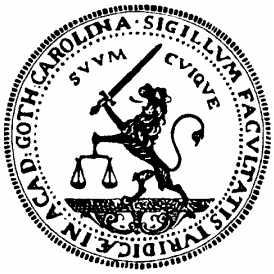

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Summary

This thesis is essentially a political jurisprudential case study of two labor disputes and their judicial aftermaths. The two cases studied are the highly publicized *Laval* and *Viking* cases, and the theoretical model employed is Alec Stone Sweet's model on judicialization and the construction of governance.

The paper is made up of six sections. After the introductory section, I introduce the reader to Stone Sweet's model, explaining its basic concepts and the logics under which it operates. Thereafter I give a short account of some of the empirical studies in which Stone Sweet has employed that same model. In the two sections that follow, I give a historical overview of the Swedish model of industrial relations and a summary of the *Laval* and *Viking* cases. Finally, in section five I bring together all the elements of the preceding three sections, by employing Stone Sweet's model on the two cases in order to analyze the causes of the conflicts and their ramifications for the Swedish model of industrial relations.

The study produces two findings worthy of interest. First, it lends further empirical support to the validity of Stone Sweet's model, by showing how micro-level events (two isolated labor disputes) can lead to macro-level change (the judicialization of the Swedish model of industrial relations). In this regard, it also extends the use of Stone Sweet's model into policy areas and processes – the free movement of services and Europeanization, respectively – on which it has not previously been employed. Second, the study adds some valuable insights into the motivations and dynamics that drive labor market disputes in general, and the parties involved in the *Laval* dispute in particular. Although it is this process-tracking which is the main purpose of the study, I also make some predictions about what we can expect to happen to the Swedish model of industrial relations in the future. In this regard, the study finds that we are likely to see an ever-increasing influence of litigation and adjudication in the field of industrial relations, and that considerations of the behavior of the judiciary will become increasingly important in determining whether to resort to collective action in labor disputes.

Sammanfattning

Föreliggande uppsats är en studie av två arbetsmarknadskonflikter och deras juridiska efterspel, analyserat utifrån ett s.k. *political jurisprudence*-perspektiv. De två fallen som studeras är de kända fallen *Laval* och *Viking*, och den teoretiska modell som används är Alec Stone Sweets modell om judikalisering och *governance*-byggande.

Uppsatsen består av sex avsnitt. Efter introduktionen följer ett avsnitt där jag introducerar läsaren till Stone Sweets modell och förklarar dess grundläggande koncept och logik. Därefter följer en beskrivning av hur Stone Sweet har använt sin modell för att göra ett flertal empiriska studier. I de två efterföljande avsnitten ger jag sedan en historisk överblick över den ”svenska modellen”, samt ger en sammanfattning av *Laval* och *Viking*. Slutligen, i avsnitt Fem för jag samman de element som diskuterats i de föregående tre avsnitten, och använder Stone Sweets modell på de två konflikterna, för att på så vis analysera deras bakgrunder och konsekvenser för den svenska modellen.

Studien åstadkommer två intressanta resultat. För det första ger den vidare empiriskt stöd för validiteten av Stone Sweets modell, genom att visa på hur händelser på mikronivå (två arbetsmarknadskonflikter) kan komma att påverka strukturer på makronivå (judikaliseringen av den svenska modellen). Studien innebär också en utvidgning av Stone Sweets modell till policyområden och processer – fri rörlighet av tjänster och europeisering, respektive – på vilka den tidigare inte använts. För det andra tillför studien till vår förståelse av de motiveringar och den dynamik som driver arbetsmarknadskonflikter i allmänhet och *Laval*-konflikten i synnerhet. Det är denna sorts ”processföljande” som är studiens huvudsyfte, men jag gör icke desto mindre även en del förutsägelser angående hur den svenska modellen kan komma att påverkas av dessa fall. Studien finner att vi kan förvänta oss mer och mer rättstvister på arbetsmarknaden, samt att juridiska hänsynstaganden kommer att bli mer betydelsefulla vid beslut om tillgripande av konfliktvapen.

1 Introduction

"There is a Chinese curse which says 'May he live in interesting times.' Like it or not, we live in interesting times…"
- John F. Kennedy

A phenomenon that I think most academic writers recognize is that of constantly applying one's research to occurrences in one's everyday life – no matter how far-fetched or absurd. Be it the political scientist who analyzes the neighborhood car-pooling as a nonzero-sum cooperative game, the economist who sees lost opportunity costs wherever he goes, or the academic lawyer who, before starting a game of Monopoly, inquires his fellow players as to by what means future rules disputes will be settled, what canons of interpretation will be employed, and what the consequences of non-compliance are.

When I recently came across the quotation above, it was therefore nigh impossible for me not to, firstly, do a literal reading of it – and hence disregard the obviously euphemistical use of the word "interesting" – and, secondly, to apply it directly to the study of European law. Because of the incremental and slow development of legal doctrine – the logic of which will be discussed at length in this paper – the academic study of law is seldom something that keeps you "on the edge of your seat". However, if there ever were a place and time where this did not hold true, I believe Europe in the first decade of the 21st century would be it. Since the end of the Second World War, the judicial landscape of Europe has gone through a process of change that is of unprecedented magnitude and importance, and the speed of this change seems to be accelerating rather than slowing down.

This paper focuses on two intimately interrelated aspects of this process of change: the creation of a supranational constitutional polity (the European Union [EU]), and the so-called 'Europeanization' of national law and politics. These two rather abstract processes are explained by employing an even more abstract theoretical model, developed by Alec Stone Sweet, which explains how a polity may become *judicialized* through the use of so-called triadic dispute resolution. In order to bring all this abstract theorizing down to a more concrete level, the gist of the paper is a case study of how recent case law[1] by the European Court of Justice (ECJ)[2] may come to radically change the nature of industrial relations in Sweden – the famous "Swedish model" – and how this change fits perfectly into the

[1] What Shapiro calls "a case study of cases", Martin Shapiro, "Political Jurisprudence", p. 27, in Martin Shapiro and Alec Stone Sweet, *On Law, Politics & Judicialization* (New York: Oxford University Press, 2002) [hereinafter: Shapiro, Stone Sweet (2002)].
[2] Cases C-341/*05 Laval un Partneri Ltd. v Svenska Byggnadsarbetarförbundetand* (not yet reported in the European Court Reports [ECR]) and C-438/05 *The International Transport Workers' Federation (ITF) & The Finnish Seamen's Union (FSU) v Viking Line ABP & Oü Viking Line Eesti* (not yet reported).

aforementioned model of judicialization. As way of conclusion, I argue that this model predicts the demise of the Swedish model of industrial relations. Like it or not, we live in interesting times.

The paper is structured in the following way: In the first section I explicate and discuss Stone Sweet's model of judicialization; both the abstract theory itself, and the various case studies in which it has been employed. In the section that follows, I make a clean break and discuss briefly the legal and historical aspects of the Swedish model of industrial relations. This section leads into the "doctrinal" part of the paper, where the two recent cases *Laval* and *Viking* are dissected. In the concluding section, I bring together these three sections by applying the theoretical model on the case law in order to predict what the consequences of these cases will be for the Swedish model.

2 A Model of Judicialization

In his article *Judicialization and the Construction of Governance*,[3] Stone Sweet, who is a political scientist, draws heavily on research in political science, economics, sociology and anthropology to expound a highly abstract and generalizable theoretical model for how a simple contract between two individuals can, over time, come to produce "an expansive, self-sustaining system of governance".[4] From this model, he has deduced testable hypotheses, which have then been tested empirically. In this section, I will first explain the model itself, and then give an account of Stone Sweet's empirical studies.

2.1 The Model

2.1.1 Basic Elements

The model is comprised of three basic elements: the *dyad*, the *triad*, and the *normative structure*.[5]

The Dyad

The dyad is the simplest and most common of all sociological formations, and consists of two individuals or groups that engage each other socially. Examples of dyads abound in most (if not all) societies: in marriage (husband – wife), at work (employer – employee), in sports (home team – away team), in industrial relations (capital – labor), and so on. The dyad as a social institution can be viewed as the most basic building block of society, since multiple dyads can be linked together to form larger and more complex social formations.

The normative basis for dyads is reciprocity; that is, the social norm which says, "You shall help those that help you". For example, an employer should pay his employee because the employee produces goods for the employer, while the employee should produce goods for the employer because the employer pays the employee. The concept of reciprocity is fundamental to the maintenance of *any* social order, and studies in social psychology and cultural anthropology have shown that ideas of reciprocity can be found in any society, no matter how small or "primitive".[6] There is, however, a

[3] Alec Stone Sweet, "Judicialization and the Construction of Governance" [hereinafter Stone Sweet (2002)], in Shapiro, Stone Sweet (2002).
[4] Alec Stone Sweet, "Judicial Authority and Market Integration in Europe" [hereinafter: Stone Sweet (2005)], p. 102, in Tom Ginsburg and Robert A. Kagan (eds.), *Institutions & Public Law – Comparative Approaches* (Peter Lang Publishing, 2005).
[5] This section relies heavily on Stone Sweet (2002), pp. 56-59.
[6] See Thomas Hylland Eriksen, *What is Anthropology?* (Pluto Press, 2004), chap 5.

school of thought within the social sciences called "neo-rationalism", which relies heavily on game theory and which problematizes this notion of reciprocity as a crucial means of maintaining social systems. Essentially, this school of thought argues that actors are utility-maximizers, who base their actions not so much on social norms as on their own self-interest. If one applies this idea to the example with the employer and employee above, it would be in the employer's self-interest to receive the goods, but to then renege on his promise to pay the employee (assuming that there are no sanctions for this sort of behavior). This would obviously mean the end of the dyad, since the employee would refuse to continue working for the employer. Neo-rationalists argue that the strong incentives for parties to ignore their normative obligations – and instead cheat on each other – make dyadic relationships inherently unstable. In essence, then, a dyad will only last so long as both parties deem the benefits of the relationship to outweigh its costs, argues the neo-rationalists.

The Triad

Stone Sweet understands the triad – two disputants and a dispute resolver – to be "a primal technique for organizing social authority" through its function as "the guarantor of reciprocity".[7] Triadic dispute resolution (TDR) serves the basic function of perpetuating the dyad, by responding to changes in the environment or in the preferences and identities of the parties. It therefore both "responds to, and is a crucial agent of, social change".[8]

There are two ideal-typical forms of TDR: *consensual* and *compulsory*. Consensual TDR is brought into existence by a consensual act of delegation by the parties, and it is the very fact that this delegation is wholly consensual which endows the TDR with its social authority and legitimacy. As examples of consensual TDR, Stone Sweet writes of siblings appealing to parents, classmates to teachers and villagers to shamans.[9] Compulsory TDR, on the other hand, can be activated by one party against the will of the other party, and derives its authority from a constitutional act of delegation. Courts are the most common and straightforward forms of compulsory TDR in modern societies.

