texas voted for union representation by the Meat Cutter Unions. When they voted "yes," Wal-Mart chose to shut down its meat cutting operations *en toto*.⁷³

Mart between 2000-2005, many of which had multiple charges. One hundred-ninety of these were examined by NLRB lawyers for merit, while 98 were withdrawn and 4 settled. At the time of the writing of the HRW report, the NLRB had found merit in 101 of the complaints, and it consolidated those into 39 complaints that the NLRB filed against Wal-Mart. Of these, in seventeen the administrative law judge (ALJ) determined that Wal-Mart violated U.S. labor law. Wal-Mart appealed thirteen of these, and in two of these, the Board reversed the decision against Wal-Mart, in five it found at least some of the charges to be valid, and six were still pending. Of the other twenty-two complaints, Wal-Mart was cleared of the charges in three; thirteen were settled between the parties; four were withdrawn before ALJ hearings; and two were still pending before an ALJ. *Id.* at 113.

⁶⁴ *Id.* at 115-18.

⁶⁵ *Id.* at 118-21.

⁶⁶ *Id.* at 121-22.

⁶⁷ *Id.* at 123-25.

⁶⁸ *Id.* at 125-26.

⁶⁹ *Id.* at 126-28.

⁷⁰ *Id.* at 129.

⁷¹ *Id.* at 130-36.

⁷² *Id.* at 136-38.

⁷³ The UFCW challenged this move under the National Labor Relations Act. An ALJ found that while Wal-Mart had the right to close down the operation, it nevertheless had a duty to bargain in good faith about the effects of the closure with the UFCW, and had to reopen the operations until it did so. The Appellate Board panel, however, found that while Wal-Mart

II. WAL-MART'S INTERNATIONAL LABOR PRACTICES

Despite Wal-Mart's intensely anti-union tactics in the United States and its success in remaining "union free," its conduct in its myriad foreign operations has been notably different. To understand the dynamics of Wal-Mart's relations with unions in the context of local regulatory structures, law, and political systems, this Part analyzes Wal-Mart's conduct in all of the foreign countries in which it is currently operating or has operated, with the exception of South Korea and countries in Central America.⁷⁴

A. Canada: The U.S. Model Modified

Wal-Mart's approach to unions in Canada is very similar to its approach in the United States—it fights hard against them. Wal-Mart entered Canada in 1994 when it bought 122 of 144 stores of Woolco, a Canadian discount chain.⁷⁵ Notably, none of the stores purchased in the Woolco chain were unionized, while ten of the twenty-two stores Wal-Mart did not purchase did have unions. Wal-Mart representatives claimed that the choice of stores was "generally performance based," and that union status was not the focus.⁷⁶ In

had an obligation to negotiate over the effects of the closure, Wal-Mart had no obligation to re-open the meat-cutting department. *See* Wal-Mart Stores, Inc., 348 N.L.R.B. No. 16 (Sept. 28, 2006).

⁷⁴ Wal-Mart left South Korea in 2006. Although there were some accusations by UNI that Wal-Mart had gotten rid of the "small" union in the *Makro* chain of stores that it bought when it entered the market in 1998, there is very little information available in English about its relations with the local unions. There were no unions in the sixteen stores operated by Wal-Mart. *See* UNI Commerce, *Wal-Mart Leaves Korea - Never a Success Story*, (June 27, 2006), http://www.union-network.org/Unisite/Sectors/Commerce/Multinationals/Wal-Mart_leaves_Korea.htm; Kelly Olson, *Wal-Mart Pulls out of South Korea, Sells 16 Stores*, USA TODAY, May 22, 2006, available at http://www.usatoday.com/money/industries/retail/2006-05-22-walmart-korea_x.htm. I have not analyzed its Central American operations because its entry into that market is very new, and there is little available information about its labor relations. Wal-Mart acquired a 33 1/3 % stake in the supermarket concern, CARHCO, from Royal Ahold NV, a Dutch MNC. In 2006 Wal-Mart became the majority stakeholder in CARHCO and changed the name to Wal-Mart Central America. CARHCO operates a number of retail brands, such as *Dispensa Familiar* and *Paiz*, in Guatemala, Honduras, Nicaragua, Costa Rica, and El Salvador. *See* Wal-Mart Guatemala Fact Sheet, http://walmartstores.com/media/factsheets/fs_2002.pdf (last visited May 15, 2008). As far as could be determined, there are no unions in these stores.

⁷⁵ John Stout & Jo-Anne Pickel, *The Wal-Mart Waltz in Canada: Two Steps Forward, One Step Back*, 39 CONN. L. REV. 1493, 1497 (2007).

⁷⁶ *Id.*; Ian Austen, *A Rarity for Wal-Mart: Talking to a Union*, N.Y. TIMES, Oct. 26, 2004 (quoting Wal-Mart representative Andrew Pelletier), available at <http://www.nytimes.com/2004/10/26/business/worldbusiness/26canwalmart.html>.

Canada, Wal-Mart has seemingly adopted the same anti-union approach that it has in the United States.⁷⁷

Canadian labor law is regulated at the provincial level for most private sector economic activities, and private sector retail employees fall under provincial jurisdiction.⁷⁸ The basic framework of Canada's labor law is based on the U.S. labor law model and the Wagner Act.⁷⁹ Most provincial labor statutes are substantially similar; however, in the area of rules regulating union recognition, there are some significant differences both among provinces and from the U.S. system.⁸⁰ The primary difference is that in some provinces, workers in the bargaining unit can obtain union recognition through a card check system if there is a sufficient showing of support.⁸¹ Under this system, once a union is certified as the exclusive bargaining agent through a showing that a minimum percentage of the workers desire union representation, a duty to bargain similar to that in the United States arises.⁸² But in the United States, the duty only accrues after the employees indicate desire for representation through a union election.

The card check system was predominant for many years in the various provinces, but since the 1990s there has been a move toward a U.S.-style election format, which generally makes it more difficult for unions to organize.⁸³ This development has been described by at least one scholar as "neoliberal governments intent on discouraging union growth."⁸⁴ Currently, five of ten provinces have instituted a mandatory union election regime,⁸⁵ and in these five provinces reside the majority of Canada's workers.⁸⁶ The manda-

⁷⁷ Roy J. Adams, *The Campaign to Organize Wal-Mart in Canada*, 36 SOC. POL'Y, 13, 14 (2006) (including making clear its anti-union preferences and helping facilitate anti-union worker committees to oppose the union drive).

⁷⁸ Stout & Pickel, *supra* note 75, at 1498 (summarizing the Canadian legal context).

⁷⁹ Roger Blanpain et al., *THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW – CASES AND MATERIALS* 171 (2007).

⁸⁰ Stout & Pickel, *supra* note 75, at 1498-99.

⁸¹ *Id.* at 1499. Five provinces currently have a card check system: Québec, Saskatchewan, Manitoba, New Brunswick, and Prince Edward Island. *Id.* at 1499 & n.22.

⁸² See Blanpain et al., *supra* note 79, at 175.

⁸³ *Id.* at 19. The difficulties that the U.S. election process provided for under the National Labor Relations Act pose for the exercise of the right to freedom of association have been analyzed by a number of scholars and commentators. See, e.g., COMPA, *supra* note 8, at 17-32.

⁸⁴ David J. Doorey, *Neutrality Agreements: Bargaining Freedom of Association in the Shadow of the State*, 13 CANADIAN LABOUR & EMPLOYMENT L.J. 1, 4 (2006).

⁸⁵ These provinces are Québec, Saskatchewan, Manitoba, New Brunswick, and Prince Edward Island. Stout & Pickel, *supra* note 78, at 1499 & n.22.

⁸⁶ See Doorey, *supra* note 84, at 4.

tory election regime effectively allows employers to engage in more intense anti-union campaigns leading up to the election.⁸⁷

The history of organizing Wal-Mart in Canada started soon after its arrival in Canada. The United Steelworkers succeeded in Windsor, Ontario, a mandatory election state, in obtaining a union vote in 1997 but lost. Nevertheless, the union brought a range of allegations against Wal-Mart, claiming it engaged in a range of unfair labor practices that violated Ontario's labor laws.⁸⁸ The Ontario Labour Relations Board found that the election did not amount to an accurate reflection of the employees' wishes, and ordered that the union automatically be recognized.⁸⁹ Although a collective bargaining agreement was reached in December 1997, Wal-Mart continued to challenge the legitimacy of the union, and a group of anti-union employees sought to withdraw the union's bargaining rights.⁹⁰ In 2000 the union agreed to terminate its bargaining rights.⁹¹

This pattern of resistance, through both campaigning and extensive legal challenges, has marked the history of organizing at Wal-Mart in Canada. In British Columbia, another election state, Wal-Mart succeeded in thwarting organizing drives through aggressive anti-union campaigning using tactics used by Wal-Mart in the United States, such as flying in managers to "intimidate or coerce employees" and organizing anti-union committees of employees.⁹² The United Food and Commercial Workers ("UFCW") has also accused Wal-Mart of a range of actions that would have violated British Columbia's labor laws,⁹³ and the British Columbia Labor Relations Board ("BCLRB") has found the company to have "engaged in inappropriate conduct in violation of the British Columbia Labour Relations Code".⁹⁴ In one

⁸⁷ *Id.*

⁸⁸ Stout & Pickel, *supra* note 75, at 1500. Some of these alleged violations included Wal-Mart management circulating among employees and having discussions with them about unions, and refusing to answer questions about whether or not the store might close if there were a union, which the Board determined was an "implied threat to the employees' job security in violation of the Ontario Labour Relations Act." *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* The occurrence of such employee-driven campaigns, according to Stout and Pickel, was a tactic that repeatedly occurred in Wal-Mart organizing drives. *See Id.*

⁹¹ *Id.* Following this chain of events, the Ontario government amended the labor law such that the OLRB could not automatically grant certification to a union as a remedy. This was known as the "Wal-Mart amendment" among circles of labor activists. *Id.* at 1501.

⁹² *Id.* at 1502, 1503.

⁹³ *Id.* at 1502.

⁹⁴ *Id.* (citing *Wal-Mart Canada Corp. v. United Food & Com. Workers Int'l Union*, [2003] 95 C.L.R.B.R. (2d) 1, ¶¶ 167, 195).

instance, the UFCW succeeded in winning certification in a proposed bargaining unit of Wal-Mart tire and automotive division workers,⁹⁵ but Wal-Mart aggressively used the law to fight the union drive and successfully challenged the bargaining unit before the BCLRB, effectively defeating the union drive.⁹⁶

In Québec, a card check province and one of the most union friendly provinces in Canada, the UFCW managed to gain certification in two store-wide units in Jonquière and Sainte-Hyacinthe, and in two smaller bargaining units in Sainte-Hyacinthe and Gatineau.⁹⁷ The Jonquière win, however, was short lived. Within two months of the certification in August 2004, Wal-Mart announced that it might close the store; on February 9, 2005 Wal-Mart announced that it would indeed close the store—the same day that the union application for binding first contract arbitration was accepted by the Québec Labour Relations Commission (“QLRC”).⁹⁸ In September 2005, the QLRC found that Wal-Mart had effectively committed an unfair labor practice and that its actions were a form of anti-union reprisal.⁹⁹ The QLRC also launched extensive legal challenges to the recognition of the unions in Saint Hyacinthe, an issue that is ongoing in the courts.¹⁰⁰

In Saskatchewan, another province with card check provisions, Wal-Mart has acted aggressively against union organizing drives, and has engaged in aggressive legal strategies to prevent unionization. It has chal-

⁹⁵ This division-specific bargaining unit was smaller than the usual store-wide bargaining unit. *Id.* at 1503.

⁹⁶ *Id.* at 1504. Finding little success in organizing stores as a whole, the UFCW attempted to organize through smaller bargaining units, such as workers in the tire and lube division. But the BCLRB eventually found these smaller units to be inappropriate. *Id.*

⁹⁷ *Id.* at 1504-05.

⁹⁸ *Id.* at 1505-06. The store finally closed on April 29, 2005. *Id.* at 1506.

⁹⁹ *Id.* at 1506. The plaintiffs had alleged that their job loss was motivated by anti-union animus, in violation of Division 1 of the Québec Labour Relations Code. R.S.Q., ch. C-27 [*hereinafter* QLRC], available at <http://www.canlii.org/qc/laws/sta/c-27/20080515/whole.html>. See *Bourgeois c. Compagnie Wal-Mart de Canada*, [2005] Q.C.C.R.T. 0502, available at <http://www.crt.gouv.qc.ca/decisions/2005/2005QCCRT0502.pdf>. Under the QLRC, if the employee demonstrates that she exercised her rights to freedom of association, the defendant has the burden of showing that the firing was undertaken for “good and sufficient reason”. QLRC, Art 17. Wal-Mart argued, and the court agreed, that under Québec law, the closing of the store is a just and sufficient cause for terminating their employment. *Bourgeois*, at ¶ 37. But the company still had to show that the closure was “real, genuine, and definitive”. *Id.* at ¶ 53. The court ruled that Wal-Mart did not carry its burden because it still held a twenty-year lease on the property, thus “keeping the door open” for re-opening the store. *Id.* at ¶ 60. The court has yet, however, to determine a remedy. Stout & Pickel, *supra* note 75, at 1506.

¹⁰⁰ Stout & Pickel, *supra* note 75, at 1507.

lenged certification petitions on procedural grounds at three stores in Saskatchewan, dragging out the recognition process as much as possible.¹⁰¹ When the Saskatchewan Labour Relations Board issued document production orders, Wal-Mart filed unsuccessful motions claiming that the Saskatchewan Trade Union Act unconstitutionally violated its freedom of expression, and that the Board was biased against the company.¹⁰² The organizing union, the United Food and Commercial Workers (“UFCW”), has also filed unfair labor practices claims against the company with charges of intimidation, coercion, surveillance, and anti-union activities.¹⁰³

Wal-Mart has taken an aggressive stance against unions in Canada, where the law is based on the Wagner Act model, and in many ways is institutionally and culturally close to the United States. Wal-Mart’s aggressive tactics must also be understood in light of the trend of some provinces in Canada to reform their laws to make union organizing more difficult, indicating a political context that is increasingly hostile toward unions and collective bargaining.

