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REFLAGGING A VESSEL IN THE EUROPEAN  
MARKET AND DEALING WITH TRANSNATIONAL  
COLLECTIVE DISPUTES: *ITF & FINNISH  
SEAMEN'S UNION V. VIKING LINE*

*Patrick Chaumette*\*

I. INTRODUCTION

Before the rulings were even handed down by the Court of Justice of the European Community (ECJ) in December of 2007, much ink had flowed on the subject of the *Viking Line* and *Laval & Partnery* judgments.<sup>1</sup> The conclusions delivered by Advocates General Poiares Maduro and Paolo Mengozzi, together with the Court's judgments,<sup>2</sup> subsequently gave rise to numerous commentaries in European Union (EU) Member States. These rulings interested a wide range of legal scholars and experts in international law and labor law, as well as

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1. See Kerstin Ahlberg, Niklas Bruun & Jonas Malmberg, *The Vaxholm Case from a Swedish and European Perspective*, 12 TRANSFER 155 (2006); Thomas Blanke, *The Viking Case*, 12 TRANSFER 251 (2006); Tania Novitz, *The Right to Strike and Re-flagging in the European Union: Free Movement Provisions and Human Rights*, 33 LLOYD'S MARITIME AND COMMERCIAL LAW QUARTERLY [LLOYD'S MAR. & COM. L. Q.] 242 (2006) (Gr. Brit.); Giovanni Orlandini, *Diritto di Sciopero, Azioni Collettive Transnazionali e Mercato Interno dei Servizi : Nuovi Dilemmi e Nuovi Scenari per il Diritto Sociale Europeo*, 45 WORKING PAPERS CENTRO STUDI DI DIRITTO DEL LAVORO EUROPO "MASSIMO D'ANTONA" [WP C.S.D.L.E.] (2006) (Italy); BRIAN BERCUSSON, COLLECTIVE ACTION AND ECONOMIC FREEDOMS BEFORE THE EUROPEAN COURT OF JUSTICE 40-45 (ETUI-REHS, Brussels) (2007); Brian Bercusson, *The Trade Union Movement and the European Union: Judgment Day*, 13 EUR. L.J. 279 (2007); Mikaela Bjorkholm, *Safeguarding EC Fundamental Freedoms: Are Ship Blockades Exempt from the Freedom of Movement Rules?*, 25 ANNUAIRE DE DROIT MARITIME ET OCÉANIQUE 103 (2007) (Fr.).

2. Case C-438/05, Int'l Transport Workers' Fed'n v. Viking Line ABP, 2007 E.C.R. I-10779; Case C-341/05, Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet, 2007 E.C.R. I-11767.

workers, employers, and professionals in the European Community. Fierce debate sparked when those close to the jurisdiction explained that these classic decisions could not be otherwise, even though the decisions were not in line with the conclusions of the two advocates general. However, if it is true that these decisions could not have any other outcome, why did the European Parliament issue a report,<sup>3</sup> and why was there a state of turmoil at the International Labour Organization in Geneva?

The proximity of the two judgments shows the similarity of themes related to the international mobility of undertakings and of workers. The *Viking Line* case concerned ferries crossing the Baltic Sea, the reflagging of a vessel, and companies' freedom of establishment in the Common Market. A Finnish ship-owner, who was losing money on his ferry line between Finland and Estonia, wanted to register his ferryboat "The Rosella" in Estonia to take advantage of a cheaper Estonian crew. The Finnish Seamen's Association and the International Transport Workers' Federation (ITF) campaigned to ensure that the Estonian Seamen's Union would not sign a collective agreement. ITF also sought assurance that if "The Rosella" was reflagged, the ship-owner would comply with Finnish law and would keep the existing crew. Confronted by this industrial action, the ship-owner began legal proceedings in London to prohibit ITF and its subsidiary from hindering the ferry's reflagging. The Court of Appeals in London referred the case to the ECJ for preliminary issues of interpretation.

In the *Laval & Partnery* case, a Latvian company, "Laval," won a contract to renovate a school building in Sweden. Laval intended to subcontract part of the work to its Swedish subsidiary, "Baltic Bygg," using posted workers. The case hinged on businesses' freedom to provide services within the Common Market. When negotiations between Laval and the Swedish trade union broke down, the unions blockaded the building site in an attempt to force the Latvian undertaking into signing the Swedish collective agreement for building trades and public works. Was this obstructive action on the worksite compatible with directive 96/71/EC of the European Parliament and the Council of December 16, 1996 on the posting of workers in the framework of the provision of services,<sup>4</sup> and with the principle of non-discrimination? As

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3. Report on Challenges to Collective Agreement in the EU, EUR. PARL. DOC. A6-0370/2008 (Sept. 30, 2008).

4. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, 1997 O.J. (L 18) 1-6 (EC).

a result of the blockade, Baltic Bygg filed for bankruptcy because it had no activity in the country where its headquarters were located.

In both cases, the national judges questioned who had legal jurisdiction over these transnational union actions. Could a threat of collective action in Finland be subject to British law because ITF's headquarters are in London? Would blocking a Swedish worksite come under Swedish law alone? Furthermore, would the transnational nature of collective action conflict with Community Law of the Internal Market? These two cases are also related to the European Union's poorly controlled process of enlargement that took place in 2004 and that led to two negative outcomes for referendums in the Netherlands and in France in 2005.

Companies often take advantage of social differentials in terms of pay and social protection, either by postings on land in the economic area or by reflagging a vessel. One example is Irish Ferries. In one instance, an Irish company plying a cross-Channel route that flagged its vessels in Cyprus fired its Irish seamen and hired seafarers from Baltic countries for regular ferry links between Ireland, Wales, and France. The company ultimately complied with the minimum wage in Ireland to put an end to the social conflict it had engendered.<sup>5</sup>

Allegation of union responsibility due to transnational collective actions forced the Court of Justice to make an initial decision about jurisdiction, including which judge is competent to hear a case.<sup>6</sup> The Swedish Seamen's Union threatened to blockade a Danish vessel in Sweden that belonged to a Danish ship-owner, was flagged under the international Danish registry, and was manned by cheaper Polish seafarers, in order to operate a regular line between Sweden and the United Kingdom (U.K.).<sup>7</sup> Ship-owners employ rights inherent to

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5. Patrick Chaumette, *Du portuaire et de la nouvelle bataille du Transmanche. Soeur Anne, soeur Anne, ne vois-tu rien venir?*, 667 LE DROIT MARITIME FRANCAIS [D.M.F.] 99 (2006) (Fr.); Patrick Chaumette, *Marine marchande, navigations et espaces juridiques*, in LES TRANSPORTS MARITIMES DANS LA MONDIALISATION 233 (Jacques Guillaume ed., L'Harmattan 2008).