Normative Structure

The last basic element in Stone Sweet's model is the normative structure, by which he means "the system of rules – or socially constituted constraints on behaviour – in place in any community".[10] These rules can run the gamut from simple and informal (e.g. dining etiquette) to highly complex and formal (e.g. statutes on the trading of financial instruments). They serve the function of enabling human interaction, by limiting the set of possible

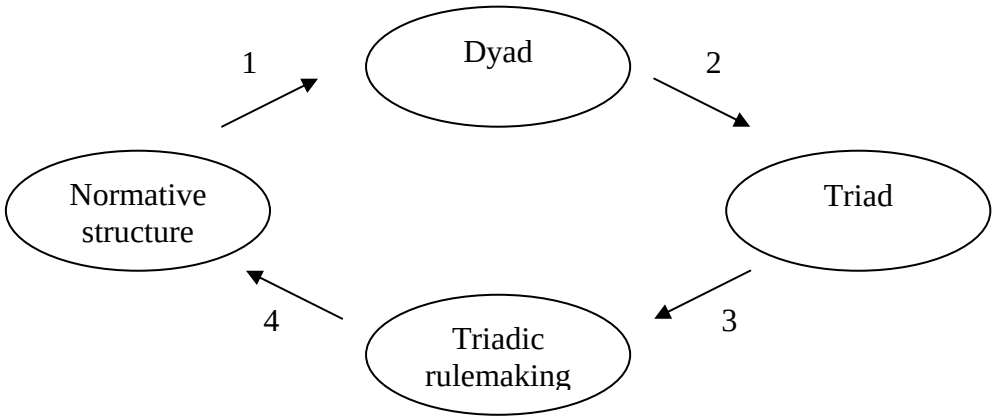
[7] Stone Sweet (2002), p. 57.
[8] Ibid.
[9] Ibid.
[10] Ibid.

choices available to an individual at any one time – and thereby greatly reduce transaction costs – as well as to give these choices meaning.

2.1.2 The Virtuous Circle

As the name of Stone Sweet's original article suggests, his model is meant to explain two intimately related processes: *judicialization* and *construction of governance*. By judicialization he means "the process through which: (1) a TDR mechanism develops authority over the normative structure in place in any given community; and (2) the third party's decisions – what [he calls] triadic rulemaking – come to shape how individuals interact with one another."[11] This is the process that I argue will occur in Sweden in the policy domain of industrial relations, following the recent case law of the ECJ. *Governance* is defined as "the social mechanisms through which rules systems are adapted, over time, to the needs and purposes of those living under them."[12] Following from this definition, the form of governance that we find in most nation-states today – *government* – is but one form of governance.[13] Although this paper mainly concerns itself with judicialization, the two processes are too intimately related for them to be separated. I will therefore, in the following, deal with both.

Diagrammatically, the model can be depicted in the following way: [14]



The figure shows the process of judicialization broken down into four chronological shifts moving clockwise along a circular path. Each shift works according to its own logic, but is at the same time dependent upon what happened in the previous shift. What is, in my opinion, the most

[11] Alec Stone Sweet, *Governing with Judges – Constitutional Politics in Europe* (New York: Oxford University Press, 2000) [hereinafter: Stone Sweet (2000)], p. 13.
[12] Shapiro, Stone Sweet (2002), p. 14.
[13] Another example of governance would be the intricate system of corporations, international law firms and arbitration houses that are becoming increasingly important in structuring relations in the private sector. See Shapiro, Stone Sweet (2002), chap 5.
[14] Stone Sweet (2000), p. 13.

appealing aspect of Stone Sweet's model is that, although it rests upon very few – and rather uncontroversial – assumptions about human behavior, one can construct a purely consensual version of it that is both self-perpetuating and self-reinforcing. The main assumption on which the model rests is that individual actors – the dyad and the dispute resolver – are "rational actors"; that is, they act in purely self-interested ways in order to maximize their utility.[15]

Shift 1: From normative structure to dyadic contract

In order for a dyadic contract to come about, we need, first, two individuals interested in entering into a contractual relationship with each other, and, second, at least some rudimentary normative structure in the form of a means of communication and some idea of reciprocity.[16] The form of the contract is of no importance.

As discussed above, dyads are inherently unstable and prone to conflict, and will only be maintained as long as it is in the interest of both parties. Fortunately, the normative structure provides some basic forms of dispute resolution. Firstly, it provides the actors with "behavioral guidance",[17] which informs the actors of what they have to expect if they do not live up to their promises, thereby preventing a conflict from occurring in the first place. Secondly, if a conflict nonetheless erupts, it can provide guidance for how to deal with the conflict. For example, if a seller has delivered goods of poor quality, the reciprocity norm may instruct the buyer not to pay. The authority of these norms stem from their perceived status as *neutral*, i.e. the fact that they existed before the actual conflict erupted.[18]

Shift 2: From dyad to triad

No matter for how long a dyad remains mutually beneficial, the risk of conflict will never go away; to the degree that circumstances may change, so may the cost-benefit analysis for maintaining the dyad. For a rational actor, reneging on one's promises will therefore always remain an option. Additionally, in a long-lasting relationship, the interpretation of the rules of a contract may come to diverge over time.

When a conflict erupts, the parties have usually only three options: to dissolve the relationship; to resolve the conflict dyadically, employing the

[15] The issue of whether human beings are rational utility-maximizers or not has a long and rancorous history within the social sciences. The reason I call Stone Sweet's assumption of rational actors "rather uncontroversial" is that he seems to take the middle road in the debate. He does not assume – as some rationalists do – that rational behavior can be explained without any reference to norms whatsoever. Rather, he argues that all rational behavior is contingent upon at least a minimal existing normative structure, such as "promises shall be kept" and "do not deal with cheaters". See Stone Sweet (2000), pp. 8-11.
[16] Reciprocity can be understood as a "starting mechanism" for initiating social exchange, Stone Sweet (2002), p. 60.
[17] Ibid.
[18] Ibid.

rules of the normative structure; or to refer the dispute to a third party. When the dyad remains mutually beneficial despite the conflict – and a dyadic resolution is not possible – the two parties will have to call in a third party to resolve the dispute. The dyad has now become a triad.

Keeping in mind that this model is purely consensual, both parties must agree to this delegation to a third party. Since both parties run the risk of losing the referred dispute, however, this delegation will only occur to the extent that both parties consider the short-run risk of losing the dispute to be outweighed by the long-term benefits of maintaining the relationship.[19]

The TDR can take many different forms, depending on how permanent its jurisdiction is and what powers are delegated to it. At one end of the spectrum is the mediator, to whom the parties have delegated no power to impose unwanted decisions, and who has no means of enforcing whatever solution is reached. At the other end are permanent courts, which have been delegated far-reaching powers to decide a case against the will of a party, and the decisions of which are backed up by the state's monopoly on the legitimate use of physical force.

Shift 3: From triad to triadic rulemaking

"Once constituted," Stone Sweet writes, "the triadic dispute resolver faces a potentially intractable dilemma."[20] The legitimacy of the dispute resolver stems from his or her perceived neutrality vis-à-vis the parties and the conflict. As soon has he declares a winner of the dispute, however, the loser will perceive the dispute resolver to have abandoned his neutrality and to have taken a position of "two-against-one". This may lead to the losing party refusing (a) to comply with the ruling, and (b) never to refer a dispute to the dispute resolver again. Since it is in the self-interest of the dispute resolver to avoid both of these behaviors on the part of the losing party, he must find a way of maintaining the social legitimacy of the TDR, while still fulfilling his function of solving disputes. There are several tactics that the dispute resolver can employ in order to achieve these goals.

One tactic that dispute resolvers often employ is not to declare a clear winner or loser. Parties to a dispute are often willing to comply with rulings within a certain spectrum of outcomes, ranging from an all-out win to an outcome where he or she wins on some accounts, and loses on some other accounts. The key is therefore to find a solution that falls within the area of outcomes where the parties' ranges of acceptable outcomes overlap.[21] A variant of this tactic is to divide a case into two categories – *questions of law* and *questions of fact* – and then resolve the case by telling one party that its interpretation of "the law" is correct, but that the facts of the case fail to fulfill the requirements of the law. In this way, both parties can be said to have won partial victories: the party that was wrong on "the law" but right

[19] Stone Sweet (2002), pp. 61-62.
[20] Ibid., p. 62.
[21] For a graphical depiction of this "dispute resolver's calculus", see Ibid., p. 63, fig. 1.2.

on "the facts" will be vindicated, by being awarded with formally winning the case, and will avoid paying any damages or the like, whereas the other party will know that, as long as it makes sure that the facts fulfill the requirements set out in the ruling, it will win similar cases in the future. Rulings like these abound in the case law of constitutional courts, and are especially common when making expansionary and controversial rulings.[22]

Sometimes it is impossible for the dispute resolver to find a solution that falls within both parties' ranges of acceptable outcomes. In these cases, there will, by definition, be one clear-cut winner and one clear-cut loser. In order to induce the losing party to accept and comply with the decision, the dispute resolver will have to employ a different tactic: that of appealing to the normative structure for legitimacy. The logic of this tactic constitutes the fourth and last shift of Stone Sweet's model.

Shift 4: From triadic rulemaking to normative structure

When resolving these "hard cases",[23] the dispute resolver will tend less toward mediation and more toward adjudication. When resolving a dispute as adjudicator, the *fundamental indeterminacy*[24] of law will force the dispute resolver to partake in judicial lawmaking; that is, to enact new elements of the normative structure.[25] This lawmaking will be two-fold. Firstly, he will create rules that apply to the particular dispute at hand. These rules are "concrete, particular and retrospective".[26] Secondly, by telling us *why* a party should not have acted as it did, and to the extent that he is not just reiterating the pre-conflict normative structure, he will create rules that are abstract, general, and prospective.[27]

Now, by employing this second tactic, the dispute resolver opens himself up to a new line of criticism regarding his legitimacy. Since, in order to solve

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[22] Ulrich Haltern, *Europarecht – Dogmatik im Kontext*, 2. Auflage (Tübingen: Mohr Siebeck, 2007) [hereinafter: Haltern (2007)] pp. 450-451. The ECJ has made use of this tactic in several of its landmark cases, including 6/64 *Costa v. ENEL* [1964] ECR 585 and C-224/01 *Köbler* [2003] I-10239. The same tactic was employed by the U.S. Supreme Court in its most famous ruling, *Madison v. Marbury* (Supreme Court, 5 U.S. (1 Cranch) 137 (1803) – *Marbury v. Madison*).

[23] Stone Sweet (2002), p. 63.

[24] "Fundamental indeterminacy of law" (or "normative indeterminacy") refers to the fact that it is practically impossible for a system of laws to contain rules that cover every situation imaginable, since such a system would have to contain a near-infinite number of extremely detailed provisions. In practice, therefore, instead of having, for example, three provisions stating that dogs, wolves, and lions are not allowed at a playground, the legislator makes one provision stating that dogs are not allowed, and then leaves it up to the courts to prohibit, by way of analogy, the keeping of wolves and lions at the playground. A straightforward case like this makes it obvious that there is a non-insubstantial element of judicial law making involved in practically every interpretation of legal rules. The idea that courts partake in lawmaking is something that runs against conventional legal philosophy in both civil and common law jurisdictions, but it is something of an orthodoxy in political jurisprudence.

[25] Stone Sweet (2002), p. 64.

[26] Ibid.

[27] Ibid.

the dispute, the dispute resolver had to create new rules, it will be obvious to the parties that there was no possibility for them to have known the exact content of the rules, and to have avoided the dispute by acting in conformity with them. That is, one cannot know the content of a rule before the rule itself is enacted. Once the lawmaking-ability of the dispute resolver becomes apparent, the parties will be unlikely to view him as a neutral third party. To deal with this crisis of legitimacy, dispute resolvers will, finally, adopt a concept with which all jurists should be well acquainted: the idea of *precedent*. If the TDR is a constitutional court with the responsibility for protecting constitutional rights, it may also develop tests of *proportionality* (or '*least-means*') in order to mitigate the legitimacy crisis.