B. The United Kingdom: Between U.S. and European Labor Models

Outside of North America, Wal-Mart’s most contentious relations with unions have occurred in the United Kingdom. Nevertheless, unions have been far more successful in organizing in the United Kingdom than in North America. Wal-Mart entered the U.K. market in 1999 with the acquisition of ASDA, a major U.K. retail chain, for \$10.72 billion.¹⁰⁴ Soon after the purchase, however, labor troubles began to emerge. The most pertinent one for the purposes of the discussion in this article was a union recognition battle between the union GMB and ASDA.

British labor law falls somewhere between the laissez-faire regulatory structure of U.S. labor law and the more protective and union-friendly systems of continental Europe.¹⁰⁵ Over the last several years, the Labour Government has reformed British labor law in an attempt to bring it into line with European Union directives, culminating in the Employment Relations

¹⁰¹ *Id.* at 1508 & n.69.

¹⁰² *Id.* at 1508-10.

¹⁰³ *Id.* at 1508.

¹⁰⁴ See Steve Burt & Leigh Sparks, *ASDA: Wal-Mart in the United Kingdom*, in *WAL-MART WORLD: THE WORLD’S BIGGEST CORPORATION IN THE GLOBAL ECONOMY* 243, 248 (Stanley D. Brunn ed., 2006) (describing the history of ASDA and issues facing ASDA in the UK business environment).

¹⁰⁵ See Blanpain et al, *supra* note 79, at 332.

Act of 2004.¹⁰⁶ This Act provides greater protections for workers from coercive practices from employers during the statutory recognition procedure and increased access for unions to employees.¹⁰⁷

There are basically two ways in which a union may be recognized for the purposes of collective bargaining: (1) voluntarily, or (2) through statutory recognition.¹⁰⁸ To be recognized statutorily, the union must apply to the Central Arbitration Committee (“CAC”), and must demonstrate both that at least 10% of the proposed bargaining unit is already a member of the union and that a majority of the workers in that unit are likely to support union recognition.¹⁰⁹ If the CAC determines that a majority of the bargaining unit is a member of the petitioning union, then the union is recognized. If not, then the CAC may call for a ballot. A majority of those voting, and at least 40% of the bargaining unit, must vote for recognition.¹¹⁰

GMB claims to be the recognized trade union in ASDA’s retail stores, although in Northern Ireland, the Union of Shop, Distributive and Allied Workers have some recognition rights.¹¹¹ GMB does not have collective bargaining rights in the retail stores, however, and the collective bargaining rights that had been in place between the union and ASDA’s retail stores had been withdrawn in the mid-1990’s prior to Wal-Mart’s arrival.¹¹² The dispute in question involves the warehouse depots that supply the retail supermarkets. At the time of the threatened industrial action, nine of the twenty had collective bargaining agreements with ASDA. The union has been seeking to increase collective bargaining recognition to all twenty of the depot

¹⁰⁶ Employment Relations Act, 2004, c. 24 (U.K.) [hereinafter U.K. Employment Relations Act].

¹⁰⁷ See Blanpain et al, *supra* note 79, at 362.

¹⁰⁸ See generally James J. Brudney, *Recrafting a Trojan Horse: Thoughts on Workplace Governance in Light of Recent British Labor Law Developments*, 28 COMP. LAB. L. & POL’Y J. 193 (2007) (discussing the new British union recognition and collective bargaining procedures, and suggesting ways in which voluntary agreements and the de-politicization of the dispute process might be incorporated into U.S. labor law).

¹⁰⁹ CENTRAL ARBITRATION COMMITTEE, STATUTORY RECOGNITION: GUIDE FOR THE PARTIES 3, 12 (July 2007) <http://www.cac.gov.uk/Publications/publicathead.htm> (follow “Statutory Recognition: A guidance document for the Parties” hyperlink); U.K. Employment Relations Act, *supra* note 109, at §36, sched. 1.

¹¹⁰ CENTRAL ARBITRATION COMMITTEE, *supra* note 112, at 29; U.K. Employment Relations Act, *supra* note 109, at §29(3), sched. 1.

¹¹¹ Tony Edwards, *Ruling Highlights Poor Industrial Relations at ASDA*, EUR. INDUS. REL. OBSERVATORY ON-LINE, May 15, 2006, <http://www.eurofound.europa.eu/eiro/2006/04/articles/uk0604059i.html>.

¹¹² Mark Tran, *Deal Averts ASDA Strike*, GUARDIAN UNLIMITED, June 29, 2006, available at <http://www.guardian.co.uk/business/2006/jun/29/supermarkets.asda>.

sites.

The initial dispute started to take shape when ASDA tried to amend or rescind existing collective bargaining agreements in some of its depots. At one depot, in the town of Washington in the county of Tyne and Wear, ASDA offered employees a 10% raise if they agreed to rescind a collective agreement that had been entered into between ASDA and GMB in 2004 under the statutory recognition requirements.¹¹³ As a result, an employment tribunal found in 2006 that the company violated the Trade Union and Labour Relations (Consolidation Act) of 1992 and was required to pay each of its 340 workers £ 2,500, for a total of £ 850,000.¹¹⁴

While ASDA was attempting to renegotiate and rescind the collective bargaining agreements (“CBAs”) in 2004-05, it was also engaging in anti-union activities reminiscent of U.S. practices. For example, it hired a public relations firm to disseminate anti-union literature during the Washington depot vote on collective bargaining rights, and an internal memo from ASDA suggested that workers who refuse to sign a new contract should be dismissed.¹¹⁵

Following the Washington depot incident, ASDA also threatened to terminate the collective bargaining agreement at a depot in Dartford unless the union was willing to open negotiations on the existing agreement. This threat, with other standing issues,¹¹⁶ pushed GMB to call for a strike ballot in all the depots.¹¹⁷ In June 2006 the union members voted 2209 to 771 in favor of a strike, and the union hence called for a five-day strike starting June 30, 2006. On the day before the strike was to take place, however, ASDA and GMB announced an agreement that provided, *inter alia*, for a joint union-management council which would cover all ASDA distribution depots, a process that could potentially lead to a model collective bargaining agreement for all the depots, that ASDA would remain neutral about GMB’s union organizing activities, and that it would provide access to the depots for GMB’s organizers.¹¹⁸ Subsequently, workers at the Skelmersdale, Chep-

¹¹³ Edwards, *supra* note 111.

¹¹⁴ *Id.*

¹¹⁵ See Barrie Clement, *ASDA Hatched Secret Plan To Sack Union Members*, INDEP. (London), Mar. 1, 2006, at 52. The same tribunal found that this literature was “very hostile to trade unions and highly disparaging of the process of collective bargaining.” *Id.*

¹¹⁶ These included no bonuses for many employees in 2006 and what the union felt were hazardous “pick rates” in the depots. See Press Release, GMB, GMB Officers to Seek Authority for Official Strike Ballot at ASDA (Feb. 23, 2006), available at <http://www.gmb.org.uk/Templates/PressItems.asp?PrintFriendly=True&NodeID=93450>.

¹¹⁷ *Id.*

¹¹⁸ Press Release, GMB, GMB Members Win The Right To Collective Bargaining In The UK

stow, and Erith stores voted overwhelmingly in favor of representation by GMB.¹¹⁹

Compared to Wal-Mart's anti-union activities in the United States, the actions of ASDA, while not exemplary, seem somewhat more benign, and at the very least, ended up being fairly ineffective. Indeed, in the end ASDA agreed to engage in collective bargaining and to effectively implement a neutrality agreement—a step that would be hard to imagine Wal-Mart taking in its U.S. operations. While true that ASDA took a fairly aggressive stance on collective bargaining and union recognition,¹²⁰ its tactics do not compare to Wal-Mart's home-country tactics. It is also noteworthy that ASDA officials are careful to differentiate themselves from Wal-Mart's home operational team, stating that “[e]veryone seems to think that Wal-Mart pulls the strings . . . [b]ut its businesses are independently run by the local people.”¹²¹ In other words, the Wal-Mart model is not exported in whole cloth from the United States. Moreover, ASDA was and remains a British company embedded in British norms and expectations. As one staff person of GMB reported in a phone interview, “[I]n Britain, you can't maintain the attitude that as the biggest company in the world one has to bargain with you as individuals. It is part of the democracy of this nation.”¹²²

C. Germany: Co-Determination and Sector-Wide Collective Bargaining

Wal-Mart entered Germany in 1997 with high hopes after acquiring two smaller German retail chains. Adapting to Germany's labor relations systems and cultures as well as to its consumer markets proved difficult, however, and the experience there likely served as an important learning experi-

ASDA Wal-Mart Distribution Depots (June 29, 2006), available at <http://www.gmb.org.uk/Templates/PressItems.asp?NodeID=94098>.

¹¹⁹ Press Release, GMB, ASDA Wal-Mart Workers Overwhelming Vote for GMB for Collective Bargaining at Skelmersdale Distribution Depot (Aug. 16, 2007), available at <http://www.gmb.org.uk/Templates/Internal.asp?NodeID=95952>. Workers voted 90% in favor at the Chepstow store with 76% turnout, and 85% in favor at Erith with 78% turnout. Press Release, GMB, ASDA Workers Landslide Vote For GMB Collective Bargaining In Chepstow And Erith Distribution Depots (Nov. 20, 2006), available at <http://www.gmb.org.uk/Templates/Internal.asp?NodeID=94779>.

¹²⁰ In one article, David Smith, ASDA's "People Director," was quoted blasting GMB as a "union with declining membership 'desperately seeking to gain funds.'" Mike Berry, *Asda HR Chief Slams Cynical Union Tactics*, PERSONNELTODAY.COM, Mar. 14, 2006, <http://www.personneltoday.com/Articles/2006/03/14/34351/asda-hr-chief-slams-cynical-union-tactics.html>.

¹²¹ *Id.*

¹²² Telephone Interview with Steve Pryle, Communications Director, GMB (June 6, 2007).

ence. Germany's industrial relations system is constructed upon a dual system of Works Councils and union-based collective bargaining. Works Councils are responsible for collaborative workplace consultation and co-determination,¹²³ while unions are responsible for negotiating sector-wide or, less often, company-specific collective bargaining agreements.¹²⁴ If just one employee in a workplace is a member of a union, then that union is recognized as the representative union, and employers are to engage in collective bargaining.¹²⁵

Not accustomed to dealing with systems of collaborative workplace relations, at first Wal-Mart did not consistently consult with the existing Works Councils and initially resisted signing on to the sector-wide collective bargaining agreement and individual company-specific agreements. This highly irritated the unions, and in the year 2000 workers picketed the Wal-Mart stores.¹²⁶ In response, according to Ver.di, the German service sector union, Wal-Mart proceeded to post anti-union flyers on their walls.¹²⁷ Despite its fairly weak efforts at anti-union campaigning, however, the company eventually implemented the sector-wide agreements as a result of the protests.¹²⁸ Thus, Wal-Mart once again entered into collective bargaining agreements with its workers.

Wal-Mart was also learning that other aspects of its home-country human resource practices did not necessarily translate well. Wal-Mart's restrictions on workplace romances,¹²⁹ its hotlines to report on untoward worker activities, the required Wal-Mart cheer, and the company's requirement that cashiers smile at customers, which male customers would some-

¹²³ Co-determination entails negotiation, and even the possibility of blocking the decisions of employers, over "work rules, working time including overtime and holiday roster, methods of pay, the introduction and use of technical devices for monitoring employees' conduct and performance, accident prevention and health protection, fringe benefits and the provision and withdrawal of company-owned housing." ILO, National Labour Law Profile: Federal Republic of Germany, <http://www.ilo.org/public/english/dialogue/ifpdial/info/national/ger.htm> (last visited Mar. 21, 2008).

¹²⁴ See Blanpain et al., *supra* note 79, at 404-08.

¹²⁵ Blanpain et al., *supra* note 79, at 406.

¹²⁶ Susan Christopherson, *Challenges Facing Wal-Mart in the German Market*, in *WAL-MART WORLD: THE WORLD'S BIGGEST CORPORATION IN THE GLOBAL ECONOMY*, *supra* note 104, at 261, 263-64.

¹²⁷ See Uni Commerce, *Wal-Mart Throws in the Towel in Germany as Social Dumping Did Not Work* (July 28, 2006), http://www.union-network.org/Unisite/Sectors/Commerce/Multinationals/Wal-Mart_throws_in_towel_in_Germany.htm.

¹²⁸ *Id.*

¹²⁹ Mark Landler & Michael Barbaro, *No Not Always*, N.Y. TIMES, Aug. 2, 2006, at C1.

times interpret as a form of flirtation, all seemed very odd to German workers.¹³⁰

Unable to compete with the larger chains such as Aldi, Wal-Mart left Germany in 2006 after losing hundreds of millions of dollars and clashing with German labor, consumers, and legal cultures.¹³¹ Wal-Mart's experience in Germany was likely a learning experience about adapting to local practices and work cultures. While it did at first struggle with aspects of the German industrial relations system, including unions, Wal-Mart did in the end engage in collective bargaining and attempted to conform to Germany's collaborative, corporatist system.

D. Mexico, Argentina, and Brazil: Corporatist Political and Labor Systems

A corporatist framework that encourages a highly centralized role for the state in labor relations marks the Mexican and South American labor law systems. Although variations in historical evolution, types of corporatist systems, and the degree of state control certainly exist between countries,¹³² corporatism in Latin America has been marked by a fairly straight forward quid pro quo: in exchange for labor peace and submission, unions and workers' organizations receive state support and protection as well as a degree of control over their memberships.¹³³

A primary goal of the labor relations systems has been to provide job security.¹³⁴ Accordingly, corporatist countries adhere to what many authors refer to as a social protection model, in which the state acts as the primary source of workplace regulation, relegating collective bargaining and decentralized forms of workplace regulation to a secondary position. This framework leaves less flexibility in how collective bargaining takes place than in, for example, the pluralist North American framework.¹³⁵

¹³⁰ Many of these requirements were challenged in courts by the Works Councils and German Unions. See Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39 CONN. L. REV. 1739, 1768-74 (2007).

¹³¹ *Id.* at 1768-69; Landler & Barbaro, *supra* note 129 at C1.

¹³² See ADALABERTO CARDOSO, INDUSTRIAL RELATIONS, SOCIAL DIALOGUE AND EMPLOYMENT IN ARGENTINA, BRAZIL AND MEXICO 4-11 (2004), available at <http://www.ilo.org/public/english/employment/strat/download/esp7.pdf> (discussing the different industrial relations systems and varieties of corporatism in Brazil, Mexico, and Argentina).