6. Case C-18/02, *Danmarks Rederiforening v. LO Landsorganisationen i Sverige*, 2004 E.C.R. I-1417; see also Olga Fotinopolou Basurko, *Competencia judicial internacional en materia de responsabilidad sindical por conflicto entablado frente a empresario marítimo - Indicios de debilitamiento del pabellón como referencia para vincular el buque a un Estado concreto*, 26 REVISTA DE DERECHO SOCIAL 99 (2004) (Spain); Patrick Chaumette, *Fragment d'un droit des conflits internationaux du travail?*, 3 DROIT SOCIAL 295 (2005); Etienne Pataut, *La grève dans les rapports internationaux de travail : question de qualification*, 3 DROIT SOCIAL 303 (2005).

7. See *Danmarks Rederiforening*, 2004 E.C.R. I-1417.

freedom of establishment principles to reduce the cost of social contributions by flagging a vessel on the so-called international registry, which is adapted to global competition for vessels to be flagged freely, even when considering a regular line running geographically between Community countries. Social competition for “low cost” workers seems to be boundless. Legal recourse with respect to the licitness of a threat to strike applies to “matters of tort” as governed by Article 5.3 of the December 27, 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.<sup>8</sup> The plaintiff has the option of choosing either the court where the offence took place or where the defendant is domiciled. But where did the damage actually take place? Should the place where the causal event occurred have more importance than the place where the harm occurred? Damage resulting from a trade union’s industrial action in a Contracting State to which a ship registered in another Contracting State sails must not necessarily be regarded as occurring in the flag State, with the result that the ship-owner can bring an action for damages against that trade union in the flag State. In that case, the place where the event likely to give rise to tortious liability for the person responsible for the act could only be Sweden, since that is the place where the harmful event originated.<sup>9</sup> It is for the national court to inquire whether such financial loss may be regarded as having arisen at the place where the enterprise is established. In that case, the Danish ship-owner could lay the matter before a Danish court to examine the legality of collective actions in Sweden. The territorial nature of the strike is asserted, but not exclusively so, meaning that the Court left the national judge with some leeway for action. In the course of that assessment by the national court, the flag State, i.e. the State where the ship is registered, must be regarded as being only one factor among others that can help determine where the harmful event took place. The nationality of the ship could only play a decisive role if the national court reached the conclusion that the damage arose on board the *Tor Caledonia*, in this instance. In the latter case, the flag State must necessarily be regarded as the place where the harmful event caused damage.<sup>10</sup>

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8. See Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, art. 5(3), Sept. 27, 1968, O.J. L/299/32, available at [curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm](http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm).

9. *Danmarks Rederiforening*, 2004 E.C.R. I-1417 at para. 41.

10. Etienne Pataut, *Cour de justice des Communautés européennes*, 93: 4 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE [R.C.D.I.P.] 791 (2004) (Fr.); Case C-168/02, *Kronhofer v. Maier*, 2004 E.C.R. I-6009, I-6019, para. 44 (“[T]he expression ‘place

## II. WHAT ARE THE COMMUNITY JURISDICTIONS?

The *Viking Line* and *Laval & Partnery* decisions raised even more fundamental issues about which legal system applies for transnational collective actions in the European area than did *Tor Line*. It was conceivable that even the Court of Justice would not be competent. Just like the Social Policy Agreement of April 7, 1992, appended to the Maastricht Treaty of the same date, Article 2, Section 6 of the Treaty of Amsterdam of October 2, 1997 excluded the EU's competence (granted by Article 137 of the EC Treaty on pay), the right of association, the right to strike or the right to impose lock-outs (meaning respectively wages set by employers and workers), union freedoms and rights, and the right to collective labor action.<sup>11</sup> Neither the Council nor the Commission could take measures on these subjects because they fall under the jurisdiction of Member States. This meant that the Court of Justice could refer the questions brought before it to national courts which would apply national legislation.

In 1992, the House of Lords took the grounds of the law on collective bargaining, making the Swedish collective agreement a form of non-binding, gentlemen's agreement. Subjected to common law and excluded from trade union immunities, this collective contract was considered null and void because it was signed under constraint.<sup>12</sup> As a result of boycott action while the vessel was in a Swedish port, the owner of a Panamanian vessel signed contracts with its Greek and Filipino seafarers, compliant with ITF standards, and then sued ITF in the British courts to recover the sums.<sup>13</sup> According to the House of Lords, British courts were competent to rule on a lawsuit of this type, because the collective agreement is governed by British law, which was the collective autonomy law explicitly chosen by the contracting parties.<sup>14</sup> Furthermore, ITF's headquarters are in London. Although the conflict

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where the harmful event occurred' does not refer to the place where the claimant is domiciled or where 'his assets are concentrated' by reason only of the fact that he has suffered financial damage there resulting from the loss of a part of his assets which arose and was incurred in another Contracting State.”)

11. Consolidated Version of the Treaty Establishing the European Community, Article 137(5), [http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C\\_2002325EN.003301.html](http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html) (last visited Nov. 30, 2009) (“The provisions of this article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.”).

12. *See Dimskal Shipping v. International Transport Workers' Federation* (The “Evia Luck” (No. 2)), [1992] 1 Lloyd's Law Reports 115 (H.L.).