Before dealing with these two concepts, it may be helpful to summarize schematically the argument thus far: *resolving "hard cases" –> adjudication + normative indeterminacy –> judicial lawmaking –> legitimacy crisis –> precedent and balancing/least-means tests*. At the end of this section we will be able to add the following to that sequence: *–> courts thinking like legislators; legislators, administrators and private actors thinking like courts –> policy domain more judicialized*.[28]

The best thing a dispute resolver can hope to do to allay the fears of the parties that he is arbitrarily making up new rules to solve a dispute, is to convince the parties that his decision is simply the end-result of a "formal exercise in normative deliberation and [analogical] reasoning."[29] That is, he claims not to be, in fact, making any new rules at all, but is merely looking at how previous disputes have been settled, showing how the present dispute is analogous in relevant aspects to these previous disputes, and that his decision follows logically from this deliberation. At the most, he may admit to have marginally adjusted the previously settled case law. This idea, that previous cases should be followed and are more or less legally binding upon the dispute resolver – what in common law jurisdictions is called the 'doctrine of *stare decisis*' – both enables judicial law making, by "camouflaging" it as "self-evident, redundant, deductive extensions of pre-existing law",[30] while at the same time also restricting it, since the dispute resolver cannot stray too far from settled case law, lest he make his lawmaking-activity too obvious.

The decision/rulemaking of a TDR with at least a rudimentary doctrine of precedent will therefore proceed in an *incremental* and *path-dependent* fashion. That is, new rules and legal doctrines will be developed in small increments by marginally changing and augmenting old rules, and each

[28] Note that it would be wrong to label the end-result as "policy domain being judicialized" – as opposed to "*more* judicialized" – since it is not a binary state (either/or), but rather a matter of degree (more/less). The reader should also keep in mind the difference between the noun "judicialization", which describes a *process*, and the adverb "judicialized", which describes the *state* of a policy domain or community, i.e. how much authority a TDR has over the normative structure of a given community and the degree to which its decisions shape the behavior of actors in the community.
[29] Stone Sweet (2005), p. 105.
[30] Ibid.

decision will be conditioned by the previous case law in the relevant legal domain. Thus, if a court wants, for example, to develop a doctrine of strict product liability, we can expect it to first switch the burden of proof, then to implement strict liability for especially hazardous products, until finally extending the strict liability to all products. Each decision is here a case of lawmaking, but it is also just a marginal change to the old rule, and each change is dependent upon how the court had decided in previous cases.

The last tactic that we will consider here is that of *balancing tests*. Just like precedent, the dispute resolver employs balancing tests in order to persuade the disputants that he is – his lawmaking-abilities notwithstanding – in fact a neutral third party. Balancing tests can be used when a case boils down to the disputants invoking opposing rights, with the rights often being enshrined in a constitution or otherwise considered fundamental. In such a situation, the dispute resolver can recognize the legitimate interest of both parties, but at the same time show that, unless an interpretation can be found that reconciles the claims of both disputants, one right must give way to the other. In other words, upholding one right must be balanced against upholding the other right. In order to do this balancing test, dispute resolvers will usually develop a *proportionality test*. A proportionality test can consist of different 'sub-tests',[31] but in general, what a dispute resolver will do is to ask whether the benefits of upholding one right will be greater than the costs incurred by infringing upon the exercise of the other right. Often, however, dispute resolvers will go further and demand that the benefits do not just *outweigh* the costs, but that the purpose of one right is achieved with the *least possible infringement* upon the other right (least means).[32]

When performing a least-means test, a dispute resolver must by definition ask himself whether party A could have exercised its right in a way that infringed less on party B's right. For example, assume that a dispute revolves around the constitutionality of a statute banning the driving of all automobiles that do not live up to a certain fuel-efficiency standard, where the purpose of the statute is to secure a constitutional right to a clean environment. Assume also that this statute infringes the constitutional right to property. The court must now ask itself whether the legislator could have enacted a different statute, which would still secure the right to a clean environment, but at the same time infringed less upon the right to property. It does not take much contemplation to think of several ways through which this could have been achieved (a special tax on fuel-inefficient cars comes to mind). Through its ruling, the court would in this case have sent a message to the legislator, saying that it is in its full right to enact statutes pursuant to a fundamental right to a clean environment, but that it needs to consider the proportionality of its actions. Proportionality tests, therefore, do not only

[31] For description of such "sub-tests" and a survey of how proportionality tests in Sweden have been influenced by EC law, see Xavier Groussot, "Proportionality in Sweden: The influence of European Law" *Nordic Journal of International Law* (2006) 75: 451-472.
[32] Stone Sweet (2000), p. 98.

force courts to think like legislators, but it also forces legislators to think like judges.[33]

Shift 1: The process begins anew

The model has now gone through its four shifts. The result is that we now have a larger and more differentiated normative structure, and a more precise set of rules governing the relationship of the dyad. As long as we assume that the contractants forming the dyad "perceive that they are better off in a world with TDR than they are in a world without TDR",[34] and that the dispute resolver considers his decision to have some precedential value, we can expect the following: before acting, the contractants will evaluate the rulefulness of their actions, drawing on the "reconsecrated contract" and the "re-enacted normative structure";[35] when a new disputes arises, they will delegate it to TDR; the dispute resolver, conditioned by his previous ruling, will make a new decision, which in turn will act to further develop the normative structure. As we go around and around the circle, the dyadic exchange will "inevitably be placed in the 'shadow' of triadic rule-making", and this shadow will "deepen and expand, covering more and more forms of human interaction".[36] It is this process – whereby the triadic dispute resolvers/judges become more and more influential in more and more areas of society – that is captured in the concept of *judicialization*.

2.2 Empirical Studies

To the average law student with no previous contact with the social sciences, the previous sub-section may have seemed unnecessarily abstract, and he or she may fail to see how this is relevant to analyzing the case law of the ECJ. Now that the reader is acquainted with the abstract model, we will therefore move on and see how this model has been used to explain how different polities and policy domains have become judicialized. The regimes and polities we will look at are: the international trade regime, the French Fifth Republic, and the Constitutionalization of the EC Treaty System.

2.2.1 The International Trade Regime

The GATT (General Agreement on Tariffs and Trade) entered into force in 1948 and was supposed to be followed by the setting up of an International

[33] Stone Sweet (2005), p. 107. As far as I can tell, all literature in political jurisprudence that deal with proportionality tests do so in the context of public law. One of the novelties of my paper is to show that the logic of proportionality/least-means tests can be employed when analyzing Swedish labor law, which is, strictly speaking, an area of civil law.
[34] Stone Sweet (2002), p. 65.
[35] Ibid.
[36] Ibid.

Trade Organization (ITO) to administer it. Following the U.S. Congress's failure to ratify the Charter of Havana, however, the GATT came, over the years, to transform itself into a de facto international organization and taking on the duties that had been meant for the ITO. Importantly, a spirit of "anti-legalism"[37] reigned during the time when the GATT and the ITO were negotiated, meaning that diplomats wanted to keep law out of the international trade regime, by excluding lawyers from the GATT organs and opposing the possibility of litigating treaty violations.

Normative Structure

At its inception, the normative structure of the international trade regime was essentially just the provisions of the GATT. Save for a few operative provisions – mainly the Most Favored Nation (MFN) principle and a general prohibition on import quotas – the Agreement consisted of very broad, flexible provisions and statements of principle and aspiration.[38]

In order to achieve optimal levels of trade, abstract principles like these need to be concretized in order to act as behavioral guides for traders and states. At the same time, however, the high degree of imprecision in the Agreement had been a condition for ratification for many states, and changing or amending the Agreement required unanimity from the signatories. In a way, then, the "the textual imprecision was … locked in by the unanimity requirement".[39]

From Dyad to Triad

As a result of the aforementioned "anti-legalism" sentiment, the early institutionalization of the GATT did not include a TDR mechanism, save for the possibility of a unanimous decision by the GATT membership to authorize a state to suspend its concessions vis-à-vis a treaty-violating state. Since it is rarely in the economic interest of a state to suspend its concessions – regardless of whether or not the other state is violating its concessions – there was a great need for a way in which to solve disputes without discontinuing the dyadic exchange (i.e. the cross-border trading). Almost immediately, therefore, the member states invented the Panel System.[40]

Under the Panel System, whenever a dispute would arise, the disputants could agree to refer the dispute to a panel of diplomats, who would then solve the dispute based more on equity and economic efficiency than on judicial deliberations. The problem with this system, however, was that it was not compulsory, and in a world where the major trading powers were increasingly trading more or less the same kinds of goods, and therefore

[37] See Stone Sweet (2002), p.72 for references.
[38] Ibid., p. 73.
[39] Ibid.
[40] Ibid.

basically interpreting trade relations in zero-sum terms,[41] there was often an incentive for the "defendant" of a dispute to block the setting up of a dispute resolution panel.

Following this logic, the Panel System was rarely activated during the 1960s. For a number of reasons, however, this situation changed during the beginning of the 1970s, when statistics show a virtual explosion in the number of complaints filed.[42] These reasons cannot by themselves be explain by Stone Sweet's model – they are exogenous to it – but the consequences they triggered can.

First of all, the lack of effective dispute resolution notwithstanding, there was a great increase in global exchange, which provided a steady stream of disputes that needed to be resolved.[43] Secondly, by 1970: the United States was suffering from a chronic trade deficit; protectionism was in vogue; and a string of GATT rounds of trade negotiations had failed to liberalize several important trade sectors. There was, in other words, a great need – especially for the United States, but also for other major trading powers – to liberalize international trade, but the institutionalized way of doing this had failed. Consequently, they turned to the Panel System.

Put in terms of Stone Sweet's model, the impasse described above can be understood as a situation where, initially, the dyadic contractants did not consider the short-term costs of delegating disputes to a third party – or of complying with its decision – to be outweighed by the benefits of making the rules governing the relationship clearer and more predictable. At a certain point, however, this calculus shifted – especially for the United States, the world's most important trading power – and states became ready to delegate disputes to third parties. Once this hurdle was overcome, the process evolved, as we will see, in a way that is fully consistent with what the model predicts. This example also shows how a move to triadic dispute resolution and subsequent judicialization is in no way *preordained* by the model,[44] but that it will only occur to the extent that certain necessary requirements are fulfilled. There will consequently always remain a possibility of halting the process, albeit at an ever-increasing cost for whomever wishes to do so.

Triadic Governance

Now, as mentioned above, this move to triadic dispute resolution by the member states had some predictable consequences.[45] Firstly, the Panel System quickly developed a rudimentary idea of precedent, ignoring the refusal by the member states to formally accept such an idea. This

[41] Stone Sweet (2002), p. 74.
[42] See Table 1.1 in Ibid., p. 88.
[43] The reader should keep in mind that effective dispute resolution facilitates social exchange, but it is not a *sine qua non* of it.
[44] Stone Sweet (2002), p. 87.
[45] Ibid., p. 76-78.

development can be traced by looking at the number of citations of previous cases in panel-rulings, which predictably grew commensurate to the body of previous decisions. Secondly, in order to attenuate its legitimacy problems, panels began acting more like judges than like diplomats, claiming that its decisions could be more or less derived from the Agreement through deliberation and analogical reasoning. This led, thirdly, to the normative structure becoming ever more elaborate, differentiated and precise. Fourthly, the member states responded to this by gradually handling international trade disputes over to professional lawyers, who in turn took their cues from, and developed their litigation strategies based on, the reconstructed normative structure and the ever-growing corpus of Panel decisions. Finally, instead of eventually scrapping the system when they saw that it had become something initially unintended – that is, filled with lawyers – a *compulsory* system dispute resolution was codified when, following the Uruguay Round, the GATT was transformed into the WTO.