¹³³ *Id.* at 5.

¹³⁴ *Id.* at 3.

¹³⁵ *Id.*

1. Mexico

Wal-Mart entered the Mexican market in 1991—its first international venture—when it entered a joint venture with the Mexican chain Cifra. In 1997, it acquired majority ownership of Cifra and changed the name to Wal-Mart de Mexico, S.A. de C.V. (“Walmex”). As of this writing, Walmex has over 1045 stores,¹³⁶ 155,000 employees,¹³⁷ and is the largest retailer in Mexico.

The industrial relations system in Mexico is rooted within the corporatist framework that marks the political and labor systems in many central and South American countries.¹³⁸ The *Congreso del Trabajo* (“CT”), organized in the mid-1960s, is the main umbrella organization. The CT has traditionally had a close relationship with both the Institutional Revolutionary Party (“PRI”) and the state and its institutions; thus, its affiliated unions and federations have been accorded privileges.¹³⁹ Within the CT several competing union federations are aligned with the state, the largest of which is the Mexican Workers Confederation (“CTM”).¹⁴⁰ Apart from the CT and its federations, there are independent unions, although much fewer. Some of these have organized into the *Unión Nacional de Trabajadores* (“UNT”).¹⁴¹ Since the 1990s, however, as the PRI has lost its role as the super-dominant party, there has been a loosening of this connection between the large union federations and the PRI, and the unions have become allied more with the state than with any one party.¹⁴²

To form a union, twenty workers in a given enterprise must wish to have a union. The union must register with the Secretary of Labor in cases of federal labor jurisdiction, or a state Conciliation and Arbitration Board

¹³⁶ Wal-Mart, Mexico Fact Sheet, http://walmartstores.com/media/factsheets/fs_2006.pdf (last visited June 23, 2008).

¹³⁷ Wal-Mart, Mexico Fact Sheet, http://walmartstores.com/media/factsheets/fs_2006.pdf (last visited June 23, 2008).

¹³⁸ CARDOSO, *supra* note 132, at 16.

¹³⁹ *Id.* at 5-6, 16.

¹⁴⁰ For a discussion of the dynamics and history of union competition in Mexico, specifically in the late 1980s and early 1990s when the PRI was the dominant political party, see MARIA VICTORIA MURILLO, LABOR UNIONS, PARTISAN COALITIONS, AND MARKET REFORMS IN LATIN AMERICA 92-130 (2001). Murillo argues that the system of union competition, combined with general partisan loyalty to the PRI, resulted in the subordination of unions to the state’s neoliberal economic policies. *Id.*

¹⁴¹ CARDOSO, *supra* note 132, at 17.

¹⁴² Telephone Interview with Ben Davis, Field Representative, Am. Ctr. for Int’l Labor Solidarity, in Mexico (July 5, 2007).

where there is state jurisdiction.¹⁴³ Bargaining rights accrue automatically with registration, and the union that signs a collective bargaining agreement has *titularidad*, or “title,” meaning exclusive bargaining rights, although there are provisions for determining representation rights when workers are members of multiple unions.¹⁴⁴ All employees in that enterprise, regardless of union membership status, are subject to the terms of the contract.¹⁴⁵

According to some experts in Mexican labor relations, however, the process for organizing unions is in practice less often a grassroots process. Rather, it is a top down collaborative process between a union and the employer, leading to what are called “white unions.”¹⁴⁶ The union will consult with the employer to negotiate a deal before the establishment is even set up, and the official union for that establishment is agreed upon.¹⁴⁷ This process has been used to exclude independent unions from gaining *titularidad*.

There are unions in all, or close to all, of Walmart’s stores.¹⁴⁸ Six unions from two different confederations, the CTM and the CROC, represent Walmart workers.¹⁴⁹ While there are unions and contracts in basically all of the stores, most workers, and even many managers, seem to have little awareness of this fact.¹⁵⁰ Indeed, the process of union recognition apparently reflects the mainstream of the Mexican retail industry, and operates based on the top-down process described above.¹⁵¹

Most of the contracts, despite being negotiated by different unions and in different cities, have identical provisions other than wage rates.¹⁵² In general, these contracts provide for few protections or benefits other than the minimum required under Mexican labor law, apart from a more generous

¹⁴³ Blanpain, *supra* note 79, at 228.

¹⁴⁴ *Id.* at 229-30.

¹⁴⁵ *Id.* at 230.

¹⁴⁶ Chris Tilly & José Luis Álvarez Galván, *Lousy Jobs, Invisible Unions: The Mexican Retail Sector in the Age of Globalization*, 70 INT’L LABOR & WORKING-CLASS HIST. 61, 69 (2006). Tilly and Galván define white unions as “company unions formed when self-appointed ‘leaders’ sign union contracts without workers’ knowledge in order to create a closed shop that can occupy the space of a ‘union.’ The ‘union’ is then certified by the government and its legal status blocks the formation of a legitimate independent union.” *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 71.

¹⁴⁹ *Id.* at 72, 79-81.

¹⁵⁰ Chris Tilly, *Wal-Mart Goes South: Sizing up the Chain’s Mexican Success Story*, in WAL-MART WORLD: THE WORLD’S BIGGEST CORPORATION IN THE GLOBAL ECONOMY, *supra* note 104, at 357, 361.

¹⁵¹ See Tilly & Galván, *supra* note 146, at 69.

¹⁵² *Id.* at 72.

year-end bonus than is legally mandated.¹⁵³ Walmex's wage rates, it should be noted, tend to be on par with, or even superior to, competing retail chains, although it provides slightly lower benefits.¹⁵⁴ Finally, the terms of these contracts have been basically unchanged since 1993, which is before Wal-Mart acquired Cifra.¹⁵⁵

These contracts and unions are not similar to those in countries such as the United States, which are based on genuine collective negotiations. In Mexico, most of these contracts are what might be termed "protection contracts" because they protect companies from the organization of genuine, independent unions.¹⁵⁶ Because Mexican law provides that there can be only one representative union in a given workplace, employers therefore prefer to deal with non-combative, compliant unions which are often seen as relatively quiescent, corrupt, or both.¹⁵⁷ Retail unions in Mexico have also been described as the "worst of the corporatist tradition," negotiating contracts more to stay in favor with the employers rather than negotiating in the best interests of their members.¹⁵⁸ These "white unions" are formed by non-democratically elected leaders without worker support and become certified as the official union for the bargaining unit. "White unions" function to squeeze out competing unions, particularly ones that are independent and confrontational.¹⁵⁹

While Wal-Mart has apparently exported most of the elements of its standard business model to Mexico, it has not brought with it the union avoidance strategy that marks its American and, to a lesser extent, Canadian operations. This could very well be because the costs of not having a union in Mexico are greater than the costs of having one. Regardless of the reason, Walmex lives comfortably within this corporatist system that is primarily dominated by "white unions," which are largely quiescent and cooperative. This is the industry norm, and Walmex works squarely within it.¹⁶⁰ What would happen if an independent union, such as the Frente Auténtico del Tra-

¹⁵³ *Id.* at 73.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 72. Mexican labor law provides for indefinite contracts, but there must be wage reopeners once a year and a right to reopen contracts every two years. *See* Blanpain et al., *supra* note 79, at 229.

¹⁵⁶ Tilly & Galván, *supra* note 146, at 69-70.

¹⁵⁷ *Id.* at 67.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 67-71.

¹⁶⁰ *See* Chris Tilly, *Wal-Mart and its Workers: NOT the Same All Over the World*, 39 CONN. L. REV. 1805, 1816 (2007).

bajo ("FAT"), attempted to organize in the industry remains an open question. In all likelihood, Walmex would respond as other retailers would in Mexico, which is by fighting against the union.

2. Brazil

Wal-Mart entered the Brazilian market in 1995 in a joint venture with Lojas Americanas and established five stores.¹⁶¹ Since then, it has grown rapidly, through both organic growth and acquisitions. In 2004, Wal-Mart purchased the chain Bompreço from the Dutch based MNC, Royal Ahold NV, acquiring 118 stores. In 2005, it acquired the Portuguese MNC Sonae, which added 140 additional units. As of this writing, Wal-Mart operates 314 stores in Brazil using both the Wal-Mart brand as well as the acquired brand names.¹⁶²

The Brazilian labor law system, like the other Central and South American countries with a Wal-Mart presence, is embedded within a corporatist framework. Brazil's labor law is governed by the *Consolidação das Leis do Trabalho* (CLT).¹⁶³ The CLT provides for monopoly representation of workers in a particular sector. This is known as union "unicity" and workers are represented by that union, whether or not they have chosen to affiliate with it. Union dues are deducted directly from their paychecks and are equal to about one day's wages per year.¹⁶⁴

Two unions represent Wal-Mart's workers: Força Sindical, which is prominent in the south of the country and is the largest union in the retail sector, and Contracs, which is affiliated with the main union federation, CUT, and has fewer members in the Wal-Mart owned stores.¹⁶⁵

Wal-Mart, by most reports, generally has good relations with the unions

¹⁶¹ Kerry A. Dolan, *Latin America: Bumps in Brazil*, FORBES.COM, Apr. 12, 2004, http://www.forbes.com/free_forbes/2004/0412/076d.html; WAL-MART STORES, INC., ANNUAL REPORT 10 (1996); Wal-Mart Brazil Fact Sheet, http://walmartstores.com/media/factsheets/fs_1997.pdf (last visited May 15, 2008).

¹⁶² Wal-Mart Brazil Fact Sheet, *supra* note 161.

¹⁶³ CARDOSO, *supra* note 135, at 7; *see also* JOHN D. FRENCH, DROWNING IN LAWS: LABOR LAW AND BRAZILIAN POLITICAL CULTURE 10-22 (2004) (discussing the ideological genealogy of Brazilian labor law).

¹⁶⁴ CARDOSO, *supra* note 132, at 18.

¹⁶⁵ Telephone Interview with Jason Judd, Wal-Mart Campaign Director, Change to Win (May 24, 2007). These unions are competitive with each other, and CUT, interested in organizing more within Wal-Mart, has recently put forth a proposal through its "social observatory unit" to conduct research on the company and its compliance with social and labor rights. *See* Wal-Mart Expansion in Brazil and the Research of the Social Observatory Institute (on file with author).

in Brazil and accommodates the Brazilian labor regulatory structure.¹⁶⁶ When Wal-Mart first announced, for example, that it was going to buy the major chain Sonae, it quickly sought to open communication channels with Força Sindical in order to stem any opposition that the union might have raised against the sale.¹⁶⁷ The union still had planned to protest the sale in coordination with the U.S. federation Change to Win, but the leader of Força Sindical appeared to be somewhat ambivalent about this in a newspaper report. The Força Sindical leader was quoted to have said that the union has a good relationship with Sonae, and that Wal-Mart in Brazil adopts the same labor practices as its competitors.¹⁶⁸

3. Argentina

Wal-Mart entered Argentina in 1995 and as of this writing operates twenty-two stores.¹⁶⁹ Argentina's labor law, like Mexico's and Brazil's, is rooted in a corporatist system that originally developed during the regime of the union-backed, populist president Colonel Juan Perón. The alliance that began in 1946 between Perón and the labor movement established a system in which the state provided assistance to state-backed unions in return for union support.¹⁷⁰ The institutional legacy of this alliance is still felt today,¹⁷¹

¹⁶⁶ See UNI COMMERCE, WAL-MART STORES, INC: UNI COMMERCE COMPANY OVERVIEW 11 (2005), available at http://www.union-network.org/unisite/Sectors/Commerce/Multinationals/Wal-Mart_Report_UNI_Commerce_Dec_2005.pdf. However, a report in 2000 by the Social Observatory, a labor research organization, did find in 1998 some problems between Wal-Mart and its unions in the realm of freedom of association and collective bargaining. Most workers interviewed, however, claimed there was no pressure from the company regarding union membership or participation. Some unions did report, however, that Wal-Mart did not respect all provisions of the CBA. See OBSERVATÓRIO SOCIAL, WAL-MART BRASIL LTDA. 10-12 (2000).

¹⁶⁷ Sergio Bueno, *Wal-Mart Tenta Aproximar-se de Sindicato*, SINDICATO MERCOSUL, Dec. 1, 2005, <http://www.sindicatomercosul.com.br/noticia02.asp?noticia=28273>.

¹⁶⁸ Claudia Facchini, *Sindicatos Farão Protesto Contra a Venda do Sonae*, SINDICATO MERCOSUL, Nov. 21, 2005, <http://www.sindicatomercosul.com.br/noticia02.asp?noticia=28023>.

¹⁶⁹ Wal-Mart Argentina Fact Sheet, available at http://walmartstores.com/media/resources/r_2222.pdf (last visited May 15, 2008).

¹⁷⁰ CARDOSO, *supra* note 132, at 8-9.

¹⁷¹ Some commentators, however, have described Argentina as being in a "postcorporatist" phase, in which the traditional corporatist institutions such as labor unions, who have weakening relationships with the state, no longer serve the primary function of mediating relations between state with society. Instead, new institutions such as NGOs and social movement might be increasingly occupying that role. See Steven Levitsky & Maria Victoria Murillo,

with a labor law that is marked by monopoly representation granted by the state, compulsory collective bargaining at the industry level, and non-expiring contracts.¹⁷² For a union to receive *personería gremial*, which is legal recognition by the state, a union must be officially registered and operating for at least six months, have a membership covering not less than 20% of the workforce, and be the most representative union in a geographical area.¹⁷³ Many contracts were originally negotiated in 1975, including those that apply to Wal-Mart, and apart from wages, have not been renegotiated.¹⁷⁴ Most workers in the formal sector are covered by collective bargaining agreements.¹⁷⁵

Although all formal employees of Wal-Mart are covered by a contract, some experts estimate that only 50-60% of the workforce is actually covered by a contract, with the rest being casual employees not subject to the terms of the collective bargaining agreement.¹⁷⁶ The union representing supermarket workers, including Wal-Mart employees, is the *Federación Argentina de Empleados de Comercio y Servicios* ("FAECYS"), which is an affiliate of the Peronist union federation, the *Confederación General del Trabajo* ("CGT").