13. *See id.*

14. *See id.*

took place in Sweden and this boycott was legal under Swedish law, the agreement was null and void under common law; the ship-owner could claim to have the sums paid to ITF under constraint returned.<sup>15</sup> According to the British judge, the Swedish collective dispute and the British collective bargaining agreement (which was the outcome of the dispute) had to be considered separately.<sup>16</sup>

In conclusion, the nullity of the contract signed incurred the liability of the international union behind the licit collective conflict in Sweden.<sup>17</sup> Although the application of British common law was not to the liking of the Finnish Seamen's Union with respect to *Viking Line*, contrary to Finnish law, applying Swedish law made the boycott of the school building worksite legal and required compliance with conventional wages by the Swedish unions in the *Laval & Partnery* case. Transnational collective disputes would thus fall under the patchwork of national legislations, depending on the connections between the place where collective action took place and the headquarters of the entities involved.<sup>18</sup>

### III. INTERNAL MARKET LAW TAKES PRECEDENCE OVER THE LACK OF COMMUNITY JURISDICTION

The Court of Justice of the European Communities acts as a Constitutional court. It can take action in matters where the Council of the European Union and the European Commission do not have competence. This seems obvious once economic freedoms, freedom of establishment for undertakings, or free movement of workers are or may

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15. PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 495 (Oxford University Press 2d ed. 2007); Keith Ewing, *British Labour Law and Private International Law Report*, in 13 *CROSS-BORDER COLLECTIVE ACTIONS IN EUROPE: A LEGAL CHALLENGE - A STUDY OF THE LEGAL ASPECTS OF TRANSNATIONAL COLLECTIVE ACTIONS FROM A LABOUR LAW AND PRIVATE INTERNATIONAL LAW PERSPECTIVE* 226 (Filip Dorssemont, Teun Jaspers, & Aukje Van Hoek eds., 2007).

16. See *Dimskal Shipping*, 1 Lloyd's Law Reports 115 (H.L.).

17. Patrick Chaumette, *Les actions collectives syndicales dans le maillage des libertés communautaires des entreprises*, 2 DROIT SOCIAL 210 (2008).

18. See Filip Dorssemont, *Labor Law Issues of Transnational Collective Action - Comparative Report*, in 13 *CROSS-BORDER COLLECTIVE ACTIONS IN EUROPE: A LEGAL CHALLENGE - A STUDY OF THE LEGAL ASPECTS OF TRANSNATIONAL COLLECTIVE ACTIONS FROM A LABOUR LAW AND PRIVATE INTERNATIONAL LAW PERSPECTIVE* 245 (Filip Dorssemont, Teun Jaspers, & Aukje Van Hoek eds., 2007).

be challenged.<sup>19</sup> The social aims pursued by the European Community are part of creating the Internal Market, where social rules are designed to guarantee workers' rights and make conditions for competition more equal. This dual objective was likewise that of the International Labour Organization as of 1919. The preamble to the Treaty of Versailles of June 28, 1919 states that universal peace can be established only if it is based upon social justice, and that failure of any nation to adopt humane conditions of labor is an obstacle impeding other nations that desire to improve the conditions in their own countries. Internal Market law is formed by EC law on competition, free movement of goods, people, services, and capital. The general impression has been that Community social law tends to be absorbed into the general aim of the Internal Market's operation.<sup>20</sup> Only the principles of non-discrimination, gender equality for employment, and protection of health and safety at work clearly emphasize the protection of people's fundamental rights. The progressive emergence of European citizenship does not disconnect EC law from economics, even when it lends a non-utilitarian dimension to the freedom of movement of individuals.<sup>21</sup>

Consequently, economic freedom and social rights must be reconciled. The Court of Justice recalled that Articles 39 EC on the freedom of movement for workers, 43 EC on the right of establishment, and 49 EC on the freedom to provide services do not only regulate the action of public authorities, but also extend to regulations of another type that aim to collectively regulate salaried employment, independent employment, and provision of services. Collective actions by trade unions theoretically fall under the scope of application of Article 43 EC. In the *Schmidberger* and *Omega* rulings, the Court of Justice of the European Communities judged that exercising the fundamental rights in question—freedom of expression, freedom of assembly, and respect for human dignity—did indeed fall within the scope of application of the Treaty's provisions. The Court considered that this exercise should be reconciled with requirements related to the rights protected by the Treaty of Freedom of Movement of Goods and Freedom of Provision of

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19. PIERRE RODIÈRE, *DROIT SOCIAL DE L'UNION EUROPÉENNE* 48-49, 448-52 (LGDJ, 3d ed. 2008).

20. LAETITIA DRIGUEZ, *DROIT SOCIAL ET DROIT DE LA CONCURRENCE* 41-42 (Bruylant 2006).

21. SANDRINE MAILLARD, *L'ÉMERGENCE DE LA CITOYENNETÉ SOCIALE EUROPÉENNE* 155-82 (Presses Universitaires d'Aix-Marseille - Puam 2008).

Services, as well as complying with the principle of proportionality.<sup>22</sup> In regard to the collective bargaining agreements concerning labor and management, social policy objectives should not be considered as falling under Article 81, Section 1 of the Treaty, which prohibits agreements restricting competition. Further, Article 81, Section 1 does not cover the Community law on competition,<sup>23</sup> and it is impossible to transpose this reasoning to the fundamental freedoms set out in Title III of the aforementioned Treaty. Flagging of a vessel is indivisible from exercising freedom of establishment when the vessel in question provides the instrument to exercise an economic activity, set up in a stable manner in a Member State of registration.<sup>24</sup> Article 43 asserts the freedom of establishment and may be directly relied upon by a private undertaking against a trade union or an association of trade unions, even though Finnish law gives unions the right to take collective action.<sup>25</sup>

Marc Fallon has noted that it is not surprising that workers' social rights be addressed from the angle of economic freedoms of entrepreneurs. This approach has come from the decisions in the *Rush Portuguesa* and *Vander Elst* cases, which address freedom of service provisions by employers that enable an extension of freedom of movement for posted workers.<sup>26</sup> Therefore, it must be verified whether the application of a regulation from national law, in this case, dealing with the right to collective action by workers and their trade unions, constituting an ordinarily forbidden curb on functioning of the Internal

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22. Case C-112/00, *Schmidberger, Internationale Transporte und Planzüge v. Austria*, 2003 E.C.R. I-5659; Case C-36/02, *Omega Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, 2004 E.C.R. I-9609; LAETITIA DRIGUEZ, *supra* note 20, at 39-41, 765-68.