I have dealt with the judicialization of the international trade regime at some length because (a) it is an excellent example of how Stone Sweet's abstract model can be used to explain very concrete systemic changes, and because (b) it shares some interesting aspects with the object of my case study. In order not to preempt that analysis, however, the discussion on these parallels will be put off until section five.

2.2.2 The French Fifth Republic

The judicialization of the French Fifth Republic provides a second case study for Stone Sweet's model.[46] Just like the GATT and the international trade regime, this is a story of how a system almost wholly devoid of judicial influence came to evolve – through the dynamics of the TDR model – in path-dependent ways, resulting in a situation where (constitutional) law and judges now play a decisive role in legislative politics.

The Fifth Republic, which is the current republican constitution of France and which was introduced in 1958 by Charles de Gaulle, contains two major changes from the preceding constitution. First, in order to overcome the problem of weak governments, which had plagued the Fourth Republic, powers were transferred from the parliament to the executive. Second, to oversee this redistribution, a new state organ was established: the Constitutional Council.[47]

[46] Judicial politics in France was the topic of Stone Sweet's dissertation, and was subsequently published in book form as Alec Stone, *The Birth of Judicial Politics in France – The Constitutional Council in Comparative Perspective* (New York: Oxford University Press, 1992).
[47] Stone Sweet (2002), p. 79.

Normative Structure

As a normative structure, the Fifth Republic was initially very rudimentary and weak. This was in keeping with French constitutional tradition, which held statutory sovereignty as its highest principle, and did not view constitutions as anything more than a source of legitimacy for those currently in power.[48] Accordingly, the Constitutional Council had no bill of rights over which to exercise jurisdiction, and its functions as TDR were narrowly circumscribed: only four officials could ask for a judicial review – the President, the Prime Minister, the President of the Assembly, or the President of the Senate – and they could only do so after a statute had been adopted by the Parliament and before its entry into law. Later, the power to refer a proposal to the Council for review was expanded to 60 deputies or senators.[49]

From Dyad to Triad

The move from the traditional dyad (parliamentary majority – opposition) to triad (systematic referral to the Council) began in the 1970s, and had some predictable consequences (discussed below). It was often in the interest of the opposition to refer adopted legislation to the Council, since this was the only way for it to influence the legislative agenda of the parliamentary majority. Since 1981, 30 percent of all adopted legislation have been referred to the Council, and of these 57 percent have resulted in annulment.[50] Initial success in activating TDR naturally provoked further referrals, a process which is well supported by statistics.[51]

Triadic Governance

As the reader knows by now, a move to TDR is almost always followed by triadic rulemaking, and the Fifth Republic is no exception. The Council was forced to justify why some statutes were unconstitutional, and it did so by increasingly acting like a court: its decisions became increasingly longer; it developed sophisticated canons of interpretation and a de facto system of precedent; and it began to refer to commentaries by legal scholars in its decisions.[52] "For the first time in history," Stone Sweet writes, "French constitutional law is [today] case law".[53]

Also predicted by the model is how the emergence of triadic governance affects the social interactions of other actors. Not only does initial success lead to further referrals, but the referrals also become increasingly elaborate, taking their cues from the Council's decisions. As Stone Sweet points out,

[48] Stone Sweet (2002), p. 79.
[49] Ibid.
[50] Ibid., p. 81.
[51] See Table 1.3 in Ibid., p. 89.
[52] Ibid., p. 83.
[53] Ibid.

"triadic rule-making exercised a powerful pedagogical influence on the strategic behaviour of law-makers."[54]

Of course, the Council's decisions did not just influence the strategic behaviour of the opposition, but also the parliamentary majority. In order to avoid an annulment by the Council, the government would scrutinize its legislative proposals and make sure that they were in conformity with the constitution, as interpreted by the Council. Thus, in a way, the Council came to exert an influence on *all* legislative proposals, regardless of whether the adopted statute was eventually referred to it for judicial review or not.

In summary, then, the process of judicialization in the French Fifth Republic followed much the same path as that of the GATT. However, one important difference between the two is that in the latter case, the system progressed from consensual TDR to compulsory TDR, whereas in the former case the TDR was compulsory from the very beginning. The judicialization of a domain with consensual TDR is more contingent than one with compulsory TDR, since in the former case the contractants always retain the possibility of refusing to refer to, or comply with the decision of, the dispute resolver.[55] As we will see in section five, I argue that the compulsory jurisdiction of the ECJ is conducive to a judicialization of Swedish industrial relations.

2.2.3 The Constitutionalization of the EC Treaty System

With this third – and last – case study, we continue on the beaten path of the preceding two case studies, but we are now approaching territories that are more directly relevant to the substantial area of law with which this paper concerns itself; that is, the "constitutional law" of the European Community (EC) and its relation to domestic law. Accordingly, this section does not only provide yet another case study of how Stone Sweet's model can employed, but it also deals with some aspects of EC law that, I argue, are of pivotal importance as (independent) variables in my own case study of Swedish industrial relations.

When commentators conceptualize the EC today, they invariably resort to such labels as "system of multilevel governance", "quasi-federal polity" or "complex of policy networks".[56] What these labels all have in common is that they describe the EC as an entity above and beyond a traditional international organization, but without going so far as to equate it with a sovereign (nation-) state. The use of these kinds of labels is also not confined to the academy, but extends even to the EC institutions themselves: the ECJ, for example, has referred to the treaties as "the

[54] Stone Sweet (2002), p. 83.
[55] Albeit, as previously mentioned, at ever-increasing costs.
[56] Wayne Sandholtz and Alec Stone Sweet, "Integration, Supranational Governance, and the Institutionalization of the European Polity", p. 1, in Sandholtz, Stone Sweet (eds.), *European Integration and Supranational Governance* (New York: Oxford University Press, 1998).

constitutional charter of a Community based on the rule of law",[57] a phrase which invokes concepts much closer to national, rather than international, law.

Now, as the reader is surely aware, the EC has not always been this "quasi-federal polity". Indeed, when the six founding states in 1957 signed the original Rome Treaty, they had no reason to believe that the organization they had just brought into being would be different from any other international organization at the time. It is this transformation of the EC – from "an intergovernmental organization, governed by international law, into a multi-tiered system of governance founded on higher-law constitutionalism"[58] – that is captured in the concept of the *Constitutionalization of the EC Treaty System*.

In line with most academic lawyers, Stone Sweet emphasizes the importance of Article 234 EC (previously Article 177 EC) in explaining this process of constitutionalization. Article 234 EC essentially provides a mechanism for national judges to refer a case to the ECJ whenever the outcome of the national proceedings hinges on the interpretation of some provision or principle of Community law. After reviewing the case referred, the ECJ will respond to the national court by issuing a so-called preliminary ruling, wherein it gives an authoritative interpretation of the EC provision or principle in question. The national judge will then apply this interpretation to the facts of the case. Stone Sweet argues that this Article 234 framework helped bring together private litigants, national judges and the ECJ, and that these three actors are almost entirely responsible for the constitutionalization of the EC Treaty System.[59] The argument is quite elaborate and comprehensive, with derived hypotheses tested through both quantitative methods (e.g. linear regression analysis) and qualitative studies (e.g. process-tracing). For reasons of space, therefore, I will in the following only sketch the contours of the argument, focusing on the elements that are especially relevant to my case study.

The essentials of Stone Sweet's argument should be familiar to the reader by now: transnational activity leads to disputes;[60] disputes are referred to national judges (TDR) and are, by way of Article 234 EC, "relayed" to the ECJ; the ECJ interprets the Treaty in an integration-friendly way and, in the process, develops a system of precedent; this constitutes a change in the normative structure that is conducive to more trade, which in turn leads to

[57] Opinion 1/91 on the creation of the European Economic Area [1991] ECR 1-6079, para 21. See also Case 294/83 *Les Verts v Parliament* [1984] ECR 3325, para 23.

[58] Alec Stone Sweet and Thomas Brunell, "Constructing a Supranational Constitution: Dispute Resolutino and Governance in the European Community" [Hereinafter: Stone Sweet and Brunell, (2002)], p. 263, in Shapiro, Stone Sweet (2002).

[59] Stone Sweet and Brunell, (2002), p. 264.

[60] Stone Sweet also accords an important role to individuals and groups not directly engaged in cross-border activity, such as advocates of women's rights, see Alec Stone Sweet, *The Judicial Construction of Europe* (New York: Oxford University Press, 2004) [hereinafter: Stone Sweet (2004)] p. 53. I will in the following refer exclusively to transnational activity, since it lies closer to my case study.

more litigation, and so on. This neat model, however, disguises some important contingencies and exogenous variables that are of crucial importance for the perpetuation of the virtuous circle of judicialization.

First, the process could have been stopped very early on, if national judges had refused either to refer questions of interpretation to the ECJ, or to settle their cases in conformity with these interpretations. The question of why national judges (excluding constitutional and supreme court judges) so readily embraced the preliminary reference procedure is one that has been thoroughly discussed within the academy, and the answers proffered are numerous.[61] Most commentators seem, however, to agree on two things: (1) that the ECJ has been very adroit in handling this "constitutional dialogue",[62] and (2) that it was in the self-interest of the national judges to embrace the Article 234 system, since it empowers them by essentially turning them into "Community judges"[63] whenever issues of Community law arise in national proceedings. For whatever reasons national judges were favorably disposed toward using the preliminary reference procedure, the fact that it has been an astounding success is indisputable, with more than 250 references for preliminary ruling being filed in 2006.[64]

Second, for the process to perpetuate itself it needs private litigants that are willing to spend time and resources on litigating issues of Community law. These actors can only be expected to do so to the extent that the outcome of their litigation is favorable to them, i.e. in the case of traders, to the extent that the ECJ's decisions result in a liberalization of the market. Beyond the self-interest of the ECJ judges to provoke more litigation and thereby strengthen their own positions, there is nothing in the model itself that predicts that the Court would take such an extremely integration-friendly approach as it did in, for example, the interpretation of Article 28 EC.[65]

Third, notwithstanding the national courts' embrace of the preliminary reference procedure and the Court's consistent pro-market decisions, the triadic governance of the ECJ would have been stillborn without the twin-doctrines of *direct effect*[66] and *supremacy*.[67] Without the doctrine of direct effect, which essentially says that certain treaty provisions[68] bestow rights upon individuals and are directly enforceable in national courts, private

[61] For a good overview of the research with references, see Haltern (2007) p. 198 ff.
[62] Alec Stone Sweet, "Constitutional Dialogues in the European Community" in Anne-Marie Slaughter, Alec Stone Sweet, J.H.H. Weiler (eds.), *The European Courts and National Courts* (Oxford: Hart, 1998), p. 305.
[63] Shapiro, Stone Sweet (2002), p. 265.
[64] Court of Justice Annual Report 2006, p. 77.
[65] The landmark cases are 8/74 *Dassonville* [1974] ECR 837 and 120/78 *Cassis de Dijon* [1979] ECR 649.
[66] Case 26/62 *Van Gend en Loos* [1962] ECR 1.
[67] Case 6/64 *Costa v ENEL* [1964] ECR 585.
[68] Since case 41/74 *Van Duyn* [1974] ECR 1337, directives are also capable of having direct effect. The direct effect of directives are, however, not as important for Stone Sweet's model as the direct effect of treaty provisions, since the procedures of changing a directive and amending a treaty are very different.

litigants would have been unable to invoke treaty provisions in the national courts in the first place. The doctrine of supremacy was just as important, since without a rule saying that Community law is superior to national law and that in the case of a conflict between the two, the former will take precedence, Member States could have effectively "overruled" any treaty interpretation of the Court by simply passing legislation contradicting the interpretation.