Some commentators have noted that, as is common in South American corporatist regimes, FAECYS rarely takes a strongly oppositional position to the employer.¹⁷⁷ Recently, however, representatives of Wal-Mart had to testify before a committee of the Argentine Chamber of Deputies to respond to accusations that the company fired two shop stewards because, according to accusations of a rival union to the CGT, the *Central de Trabajadores Argentinos* ("CTA"), they were seeking to organize a more active union.¹⁷⁸ This attracted particular criticism from a legislator, Claudio Lozano, who was also, incidentally, a director of the competitor union, the CTA. Yet all in all,

Introduction to ARGENTINE DEMOCRACY: THE POLITICS OF INSTITUTIONAL WEAKNESS 10-14 (Steven Levitsky & Maria Victoria Murillo eds., 2005).

¹⁷² See MURILLO, *supra* note 140, at 49-50 (discussing aspects of Argentinean labor law).

¹⁷³ ARTURO BRONSTEIN, INT'L LABOUR ORG., NATIONAL LABOUR LAW PROFILE: ARGENTINA (2000), <http://www.ilo.org/public/english/dialogue/ifpdial/info/national/arg.htm>.

¹⁷⁴ See CARDOSO, *supra* note 132, at 24; Telephone Interview with Brian Finnegan, Uruguay Field Representative, Am. Ctr. for Int'l Labor Solidarity (June 4, 2007) [hereinafter Finnegan Interview].

¹⁷⁵ CARDOSO, *supra* note 132, at 28.

¹⁷⁶ Finnegan Interview, *supra* note 174.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*; see also Mariano Vázquez, *Trabajadores de Wal Mart Demostraron la Persecución Sindical de la Empresa*, EL SINDICAL, <http://www.elsindical.com/noticia.php?id=1717> (last visited June 22, 2008).

the relationship between Wal-Mart and the unions is generally good, and the CTA or other unions have generally not attacked Wal-Mart very much, at least until this recent incident.¹⁷⁹

E. China: Corporatism with Chinese Characteristics

Wal-Mart's retail entry into China presents one of the most interesting case studies of the company's entry into a foreign market and its relationships with unions, the state, and the law. While much has been made of China's role as a manufacturer and supplier to Wal-Mart's U.S. retail stores, Wal-Mart's retail operations in China have been a major priority for the company in recent years, and the company's retail presence has been rapidly growing.

Wal-Mart entered the Chinese market in 1996 with two stores in the Special Economic Zone ("SEZ") of Shenzhen. At that time there was a ban on the entry of foreign chain stores, so Wal-Mart needed local partners. It joined with two entities that were controlled by the local government: the Shenzhen International Trust and Investment Corporation ("SZITIC") for the Supercenter, and the Shenzhen SEZ Development Corporation for the SAM's Club.¹⁸⁰ Since then, foreign chains have been permitted to open in China.

1. Chinese Labor Law and the ACFTU

China's labor law is constituted by an array of state and national laws. National laws pre-empt local law, however, and are the primary sources of labor regulation. Chinese labor law provides that workers have the right to organize trade unions without obstruction.¹⁸¹ However, in an important limitation, the All China Federation of Trade Unions (ACFTU) is the sole national trade union organization.¹⁸² One primary obligation of the union is to serve and cooperate with the state and the communist party.¹⁸³ Independent

¹⁷⁹ Finnegan Interview, *supra* note 174.

¹⁸⁰ Shuguang Wang & Yongchang Zhang, *Penetrating the Great Wall, Conquering the Middle Kingdom: Wal-Mart in China*, in *WAL-MART WORLD: THE WORLD'S BIGGEST CORPORATION IN THE GLOBAL ECONOMY*, *supra* note 104, at 293, 299.

¹⁸¹ Trade Union Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2001, effective Oct. 27, 2001) (P.R.C.), available at http://www.gov.cn/english/laws/2005-10/11/content_75948.htm [hereinafter Trade Union Law], art. 3.

¹⁸² *Id.* art. 10.

¹⁸³ The law provides, for example, that "trade unions shall assist the people's governments in their work and safeguard the socialist State power under the people's democratic dictatorship

unions not affiliated with the ACFTU are banned, and those who have attempted to organize them have been charged with treason or subversion by the government.¹⁸⁴

The law provides that in firms with twenty-five workers or more, a “basic-level trade union committee shall be set up.”¹⁸⁵ Trade unions are to negotiate and sign collective contracts for the workers, who in turn are supposed to approve the proposed agreements.¹⁸⁶ In 2004, the government promulgated a new collective bargaining law that provided for more far reaching collective bargaining practices, including greater scope of bargaining subjects, good faith bargaining requirements, and a requirement that parties have a “legitimate” reason for refusing to bargain if requested to do so.¹⁸⁷ Then, in 2007 China passed a new law on employment that, *inter alia*, places stricter requirements on employers to have written employment contracts, and provides for collective bargaining between the union and employers, and for consultation with unions on certain workplace rules other issues, such as layoffs.¹⁸⁸ In practice, however, despite a large number of collective bargaining agreements,¹⁸⁹ there are few with provisions more demanding than the statutory minimums.¹⁹⁰ This is especially true with foreign companies, where there is relatively little union presence.¹⁹¹ What’s more, union formation, as

led by the working class and based on the alliance of workers and peasants.” *Id.* art. 5; see generally CHING KWAN LEE, *AGAINST THE LAW: LABOR PROTESTS IN CHINA’S RUSTBELT AND SUNBELT* 57-61 (2007).

¹⁸⁴ LEE, *supra* note 183, at 57.

¹⁸⁵ Trade Union Law, *supra* note 181, art. 10.

¹⁸⁶ *Id.* art. 20.

¹⁸⁷ See Decree 22 of the Ministry of Labor and Social Security (promulgated by the Ministry of Labor and Soc. Sec., Jan. 20, 2004, effective May 1, 2004) (P.R.C.), available at <http://www.ilo.org/dyn/natlex/docs/SERIAL/67073/63607/F946237266/CHN67073.pdf> [hereinafter Decree 22]; see generally Ronald C. Brown, *China’s Collective Contract Provisions: Can Collective Negotiations Embody Collective Bargaining?*, 16 DUKE J. COMP. & INT’L L. 35 (2006) (analyzing the provisions of the collective negotiations law and suggesting it has promise to lead towards genuine collective bargaining procedures).

¹⁸⁸ See Law on Employment Contracts (promulgated by the Standing Comm. Nat’l People’s Cong. on June 29, 2007, effective Jan. 1, 2008) (P.R.C.) available at <http://al2.mofcom.gov.cn/aarticle/chinalaw/humanresource/200712/20071205270196.html>.

¹⁸⁹ The *China Daily* has reported that 49% of Chinese workers are covered by collective agreements. See Guan Xiaofeng, *Workers to Get Power to Negotiate, Union Says*, CHINADAILY, May 25, 2007, available at http://www.chinadaily.com.cn/china/2007-05/25/content_880121.htm.

¹⁹⁰ See Brown, *supra* note 187 at 54.

¹⁹¹ Some reports have suggested that only 10% of the 500,000 foreign firms operating in China have unions. See UNI Commerce, *Wal-Mart Singled Out as Anti-Union by Chinese Union Leader: New Legislation May Be Needed to Secure the Rights of Workers in All For-*

in the Mexican context, is usually a “top down” process by which the ACFTU strikes a deal with the employer to form a union.¹⁹²

Clearly, the ACFTU is not a union in the traditional sense. For one, it is not independent—it is tightly bound with the state, which is interchangeable with the Communist Party. Union leaders, for example, are often party officials or deputy managers of the company itself.¹⁹³ In one SEZ in Guangdong province, for example, reportedly all the union chairs in the foreign owned companies are also managers in that company.¹⁹⁴ This intermingling of interests means that the ACFTU generally does more to ensure labor peace and provide recreation for the workers than to protect workers rights or improve working conditions—a situation which, according to some surveys, has bred skepticism and resentment by workers towards the union.¹⁹⁵

Nevertheless, according to some China labor scholars, such as Anita Chan, the ACFTU plays an increasingly important role in mediation and advocacy within what might be thought of as a Chinese version of corporatism.¹⁹⁶ Other scholars of Chinese law have also suggested that recent reforms in Chinese collective bargaining laws might portend greater collective

eign Enterprises (July 7, 2006), http://www.union-network.org/Unisite/Sectors/Commerce/Multinationals/Wal-Mart_singled_out_as_leading_anti-union_foreign_employer_by_Chinese_union_leader.htm. However, according to ACFTU statistics, there are 169.94 million members of the ACFTU, and 1.324 million grassroots unions. See ACFTU, A Brief Introduction of the All-China Federation of Trade Unions (Sept. 20, 2007), available at <http://english.acftu.org/template/10002/file.jsp?cid=63&aid=156>. Some reports have suggested that only 10% of the 500,000 foreign firms operating in China have unions. See UNI Commerce, *supra*.

¹⁹² See Anita Chan, *Organizing Wal-Mart: The Chinese Trade Union at a Crossroads*, JAPAN FOCUS, Sept. 8, 2006, <http://www.japanfocus.org/products/details/2217>.

¹⁹³ LEE, *supra* note 183, at 59.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 59-60.

¹⁹⁶ See Jonathan Unger & Anita Chan, *China, Corporatism, and the East Asian Model*, 33 AUSTL. J. CHINESE AFF. 29, 37-51 (1995). Chan and Unger argue that in the Chinese version of corporatism, unlike traditional forms of corporatism, the state uses the mediating institutions to loosen the grip of the government over the economy and society. The ACFTU in this scheme is described as being organized at the national level and thus constitutes what the authors call “peak corporatism.” *Id.* at 41; see Feng Chen, *Between the State and Labour: The Conflict of Chinese Trade Unions’ Double Identity in Market Reform*, 176 CHINA Q. 1006, 1008 (2003) (describing three roles of the ACFTU in China within the Chinese corporatist framework: representing, mediating, and pre-empting). At least one popular commentator has described the Chinese system as one of “Leninist corporatism.” See WILL HUTTON, *THE WRITING ON THE WALL: WHY WE MUST EMBRACE CHINA AS A PARTNER OR FACE IT AS AN ENEMY* 11 (2006).

bargaining capacity for workers.¹⁹⁷ Some observers have also suggested that the Chinese government is worried that if workers do not have some genuine representation, that they will feel compelled to create independent labor unions, which would be a threat to the power of the Party.¹⁹⁸ As a result, ACFTU is likely on its way to becoming more of a “real” union, and, as one China based lawyer suggested, will shift from being “management-friendly social clubs, to [being] workers’ rights organizations with collective bargaining authority.”¹⁹⁹ According to scholars such as Anita Chan, the story of the ACFTU organizing in Wal-Mart might be emblematic of this transformation.

2. Bringing the ACFTU to Wal-Mart

In 2003 the ACFTU announced through the official Chinese news agency, Xinhua, that although it tried to contact Wal-Mart many times to cooperate with the union to establish trade unions, little progress had been made in convincing Wal-Mart to do so.²⁰⁰ This announcement was apparently part of a broader goal of establishing unions in a number of foreign MNCs, which according to ACFTU officials, had been resistant to allowing the ACFTU in.²⁰¹ Indeed, the national legislature had launched an investigation of the degree of compliance with Chinese labor law, and found that some leading MNCs were resisting efforts by ACFTU to organize, including Wal-Mart.²⁰²

Lack of membership in both private and foreign firms is a problem for the ACFTU, which is trying to cope with the structural changes stemming from privatization and increased FDI in the Chinese economy. The reduction in state enterprises has resulted in a large decrease in union membership in the public sector,²⁰³ thus leading the ACFTU to increase its ranks in private firms, both domestic and international. According to estimates of some

¹⁹⁷ See Brown, *supra* note 187, at 70-72.

¹⁹⁸ Mary Swanton, *Chinese Unions Gain Strength from Government Directives and Proposed Law*, INSIDE COUNSEL, Nov. 2006, at 60, 60 (quoting Andreas Lauffs, partner in Baker & McKenzie’s Hong Kong office.).

¹⁹⁹ *Id.*

²⁰⁰ *China Union Body Pressuring Wal-Mart to Establish Unions*, DOW JONES INT’L NEWS, Aug. 25, 2003.

²⁰¹ See *id.*

²⁰² Leslie T. Chang, *Wal-Mart Says It Would Allow Unions in Its Chinese Operations*, WALL ST. J., Nov. 24, 2004, at A3. Some companies that were highlighted included major corporations such as Dell, Samsung, and Kodak. *Id.*

²⁰³ LEE, *supra* note 183, at 58 (noting that membership levels have decreased by 15 million between 1990–2000).

scholars who study the issue, membership rates in private firms overall are approximately 4%, and about 33% in the foreign sector.²⁰⁴ In a national survey, the Chinese government found that only 10% of foreign firms had ACFTU chapters.²⁰⁵

After increasing pressure from the ACFTU and the Chinese government, in November 2004, Wal-Mart announced that “[s]hould associates request formation of a union, Wal-Mart China would respect their wishes and honor its obligation under China’s trade union law.”²⁰⁶ At the same time, Wal-Mart suggested that there were no unions because workers had “not requested that one be formed,” but that “employees can take voluntary action if they so desire.”²⁰⁷

What the statement meant, however, was unclear. Other MNCs such as Carrefour, Samsung, and McDonalds permitted unions in their workplaces when requested by workers, reportedly in response to pressure from Chinese authorities and the ACFTU, which threatened to sue.²⁰⁸ But in 2006, there were still no unions organized in Wal-Mart’s stores, and newspapers reported that the ACFTU was having difficulty getting access to the stores to meet with managers²⁰⁹ as well as with workers.²¹⁰ The president of the ACFTU publicly complained that two years after the Wal-Mart announcement, there were still no unions at Wal-Mart.²¹¹

Pressure from the Chinese government increased in the form of threats of more stringent application of health and safety and sanitation regulations.²¹² There was also discussion of a proposed legal amendment to the labor law, clearly aimed at Wal-Mart, that would force foreign companies to unionize.²¹³ In fact, Chinese President Hu Jintao had issued a written order in

²⁰⁴ *Id.*

²⁰⁵ *Id.*, at 58 n.74 (citing Lan Xinzhen, *Coming to Terms with Unions*, BEIJING REV., Dec. 9, 2004, at 32); UNI Commerce, *supra* note 194.

²⁰⁶ Chang, *supra* note 202.

²⁰⁷ *Id.*

²⁰⁸ See Mei Fong & Ann Zimmerman, *Red Flag: China’s Union Push Leaves Wal-Mart with Hard Choice*, WALL ST. J., May 13, 2006, at A1.