23. Case C-67/96, *Albany Int'l BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, 1999 E.C.R. I-5751; Daniel Gadbin, *Les fonds de pension obligatoires face au droit communautaire de la concurrence : des positions dominantes à préserver dans le futur marché intérieur des services financiers*, 2 DROIT SOCIAL 178 (2001); Christophe Vigneau, *De la soustraction des accords collectifs aux règles communautaires de la concurrence*, J.C.P./La Semaine Juridique 2001-E-1032 (Fr.).

24. Case C-221/89, *The Queen v. The Sec'y of State for Transp., ex parte Factorame LTD*, 1991 E.C.R. I-3905; Case C-334/94, *Commisson v. French Republic*, 1996 E.C.R. I-1307; DROITS MARITIMES ¶ 212.11 (Jean-Pierre Beurier, ed., Éditions Dalloz 2006).

25. Case C-438/05, *Int'l Transp. Workers' Fed'n v. Viking Line ABP*, 2007 E.C.R. I-10779, I-10801-I-10802, paras. 61, 63.

26. See Marc Fallon, *Le détachement européen des travailleurs à la croisée de deux logiques conflictualistes*, 97: 4 R.C.D.I.P. 781 (2008); Case C-113/89, *Rush Portuguesa Lda v. Office National de l'Immigration*, 1990 E.C.R. I-1417; Case C-43/93, *Raymond Vander Elst v. Office des Migrations Internationales*, 1994 E.C.R. I-3803.

Market, could be found to be objectively justified and proportional to the justification cited.<sup>27</sup>

#### IV. JUSTIFICATION OF COLLECTIVE ACTION AS A FUNDAMENTAL RIGHT

The collective action taken to implement the policy to combat flags of convenience pursued by ITF, which mainly aims to prevent ship-owners from registering their vessels in a State other than that of which the beneficial owners are nationals, should be considered (at the very least) as designed to restrict Viking Line exercising its right to free establishment.

The right to take collective action aiming to protect workers substantiates a legitimate interest justifying, on principle, the restriction of one of the fundamental freedoms guaranteed by the Treaty. Additionally, protecting workers is one of the overriding public interest reasons already acknowledged by the Court. Collective actions, like collective bargaining and collective agreements, may make up, in the specific circumstances of a case, one means for trade unions to protect their members' interests. The Court of Justice refers to the case law of the European Court of Human Rights on this point.<sup>28</sup> That is why a large proportion of legal scholars in France saw these two decisions as recognizing social rights, before their analysis of the arbitration led to their disappointment regarding this theory. Since the Community has both an economic and a social purpose, the rights ensuing from the provisions of the treaty with respect to free movement of goods, people, services, and capital must be weighed in balance with the social policy objectives pursued. Amongst the latter are notably (as per Article 136, paragraph 1, EC) improved living and working conditions, so as to make possible their harmonization while the improvement is being maintained; proper social protection; and dialogue between management and labor. If trade union actions intended to ensure a collective work agreement with an undertaking established in another Member State constitute a restriction for freedom of establishment, that restriction may, in principle, be justified by public interest, such as the protection of workers, but only if it is established that the restriction is suited to attain

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27. Pierre Rodière, *Les arrêts Viking et Laval, le droit de grève et le droit de négociation collective*, 44: 1 REVUE TRIMESTRIELLE DE DROIT EUROPEEN [R.T.D. Eur.] 47 (2008) (Fr.).

28. See *National Union of Belgian Police v. Belgium*, 19 Eur. Ct. H.R., (ser. A) (1975); *Wilson, National Union of Journalists, and Others v. United Kingdom*, 2002-V Eur. Ct. H.R. 523, 534.

the legitimate objective pursued and does not go beyond what is needed to achieve that objective.<sup>29</sup>

#### V. COLLECTIVE ACTION AS THE ULTIMATE WEAPON

The Court of Justice left it to the British courts to determine whether the aims pursued by the trade unions, through the collective action taken, concerned the protection of workers. Were jobs or working conditions aboard the Rosella ferryboat jeopardized or seriously threatened? This would not be the case if the ship-owner had undertaken to avoid ending the lasting employment of all crew members due to the reflagging, if this commitment's scope was as binding as the stipulations of a collective agreement, if it guaranteed workers compliance with legal provisions, and if the provisions of the collective agreement governing their working relations were to be maintained. The court the case was referred to had to verify whether the collective union action was appropriate to guarantee reaching the goal set, i.e. maintaining jobs and working conditions, and did not go beyond what was necessary to achieve this objective. Did not the trade union have other means at its disposal which were less restrictive of freedom of establishment in order to bring collective negotiations to a successful conclusion? Had that trade union exhausted those means before initiating such action under the applicable national rules and collective agreement law?<sup>30</sup>

The British judge did not intervene, since an agreement was struck between ITF and Viking Line to put an end to the dispute. As seen from the United Kingdom, this decision was certainly an advance, explaining the relief of David Cockroft, ITF Secretary General, who stated: "We welcome the Court's assertion that the right to take collective action - including the right to strike - is a fundamental right . . . ."<sup>31</sup> However, the ruling challenges the very idea of combating the use of flags of convenience, led by ITF since 1948 and based on registry of a vessel in a State other than that of which the beneficial owners are nationals. The statutes of ITF require it, when asked by one of its members, to initiate solidarity action against the beneficial owner of a vessel which is registered in a State other than that of which that owner is a national. Whether or not that owner's exercise of its right of freedom of

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29. *Viking Line ABP*, 2007 E.C.R. I-10779 at I-10838, para. 90.

30. *Id.* at I-10837, para. 87.

31. International Transport Workers' Federation, *ITF welcomes court assertion on the right to take collective action*, <http://www.itfglobal.org/news-online/index.cfm/newsdetail/1705> (last visited Nov. 30, 2009).

establishment is liable to have a harmful effect on the work or conditions of employment of its employees was not an issue. The Court of Justice imposes this in the frame of Community market law. Can ITF continue to reserve the right to collectively negotiate for trade unions of seafarers in the State where the beneficial owner is a national,<sup>32</sup> when freedom of establishment alters the conditions under which vessels are operated, particularly on regular lines, when the ship-owner's functions are dispersed? How should the stable establishment for operating a vessel be defined in order to restore the substantial link between the vessel and the State whose flag it flies?