Finally, the constitutionalization of the EC Treaty System could have been thwarted by the Member States, through the amendment of any treaty provision that the Court had interpreted in a way deemed not to be in the national interest of the Member States. The reason for why this has never occurred is not that the Court has always sided with the Member States; on the contrary, statistical analyses show that the Court's rulings very often run contrary to the stated preferences of the Member States.[69] Rather, the fact that Member States have gone along with the Court's judgments, which have often gone a long way in impinging on the sovereignty of the Member States, can be explained through the concept of *zone of discretion*.[70]

A court's zone of discretion refers to how free that court is to shape the normative development of a polity: the larger a court's zone of discretion, the freer it is to shape the normative development. Formally, the size of a court's zone of discretion is determined by "(a) the sum of powers delegated to the court, or possessed by the court as a result of its own accreted rulemaking, minus (b) the sum of control instruments available for use by non-judicial authority to shape (constrain) or annul (reverse) outcomes that emerge as the result of the court's performance of its delegated tasks".[71] Following this equation, when the ECJ acts as a constitutional court – i.e. when interpreting the treaties – its zone of discretion is practically unlimited, since the only way for the Member States to reverse its decision (letter b) is to amend the treaties, which requires a unanimous decision by an intergovernmental conference. Conversely, when the Court interprets a piece of secondary legislation, its zone of discretion is markedly more

[69] Stone Sweet (2004) with Rachel Cichowski (chap co-author), pp. 186-188. This may seem like an obvious point to most lawyers familiar with the case law of the Court, but it is a central point of contention within political science, where the so-called *intergovernmentalists* argue that the Court has more or less never acted against the will of the Member States. Strong claims of this nature have been propounded by Geoffrey Garret, especially in "The Politics of Legal Integration in the European Union" *International Organization* (1995), 49:171. See also the strong repudiation of this view in Stone Sweet (2004), pp. 116-118. For a good introduction to intergovernmentalism in general, see Ben Rosamund, *Theories of European Integration* (New York: Palgrave MacMillan, 2000), chap 6.

[70] Stone Sweet (2005), p. 103.

[71] Alec Stone Sweet, "Constitutional Courts and Parliamentary Democracy" *West European Politics* (2002), 25:77, p. 93. Stone Sweet's concept of zone of discretion is part of a larger argument on why constitutional courts should be viewed as "trustees" rather than "agents" controlled by "principals" (here: the Member States) – hence the apparent verbiage of his definition.

limited, since any such decision could be reversed by majority decision in the Council.[72]
The reason for why the Member States did not stop the Court as it was constitutionalizing the Treaty System is, therefore, to be found in the design of the Court, i.e. its practically unlimited zone of discretion. Furthermore, by constitutionalizing the Treaty System, and by subsequently inventing other doctrines – notably that of *state liability*[73] –, both of which can be subsumed under letter (a) above, the Court's zone of discretion is today greater than ever before. In section five, I argue that this discretion played a major role in the Court's judgments in *Laval* and *Viking*.

2.3 Interim Results

To paraphrase Winston Churchill's famous *End of the Beginning* speech, we have now reached not the end, nor even the beginning of the end, but – perhaps – the end of the beginning. In this first part of the paper, I have sought to elucidate Stone Sweet's ideas and theories in as concise and straightforward a manner as possible. Furthermore, by dwelling on three case studies employing Stone Sweet's model, two of which deal with polities far-removed from the object of my study, I hope to have endowed the reader with a more intuitive idea of how real-life events can be "plugged into" an abstract, theoretical model to produce a non-trivial understanding of the causality of those events.

As promised in the introduction, we now make a clean break from the netherworlds of abstract social theorizing. In the next section, I give a short account of the famous "Swedish Model" of industrial relations – where it comes from and what its hallmarks are. I do so because, as the reader now knows, any analysis of the judicialization of a polity or a policy domain both starts and ends with a description of its normative structure and how this "shifts" to social exchange. Differently put: in order to assess whether – and if so, how – something has changed, we must first know what it used to be.

[72] Of course, the easy with which the Court's decisions can be reversed depends on the legal basis of the legislation and the corresponding legislative procedure. Nonetheless, amending primary legislation (treaties) is always more difficult than amending secondary legislation.
[73] Cases C-6/90 and 9/90 *Francovich* [1991] ECR I-5357, C-46/93 *Brasserie du pêcheur* [1996] ECR I-1029, and C-224/01 *Köbler* [2003] I-10239.

3 The Swedish Model of Industrial Relations

When using the term "Swedish Model", it is important to be precise with what one takes the term to mean, since different authors take it to mean disparately different things. When used broadly, the term is essentially meant to capture holistically the arrangement of the Swedish post-war welfare state, emphasizing its hallmarks of compromise politics, social consensus, and comprehensive social engineering.[74] In its more narrow usage, it is taken to mean the relationship between employers and employees that has been characteristic of Swedish industrial relations over the last seventy years. As can be inferred from the heading of this section, I use the term in this latter, narrower sense.

When chronicling the history of industrial relations in Sweden, historians typically take the founding of the Swedish Trade Union Confederation (Landsorganisationen i Sverige – LO) in 1898 as their starting point.[75] Over the two decades following the founding of the LO, the membership of trade unions grew rapidly, resulting in the Swedish trade union movement being the best organized in the world at the time.[76] However, the militant nature of many of the trade unions at this time, and the resulting industrial strife, also precipitated the founding of the Swedish Employers' Association (Svenska Arbetsgivareföreningen – SAF) in 1902.[77] Following a series of industrial conflicts, the SAF and the LO entered into the so-called December Compromise of 1906, wherein "the LO recognized the right of the employers to manage and distribute work, to hire and to dismiss workers at will, and to employ workers, whether organized or not. In return, the SAF recognized the right of the workers to organize themselves in trade unions."[78]

The December Compromise notwithstanding, over the following decades, Sweden remained a conflict-ridden country.[79] With both employers and employees perceiving the situation to be a mutually detrimental stalemate, while at the same time eschewing any solution through legislation, the SAF and the LO decided, in 1938, to negotiate a comprehensive agreement on how to regulate their relationship.[80] The resulting agreement was the so-

[74] Jan-Erik Lane, "Interpretations of the Swedish Model", p. 1, in Jan-Erik Lane (ed.), *Understanding the Swedish Model* (London: Frank Cass, 1991).
[75] Klas Åmark, "Sweden" [hereinafter: Åmark (1992)], p. 429, in Joan Campbell (ed.), *European Labor Unions* (Greenwood Press, 1992).
[76] Åmark (1992), p. 430.
[77] In 2001, SAF became the Confederation of Swedish Enterprise (Svenskt Näringsliv), <www.svensktnaringsliv.se> (accessed: 17 March 2008).
[78] Åmark (1992), p. 431.
[79] Ibid.
[80] Lars Magnusson, *An Economic History of Sweden* (Routledge Publishing, 2000) [hereinafter: Magnusson (2002)], p. 233.

called Saltsjöbaden Agreement (Saltsjöbadsavtalet), which ushered in the modern era of industrial relations in Sweden.

The Saltsjöbaden Agreement set out an agreed bargaining procedure for resolving conflicts, which together with the law on collective agreements of 1928 made it considerably more difficult to start strikes and lockouts.[81] However, the signing of the Saltsjöbaden Agreement is considered a watershed event in the history of Swedish industrial relations not so much because of the actual *content* of the agreement, but rather because of the subsequent *atmosphere of consensus* to which it gave rise. Together with some ancillary agreements negotiated after 1938, this atmosphere of consensus "created a unique climate of co-operation that was an important precondition for the rapid economic and social development of the post-war period".[82] Most importantly, however, at the core of this new relationship between employers and employees was an understanding that the government would not intervene in labor market affairs.[83]

As a consequence of the state staying out of labor market affairs, Sweden is today one of the few countries in Europe without a statutory national minimum wage.[84] Instead, this issue is regulated in collective agreements following negotiations between the social partners. Similarly, the jurisdiction of the Labor Court (founded in 1928)[85] is often narrowly circumscribed. Consequently, when ruling on the lawfulness of an industrial action, the only question that the Labor Court addresses is whether the parties to the conflict are bound by a collective agreement (which in turn obliges the parties to maintain social peace). If this is not the case, the Court must rule the action lawful; that is, it cannot take issues of equity or proportionality into account. This last point cannot be stressed enough: if an employer has not signed a collective agreement with a trade union, the trade union can undertake whatever industrial actions it deems necessary, without having to fear *any* kind of adverse judicial response. Naturally, the trade union will have to take other considerations, e.g. public relations issues, into account when deciding whether to undertake an industrial action grossly disproportional to its goal, but any judicial considerations will never enter the calculation. In other words, the policy domain of Swedish industrial relations, especially as it pertains to industrial actions, is one characterized by a high degree of *non*-judicialization. This, I argue, is the situation where we can expect to see changes following the recent case law of the ECJ, and it is to this case law that we now turn.

[81] Magnusson (2000), p. 234.
[82] Ibid.
[83] Ibid.
[84] Of the EU countries, Sweden is joined by Austria, Denmark, Finland, Germany, Italy, and Cyprus, <http://www.eurofound.europa.eu/eiro/2005/07/study> (accessed: 18 March 2008). However, even among these countries, Sweden stands out for being the only country without a mechanism to declare collective agreements universally applicable.
[85] Åmark (1992), p. 431.

4 The *Laval* and *Viking* cases

4.1 The *Laval* Case

4.1.1 Factual Background

The humble beginning of this dispute, which over the years became somewhat of a cause célèbre for Eurosceptics and Europhiles alike, was a municipal decision to refurbish a school and to build an annex in the Stockholm suburb of Vaxholm. The subsequent public tender for this contract was won by a Latvian construction company called Laval un Partneri, which had been using Latvian labor to do similar work in Sweden since 2002.[86] It did so again in 2004, when the construction in Vaxholm began, and was reportedly then paying its 14 Latvian workers Skr 80 (less than €9) per hour.[87] Under the Swedish Construction Federation collective agreement, which is the dominant collective agreement in the Swedish construction industry – but to which Laval was not a signatory – workers could expect Skr 130-145 (€15-16) per hour.[88]

Over the summer of 2004, representatives from Laval and the local section of Byggnadsarbetareförbundet ("Byggnads"), the dominant trade union in the Swedish construction sector, met on several occasions to negotiate Laval's signing of a "tie-in" agreement with Byggnads.[89] On 14 September, however, Laval announced it had concluded a collective agreement with the Latvian Building Workers' Union, the timing of which led some commentators to speculate that Laval was attempting to "indulge in a form of 'pre-emptive recognition'".[90] Unfazed by this development, the Swedish union kept negotiating with Laval, but its patience eventually ran out and on 19 October it announce that it would initiate a blockade of the construction site.