²⁰⁹ See Chan, *supra* note 192; see also Anita Chan, *Made in China: Wal-Mart Unions*, YALEGLOBAL ONLINE, Oct. 12, 2006, <http://yaleglobal.yale.edu/display.article?id=8283>. Anita Chan, in an analysis of Chinese newspaper accounts of the issue, describes one report that the local union in Nanjing went to the local Wal-Mart Superstore twenty six times over two years, but could not meet even once with the store manager. *Id.*

²¹⁰ See Fong & Zimmerman, *supra* note 208.

²¹¹ See UNI Commerce, *supra* note 191.

²¹² See Fong & Zimmerman, *supra* note 208.

²¹³ Mei Fong, *China May Force Foreign Firms to Allow Unions*, WALL ST. J., July 8, 2006, at

March 2006 directing the ACFTU to “[d]o a better job of building [Communist] Party organizations and trade unions in foreign-invested enterprises.”²¹⁴

Finally, without Wal-Mart’s knowledge, a group of workers formed a union in a store in the southeastern city of Quanzhou on July 29, 2006.²¹⁵ According to accounts by the *Wall Street Journal*, the ACFTU initiated contact with a college educated worker, Ke Yunlong, who worked in the frozen meats section.²¹⁶ According to Anita Chan’s account, the process was even more grassroots, with Ke taking the initiative to approach the union along with two colleagues. Regardless of the exact order of events, what ensued was similar to what one might find in a U.S. union organizing drive: secret offsite meetings, the formation of an organizing committee, and organizers meeting workers when they came to and left shifts. In the end, thirty people signed on—more than the legal minimum—to form the union under a banner that read “[d]etermined to take the road to develop trade unionism with Chinese characteristics.”²¹⁷

Soon thereafter, unions were formed at stores in Shenzhen (Wal-Mart’s first store in China) and Nanjing.²¹⁸ Wal-Mart, according to Chan, went into anti-union mode, holding meetings and even threatening to terminate the contracts of workers who joined the union.²¹⁹ But within one to two weeks of the initial union formation, something caused Wal-Mart to change tactics and reach out to the ACFTU with an olive branch.²²⁰ Wal-Mart officials met with ACFTU officials to discuss the entry of unions in all Wal-Mart stores, and began to make statements that were unprecedented from Wal-Mart.²²¹ Joe Hatfield, Wal-Mart’s China CEO and an old time Wal-Mart executive, announced in a written statement that “I fully anticipate working collabora-

A2.

²¹⁴ *China President Ordered Wal-Mart Union Campaign*, DOW JONES INT’L NEWS, Aug. 16, 2006 (second alteration in original).

²¹⁵ Chan, *supra* note 192.

²¹⁶ Mei Fong & Kris Maher, *Solidarity Movement: U.S. Labor Leader Aided China’s Wal-Mart Coup—Unlikely Alliance Helps Beijing-Backed Union Organize at Retailer*, WALL ST. J., June 22, 2007, at A1. The irony of a meat section worker being the center of organizing should not be lost, given Wal-Mart’s closure of the newly organized meatpacking department in Jacksonville, Texas. See *supra* note 76 and accompanying text.

²¹⁷ Chan, *supra* note 192.

²¹⁸ *Employees at 2 More Wal-Marts in China Form Unions – Report*, DOW JONES INT’L NEWS, Aug. 7, 2006.

²¹⁹ Chan, *supra* note 192.

²²⁰ *Id.*

²²¹ Mei Fong, *Wal-Mart Meets With Officials from China Union*, WALL ST. J., Aug. 10, 2006, at A2.

tively with leadership from ACFTU and Union organizations at all levels to create a model working relationship,” and that the company’s “mutual aim is to establish grassroots unions within each Wal-Mart store throughout China.”²²² Organizing spread to other Wal-Mart stores, and soon unions formed in all of them.

The ACFTU used the successes at Wal-Mart to organize unions in other foreign firms, such as Eastman Kodak, Dell, and a Taiwanese company manufacturing Apple iPod parts called Foxcomm.²²³ The local ACFTU branch in Guangdong aimed to set up unions in the 300 companies that were part of the Fortune 500, although the head of the union assured foreign investors that the union does not “protect rights for the sake of protecting rights, but rather mobilize[s] the initiative of workers to promote the development of enterprises.”²²⁴ By the beginning of 2007, the ACFTU reported that there were branches at 60% of foreign owned enterprises. Even McDonalds and KFC were reported to be explicitly allowing unions in their branches.²²⁵ The ACFTU’s success drew criticism from the bastion of union free workplace advocacy, the *Wall Street Journal* editorial page, which was concerned that the creation of ACFTU unions in Wal-Mart might lead to a transfer of U.S.-style collective bargaining and employer–union conflict into the Chinese industrial relations system.²²⁶

3. International Collaboration

Notably, the ACFTU’s organizing drive against foreign MNCs was not done in isolation. In fact, it reportedly found common cause with the Service Employees International Union (SEIU), which has made international organizing campaigns against multinationals a major part of its agenda. SEIU, in a somewhat controversial move, invited ACFTU officials to the United States for meetings with union officials and academics and held an

²²² Mei Fong, *Wal-Mart Execs Meet China Labor Grp on More Unions*, DOW JONES INT’L NEWS, Aug. 9, 2006.

²²³ *See Union Formed at Taiwan Co Operating in China – Officials*, DOW JONES INT’L NEWS, Jan. 17, 2007.

²²⁴ *Chinese Union Aims to Set up Branches at US Firms in S China*, DOW JONES INT’L NEWS, Jan. 29, 2007.

²²⁵ *McDonald’s, KFC Allow Unions at China Outlets*, DOW JONES INT’L NEWS, Apr. 10, 2007. This was apparently in response to an investigation by authorities in Guangdong regarding underpayment of wages to part-time workers, which was dropped at the time of the announcement. *Id.*

²²⁶ *See Editorial, Welcome, Wal-Mart Comrades*, WALL ST. J., Dec. 21, 2006, at A16.

impromptu training in U.S. organizing methods.²²⁷ Andy Stern, SEIU's president, and other union officials from the breakaway Change to Win Federation also met with ACFTU officials in Beijing before and after the Wal-Mart success.²²⁸

F. Japan: Industrial Cooperation

Wal-Mart entered the Japanese market in March 2002 through the acquisition of a 6.1% stake in the Japanese supermarket Seiyu. In late 2005, it increased its share to a majority 53% stake in the company and installed a Wal-Mart executive as CEO.²²⁹ There are, as of this writing, 392 stores in Japan,²³⁰ and all of these stores are unionized with the Seiyu Workers' Union, which is an affiliate of the JSD union.²³¹

Once Wal-Mart took over Seiyu, a major objective was to take the ailing chain into profitability by extending some of Wal-Mart's practices into the Japanese retailer, such as methods to increase labor productivity. However, this transfer of practices did not seem to extend to union relations. Labor relations have been described as "normal" by UNI,²³² and in 2004, there was an agreement between the union and Seiyu (as well as two other companies) to allow part-time employees to join the union, purportedly to ensure high quality personnel.²³³ This meant that 14,000 more Seiyu workers would become union members and be covered by the CBA.

Japanese labor law is influenced by both German labor law and the U.S. Wagner Act.²³⁴ However, there are significant differences. Because bargaining is largely decentralized and enterprise-based,²³⁵ a norm of cooperation

²²⁷ Fong & Maher, *supra* note 216.

²²⁸ *Id.*; *US Labor Leader to Visit China to Examine Working Conditions*, DOW JONES INT'L NEWS, May 17, 2007.

²²⁹ Ian Rowley, *Wal-Mart's Waiting Game in Japan*, BUSINESSWEEK ONLINE, Dec. 21, 2005, http://www.businessweek.com/bwdaily/dnflash/dec2005/nf20051221_7745_db039.htm.

²³⁰ Wal-Mart Japan Fact Sheet, available at http://walmartstores.com/media/factsheets/fs_2005.pdf (last visited July 14, 2008).

²³¹ UNI-LCJapan, *Giant Commerce Multinationals in the Japanese Market in Full Force*, BULLETIN (Oct. 2004), at 3, 3, available at http://web.archive.org/web/20070316041154/http://www.uranus.dti.ne.jp/~unitokyo/Lcj/Bulletin/Bulletin_No.6_Commerce.pdf.

²³² UNI COMMERCE, *supra* note 166, at 13.

²³³ *See Three Major Supermarket Operators to Unionize Part-Time Workers*, NIKKEI REP., Apr. 23, 2004.

²³⁴ Takashi Araki, *Changing Employment Practices, Corporate Governance, and the Role of Labor Law in Japan*, 28 COMP. LAB. L. & POL'Y J. 251, 259-261 (2007).

²³⁵ *Id.* at 259-60.

has developed in Japanese industrial relations. This cooperation norm contrasts sharply with the adversarial relationship found in North American and, to a lesser extent, European bargaining systems.²³⁶ This has led in Japan to an approach to industrial relations that one scholar has termed a “community of shared fate.”²³⁷ Indeed, the bulk of labor disputes brought to adjudication concern not labor recognition or collective bargaining disputes, but rather unpaid wages and unfair dismissals, followed by adverse changes in working conditions and transfers.²³⁸ Thus, Wal-Mart bought a unionized company with pre-existing, cooperative union relations, and entered into an industrial relations context where unions and employers try to work collaboratively for the good of the company. It has not intervened or tried to change that dynamic.

III. MAKING SENSE OF WAL-MART

As the country narratives above illustrate, Wal-Mart’s relationships with unions and collective bargaining structures in its foreign operations are, if not seamless, much less conflict-ridden than they are in the United States. Wal-Mart, one of the fiercest opponents of unions and unionization in America, generally complies with host country regulations and norms concerning freedom of association and collective bargaining, and fits into the broad norms of the retail sectors in which it operates. Where it has deviated from this path, it has often been forced to conform to prevailing standards.

Thus, as a broadly applicable conclusion, with some small variations, Wal-Mart adapts to the practices of the country and the retail sector in which it operates and does not export, at least in any directly comparable way, its home-country approach to unions to the host country. It tends to comply with the domestic laws and industrial relations systems, as well as with the norms of the society and the organized retail sector in the country in which it

²³⁶ *Id.* at 262. Araki describes a joint labor-management machinery that has sprouted not from law, but rather from practice. As such, according to Araki, unions in Japan have taken the *de facto* role of works councils. *Id.*

²³⁷ See Kenneth G. Dau-Schmidt, *Labor Law and Industrial Peace: A Comparative Analysis of the United States, the United Kingdom, Germany, and Japan Under the Bargaining Model*, 8 TUL. J. INT’L & COMP. L. 117, 142-45 (2000) (arguing that a bargaining model of collective bargaining, in which information is shared between employers and employees, and incentives aligned, explains why the Japanese system has achieved industrial peace compared to other systems).

²³⁸ See Kazuo Sugeno, *The Birth of the Labor Tribunal System in Japan: A Synthesis of Labor Law Reform and Judicial Reform*, 25 COMP. LAB. L. & POL’Y J. 519, 522 (2004).

does business. Moreover, Wal-Mart rarely stands out, unlike its conduct in America, from other comparable companies in its industry.

The economist Chris Tilly has also concluded that Wal-Mart's behavior abroad differs significantly from its behavior at home with respect to unions and the right to freedom of association,²³⁹ and puts forth the following explanations. First, he suggests that Wal-Mart fights unionization in wealthier countries but lives with it in poorer ones.²⁴⁰ Second, if workers are given the option of whether or not to have a union, then Wal-Mart fights against their unionization efforts.²⁴¹ Third, institutions matter. In other words, if the law and political institutions of a country require unions, especially when they are linked with what Tilly calls "patronage networks," and what I would term corporatism, such as in Argentina, China, and Mexico, then Wal-Mart acquiesces.²⁴² Wal-Mart, then, far from being a goliath impervious to domestic regulation, is in fact subject to domestic and local law.²⁴³

This Part suggests that Tilly's final observation regarding the importance of institutions and the law is the most powerful explanatory factor in understanding Wal-Mart's conduct. Accordingly, it looks at how both public and private regulation, political regimes, norms, and other dynamics shape the behavior of Wal-Mart, and help or hinder it in exporting its home practices abroad. Drawing on the country case studies above, as well as on industrial relations literature and empirical research that analyzes the conduct of MNCs abroad, this Part proposes some broad dynamics that might be at work in the case of Wal-Mart, and attempts to extrapolate some general patterns and conclusions about the conduct of MNCs more generally. In doing so, it presents a framework that provides legal scholars with a set of descriptive and predictive tools that can help scholars and advocates develop normative solutions to the regulation of transnational corporate conduct.

A. Firm Level Analysis of MNC Conduct

Wal-Mart's conduct appears to be consistent with the findings of an emerging body of empirical literature in the disciplines of industrial relations and human resources that seeks to understand, through analysis at the firm level, both (1) the ways in which MNCs conduct themselves in their international operations; and (2) how the practices of MNCs differ, remain the

²³⁹ See Tilly, *supra* note 160, at 1809.

²⁴⁰ *Id.* at 1816.

²⁴¹ *Id.* at 1822.

²⁴² See *id.*

²⁴³ See *id.* at 1822-23.

same, and are transferred between the “home country” and the “host countries.” This scholarship has primarily looked at Western MNCs operating in Europe²⁴⁴ and has shown that while in some areas of employment relations and human resource management MNCs do export some home country practices, in the context of collective labor relations, MNCs are restrained by host country regimes and institutions from exporting home country practices, and tend to adapt to host country norms and practices.²⁴⁵ Related to this phe-

²⁴⁴ Indeed, this is a limitation in the research, for most examinations of MNC behavior in the industrial relations literature have been of developed country MNCs that operate in developed countries. See Anne Tempel, Hartmut Wachter & Peter Walgenbach, *The Comparative Institutional Approach to Human Resource Management in Multinational Companies*, in GLOBAL, NATIONAL, AND LOCAL PRACTICES IN MULTINATIONAL COMPANIES 30 (Mike Geppert & Michael Mayer eds. 2006). Very few, if any, studies in the literature seem to have examined MNC practices relating to freedom of association and collective bargaining in developing countries with poor rule of law or labor law enforcement in the formal sector. Wal-Mart operates in both developed and developing countries. However, it operates primarily in countries with decent to good rule of law, at least in the realm of the formal retail sector. Some industrial relations scholars have suggested that in developing countries, MNCs will be even less likely to transfer home country practices because of the “institutional distance” between the home and host countries. See Phil Almond et al., *Unraveling Home and Host Country Effects: An Investigation of the HR Policies of an American Multinational in Four European Countries*, 44 *INDUST. REL.* 276, 277, 302 (2005). While this might be true in developed countries with good rule of law, in developing countries with few enforceable norms and undeveloped institutions, this seems less likely, at least in the area of labor rights. MNCs would have fewer institutional constraints on imposing whatever practices they deemed most beneficial to the corporation.