Although ITF must certainly adapt its doctrine to the modern management methods of global ship-owners whose location cannot be limited to the headquarters of the parent company, and whose registrations must go beyond the dimension of beneficial ownership, developing international collective bargaining should be promoted by international, regional, and national organizations, and even by the Court of Justice of the European Communities. In terms of pay and social protection for seafarers, it is mainly unilateral action by ITF that has enabled about fifty-five percent of the modern merchant fleet to be covered by collective agreements. Thus, ship-owners obtain the *blue ticket*, which simplifies shipping and contributes to the seafarers' Welfare Fund.

ITF inspectors are present in 47 countries. An International Bargaining Forum (IBF) agreement was signed on November 13, 2003 which significantly changed the way ITF standards will be applied aboard vessels. It is an agreement between ITF and the Joint Negotiating Group (JNG) with seventy-five ship owners from the twenty-four countries in the International Maritime Employers' Committee (IMEC), and those of Japan represented by their own association called the International Mariners Management Committee of Japan (IMMAJ).<sup>33</sup>

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32. See H.R. NORTHRUP & R.L. ROWAN, *THE INTERNATIONAL TRANSPORT WORKERS' FEDERATION AND FLAG OF CONVENIENCE SHIPPING* (Industrial Research Unit, Wharton School, University of Pennsylvania 1983); Patrick Chaumette, *Le Droit du Travail des Gens de Mer en Chantier-Deconstruction/Reconstruction*, 106: 4 *IL DIRITTO MARITTIMO* 1223 (2004) (Italy).

33. See International Transport Workers' Federation, Joint Statement from IBF (10/6), <http://www.seafarers.org/HeardAtHQ/2005/Q4/ibfstate.xml> (last visited Nov. 30, 2009). 55,000 seamen from 3200 vessels are covered by the International Bargaining Forum agreement drawn up by the ITF and IMEC. *Id.* See also REYNALD BOURQUE, *LES ACCORDS-CADRES INTERNATIONAUX ET LA NÉGOCIATION COLLECTIVE INTERNATIONALE À L'ÈRE DE LA MONDIALISATION*, DOCUMENT DU TRAVAIL 24 (International Institute for Labour Studies, Education Series 2005) (Switz.), available at

The ITF collective agreement, which is traditionally accompanied by issuance of a *blue ticket* – certifying that the vessel is covered by a classic ITF TCC agreement with an AB seaman’s wage set at \$1,400 – will remain in effect, but will be replaced whenever possible by the IBF agreement which gives the right to a *green ticket*. This agreement is the outcome of discussion and negotiation over a ten year period.<sup>34</sup>

The agreement legitimizes ITF’s action and sets it in the context of collective bargaining. It was noted in 2007, at the International Bargaining Forum in London, that the agreement applies to 70,000 seafarers and 3500 vessels. The development of piracy off the coast of Somalia led to specific negotiation in 2008 in order to double the wages in this war-risk area.

#### VI. ON REFLAGGING A VESSEL

Is reflagging a vessel a form of relocation? What effects does reflagging have on seafarers’ contracts of employment or their collective agreements? The question was either not asked, or received a simple and obvious response, when Flag State law was the shared law on board, or when there was a substantiated link between the State of registry and the vessel’s operation on a regularly plied line. But from now on, the question will be raised. The issue is of particular interest to those involved in international law, either in the context of national international registries created by various European countries, or within the framework of the dispute on maritime employment concerning yachting, particularly in the Mediterranean.

The question of the substantial link between the vessel and maritime occupation arises when the ship is registered in a place that may have no connection with its operation. This presents a conflict of jurisdiction, and the competent court must be determined. Can a yacht flagged in Luxembourg or Guernsey and used for sailing in the Mediterranean lead to the court of the place of the managing firm of the seafarer’s employer when the contract was signed in a recruiting firm or manning agency in another place? Vessels are made to sail, and the administrative home

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<http://www.ilo.org/public/english/bureau/inst/publications/discussion/dp16105.pdf>;

Nathan Lillie, *Global Collective Bargaining on Flag of Convenience Shipping*, 42: 1 BRITISH JOURNAL OF INDUSTRIAL RELATIONS 47 (March 2004); Nathan Lillie, *Union Networks and Global Unionism in Maritime Shipping*, 60: 1 RELATIONS INDUSTRIELLES/INDUSTRIAL RELATIONS 88 (2005) (Can.).

34. James Smith, *Le Passage du Blue Ticket au Green Ticket*, 22 ANNUAIRE DE DROIT MARITIME ET OCÉANIQUE 265 (2004).

port is often entirely different from its actual home port. Council Regulation (EC) 44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is currently being interpreted.<sup>35</sup>

The usual place of work is where the employee habitually carries out most of his/her working time on behalf of the employer, taking account of the worker's entire period of activity. In the case of stable periods of work in successive different places, the last place of activity should be chosen, when in accordance with the clear will of the parties, it was decided that the worker exercised his activities there in a stable and lasting way.<sup>36</sup>

For a seafarer, this is no longer the Flag State law. The industrial tribunal in Mecklenburg-Vorpommern had questioned the European Court of Justice about this very explicitly, but the case was struck off the roll.<sup>37</sup> This substantial link raises questions about both the conflict of jurisdictions and the conflict of laws.

With respect to the Convention of Rome of June 19, 1980 and the conflict of laws, since the vessel is not a territory and since the seafarer can carry out his work in the waters or even the harbors of different States, for Professor Paul Lagarde, designating the law of the place where the work is habitually carried out, i.e. *lex laboris*, has no possible application.<sup>38</sup> Marc Fallon shares this analysis, which no longer makes Flag State law the common law on board, but rather corresponds to free flagging of the vessel. In regard to private international law, it is not certain whether reflagging a vessel will lead to a modification in the law applicable to the seafarers' contracts of employment. For a regular shipping line, Finnish seafarers who are recruited and reside in Finland can be considered to carry out their work in that country.<sup>39</sup> The flag is a choice of commercial, fiscal, and social management. It can no longer be a single indicator of the vessel's ties. In the opinion of Horatia Muir-

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35. Regulation No. 44/2001 (O.J.E.C. 2001 L 12, 1).