Over the course of the following months, the dispute escalated. On 3 December, the Electricians' Union (Svenska Elektrikerförbundet) initiated a sympathy strike, effectively stopping all electrical work being done on the site, while at the same time prompting threats of reprisals from the Swedish

[86] Charles Woolfson and Jeff Sommers, "Labour Mobility in Construction: European Implications of the Laval un Partneri Dispute with Swedish Labour" *European Journal of Industrial Relations* 2006:12 49-68, [hereinafter: Woolfson and Sommers (2006)] p. 54.
[87] Laval also provided the workers with "free accommodation, three meals a day, and transport", Woolfson and Sommers (2006), p. 54.
[88] Woolfson and Sommers (2006), p. 54.
[89] Tie-in agreements are used when the employer is not a member of an employers' organization, and by signing such an agreement, the "employer undertakes to comply with the provisions of the collective agreement generally applied in the sector to which it belongs." See Mengozzi AG Opinion in Case C-341/05, para 25.
[90] Woolfson and Sommers (2006), p. 54.

Electricians and Installation Employers' Association.[91] The dispute also quickly found its way into the highest political levels, with the Latvian Premier Minister raising the matter with the Swedish Premier at an EU summit, as well as personally appealing to the president of the Commission in a letter expressing "deep concern".[92]

On 7 December, Laval filed an injunction to the Swedish Labor Court, wherein it argued that the blockade and the sympathy strike were unlawful and requested a ruling that they be lifted. The Labor Court disagreed, however, and in an interim judgment found the industrial actions to be lawful.[93] A month later, Laval declared bankruptcy and its posted workers returned to Latvia. With the financial help of the Confederation of Swedish Enterprise, however, Laval maintained its claims in the Labor Court, and on 29 April 2005 that court decided to suspend its proceedings and refer two questions on the interpretation of Community Law to the ECJ.[94] I will deal with these two questions at the end of the next section, after having first surveyed the legal background of the dispute.

4.1.2 Legal Background

Community Law

At the heart of this dispute is a company established in one EU Member State providing services in another Member State. The freedom to provide services is one of the four freedoms fundamental to the internal market of the EU, the Treaty basis of which is found in Article 49 EC. According to the first paragraph of this Article, restrictions on the freedom to provide services within the Community are to be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended. "Services" are defined in Art. 50 as services that are normally provided for remuneration, in so far as they are not governed by the provisions relating, in particular, to the freedom of movement for capital and persons.

Just like the other three fundamental freedoms, the freedom to provide services is not an absolute freedom. Most importantly, deviations – that is, providing for special treatment for foreign nationals – can be justified on grounds of public policy, public security, or public health, and must be laid down by law, regulation, or administrative action (Article 46 EC by way of Article 55 EC). Furthermore, Article 47(2) EC empowers the Council to issue directives for the coordination of the provisions laid down by law, regulation, or administrative action in Member States concerning the

[91] Woolfson and Sommers (2006), p. 55.
[92] Ibid.
[93] AD Mål nr A 268/04, Beslut nr 111/04 *Olovlig stridsåtgärd m.m.; nu fråga om interimistiskt förordnande*.
[94] AD Mål nr A 268/04, Beslut nr 49/05 *Olovligt stridsåtgärd m.m.; nu fråga om inhämtande av förhandsavgörande från EG-domstolen*.

provision of services. It was on the basis of this article that the Council and the Parliament adopted Directive 96/71, the interpretation of which was central to the dispute in *Laval*.

The purpose of this directive, as is indicated in the 13th recital in its preamble, is to coordinate the laws of the Member States "in order to lay down a 'nucleus' of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided." The mandatory rules that constitute this 'nucleus' are enumerated in Article 3(1) of the directive, which is worded as follows:

> 1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:
> - by law, regulation or administrative provision, and/or
> - by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:
> (a) maximum work periods and minimum rest periods;
> (b) minimum paid annual holidays;
> (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
> (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
> (e) health, safety and hygiene at work;
> (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
> (g) equality of treatment between men and women and other provisions on non-discrimination.
> For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1 (c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

Further, paragraph 8 of the same article provides that Member States without a system to declare collective agreements universally applicable (first subparagraph above), may base themselves on:

> - collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or
> - collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory,
> provided that their application to the undertakings referred to in Article 1 (1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.

National Law

Directive 96/71 was transposed in Sweden through the Law on the Posting of Workers (Lag (1999:678) om utstationering av arbetstagare). Paragraph 5 of this law corresponds to Article 3(1) of the directive, by enumerating the Swedish laws regulating the minimum requirements set out in that article. There is, however, no provision in paragraph 5 that corresponds to Article 3(1)(c) on rates of pay, since questions of remuneration are traditionally governed in Sweden by collective agreements and Sweden therefore, as previously discussed, lacks a statutory minimum wage.[95] Sweden also lacks a system of the kind mentioned in Art. 3(1) of the directive for declaring collective agreements to be of universal application, and has not availed itself of the option provided for in Article 3(8).

As for Swedish collective agreements, they are mainly governed by the 'Law on workers' participation in decisions' (Lag (1976:580) om medbestämmande i arbetslivet) ('the MBL'). Collective agreements are generally concluded at national level between employers' and workers' organizations, which then become binding on all employers that are members of the organization concerned.[96] As mentioned above, employers that are not members of the employers' organization can sign a tie-in agreement (hängavtal), whereby the employer undertakes to comply with the collective agreements generally applied in the sector to which it belongs. When such an agreement is signed, it is implied that both parties are bound by an obligation to observe good labor relations.[97]

The right to collective action is a constitutional right in Sweden, enshrined in paragraph 17, chapter 2 of the Instrument of Government (Regeringsformen 1974:152, the Swedish Basic Law), but can be subject to limitation by law or agreement. The MBL provides for such a limitation, in that it prohibits collective action when there are good labor relations between the employers and workers bound by a collective agreement. Moreover, it prohibits collective action with the aim of obtaining the repeal of, or amendment to, a collective agreement between other parties (paragraph 42, 1st subparagraph). Generally, therefore, when an employer has signed a collective agreement with one trade union, that employer is "immune" from collective action from another trade union seeking to impose its collective agreement on the employer. However, following the *Britannia* case of 1989,[98] where the Swedish Labor Court held that this prohibition extended to collective action in Sweden vis-à-vis employers bound by a foreign collective action, this provision was amended. The amending law, popularly known as the "Lex Britannia",[99] amended the MBL to give trade unions the

[95] In practice, however, the extensive coverage of collective agreements – more than 90% of workers in the private sector (see Mengozzi AG Opinion in *Laval*, para 22) – functions as a de facto minimum wage.
[96] Mengozzi AG Opinion in *Laval*, para 25.
[97] Ibid.
[98] AD 1989 nr 120 *Blockad mot ett fartyg under bekvämlighetsflagg*.
[99] Lag (1991:681) om ändring i lagen (1976:580) om medbestämmande i arbetslivet.

right to take collective actions against employers bound by collective agreements that are not governed by Swedish law, e.g. against a foreign enterprise temporarily working in Sweden and bound by collective agreements in its home country.[100]

Having gone through both the factual and the legal background of the Laval dispute, we are now in a position to look at how Advocate General (AG) Mengozzi and the Court dealt with the questions referred to them by the Swedish Labor Court. The two questions were as follows:

> (1) Is it compatible with rules of the EC Treaty on the freedom to provide services and the prohibition of any discrimination on the grounds of nationality and with the provisions of Directive 96/71/EC … for trade unions to attempt, by means of collective action in the form of a blockade ('blockad'), to force a foreign provider of services to sign a collective agreement in the host country in respect of terms and conditions of employment, such as that described in the decision of the Arbetsdomstolen [of 29 April 2005 (collective agreement for the building sector)], if the situation in the host country is such that the legislation to implement Directive 96/71 has no express provisions concerning the application of terms and conditions of employment in collective agreements?
>
> (2) The [MBL] prohibits a trade union from taking collective action with the intention of circumventing a collective agreement concluded by other parties. That prohibition applies, however, pursuant to a special provision contained in part of the law known as the "Lex Britannia", only where a trade union takes collective action in relation to conditions of work to which the [MBL] is directly applicable, which means in practice that the prohibition is not applicable to collective action against a foreign undertaking which is temporarily active in Sweden and which brings its own workforce. Do the rules of the EC Treaty on the freedom to provide services and the prohibition of discrimination on grounds of nationality and the provisions of Directive 96/71 preclude application of the latter rule – which, together with other parts of the Lex Britannia, mean in practice that Swedish collective agreements become applicable and take precedence over foreign collective agreements already concluded – to collective action in the form of a blockade taken by Swedish trade unions against a foreign temporary provider of services in Sweden?

4.1.3 Opinion of Advocate General Mengozzi

Before analyzing the two questions referred for a preliminary ruling, AG Mengozzi deals at length with the preliminary question of whether Community law is even applicable to this case. First, he dismisses outright an objection put forward by the Danish Government, which argued that according to Article 137(5) EC, the right to take collective action in order to force an employer to conclude a collective agreement falls outside the scope

[100] Woolfson and Sommers (2006), p. 59.

of Community law.[101] Next, he examines the objection – raised by both the Swedish and the Danish Governments – that the right to resort to collective action enjoys the status of fundamental right by virtue of being enshrined as such in a number of international instruments.[102] "This question is of very great importance," the AG writes, "because, if the application of the freedoms of movement provided for by the Treaty, in this case the freedom to provide services, were to undermine the very substance of the right to resort to collective action, which is protected as a fundamental right, such application might be regarded as unlawful, even if it pursued an objective in the general interest."[103]

After having thus noted the salience of this objection, AG Mengozzi proceeds to investigate the different international instruments claimed to accord the right to resort to collective action the status of "fundamental right". Although no such right can be found directly in the Rome Treaty, Article 6(2) of the EU Treaty contains a reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and provides that the EU shall respect the fundamental rights of this Convention and "as they result from the constitutional traditions common to the Member States," as general principles of Community law.