²⁴⁵ See Anthony Ferner, Javier Quintanilla & Matthias Z. Varul, *Country-of-Origin Effects, Host-Country Effects, and the Management of HR in Multinationals: German Companies in Britain and Spain*, 36 *J. WORLD. BUS.* 107, 122-24 (2001). The authors find that while MNCs are surely embedded in their home country’s national business systems and the set of practices that they are accustomed to putting into effect there, *id.* at 108, in the areas of collective bargaining and “collective employee relations,” MNCs are particularly constrained by host country regimes and institutional frameworks. *Id.* at 116. Thus, the traits defining the home country practices of an MNC are “specifically adapted to the constraints and opportunities of the host environment.” *Id.* at 123.

Another study also found strong host country effects when it looked at British and American MNCs operating in Germany. See Matthias Schmitt & Dieter Sadowski, *A Cost-Minimization Approach to the International Transfer of HRM/IR Practices: Anglo-Saxon Multinationals in the Federal Republic of Germany*, 14 *INT’L J. HUM. RESOURCE MGMT.* 409, 425-26 (2003). The authors found that, particularly in the areas of non-financial employee participation and centralized collective bargaining, subsidiaries of British and U.S. MNCs conformed to German practices, sometimes even overshooting local norms to be compliant with German co-determination. *Id.* at 418. This despite the fact, the authors note, that the firms are not required by law to engage in centralized collective bargaining, but often do anyway. *Id.* These results imply that adaptation to host country practices cannot be totally attributable to the re-

nomenon is the observation that rather than completely centralizing all aspects of their operations, MNCs tend to devolve decision-making power on labor relations issues to local managers, allowing them to make decisions based on local contexts and market needs.²⁴⁶ Often, combating unions is not consistent with these local contexts and market needs, but local contexts and needs can sometimes lead MNCs to non-union stances.²⁴⁷

This general set of dynamics has also been shown to hold true for American MNCs, which, like Wal-Mart, are often most prone to anti-union attitudes in their home countries,²⁴⁸ and, according to some researchers, are far more likely to try to impose home country anti-union approaches in host countries.²⁴⁹ Even the most anti-union U.S. companies are highly constrained in their ability to combat unions abroad because of local institutional and regulatory constraints,²⁵⁰ and local managers try to modify the MNC's home country preferences to achieve positive outcomes in the host country envi-

quirements of the law. *See id.* at 423.

²⁴⁶ *See* Ferner, Quintanilla, & Varul, *supra* note 245, at 116.

²⁴⁷ *See id.* The authors show that German MNCs, which are generally very accustomed to working closely with unions at home in the German system of works councils and "codetermination," allowed their subsidiaries to operate as they saw fit in host countries. *Id.* In Britain, that meant that the subsidiaries had almost no unions. *See id.* The authors conclude that the non-unionism, however, did not stem from a home country, corporate driven policy, but rather from central management choosing to leave these issues to local managers in the host country. *Id.* Interestingly, the authors note that even in this non-union context, there were "subtle echoes" of German employee relations practices and an emphasis on harmonious workforce relations, particularly in the non-union operations; although this was understood in part as a means of avoiding unions. *Id.* This study should be read, however, in light of findings in other studies of the growing "anglo-saxonization" of European MNCs, which signifies a more aggressive stance towards unions and collective bargaining. *See* Anthony Ferner & Javier Quintanilla, *Multinationals, National Business Systems and HRM: The Enduring Influence of National Identity or a Process of 'Anglo-Saxonization'*, 9 INT'L. J. HUM. RESOURCE MGMT. 710, 718 (1998).

²⁴⁸ *See* Almond et al., *supra* note 244, at 277.

²⁴⁹ *See* Tempel, Wachter & Walgenbach, *supra* note 244, at 24.

²⁵⁰ *See* Almond et al., *supra* note 244, at 291. Almond et al. also conclude that pay and performance management systems are "less subject to local isomorphic pressures than the nature of employee representation", *id.* at 285, and that a direct transfer of U.S. style employment relations was simply not possible. *Id.* at 295-96. *See also* Anthony Ferner et al., *Policies on Union Representation in US Multinationals in the UK: Between Micro Politics and Macro-Institutions*, 43 BRIT. J. INDUS. REL. 703, 717-719 (2005) (finding that U.S. MNCs in the United Kingdom, a country with a regulatory context closer to the United States in culture and environment than other European countries, are highly constrained in their ability to act on their anti-union preferences).

ronment.²⁵¹

This is not to say that MNCs are completely constrained in their capacity to act against unions and collective bargaining. MNCs can operate within various levels of “social space,”²⁵² allowing them to preserve some kind of “functional equivalence with the parent company’s policy and philosophy.”²⁵³ While the conduct of U.S. MNCs towards unions is of course influenced by the attitudes of the U.S. parent, “[t]he evidence indicates that many US-based firms accept local norms concerning union recognition and membership, influenced either by legal regulations concerning these areas or the perceived costs of departing from established traditions which may arise in terms of morale, bad publicity or industrial action.”²⁵⁴

The relationship, then, between MNC headquarters and its subsidiaries cannot be thought of as a simplistic, over-determined, one-way transfer of attitudes and practices. Instead, we can extrapolate three broad conclusions from the literature: First, MNCs have to adapt to local conditions and constraints that the host country regulatory and market structures impose.²⁵⁵ Second, particularly in the realm of unions and collective bargaining, rather than completely centralizing all aspects of operations, MNCs tend to devolve decision-making power on labor relations issues to local managers, allowing them to make decisions based on local contexts. Third, home country anti-union preferences tend to be mediated through local institutions and actors, and are adapted to what is effective and acceptable in local contexts.

Wal-Mart’s conduct appears to support the patterns described in this research.²⁵⁶ Compared to the level of anti-union animus found in Wal-Mart’s

²⁵¹ See Ferner et al., *supra* note 250, at 705. The authors find that although American MNC anti-union preferences might be known to local managers, and sometimes acted upon and determinative of approaches to unions, these preferences tend to be mediated through local institutions and a range of organizational actors who interact and struggle to shape corporate policy towards unions. Home country anti-union policies, therefore, are not simply implemented as they would be at home, but instead are interpreted in a “moderated, pragmatic manner” by the U.K. managers. *Id.* at 719.

²⁵² Almond et al., *supra* note 244, at 301.

²⁵³ *Id.* at 296.

²⁵⁴ Tony Edwards & Anthony Ferner, *The Renewed ‘American Challenge:’ A Review of Employment Practices in US Multinationals*, 33 *INDUS. REL. J.* 94, 102 (2002).

²⁵⁵ Ferner, Quintanilla & Varul, *supra* note 245, at 122-24 (concluding that MNCs are forced to adapt to the constraints of the host “institutional framework”).

²⁵⁶ Most of the studies cited to above examine MNCs in higher skill industries, such as engineering, manufacturing, and IT companies. One might argue, however, that a better comparative data set would be with MNCs in other low wage service sector industries, such as the fast-food industry. A series of studies over the last decade has scrutinized the conduct of U.S. fast-food companies, particularly McDonald’s, in several European countries with regard to

U.S., and to a lesser extent, Canadian operations, there certainly seems to be not only no sign of a straight exportation of anti-union practices and ideologies to its foreign operations, but in fact a careful modulation and adaptation of behavior to local circumstances. While Wal-Mart sometimes puts in managers from Bentonville to head or start up local operations, the company often installs more local managers to run in-country operations²⁵⁷ who, as we saw in the description of the U.K., have a great deal of leeway to run the businesses as they see appropriate.²⁵⁸ Finally, as described in the previous Part, Wal-Mart seems to adapt to local contexts and to function within the mean of other large retailers in a given market.

labor relations and unionization. *See generally* LABOUR RELATIONS IN THE GLOBAL FAST-FOOD INDUSTRY (Tony Royle & Brian Towers eds., 2002). McDonald's and other fast-food sector restaurants tend to fight hard against company level agreements, union representation on works councils, and union organizing in its restaurants. *See* Tony Royle, *Just Vote No! Union-Busting in the European Fast-Food Industry: The Case of McDonalds*, 33 INDUS. REL. J. 262, 265 (2002). Why Wal-Mart does not seem to follow the McDonalds route is a question for further analysis and is beyond the scope of this paper. Nevertheless, one might postulate some theories. The similarities between Wal-Mart and the fast-food sector are clear: both McDonalds and Wal-Mart are service-oriented businesses, both are highly centralized and homogenized across retail units, and both have very vigorous home country anti-union cultures. *See id.*

But there are also some notable differences. First, unlike Wal-Mart and other retail sector stores, many fast-food enterprises are franchise run, enabling the parent to distance itself from the practices of the franchisee as well as enabling the small business owners to engage in particularly paternalistic and non-union forms of employee relations. *Id.* at 276. In France, Royle describes a union recognition agreement that is only in effect with company owned stores. Although there are works councils and other representation in McDonald's owned restaurants, there is no trade union representation in any of the franchisee owned stores. Therefore, higher rates of unionization and union accommodation are found in the centrally owned franchises than in the franchisee owned ones. *Id.* at 269-70.

Second, in its foreign markets, Wal-Mart does not generally compete strictly on low prices, low service, and low wages. In fact, it pays either the average industry wage or often higher in the countries in which it does business. *See* Tilly, *supra* note 160 at 1812-15. Thus, the need to so vigorously fight unionization might be less. Finally, fast-food chains, such as McDonalds, have generally not entered the markets through mergers or even joint ventures; as such, there are fewer "tempering effects." *See infra* Part III.D.

²⁵⁷ In China, for example, Wal-Mart sent Joe Hatfield, a company man from Arkansas, to start up the China operations. But in October 2006, it replaced him with Ed Chan, a Hong Kong retailing executive. *See The Great Wal-Mart of China*, NEWSWEEK, Oct. 30, 2006, available at <http://www.newsweek.com/id/45140>. Its Central American stores are headed by Ignacio Pérez Lizaur, who is from Mexico and has also headed the Argentinean and Puerto Rican operations. *See Wal-Mart Designa Nuevo Presidente para Filial de Centroamérica Ascenso Regional Procedente de la Isla*, EL NUEVO DÍA (Puerto Rico), Aug. 8, 2006, available at 2006 WLNR 13675262.

²⁵⁸ *See supra* notes 121-22 and accompanying text.

B. Law, the State, and Political Regimes

As the literature notes, MNCs have to adapt to local regulatory and institutional constraints. Wal-Mart and its subsidiaries clearly respond to the opportunities and limitations provided to it in any given public regulatory context and appear to be, as already noted, responsive to domestic and local regulatory regimes.²⁵⁹ These regimes structure and limit the opportunities for action available to Wal-Mart in any given context.

These public regulatory regimes flow, of course, from the political structure and institutions of the state, as well as the industrial relations systems. In corporatist regimes, for example, Wal-Mart tends to be more compliant, perhaps because of the way in which the state is so integrally a part of labor and management relations and the opportunities for deviation from the given structure are limited. Corporatist regimes also often provide for weaker unionism, at least in South America and China, and there is less labor militancy in these corporatist systems. Therefore, because there are fewer perceived costs of unionization by the employer, and the potential costs of alienating a state that is tightly linked to unions is high, there are potentially fewer benefits to fighting unions and resisting collective bargaining. In non-corporatist, pluralist regimes, on the other hand, where employer union relationships are decentralized and the state occupies a background position, such as in the United Kingdom and North America, Wal-Mart is freer to mobilize against unionization. Accordingly, it appears to do so within the limits available to it in each country and political regime.

Another important factor in ascertaining the degree to which MNCs such as Wal-Mart would be responsive to public regulatory regimes is the degree to which law is enforced. Thus, in countries where there is good rule of law and labor laws are well-enforced, one would expect that Wal-Mart would be more responsive. All the countries in this case study, and thus most of the countries that Wal-Mart does business in, have fairly robust labor law regulatory regimes with good enforcement in the formal and organized labor sectors, although in some countries there is certainly room for improvement.

²⁵⁹ This might not be the case in its Central American operations, which has fairly poor institutions; in Mexico, too, there are serious problems with both Mexican law in practice and as it's enforced. However, even in Mexico, many of the primary issues relate not to a dysfunctional state that is subject to the pressures of a large MNC, but rather to a political framework that privileges loyal unions over independent grass roots organizations whose primary interest is representing workers. See Tilly & Galván, *supra* note 146, at 67-71.

C. Private Regulatory Regimes and Local Norms

It is not only public law and political institutions, however, that set the limits and opportunities for action and structure Wal-Mart's conduct. Wal-Mart's conduct in foreign countries is also clearly affected by non-state institutions and norms that prevail in society.²⁶⁰ These institutions and norms constitute, in part, what might be conceptualized as private regulatory regimes.²⁶¹ These regimes generate sets of norms that, albeit not in total isolation from public regulatory institutions, serve to discipline and constrain the behavior of individuals and entities. Non-state actors and corporate stakeholders such as consumer groups, unions, corporations, the media, and other elements of civil society, generate norms and have developed various means of pressure and enforcement that effectively discipline Wal-Mart's behavior.²⁶²

These norms limit the range of actions even within the space allowed by the law that Wal-Mart is willing to engage in. For example, in Japan there is a deeply embedded norm of cooperation, and Wal-Mart seems unwilling to deviate from that norm and risk drawing the ire of stakeholders in society. In Britain it was clear that while there was some room to campaign against the union, its range of options was limited by, in part, what was deemed acceptable within British political culture.²⁶³ Accordingly, to understand how Wal-Mart and MNCs will function in practice, an analysis of public regulatory regimes and political structures is insufficient. Scholars also need to analyze how norms and non-state, private regulatory mechanisms functionally discipline corporate behavior, and in particular the behavior of MNCs.

²⁶⁰ For an excellent analysis of private regulatory systems and Wal-Mart's role within that system, see Backer, *supra* note 130.