36. Patrick Chaumette, *Quel lieu habituel de travail pour le marin international?*, 6 DROIT SOCIAL 733 (2009).

37. *Case C-413/07, Haase v. Superfast Ferries SA*, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:051:0040:0040:EN:pdf>; *OLGA FOTINOPOULOU BASURKO, EL PROCESO LABORAL INTERNACIONAL EN EL DERECHO COMUNITARIO 128 (CES de Andalucía, Sevilla 2008)*.

38. Paul Lagarde, *A propos de la loi française n° 2005-412 du 3 mai 2005 créant le registre international français (RIF) des navires*, 94: 3 R.C.D.I.P. 527 (2005).

39. Marc Fallon, *Le détachement européen des travailleurs à la croisée de deux logiques conflictualistes*, 97: 4 R.C.D.I.P. 781 (2008).

Watt, the flag is not transparent: in the case of reflagging, Estonian law (which is the law of the new establishment and affords less protection) thus becomes applicable in the future to individual relations of labor disputes.<sup>40</sup>

Is it therefore necessary to have recourse to the Convention of Rome rule of subsidiarity, which invokes the law of the country of the undertaking that hired the worker (Article 6-2-b) (the *lex loci contractus*) unless what arises from a series of circumstances is that the employment contract shows closer ties with another country, in which case the law of the other country will apply.<sup>41</sup> Article 8 of Regulation 593/2008 of June 17, 2008, called Rome I on the law applicable to contractual obligations, refers to the place from which the employee habitually carries out his work in performance of the contract. This Regulation concerns contracts drawn up after it entered into force on December 17, 2009. Is the actual home port the vessel and its place of administrative registry, the headquarters of the management firm, or rather the material conditions of operation of the vessel? Maritime law appears to be undergoing a major overhaul in view of freedom of vessel flagging, which puts national social frameworks into competition.

#### VII. THE NEGATION OF TRANSNATIONAL COLLECTIVE BARGAINING?

The European paradox is that the European Court of Justice denies any role of collective bargaining in its ruling on *Laval & Partnery*. The collective action taken by Swedish trade unions was compliant with Swedish law, but had a transnational impact. The employer's freedom of service provision and the workers' social rights must be reconciled. Collective action cannot impose any constraints on the employer beyond the applicable Community directive.

Directive 96/71/EC concerning posting of workers provides that guaranteed working conditions for posted workers in the host Member State are laid down by law, regulation, or administrative provision, and/or by collective agreements or arbitration awards which have been declared universally applicable.<sup>42</sup> Collective agreements and arbitration

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40. Horatia Muir-Watt, *ECJ February 5, 2004, DFDS Tor Line, Case C-18/02*, 93: 2 R.C.D.I.P. 404 (2004).

41. Olga Fotinopoulou Basurko, *Reflexiones acerca de la Ley del Pabellón como criterio de Conexión conflictual a efectos de la Determinación de la ley aplicable al contrato de embarque*, 24 ANNUAIRE DE DROIT MARITIME ET OCÉANIQUE 261 (2006).

42. BERNARD TEYSSIÉ, *DROIT EUROPÉEN DU TRAVAIL* 146 (Lexis Nexis 3d ed. 2006); Umberto Carabelli, *Una Sfida Determinante per il Futuro dei Diritti Sociali in Europa*:

awards for the purposes of that provision are those which must be observed by all undertakings in the geographical area and in the profession or industry concerned.<sup>43</sup> Application of collective agreements to undertakings that post workers should guarantee equality of treatment between the latter undertakings and national undertakings in the similarly positioned profession or industry concerned. The host State can only impose compliance with its regulations if the salaried employees do not already benefit from an essentially similar protection under legislation that mainly applies to them. The application of standards in force in the host State gives them a true advantage which significantly contributes to their social protection, and provides that the application of these standards is proportional to the common objective.

The Swedish law on posting of workers specifies the working and employment conditions related to matters set out in directive 96/71/EC, with the exception of minimum wage rates.<sup>44</sup> The law says nothing about pay, which is traditionally determined in Sweden through collective bargaining between workers and employers. The Swedish system gives trade union organizations the right to resort to collective action under certain conditions, in order to compel an employer to begin pay negotiations or sign a collective agreement. In the case of construction companies, this sort of system involves a case-by-case negotiation on the worksite, taking account of the skills, qualifications, and duties of the salaried employees in question. In practice, since employees belong to trade unions, employers comply with the collective agreements when unions ask them to avoid a collective dispute or effective obstruction, and the public authorities have not had to render these collective agreements compulsory. The Court of Justice therefore considered that they are not part of the state-based law where employees are posted.<sup>45</sup> In a way, Scandinavian laws may need a procedure of extension by

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*la Tutela dei Lavoratori di Fronte alla Libertà di Prestazione dei Servizi Nella CE*, 49 WP C.S.D.L.E. 92 (2006) (Italy).

43. See, e.g., Joined Cases 369 & 376/96, *Arblade & Fils SARL and Bernard Leloup, Serge Leloup, Sofrage SARL*, 1999 E.C.R. I-8498; Case C-165/98, *Criminal Proceedings Against Mazzoleni and Inter Surveillance Assistance S.A.R.L.*, 2001 E.C.R. I-2189; Case C-164/99, *Infringement Proceedings against Portugaia Construções Lda*, 2002 E.C.R. I-787; Jean-Philippe Lhernould, *Les Salariés Détachés ont-ils Droit au Salaire Minimal Garanti dans l'Etat d'Accueil?*, 6 REVUE DE JURISPRUDENCE SOCIALE 487 (2001).

44. EMIRE Database (European Industrial Relations Glossaries), Sweden – Posting of Workers, <http://www.eurofound.europa.eu/emire/SWEDEN/ANCHOR-UTSTATIONER INGAVARBETSTAGARE-SE.htm> (last visited Nov. 30, 2009).

45. Case C-341/05, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. I-11767.

ministerial or royal order, as in France or Belgium. The ECJ does not challenge national law concerning strictly national situations, but it destabilized Swedish law as confronted with the Community market and transnational situations. The Swedish law of 1991 called *Lex Britannia*,<sup>46</sup> which does not take collective agreements signed abroad into account and which was validated by the ILO's expert committee upon a claim by Swedish ship-owners,<sup>47</sup> is discriminatory when the collective agreement in question has been signed in a Member State of the European Union. Swedish law should impose the same obligation of social peace with respect to both Swedish collective agreements and foreign collective agreements. Community jurisprudence thus promotes social dumping, since recognizing foreign collective agreements is not enough to prohibit professional claims or collective action aiming to extend collective agreements in the State of posting.