There is no need here to dwell on the details of the AG's findings. Suffice it to observe that he finds ample support for the claim that the right to resort to collective action is a fundamental right, especially in Article 11 of the ECHR, in Article 28 of the Charter of Fundamental Rights[104] and in the constitutional instruments of numerous Member States. He therefore argues that the right to resort to collective action to defend trade union members' interest, which the Court had held to be merely a "general principle of labour law",[105] should, as it were, be upgraded to a general principle of Community law, within the meaning of Article 6(2).[106]

After having thus established the right to resort to collective action as a fundamental right, the Advocate General goes on to make an important distinction between "the right to resort to collective action" and "*the means of exercising it*."[107] Whereas the former is a fundamental right, the latter is not, and, indeed, all of the abovementioned instruments recognize the possibility of imposing certain restrictions on the latter. Such restrictions must be "laid down in a legislative or regulatory measure, must be justified

[101] Mengozzi AG Opinion in *Laval*, paras 48-59.
[102] Ibid., para 60 ff.
[103] Ibid., para 61.
[104] Charter of Fundamental Rights of the European Union solemnly proclaimed on 7 December 2000 in Nice by the European Parliament, the Council and the Commission, after approval by the Heads of State or Government of the Member States, OJ 2000 C 364, p.1.
[105] Case 175/73 *Union syndicale and Others* v *Council* [1974] ECR 917, para 14; Case 18/74 *Syndicat général du personnel des organisms européens* v *Commission* [1974] ECR 933, para 10; and Joined Cases C-193/87 and C-194/87 *Maurissen and European Public Service Union* v *Court of Auditors* [1990] ECR I-95, para 13.
[106] Mengozzi AG Opinion in *Laval*, para 78.
[107] Ibid., paras 80-81, emphasis added.

by the pursuit of an overriding general interest and must not affect the 'essence' of that right".[108]

Now, AG Mengozzi recognizes that it is certainly incumbent on the Member States to determine the extent of any restrictions on the right to resort to collective action, but he also argues that they must respect their obligations under the Treaty – in particular the fundamental freedoms of movement – when doing so. To reject such an obligation on the part of the Member States, with the aim of guaranteeing the protection of fundamental rights, would "amount to upholding a hierarchy between the rules or principles of primary law which … is not allowed as Community law stands at present."[109] In connection to this need to balance fundamental rights against the fundamental freedoms of movement, the AG invokes the Court's judgment in *Schmidberger,*[110] where the Court ruled that the fundamental right to free speech outweighed the fundamental freedom of movement of goods.[111] He therefore concludes that the right to resort to collective action under such circumstances as in the main proceedings – that is, in order to compel a service provider established in another Member State to conclude a collective agreement in the host state – falls within the scope of Community law.[112]

Instead of answering the two questions as they were referred to the ECJ by the Swedish Labor Court, Advocate General Mengozzi rephrases the question in the following way:

> [The] national court seeks essentially to ascertain whether, in circumstances where a Member State has no system for declaring collective agreements to be of universal application, Directive 96/71 and Article 49 EC must be interpreted as preventing trade unions of a Member State from taking, in accordance with the domestic law of that State, collective action designed to compel a service provider of another Member State to subscribe, by means of a tie-in agreement, to a collective agreement for the benefit of workers posted temporarily by that provider to the territory of the first Member State, including cases where that provider is already bound by a collective agreement entered into in the Member State where it is established.[113]

This rephrased question then prompts him, first, to consider the interpretation of Directive 96/71 and whether it was correctly implemented in Swedish domestic law, and then to evaluate the role of Article 49 EC, as it pertains to the case.

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[108] Mengozzi AG Opinion in *Laval*, para 81.
[109] Ibid., para 84.
[110] Case 112/00 *Schmidberger* [2003] ECR I-5659.
[111] The case concerned a demonstration – authorized by Austrian authorities – which heavily impeded cross-border traffic between Austria and Germany.
[112] Mengozzi AG Opinion in *Laval*, para 91.
[113] Ibid., para 162.

Directive 96/71 and its implementation in Swedish domestic law

The purpose of Directive 96/71, according to its third Article, is to provide (1) minimum protection for posted workers and (2) equal treatment as between service providers and domestic undertakings in similar circumstances. As for the first of these purposes, the Advocate General argues that there is nothing in the wording of Article 3(1) or 3(8) that, in the absence of a statutory minimum wage or a system for declaring collective agreements to be of universal application, obliges Sweden to have recourse to the option provided for in the second subparagraph of Article 3(8).[114] Rather, he argues, it is perfectly in keeping with settled case law of the Court for Member States to leave the implementation of the objectives pursued by Community directives to both sides of industry through collective agreements.[115] Furthermore, by accepting the right of trade union to take collective action, Sweden fulfills its obligation of ensuring that workers posted to its territory enjoy the minimum protection afforded to them in Article 3(1)(c), i.e. a minimum rate of pay.

The guarantor of this route of affording minimum protection to posted workers is the Lex Britannia, because without the possibility of resorting to collective action against service providers bound by collective agreements in its state of origin, workers could be posted to Sweden without enjoying the minimum protection set out in Article 3(1)(c). The Advocate General thus argues that, contrary to violating Community law, the Lex Britannia is essential to Sweden's correct implementation of Directive 96/71.

As for the purpose of Directive 96/71 to provide equal treatment as between service providers and domestic undertakings in similar circumstances, the AG makes two observations. Firstly, he notes that it is precisely in order to ensure equal treatment that the Swedish Government has not availed itself of the option provided for it in subparagraph 2 of Article 3(8). Had it done so, foreign service providers would have effectively been discriminated against, since domestic employers are not subject to any automatic procedure such as those provided for in that provision. Secondly, he notes that the extent of the coverage of collective agreements in the Swedish building sector is so wide – practically all employers are bound by collective agreements, and 87% of workers in the Swedish building sector are represented by Byggnads – that it is in practice effective *erga omnes*.[116]

These two observations, together with earlier observation on the Lex Britannia, lead the AG to conclude that the Swedish system appears to ensure the equal treatment purpose of Directive 96/71.[117] He also notes that the *prima facie* discriminatory nature of the Lex Britannia is not

[114] Mengozzi AG Opinion in *Laval*, para 179.
[115] See Case 143/83 *Commission* v *Denmark* [1985] ECR 427, paras 8-9; Case 235/84 *Commission* v *Italy* [1986] ECR 2291, para 20; and Case C-234/97 *Fernandez de Bobadilla*, para 19.
[116] Mengozzi AG Opinion in *Laval*, para 191.
[117] Ibid., para 193.

incompatible with Community law *as it pertains to Directive 96/71*, since that directive lays down terms and conditions of employment that the host Member State must guarantee, regardless of the law applicable to the employment relationship.[118] In other words, from the perspective of the host Member State it is irrelevant whether a foreign service provider that is posting workers in its territory is bound by a collective agreement in its state of origin, since the host Member State would still have to guarantee that the posted workers enjoy the minimum protection enumerated in Article 3(1) of Directive 96/71.

Advocate General Mengozzi ends his legal analysis of Directive 96/71 and its implementation in Swedish domestic law by investigating the situation where a collective agreement – which a foreign service provider has been forced to entered into by means of collective action – contains conditions that go beyond or fall outside the scope of the matters listed in Article 3(1) of Directive 96/71. In short, he argues that most such conditions are allowed under the directive, but that they must also be examined in the light of Article 49 EC.

Article 49 EC

Article 49 EC requires the elimination, against a person providing services who is established in another Member State, of all discrimination on the ground of his nationality. However, the case law of the Court has also established that it also requires the abolition of any restriction, even if it applies without distinction to domestic service providers and to those of other Member States, when such a restriction is liable to prohibit, impede or render less attractive the activities of a service provider established in another Member State where he lawfully provides similar services.[119] Furthermore, the Court has held that the application of the host Member State's domestic legislation could constitute such a restriction. The AG therefore finds it necessary to investigate whether the exercise of collective actions by trade unions against service providers – such as was the case with Byggnads's blockade against Laval – constitutes a restriction within the meaning of Article 49 EC, and if such a restriction could be justified in any way.

To the AG, the taking of collective action obviously constitutes a restriction on the freedom to provide services, since the taking of such action is liable to give rise to significant costs for the foreign service provider, making it less attractive for him to make use of his freedom.[120] The possibility of justifying such a restriction, however, is a more complicated issue.

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[118] Mengozzi AG Opinion in *Laval*, para 200, emphasis added.

[119] See especially C-172/89 *Vander Elst* [1994] ECR I-3803, para 14; Joined Cases C-368/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, para 33; Case C-164/99 Portugaia Construções [2002] ECR I-787, para 16; and Case C-60/03 *Wolff & Müller* [2004] ECR I-9553, para 31.

[120] Mengozzi AG Opinion in *Laval*, para 233.

According to the case law of the Court, a restriction on the freedom to provide services can only be justified "where they reflect overriding requirements relating to the public interest in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established and provided that they are appropriate for securing attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it."[121] In short, it must pass a test of proportionality.

The AG separates the test of proportionality of Byggnads's actions in two, corresponding to the intended purposes of the actions. When Byggnads's actions are judged against the purpose of imposing the rate of pay in accordance with its collective agreement, the AG finds the actions to have been proportionate. This is so, he argues, mainly because the exercise of the right to take collective action is, in principle, a less restrictive measure than automatic subjection to a similar rate of pay, as would have been the case if Sweden had availed itself of the option in Article 3(8) of Directive 96/71.[122]

Of course, in the case of Laval, the resort to collective action actually caused the Latvian workers to lose their employment and Laval to go bankrupt. However, the AG argues that this was not a result of Byggnads demanding too high rates of pay, but rather that they demanded that Laval sign a tie-in agreement before initiating negotiations on pay. This tie-in agreement, furthermore, contained a number of provisions granting specific benefits to workers, but these provisions would in practice only benefit workers actually established in Sweden.[123] For the AG, making the application of a given rate of pay conditional upon signing such a tie-in agreement "goes beyond what is necessary to ensure the protection of workers and to prevent social dumping".[124] In that connection, he also notes that imposing a limit on such collective action – that is, action taken in order to compel a foreign service provider to comply with conditions which are not designed to attain the objects for which the taking of collective action is justified – does not "constitute disproportionate and unacceptable interference with the exercise of the right to take such action such as to impair the very substance of the right guaranteed".[125]

All of these considerations lead the Advocate General to conclude the following, which deserves to be quoted in its entirety:

> [Where] a Member State has no system for declaring collective agreements to be of universal application, Directive 96/71 and Article 49 EC do not prevent trade unions from attempting, by means of collective action in the form of a blockade and solidarity action, to compel a service

[121] Mengozzi AG Opinion in *Laval*, para 241.
[122] Ibid., para 258.
[123] These included sickness benefits, supplementary retirement insurance, unemployment insurance, and surcharges used to finance an industry research fund in order to promote research and development, and new processes in the building sector. See Mengozzi AG Opinion in *Laval*, paras 286-297 for a more detailed description of these benefits.
[124] Mengozzi AG Opinion in *Laval*, para 280.
[125] Ibid., para 283.

> provider of another Member State to subscribe to the rate of pay determined in accordance with a collective agreement which is applicable in practice to domestic undertakings in the same sector that are in a similar situation and was concluded in the first Member State, to whose territory workers of the other Member State are temporarily posted, provided that the collective action is motivated by public interest objectives, such as the protection of workers and the fight against social dumping, and is not carried out in a manner that is disproportionate to the attainment of those objectives. When examining the proportionality of the collective action, the national court should, in particular, verify whether the terms and conditions of employment laid down in the collective agreement at issue in the case before it, and upon which the trade unions made the application of the abovementioned rate of pay conditional, were in conformity with Article 3(10) of Directive 96/71 and whether the other conditions, upon which application of that rate of pay was also conditional, involved a real advantage significantly contributing to the social protection of posted workers and did not duplicate any identical or essentially comparable protection available to those workers under the legislation and/or the collective agreement applicable to the service provider in the Member State in which it is established.[126]

4.1.4 Judgment of the Court

Unlike the opinion of the Advocate General – which consists of more than 300 paragraphs and more than 100 endnotes – the judgment of the Court is a very succinct affair, totaling just 121 paragraphs. Also unlike the AG's Opinion, the Court stays fairly close to the referred questions as they were formulated by the referring court, and analyses and answers them separately.