²⁶¹ See Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. INT'L L.J. 203, 225-26 (2007) (defining private regulation to encompass "a broad range of practices, generally outside of the strict purview of the state, that serve to regulate working conditions and the employer-employee relationship.").

²⁶² Larry Catá Backer specifically identifies (a) MNCs; (b) NGOs and global civil society; (c) the media; (d) consumers; the investment community, and financial markets; and (e) government and political communities as constituting the elements of a private regulatory system. He includes the last grouping because he believes that private regulatory regimes operate in conversation with public regulatory regimes, and thus must be included. See Backer, *supra* note 130, at 1751-62.

²⁶³ See Telephone Interview with Steve Pryle, *supra* note 122.

D. Tempering Effects

The Wal-Mart story also reveals other dynamics that I call *tempering effects*. Tempering effects moderate or transform Wal-Mart's home country union animus in host-countries. In fact, these effects help integrate Wal-Mart into the public and private regulatory contexts of host-countries. The tempering effects described below are not exhaustive, and not applicable to all MNCs, but appear to have had some impact on Wal-Mart's conduct.

1. Joint Venture Agreements and Acquisitions

One of these effects is market entry through joint venture agreements and acquisitions. Wal-Mart has entered every foreign country in which it has established stores through either a joint venture or an acquisition; thus, it often buys its way into pre-existing labor relations and collective bargaining structures as well as pre-existing corporate cultures. This form of market entry likely serves to deflect, modify, and soften whatever practices and ideologies Wal-Mart brings to the new market.

Wal-Mart enters markets through joint ventures and acquisitions for two reasons. The first is a business justification: buying into local knowledge and a pre-existing market can be a good business decision, for it mitigates the need to understand domestic markets, regulatory structures, and markets needs. The second justification, however, is legal in nature. FDI in countries like China initially, and now in India, is restricted, making joint venture structures necessary to do business. Therefore, countries considering liberalizing their FDI requirements might think about using FDI rules as a means to affect the entry of low standard foreign MNCs.²⁶⁴

2. Wal-Mart as an International Target, Symbol, and Model

The second tempering effect relates not necessarily to domestic rules and institutions, but to the nature of MNCs and specifically Wal-Mart itself. Orly Lobel has argued that Wal-Mart plays a unique role, what she terms "socio-walmartization," for social justice advocacy in the United States.²⁶⁵ Specifically, she suggests that Wal-Mart functions as a target for activism,²⁶⁶

²⁶⁴ On the other hand, some economists have argued that requiring joint venture agreements for FDI can have negative impacts on development by creating disincentives to transfer technology. See MORAN, *supra* note 4, at 8-9.

²⁶⁵ See Orly Lobel, *Big Box Benefits: The Targeting of Giants in a National Campaign to Raise Work Conditions*, 39 CONN. L. REV. 1685, 1687 (2007).

²⁶⁶ *Id.* at 1688-94.

a symbol of bad corporate behavior,²⁶⁷ and a model for testing out reform strategies.²⁶⁸

Wal-Mart also possesses these characteristics in its international operations, particularly the roles of target and symbol. Its status as target is due in part to its unique position as a global economic powerhouse, but is also due to its identity and symbolic role as an American company with particularly poor employment practices at home. If a foreign MNC, let alone an American one, violates local laws and is a bad corporate actor, it might have extra salience in many contexts, particularly in countries with colonial histories. While violations of the National Labor Relations Act in the United States might not resonate strongly in the sphere of public opinion, in other countries, violations of labor law can be less acceptable. And foreign companies with poor labor standards can attract particular attention and risk losing legitimacy in the eyes of the public.²⁶⁹ As a foreign MNC, the spotlight is potentially far more finely focused than for domestic companies, and as such, breaches from acceptable conduct are more likely to be noted and acted upon by governments as well as members of civil society.²⁷⁰ These dynamics were clearly at work in China, where the state and the ACFTU mobilized to ensure that foreign MNCs, and particularly Wal-Mart, had union branches.

E. Applying the Framework to India

Any visitor to India, be it to the city or to rural areas, will quickly understand why India is sometimes called a “nation of shopkeepers.”²⁷¹ There are by some accounts 15 million retail outlets in India, and the retail sector is the country’s second largest employer after agriculture.²⁷² Highly fragmented, the retail market is dominated by a very large number of small businesses where prices are higher than necessary and quality is variable. The industry has, however, been undergoing a slow process of transformation, with a range of new retailing formats beginning to emerge, particularly in

²⁶⁷ *Id.* at 1694-1700.

²⁶⁸ *Id.* at 1700-09.

²⁶⁹ Legitimacy, in this conception, can be both internal and external. External legitimacy refers to legitimacy in the eyes of stakeholders outside of the corporation, while internal legitimacy refers to stakeholders, such as employees and shareholders, that are internal to the corporation. See Anne Tempel et al., *Subsidiary Responses to Institutional Duality: Collective Representation Practices of US Multinationals in Britain and Germany*, 59 HUM. REL. 1543, 1544 (2006).

²⁷⁰ See Shmitt & Sadowski, *supra* note 245, at 415.

²⁷¹ NITISHA PATEL & ARPITA MUKHERJEE, *FDI IN RETAIL SECTOR: INDIA* 53 (2006).

²⁷² *Id.*

urban areas.²⁷³

The retail sector has been historically subject to restrictions on FDI that are rooted in the autarkic, Nehruvian socialist economic regime that India has been slowly dismantling since the move towards economic liberalization in 1991. No FDI is permitted, for example, in front-end retail operations that sell a variety of brands, although 51% ownership of single brand retailers, such as Nike, is legal.²⁷⁴ FDI is completely permitted, however, in what is termed “cash and carry” ventures, which means wholesale.²⁷⁵ Wal-Mart’s arrangement with Bharti, its Indian partner, thus provides that Bharti will be the legal entity responsible for the front end retailing, while Wal-Mart will be in charge of the wholesale and logistics. Of course, should retail regulation be liberalized, as it very likely will be, Wal-Mart will be well-positioned to occupy a greater role in the front-end retailing end of the operation. This outcome is exactly what anti-Wal-Mart groups fear.

Not surprisingly, the primary opposition to liberalizing the retail sector has come from small-scale retailers, which currently make up the vast majority the retail industry—as much as 96-98% by some estimates.²⁷⁶ In India, these “mom and pop” stores, known as *kiranas*, generally occupy what is known as the informal or ‘unorganized’ sector. Although most states regulate some working conditions in shops,²⁷⁷ these laws are often poorly en-

²⁷³ *Id.* at 54-56.

²⁷⁴ See DEP’T OF INDUS. POLICY & PROMOTION, MINISTRY OF COMMERCE & INDUS., INVESTING IN INDIA: FOREIGN DIRECT INVESTMENT POLICY & PROCEDURES 66-67 (2006), available at http://dipp.gov.in/manual/fdi_manual_11_2006.pdf

²⁷⁵ *Id.* at 67. Foreign investors have already entered this market, the most notable, perhaps, being the German Metro Group, which runs wholesale stores in Bangalore, Hyderabad, and is opening stores in Mumbai and Kolkata. See Ravi Sharma, *Food for Thought*, FRONTLINE, Jun. 30-July 13, 2007, available at <http://www.flonnet.com/fl2413/stories/20070713004102200.htm>.

²⁷⁶ KPMG, CONSUMER MARKETS IN INDIA—THE NEXT BIG THING? 1 (2005), available at <http://www.kpmg.com/NR/rdonlyres/426CCCE9-733A-43B3-A27D-0EE157EFDB9F/0/ConsumerMarketsinIndia.pdf>.

KPMG defines the unorganized retail sector as being comprised of small family owned stores located in residential areas that have less than 500 square feet of store space. *Id.*

²⁷⁷ The law regulating the retail sector is called the Shops and Establishments Act and is adopted on a state-by-state basis. Each state may regulate in the way that it sees fit, and most retail shops regardless of size are required to register, and are subject to various regulations concerning hours, wages, and mandatory closing times, among other issues. See, e.g., THE KERALA SHOPS AND COMMERCIAL ESTABLISHMENTS ACT (No. 34 of 1960); THE HIMACHAL PRADESH SHOPS AND COMMERCIAL ESTABLISHMENTS ACT, 1969, amended 2004 (No. 15 of 2004); BOMBAY SHOPS AND ESTABLISHMENTS ACT, 1948.

forced.²⁷⁸ The working conditions of the employees, who are described as being part of the informal workforce,²⁷⁹ are poor.²⁸⁰ In a recent World Bank survey, for example, 73% of retail shop owners indicated that labor regulations are no obstacle to the current operations of the store.²⁸¹

Academic and civil society critics have raised legitimate concerns about the possible distributive impact of both retail sector FDI liberalization and Wal-Mart's entry in India on these shopkeepers and other elements of the retail supply chain. These distributive concerns include: the impact on small shop owners who could lose their business, workers who might lose their jobs, and suppliers who could be compelled to lower prices because of the increased bargaining power of consolidated retailers like Bharti-Wal-Mart.²⁸²

But little writing has seriously engaged with the potential impacts on either India's labor relations system or associational and collective bargaining rights. How, then, might Wal-Mart conduct itself in India with respect to freedom of association and industrial relations?

First, there is very little, if any, literature analyzing the labor conduct of foreign MNCs operating in India or in developing countries in general.²⁸³

²⁷⁸ See V.S. Palaniappan, *Ensuring Justice for Workforce*, HINDU, Jan. 1, 2005, available at <http://www.hinduonnet.com/thehindu/2005/01/01/stories/2005010114310300.htm>.

²⁷⁹ See REPORT OF THE SECOND NATIONAL COMMISSION ON LABOUR 597-605 (2002), available at http://www.labour.nic.in/lcomm2/nlc_report.html.

²⁸⁰ PATEL & MUKHERJEE, *supra* note 271, at 53 (noting that hired labor is often paid below minimum wage).

²⁸¹ MOHAMMAD AMIN, WORLD BANK, LABOR REGULATIONS AND TECHNOLOGY IN INDIA'S RETAIL STORES 6, (2006), available at <http://www.enterprisesurveys.org/Documents/Computers-Retail-1-2-2007.pdf>.

²⁸² See, e.g., V. Sridhar & Vijay Prashad, *Wal-Mart with Indian Characteristics*, 39 CONN. L. REV. 1785 (2007); Mohan Guruswamy et al., *FDI in India's Retail Sector: More Bad than Good?*, 40 ECO. & POL. WEEKLY 619 (2005); see also Malcolm Joyce, *Shopping Malls in India: New Social 'Dividing Practices'*, 42 ECO. & POL. WEEKLY 2055 (2007) (arguing that Wal-Mart and kindred shopping institutions serve to divide the middle classes from lower socio-economic classes in society).

²⁸³ See, e.g. Ferner, Quintanilla & Varul, *supra* note 244 (No reference to India). But see T.K. Rajalakshmi, *Target, Trade Unionism*, FRONTLINE, Aug. 13-26, 2005, available at <http://www.flonnet.com/fl2217/stories/20050826004202700.htm> (showing that the Indian press has reported on at least one incident involving a foreign MNC). In July 2005, the Indian subsidiary of Honda was accused of aggressively fighting the formation of a union in its factory. When workers launched a protest, they were charged by police, sending a number of workers to the hospital. The press suggested that the government of the state of Haryana, where the factory was located, might be complicit with Honda in the action or trying to send a message to foreign investors that labor unrest would not be tolerated. While the government brokered a deal with Honda to resolve some of the outstanding issues, the unions were reportedly left out of the negotiations. *Id.*

Nevertheless, we can assume that the micro-trends identified in the industrial relations literature—i.e., adaptation to local conditions and constraints, devolution of decision-making on labor relations issues to local managers, and a mediation of anti-union preferences through local institutions and actors—would likely hold in the Indian context, in part due to India's fairly vibrant regulatory regime, which is the next part of the analysis.

As a second step, one should evaluate the public regulatory and political context into which Wal-Mart is entering. The rule of law in India's organized sector is fairly good, and Indian law protects the right to freedom of association, which is generally enforced in the organized sector.²⁸⁴ While it is relatively easy to establish a union in a workplace, the law does not provide for compulsory bargaining. But in general, the state plays a highly interventionist role in labor relations and industrial disputes, although not to the degree of countries with corporatist systems.²⁸⁵ State intervention diminishes the potential for a vibrant collective bargaining regime as a means of regulating the workplace and weakens the power of unions.²⁸⁶ At the same time, it might diminish the ability of foreign MNCs such as Wal-Mart to take robust anti-union positions.

Third, India's vibrant civil society and the conduct expected of organized sector MNCs would ensure that Wal-Mart's behavior met, or perhaps even surpassed, local practices and norms in the organized retail sector. India's vibrant democracy and pluralistic society means that many interest groups are able to mobilize to ensure that Wal-Mart does not deviate from law and local norms. At least one major coalition has emerged to fight the entry of FDI into India, bringing together a range of disparate actors who will seek to ensure that Wal-Mart plays by the rules. To evaluate whether or not Wal-Mart will be able to adapt to the norms of the organized retail sector depends on knowing what those norms are—given the youth of this sector, this determination will take some time.

Fourth, tempering effects are also potentially at work in India. Wal-Mart is entering the market in a joint-venture arrangement with a local company, which should mitigate its ability to export its American ideologies and practices to India. In addition, Wal-Mart is also likely to be a particularly visible and large target. Indeed, it has already been a major target in the po-

²⁸⁴ See U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: INDIA § 6(a) (2006), <http://www.state.gov/g/drl/rls/hrrpt/2006/78871.htm>.

²⁸⁵ See Anil K. Sen Gupta & P.K. Sett, *Industrial Relations Law, Employment Security and Collective Bargaining in India: Myths, Realities, and Hopes*, 31 INDUS. REL. J. 144, 145 (2000).

²⁸⁶ See *id.* at 145-46.

litical climate of India, which can be skeptical of foreign, and particularly American, MNCs. The company also has been a primary symbol in the FDI liberalization debate. Therefore, like in China, Wal-Mart will likely be subject to special attention from the state in its application of labor law as well as from civil society.

Thus it is unlikely that Wal-Mart will be able to, or even desire to, export its U.S. practices to India. As a result, it will adhere to the general mean of the organized sector. Admittedly, it is difficult to assess what the mean would be in the organized retail sector; however, we might assume that it would not significantly deviate from the organized sector in India more broadly, although this is of course subject to further study.