Collective action cannot be justified in light of the public interest objective of protecting workers. This is particularly true where the negotiations on pay, which collective action seeks to require an undertaking established in another Member State to enter into, form part of a national context characterized by a lack of provisions of any kind that are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay.<sup>48</sup> Collective bargaining must concern precise and accessible provisions, and the requirement of compliance with wages agreed upon in Sweden was not sufficiently precise for the Latvian undertaking. Consequently, the collective action is limited to

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46. EMIRE Database (European Industrial Relations Glossaries), Sweden – *Lex Britannia*, [www.eurofound.europa.eu/emire/SWEDEN/ANCHOR-LEXBRITANNIA-SE.htm](http://www.eurofound.europa.eu/emire/SWEDEN/ANCHOR-LEXBRITANNIA-SE.htm). *Lex Britannia* is the popular name for the 1991 amendment to the 1976 Co-Determination Act (Lag (1976:580) om medbestämmande i arbetslivet, 10 juin 1976, MBL), which restricts the scope of a special ban on industrial action which had been introduced in a 1989 Labour Court Judgment. The judgment concerned boycott action against *M/S Britannia*, a ship flying a flag of convenience, and stated that industrial action aimed at replacing or amending an existing collective agreement was prohibited even if the union taking such action was not bound by the agreement concerned. *See also* Niklas Bruun, *Swedish Labour Law Report*, in 13 *CROSS-BORDER COLLECTIVE ACTIONS IN EUROPE: A LEGAL CHALLENGE - A STUDY OF THE LEGAL ASPECTS OF TRANSNATIONAL COLLECTIVE ACTIONS FROM A LABOUR LAW AND PRIVATE INTERNATIONAL LAW PERSPECTIVE* 213 (Filip Dorssemont, Teun Jaspers, & Aukje Van Hoek eds., 2007).

47. Patrick Chaumette, *Le classement sans suite de la plainte des armateurs suédois contre leur gouvernement*, D.M.F. 830 (1995).

48. *Id.*

compliance with compulsory state law, the statute law determined by the directive 96/71. Transnational collective action is prohibited in view of claims exceeding this statute law, which is the negation of the normative autonomy of workers and employers.<sup>49</sup>

#### VIII. WHAT WERE THE REACTIONS?

On April 3, 2008, the Commission published a statement which clearly states that they will continue to fight social dumping and that the freedom to provide services is in no way superior to, nor does it oppose, the fundamental rights to strike and to belong to a trade union.<sup>50</sup> The European Parliament adopted the resolution of October 22, 2008 on challenges to collective agreements in the EU.<sup>51</sup> Article 28 of the Charter of Fundamental Rights of the European Union, adopted in Nice in December of 2000, codifies the right of collective bargaining and collective action.<sup>52</sup> All the Member States have ratified the following conventions: ILO-87 on Freedom of Association and Protection of the Right to Organize; ILO-98 on Right to organize and collective bargaining; ILO-117 on Basic Aims and Standards of Social Policy (especially Part IV); and ILO-154 on collective bargaining.<sup>53</sup> Under the ILO conventions 87 and 98, restrictions on the right to industrial action

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49. See SOPHIE ROBIN-OLIVIER & ETIENNE PATAUT, EUROPE SOCIALE OU EUROPE ÉCONOMIQUE (À PROPOS DES AFFAIRES VIKING ET LAVAL) (2008) <http://www.etui.org/en/content/download/9649/50515/file/robinolivierpataud.pdf>; Lise Casaux-Labrunee, *La confrontation des libertés dans l'entreprise*, 11 DROIT SOCIAL 1032 (2008); Antonio Jose Ojeda Aviles, *Derechos fundamentales de los trabajadores y libertades fundamentales de los mercados: ¿la ecuación imposible?* 217 TRIBUNA SOCIAL: REVISTA DE SEGURIDAD SOCIAL Y LABORAL 14 (2009) (Spain); Olga Fotinopoulou Basurko, *El asunto "Viking Line": un litigio que va más allá de la encrucijada entre las libertades económicas comunitarias y el derecho a la huelga*, 217 TRIBUNA SOCIAL: REVISTA DE SEGURIDAD SOCIAL Y LABORAL 40 (2009).

50. EUROPA, EU calls for urgent action to improve working conditions for 1 million posted workers, IP/08/514 (Apr. 3, 2008), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/514>.

51. See Report on Challenges to Collective Agreements in the EU, *supra* note 3.

52. Right of collective bargaining and action, Article 28, <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/rightofcollectivebargaining.htm> (last visited Nov. 30, 2009) ("Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.").

53. See Report on Challenges to Collective Agreements in the EU, *supra* note 3.

and fundamental rights can only be justified on grounds of health, public order, and other similar factors. The European Parliament believes that the exercise of fundamental rights as recognized in the Member States, in ILO Conventions, and in the Charter of Fundamental Rights of the European Union (including the rights to negotiate, conclude, and enforce collective agreements, and to take industrial action) cannot be put at risk.

These judgments do not challenge national laws and case law on national collective disputes. They only concern transnational collective disputes with a European Community dimension. However, it is difficult to believe that these two realms of the national and transnational will stay sealed off from each other for long. It is easy to imagine that a national judge who applies Community law will not take the ECJ's rulings into account or consult the ECJ on a question of preliminary interpretation, but will simply apply his or her national law to transnational collective actions. This approach would not lead to truly consistent justice. The national judge could notably base his decision on the ILO-87 and ILO-98 conventions that his country has ratified in order to build a different case law.<sup>54</sup> However, the objective would still be to sway the reasoning of the ECJ itself.

Seeing that the collective autonomy of workers and employers is thus negated by the ECJ, could a complaint be filed with the International Labour Organization, or more specifically, with the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations? Since the European Union is not a member of the ILO, but simply an observer, it does not seem possible that the European Trade Union Confederation (ETUC) could file a complaint directly. These complaints would come from national trade unions that are members of ETUC, for non-compliance by the ECJ with conventions ILO-87 and ILO-98, ratified by the Member States. It is not necessary to exhaust national review possibilities, even if the Committee on Freedom of Association will take this into account.<sup>55</sup> Indeed, no judicial review or appeal is available to challenge a judgment of the ECJ.

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54. Constance Thomas, Martin Oelz & Xavier Beaudonnet, *The Use of International Labour Law in Domestic Courts: Theory, Recent Jurisprudence, and Practical Implications*, in LES NORMES INTERNATIONALES DU TRAVAIL: UN PATRIMOINE POUR L'AVENIR, MÉLANGES EN L'HONNEUR DE NICOLAS VALTICOS 249 (Jean-Claude Javillier & Bernard Gernigon eds., Geneva: International Labor Organization) (2004).

55. See Eric Gravel, *Les Mécanismes de Contrôle de l'OIT : Bilan de Leur Efficacité et Perspectives d'Avenir*, in LES NORMES INTERNATIONALES DU TRAVAIL: UN PATRIMOINE POUR L'AVENIR, MÉLANGES EN L'HONNEUR DE NICOLAS VALTICOS (Jean-Claude Javillier

The Council of Europe's European Social Charter, revised in 1996, asserts the rights of workers and employers to collective bargaining and to collective actions.<sup>56</sup> For a long time, the European Court of Human Rights based its reasoning on a restrictive interpretation of this Article, excluding collective bargaining from the scope of Article 11 of the 1950 Convention that sanctioned freedom of association and freedom of unions.<sup>57</sup> Consultation of unions and collective bargaining were simply means, amongst others, that States could implement to ensure the freedom of unions. On April 25, 1996, in the case of *Gustafsson v. Sweden*, the European Court accepted the legitimate nature of collective bargaining in refusing the right of an employer to avoid the application of a collective agreement, even on the grounds of his freedom to not join a union.<sup>58</sup> The European Court finally admitted that for Turkish civil servants, this freedom of association and union freedom contained the right to collective bargaining.<sup>59</sup> It must be noted that the freedom of collective bargaining does not exist without the right to union action.

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& Bernard Gernigon eds., Geneva: International Labor Organization) (2004); Alberto Otero & Maria Marta Travieso, *Le comité de la liberté syndicale (II) : composition, procédure et fonctionnement*, in LES NORMES INTERNATIONALES DU TRAVAIL: UN PATRIMOINE POUR L'AVENIR, MÉLANGES EN L'HONNEUR DE NICOLAS VALTICOS 195 (Jean-Claude Javillier & Bernard Gernigon eds., Geneva: International Labor Organization) (2004).

56. European Social Charter (revised) Strasbourg, 3.V.1996 - Article 6 <http://conventions.coe.int/treaty/en/Treaties/Html/163.htm> (last visited Nov. 30, 2009) (“The right to bargain collectively - With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:

1. to promote joint consultation between workers and employers; 2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;
3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognize;
4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.”).

57. See *Swedish Engine Drivers Union v. Sweden*, 1 Eur. H.R. Rep. 617 (1976); ALAIN CARILLON, LES SOURCES EUROPÉENNES DES DROITS DE L'HOMME SALARIÉ 410 (Bruylant 2006), available at <http://www.bruylant.be/pdf/12541.pdf?PHPSESSID=a4978cb6857eb8f808995364069a8d0f>.

58. *Gustafsson v. Sweden*, 1996-II Eur. Ct. H.R. 637 (1996).

59. *Demir v. Turkey*, 33 Eur. Ct. H.R. 1056 (2008); Pierre Marguenaud & Jean Mouly, *Le droit à la négociation collective, partie inséparable de la liberté syndicale*, J.C.P./La Semaine Juridique 2007-G-10038.

Thus, European jurisprudence with respect to human rights could be based on the autonomy of social law, autonomy over which the economic jurisprudence of the Community, based on the Internal Market's operation, has ridden roughshod. It appears that European economic and social cohesion must be based on the duality of European jurisdictions, and a dialogue between them.

#### IX. CONCLUSION: WHY SHOULD THE ECJ'S INTERPRETATION BE MODIFIED?

The autonomy of workers and employers is simply the only good way to resolve collective labor disputes.<sup>60</sup> Subordinated work, where the health and safety of the worker are at stake, and where a worker's pay depends on the labor market, cannot remain within a context of strictly individual contracts nor in a legal framework which is purely state legislation and regulation-based. One of the great novelties of social law has been to give workers and employers a role in setting standards, which has spilled over beyond the field of labor relations into that of institutions for social protection. This collective autonomy has a civilizing influence on labor relations. Denying collective autonomy means encouraging social violence.

This violence, arising from social dumping, became clearly visible recently in the case of posted Italian and Portuguese service providers used to maintain Total's refineries in the United Kingdom.<sup>61</sup> These were not specialized subcontractors with skills that British companies did not possess. They were used as a way of getting around one part of British law, and especially collective labor agreements. This subcontracting caused a scandal, coming as it did at a time of financial crisis and rapidly rising unemployment, as well as record profits for the global oil corporation in question. Some of the posted employees had to be housed on barges. Since they were not U.K. residents, what social protection were they afforded? Passions ran high and the reactions from the British, which seemed to have an anti-foreigner bent, spun out of the unions' control. Such issues resulted from a shortcoming in Community social law, encouragement of social dumping, and workers put into direct competition without any attempt to improve productivity or quality of service. In the absence of rules accepted by all, or rules which are

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60. Autonomy of workers and employers may even prevent such disputes.

61. Greg Thomson, *United Kingdom: A Total dispute*, METIS – CORRESPONDANCES EUROPÉENES DU TRAVAIL (Feb. 15, 2009), [http://www.metiseurope.eu/united-kingdom-a-total-dispute\\_en\\_70\\_art\\_28219.html](http://www.metiseurope.eu/united-kingdom-a-total-dispute_en_70_art_28219.html).

negotiated or negotiable, it is a power struggle that prevails, with opposition to what is mistakenly identified as the “law” of the market. Cross-Channel and cross-Baltic shipping links have shown the necessity of both collective bargaining and EC coordination of links between EU states.<sup>62</sup>

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62. PATRICK CHAUMETTE, *Marine Marchande, Travail et Navigation: Quelle Articulation Normative?*, in *L'UNION EUROPÉENNE ET LA MER* 115 (2007).