IV. MNCs AS CATALYSTS FOR BENEFICIAL LABOR OUTCOMES

Another possibility raised by this case study is that MNCs, even low-road ones like Wal-Mart, might act as potential catalysts for improved labor standards and labor regulatory regimes not only in countries where they do business but also perhaps even in their home countries. In this sense, we might conceive of MNCs as generating a kind of positive externality in the course of their international expansion and operations. This proposition is admittedly speculative, but I put it forth mostly as a means to engender debate and further study.

Claims that MNCs can generate improvements in domestic regulation, both private and public, and local norms have been made in other contexts. In the environmental sphere, scholars have argued that MNCs can, in fact, export norms and practices from higher standard home countries to lower standard host countries.²⁸⁷ And in the human rights realm, at least one scholar has argued that in limited circumstances, MNCs can create human rights “spin offs” in countries in which they operate, unintentionally benefiting human rights and democratic institutions in the host country.²⁸⁸ How,

²⁸⁷ See RONIE GARCIA-JOHNSON, EXPORTING ENVIRONMENTALISM: U.S. MULTINATIONAL CHEMICAL CORPORATIONS IN BRAZIL AND MEXICO 2 (2000) (describing the exportation of environmentalism by U.S. chemical companies to Mexico and Brazil, primarily in the context of voluntary corporate initiatives).

²⁸⁸ See MICHAEL A. SANTORO, PROFITS AND PRINCIPLES: GLOBAL CAPITALISM AND HUMAN RIGHTS IN CHINA 33-71 (2000) (arguing that foreign MNCs in China that attempt to establish a long term presence are helping to improve human rights conditions and democracy). Santoro is more skeptical, however, of the effects of foreign investment on labor conditions in China, particularly in low wage and low skill work, where the primary objective is to minimize labor costs. *Id.* at 95-113.

though, might we begin to conceptualize this in the labor rights sphere?

A. *Codes of Conduct*

The most prominent means by which labor standards may improve is through a ubiquitous tool of private regulation – the implementation of codes of conduct by MNCs, particularly in host countries where domestic labor standards are low. While a great deal of attention has been paid to the implementation of codes of conduct in supply chains in order to discipline the conduct of contractors, codes can also be implemented internally and be applied to subsidiary operations. Codes and their effective implementation can arguably lead to improved labor rights enforcement in the MNC's operations,²⁸⁹ but how and if these codes can spill-over and lead to sustainable improved overall domestic labor rights protections and regulatory enforcement remains an important question for further study.

B. *MNCs as Targets of Mobilization*

But codes of conduct are less relevant in Wal-Mart's internal operations than are other dynamics that the Wal-Mart story reveals.²⁹⁰ As described above, in China, Wal-Mart as well as other foreign companies became targets of the state when they did not fully cooperate and establish unions.²⁹¹ The initial recalcitrance of Wal-Mart and other foreign companies provided a catalyst for the ACFTU to engage in real grass roots organizing, and perhaps helped it in its process of developing into a more dynamic and activist union.²⁹² Wal-Mart, in this instance, might counter-intuitively have been helpful in developing more robust industrial relations in China. Is it possible then, that MNCs, at least in circumstances where there are either good public institutions or a dynamic civil society, facilitate the mobilization and development of instruments that serve to regulate their conduct? Might this dynamic be particularly relevant in post-colonial societies where there is an acute political awareness and suspicion of the entry of foreign capital?

C. *Formalizing Labor*

The expansion of MNCs into areas such as retail, which in developing

²⁸⁹ See Kolben, *supra* note 261, at 231-33.

²⁹⁰ Although codes have not been particularly relevant in Wal-Mart's conduct in relation to freedom of association, Larry Catá Backer has documented a backlash against Wal-Mart's internal ethics code in Germany. See Backer *supra* note 130, at 1770.

²⁹¹ See *supra* Part III.D.2.

²⁹² See, e.g., Chan, *supra* note 192.

countries are often situated in the largely non-union and unregulated informal sector, can help facilitate a process of labor formalization. India presents a good example of process. In India, the consolidation of retail workers into larger entities, such as Bharti-Wal-Mart, could potentially facilitate union organizing and more collective bargaining in at least two ways. First, the concentration of large numbers of workers under a single employer can make it more logistically practical for unions to organize.²⁹³ Second, when there are more employees in a given workplace, those workers will be brought under the umbrella of national and state labor legislation.²⁹⁴ The possibility of such positive outcomes from the consolidation in the retail sector has in fact been acknowledged by some unions who are skeptical of Wal-Mart²⁹⁵ and by other opponents of a Wal-Mart presence.²⁹⁶

D. Transnational Labor Networks

Another potential beneficial impact of the diffusion of MNCs is the facilitation of the development of transnational labor networks.²⁹⁷ Such net-

²⁹³ It is logistically very difficult to organize on a small scale. When retail workers are dispersed into small employers in the informal sector, it is hardly practical for unions to organize. Thus, the concentration of workers in the formal sector, where there are good formal sector legal protections, such as in India, might spur greater organizing and stronger unions than presently exist.

²⁹⁴ The law protecting the right to organize, the Trade Union Act of 1926, requires at least seven workers to create a union. See The Trade Unions Act, art. 4, No. 16 of 1926. However, there are often fewer than seven workers in small retail operations.

²⁹⁵ See Diné Butler, *India's New Millennium Salvo to Wal-Mart and Resistance to Re-Colonization*, SOC. POL'Y, Fall 2005, at 28, 30.

²⁹⁶ Indeed, in an impassioned critique of Wal-Mart's entry into India and of Wal-Martization in general, V. Sridhar and Vijay Prashad do not suggest that Wal-Mart might have a deleterious impact on rights to freedom of association. In fact, they concede, albeit in passing, that consolidated retailing could provide for more opportunities to organize, that the unorganized sector has little regulation, and that it utilizes child labor. Sridhar & Prashad, *supra* note 282, at 1791. Sridhar & Prashad defend the unorganized local sector, arguing that "a point can be made about the advantages of the social ecology of these local stores, which are often family owned and operated." *Id.* at 1791. Yet the authors do not really address why the better organization of workers and the application of regulation truly is not a benefit that might be worth contemplating, even considering the other costs they describe.

²⁹⁷ See David M. Trubek, Jim Mosher & Jeffrey Rothstein, *Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks*, 25 LAW & SOC. INQUIRY 1187, 1194 (2000) (describing the ways in which transnational labor advocacy networks can "mount campaigns that use international, supranational, regional, national, and local laws as well as private norms and political action to affect outcomes in one or more countries"); see generally MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998) (describing ways in

works are valuable in that they can mobilize to pressure governments to strengthen laws and their enforcement and also put pressure on corporations such as Wal-Mart to bring its conduct closer into conformity with international norms on the rights to freedom of association and collective bargaining. Wal-Mart Watch, for example, has already developed an extensive network of global partners to put pressure on Wal-Mart in countries in which it seeks to enter.²⁹⁸ We have also seen some evidence of transnational networking in India. ACORN, a U.S.-based community organizing group and an affiliate of SEIU, was a founder of the India FDI Watch coalition. ACORN hopes to mobilize opposition to Wal-Mart in India as part of a broader campaign against Wal-Mart in the United States and globally.²⁹⁹ In another example, CITU, the Indian trade union center affiliated with the Communist Party, entered into talks with the largest union in the United States, SEIU, about coordinating an anti-Wal-Mart campaign.³⁰⁰

E. Reverse Diffusion of Labor Norms

Finally, these unintended benefits might not only run in one direction; i.e., from home country to host country. Scholars should also examine the possibility of a beneficial reverse diffusion of norms and practices within low standard MNCs, such as Wal-Mart, when they operate in foreign environments in which unionism and collective bargaining are more intrinsic to the social and political fabric.³⁰¹ A beneficial reverse diffusion of norms in the context of Wal-Mart would mean that the anti-union norm that prevails

which transnational advocacy networks form and mobilize around a number of issue areas).

²⁹⁸ See Wal-Mart Watch, International Action, <http://walmartwatch.com/international> (last visited Mar. 21, 2008).

²⁹⁹ Telephone Interview with Reena Desai, India Field Director, ACORN (June 13, 2007). ACORN has established at least two Wal-Mart campaigns in the United States: (1) The Wal-Mart Workers' Association, see Wal-Mart Workers' Association, <http://www.walmartwork.org> (last visited Mar. 21, 2008); and (2) Wal-Mart Alliance for Reform Now (WARN), see Wal-Mart Alliance for Reform Now, <http://www.warnwalmart.org> (last visited Mar. 21, 2008), which mobilizes communities to put pressure on Wal-Mart and to prevent it from building new stores.

³⁰⁰ Ruth David, *India Union Ready to Protest Wal-Mart*, FORBES.COM, Aug. 12, 2006, http://www.forbes.com/markets/2006/12/08/wal-mart-india-markets-emerge-cx_rd_1208markets04.html.

³⁰¹ Some industrial relations scholars have begun to explore whether the phenomenon of reverse diffusion of certain human resources practices within MNCs that have international subsidiaries. See, e.g., Tony Edwards et al., *Reverse Diffusion in US Multinationals: Barriers from the American Business System*, 42 J. MGMT. STUD. 1261 (2005) (finding little reverse diffusion occurring in five U.S. companies with subsidiaries in the U.K., but noting there is still much potential for further study).

in Wal-Mart's home country corporate culture would have to be challenged. Such a challenge might take place, for example, when company executives work for a period of time abroad and become exposed to more receptive ways of interacting with unions and collective bargaining.³⁰² They might, in turn, mitigate their ideological opposition to unions when they return to headquarters, and realize that it is possible to successfully work with unions. While this process might be more difficult in highly anti-union companies such as Wal-Mart, other companies with less robust anti-union preferences might be more receptive to changes in their home country policies.

A second means of facilitating reverse diffusion in order to change Wal-Mart's conduct might take place through external pressure and organization, exerted, in part, through the transnational labor networks described above. Solidarity actions can be used to put pressure on Wal-Mart in the United States through coordinated work actions, such as strikes or boycotts.³⁰³ Unions and other workers' rights and community organizations can agitate and mobilize around the fact that Wal-Mart and its ilk are hypocritical because they permit unions in host countries but not at home. The networks could use this Janus-like quality of Wal-Mart as a rhetorical device to win legitimacy in the public sphere, and use this to put pressure on Wal-Mart to accept unions and collective bargaining in the United States.

CONCLUSION

This article has examined Wal-Mart's conduct abroad in relation to freedom of association and collective bargaining. While a committed and zealous opponent of unionization and collective bargaining at home, the company has not transferred, in any direct way, its home country approach to operations in its host countries. Notably, rather than simply running roughshod over domestic regulatory regimes and local norms, Wal-Mart is in fact highly responsive to local constraints and institutions that shape its behavior. While Wal-Mart might be the largest corporation in the world and is rapidly becoming more and more international in its scope, its conduct, at least with respect to freedom of association and collective bargaining, is em-

³⁰² In the case of Wal-Mart, for example, the former director of international operations, John Menzer, became vice chairman. See Wal-Mart, Senior Officers, <http://web.archive.org/web/20061111084400/http://walmartstores.com/GlobalWMStoresWeb/navigate.do?catg=540&contId=19>; (last visited May 17, 2008).

³⁰³ See James Atleson, *The Voyage of The Neptune Jade: The Perils and Promises of Transnational Labor Solidarity*, 52 BUFF. L. REV. 85 (2004) (describing the possibilities and opportunities for transnational labor solidarity and coordinated strikes).

bedded in the local—at least in the countries in which it currently operates.

This finding is consistent with empirical research conducted by industrial relations and human resources scholars. We have tried to make sense of this phenomenon by looking at several factors that work together to create the context within which Wal-Mart either has to, or chooses to, operate. These factors include: (1) domestic public law and regulatory regimes, including in the role of the state and political framework of local industrial relations systems; (2) the institutions of domestic private regulation and local norms; and (3) the presence of what I term tempering effects.

This adaptation to the local, while perhaps beneficial in the context of low-standard Wal-Mart, can also work in a negative way – particularly in the case of a high standard company from a high standard country that is conducting business in a low-standard country. Two recent experiences in the United States with the British company, Tesco, and the Swedish company H&M, appear to support this proposition. H&M, for example, a Swedish company with good relations with its union at home, was accused of taking an anti-union stance instead of importing its European practices when the U.S. union UNITE-HERE attempted to unionize its warehouse workers.³⁰⁴ UNITE-HERE, however, launched an international campaign that brought UNITE-HERE leaders into contact with their counterparts in Sweden, which led to the signing of an International Framework Agreement between H&M and an international union federation, UNI, in which H&M agreed not to oppose organizing drives in the United States.³⁰⁵ In another example, U.K. supermarket giant TESCO recently announced plans to move into the American market, and, according to the *Financial Times*, advertised for a human resources manager who would endeavor to keep the chain non-union despite its good relationship with its union back home, and regardless of whether or not this kind of blatant anti-union stance would violate home country norms.³⁰⁶

Accordingly, an important ramification of this analysis is that transnational labor activists and scholars should not overly-focus on the home country practices or home regulatory regime of a given company—for while informative, these factors are hardly determinative. Rather, the normative project for scholars of transnational labor regulation and law and development must be a renewed attention to improving the public and private regu-

³⁰⁴ Maria Akerhielm, *Sweden's H&M Hits Back at U.S. Union Accusations*, ASSOCIATED PRESS NEWSWIREs, Dec. 6, 2003.

³⁰⁵ Associated Press Newswire, *Swedish Retailer H&M to Sign Agreement Supporting Workers' Rights to Unions*, Jan. 14, 2004.

³⁰⁶ Jonathan Birchall, *Tesco's Stores Could be Union-Free*, FIN. TIMES, May 27, 2006.

latory regimes in host countries.

Finally, this article has suggested that the diffusion of MNCs, particularly low standard ones such as Wal-Mart, might, in counterintuitive ways, generate a set of dynamics which can help improve respect for labor rights, build union movements, and perhaps even positively affect the conduct of the MNC in its home country operations. These are of course, to some extent, speculations and provocations that others might further investigate and challenge. But in the end, my objective has been to convey that labor rights lawyers and advocates should not necessarily oppose out of hand the spread of Wal-Mart or its kindred MNCs, but reflect on their latent potential to catalyze positive change.