When answering the first question, the Court agrees with the AG that both Directive 96/71 and Article 49 EC need to be considered simultaneously.[127] This is a consequence of settled case law, which, on the one hand, holds that Article 49 EC precludes Member States from discriminating against foreign service providers,[128] but at the same time holds that this does not preclude Member States from applying legislation relating to terms and conditions of all workers, even those just temporarily posted there.[129] Such rules, however, must be appropriate for securing the attainment of the objective that they pursue, i.e. the protection of posted workers.[130]

Directive 96/71

Having made the observation above, the Court goes on to investigate Sweden's implementation of Directive 96/71. Concerning Sweden's system

[126] Mengozzi AG Opinion in *Laval*, para 307.
[127] *Laval*, para 61.
[128] Case C 113/89 *Rush Portuguesa* [1990] ECR I 1417, para 12.
[129] See, in particular, Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral* [1982] ECR 223, para 14, and *Portugaia Construções* (*supra*, note 119), para 21.
[130] *Laval*, para 57.

for implementing Article 3(1)(c), it finds that, since this provision only relates to minimum rates of pay, it cannot be relied on to justify Byggnads's sanctions, as these sought to impose a rate of pay that did not constitute minimum wages.[131] As regards the other matters covered in Article 3(1), it first notes that that provision seeks to "ensure a climate of fair competition"[132] between national undertakings and foreign service providers, and that the consequence of affording such minimum protection is to enable workers posted to a Member State that affords more favorable minimum protection than the State of origin to enjoy those better terms and conditions of employment.[133]

However, the Court notes that the collective agreements that Byggnads sought to impose on Laval contained certain provisions establishing terms more favorable than the minimum protection required by Directive 96/71.[134] In order not to render the directive ineffective, the Court therefore holds that the level of protection which must be guaranteed to workers is limited to that provided in Article 3(1), unless the workers already enjoy more favorable terms pursuant to law or collective agreement in their State of origin.[135]

Article 49 EC

When assessing the collective actions at issue from the point of view of Article 49 EC, the Court begins by following the AG's view that the right to resort to collective action is a "fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures".[136] It also takes the AG's view that this right can be subject to certain restrictions, and that it must be "reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality".[137]

Like the AG, the Court finds that the right of trade unions to take collective actions to compel foreign service providers to sign a collective agreement containing terms that depart from, or establish more favorable terms than, those required by Article 3(1) of Directive 96/71 is liable to make it less attractive for such actors to make use of their freedom to provide services.[138] It is therefore to be considered a restriction within the meaning of Article 49 EC.

[131] *Laval*, para 70.
[132] Ibid., para 74.
[133] Ibid., para 77.
[134] Ibid., para 78.
[135] Ibid., para 81.
[136] Ibid., para 91.
[137] Ibid., para 94.
[138] Ibid., para 99.

According to its case law,[139] the Court will accept a restriction on a fundamental principle of Community law only if it "pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest".[140] Even if that is the case, however, it must also pass a proportionality test *stricto sensu*; that is, it must be "suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it".[141]

The Court agrees that the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest, which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty.[142] Moreover, it notes that the Community has both economic and social purposes, and that the "economic provisions" under the Treaty – above all the four fundamental freedoms – must be *balanced* against "social policy provisions", such as Article 136 EC.[143]

The Court does not present what considerations it made when performing this balancing test, but merely gives the outcome of it. In essence, the Court says that the Swedish lack of provisions concerning the negotiations on pay make it "impossible" or "excessively difficult"[144] for a foreign service provider to determine the obligations with which it is required to comply as regards pay, and that Byggnads's collective actions therefore cannot be justified on the basis of public interest.

Lex Britannia

As for the second question referred by the Labor Court, which essentially asks whether the Lex Britannia is compatible with Community law, the Court takes a very strict approach. Unlike the AG – which accepts the overtly discriminatory nature of the Lex Britannia by situating it in the wider system of Swedish labor law – the Court merely notes that the law is directly discriminatory and that, according to Article 46 EC, such discrimination can only be justified on the grounds of public policy, public security or public health.[145] None of the intended purposes of the Lex Britannia falls under these grounds of justifications, the Court says, and it

[139] See, *inter alia*, Case 220/83 *Commission* v *France* [1986] ECR 3663, para 17, and Case 252/83 *Commission* v *Denmark* [1986] ECR 3713, para 17.
[140] *Laval*, para 101.
[141] Ibid.
[142] Ibid., para 103.
[143] Ibid., para 105. Article 136 EC reads: "The Community and the Member States … shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonization while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion."
[144] *Laval*, para 110.
[145] Ibid., paras 116-117.

consequently holds Byggnads's actions to have been unjustified and the Lex Britannia to be incompatible with Community law.[146]

4.2 The *Viking* Case

4.2.1 Factual and Legal Background

Viking Line ABP is a Finnish passenger ferry operator and the owner of *Rosella*, a vessel which operates under the Finnish flag on a route between Finland and Estonia. In 2003, the *Rosella* was operating at a loss, being in competition with Estonian-flagged vessels operating on the same route. These Estonian-flagged vessels payed their crews Estonian wages, which are markedly lower than Finnish crew wages. Viking Line, on the other hand, was obliged by Finnish law and by the terms of a collective agreement to pay the crew of *Rosella* at Finnish wage levels. In order to circumvent this obligating, Viking Line sought, in October 2003, to reflag the *Rosella* and register it in Estonia.[147]

The Finnish Seamen's Union (FSU), which is a national union representing seafarers and of which the crewmembers of the Rosella were members, was strongly opposed to Viking Line's plans. It therefore contacted the International Transport Workers' Federation (ITF) for assistance. The ITF is an umbrella organization for transport workers' unions, and has as one of its principal policies a so-called flag of convenience (FOC) policy.[148] The primary purposes of this policy are, first, to eliminate the use of flags of convenience and, second, to improve the conditions of seafarers serving on FOC ships.[149] According to the FOC policy, a vessel is considered as sailing under a flag of convenience "where the beneficial ownership and control of the vessel is found to lie elsewhere than in the country of the flag."[150]

In response to being contacted by the FSU, the ITF sent out a circular, requesting all of its affiliated unions not to negotiate with Viking Line, and threatened to exclude from the ITF any union that did not comply. The FSU, furthermore, threatened industrial actions against Viking Line, demanding, *inter alia*, that it either give up its reflagging plans, or, if Viking Line were to go through with those plans, that the crew should be employed under

[146] *Laval*, paras 119-120.
[147] Maduro AG Opinion in Case C-438/05 *Viking*, paras 5-6.
[148] "Flag of convenience" can be defined as "the foreign flag under which merchant ships register in order to save on taxes or wages, or to avoid government regulations", *The American Heritage Dictionary of the English Language*, 4th Edition. [Houghton Mifflin Company, 2004).
[149] Maduro AG Opinion in *Viking*, paras 4 and 7.
[150] Ibid., para 4.

Finnish labor conditions.[151] Because of this threat, Viking Line agreed not to commence reflagging before 28 February 2005.

However, Viking Line anticipated that a new reflagging attempt after this date would precipitate new industrial actions from the FSU and the ITF, and therefore brought an action in the Commercial Court in London (the seat of ITF) on 18 August 2004, seeking declaratory and injunctive relief which required the ITF to withdraw the circular and the FSU not to interfere with Viking Line's right to freedom of movement in relation to the reflagging of the *Rosella*.[152] This injunction was granted by the Commercial Court, but was appealed by the FSU and the ITF. On 3 November 2005, the Court of Appeal stayed its proceedings and referred "an extensive series of meticulously worded questions" to the ECJ.[153] Both the AG and the Court condensed the ten referred questions into the following three key issues:[154]

- The first issue is whether collective action such as that under consideration falls outside the scope of Article 43 EC and Article 1(1) of Council Regulation (EEC) No 4055/86 (5)[155] by virtue of the Community's social policy.

- The second issue is whether those same provisions "have horizontal direct effect so as to confer rights on a private undertaking which may be relied on against … a trade union or association of trade unions in respect of collective action by that union or association of unions."

- The third issue is whether actions such as those under consideration constitute a restriction on freedom of movement, and, if so, whether they are objectively justified, appropriate and proportionate, and "strike a fair balance between the fundamental social right to take collective action and the freedom to establish and provide services"

4.2.2 Opinion of Advocate General Maduro

The applicability of the provisions on freedom of movement on collective action

In answering the first question, the Advocate General begins by noting that Regulation No 4055/86 relates to the freedom to provide services, as guaranteed by Article 49 EC, whereas the reflagging of the *Rosella* primarily concerns freedom of establishment, as guaranteed by Article 43

[151] Maduro AG Opinion in *Viking*, para 8.
[152] Ibid., para 11.
[153] Ibid., para 12.
[154] Ibid., paras 13-15.
[155] This provision reads: "Freedom to provide maritime transport services between Member States and between Member States and third countries shall apply in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended."

EC. To clarify the relationship between the two freedoms, he construes Viking Line's plans as, first, intending to exercise its right to freedom of establishment, in order, subsequently, to exercise its right to freedom to provide services.[156]

Having made this distinction, the AG goes on to analyze the argument put forth by the FSU and the ITF that (1) the right to resort to collective action, being protected as a fundamental right in various international instruments and constitutional traditions of the Member States, should be considered a general principle of Community law, and (2) that this effectively excludes the application of Article 43 EC and Regulation No 4055/86 in the field of labor disputes such as the dispute under consideration. This is, of course, practically the same argument put forth by the Swedish and Danish governments in *Laval*.

Unlike AG Mengozzi in *Laval*, AG Maduro does not investigate the basis for the claim that the right to resort to collective action is a general principle of Community law, but rather agrees outright that it is the case. Like AG Mengozzi, however, he is quick to point out that the protection of fundamental rights is not irreconcilable with the fundamental freedoms of movement; in other words, neither right is absolute. He also cites the *Schmidberger* and *Omega* line of cases to show how this position is settled case law.[157] He concludes, therefore, that collective action, although protected as a fundamental right, is not exempted from the application of Article 43 EC and Regulation No 4055/86.

The horizontal application of the provisions on freedom of movement

A requirement for Viking Line to rely upon Article 43 EC against the FSU and the ITF is that that provision grants individuals enforceable rights against other individuals: so-called *horizontal application* of Treaty provisions. The horizontal application of some Treaty provisions – such as Article 81 EC, which concerns competition rules – have since long been established by the Court, but there remains some debate regarding the provisions on freedom of movement.

AG Maduro takes a teleological approach to the issue, and argues that the purpose of these provisions is to facilitate the creation of a common market, and that they cannot be interpreted in a way that would, in effect, emasculate them. Since private action – such as the actions of the FSU and the ITF – may very well obstruct the proper functioning of the common market, the AG finds that, under the right circumstances, private parties should be able to rely on Article 43 EC against other private parties. Most important among these circumstances is that the private action (against which the rules on freedom of movement is applied) is capable of effectively restricting others from exercising their right to freedom of movement, by raising an obstacle that they cannot reasonably

[156] Maduro AG Opinion in *Viking*, para 19.
[157] Ibid., para 24.

circumvent.[158] When applying this test to the actions of the FSU and the ITF, the Advocate General finds that these indeed did effectively restrict Viking Line's exercise of the right to freedom of establishment, and that Article 43 EC therefore had horizontal effect in the national proceedings.[159]

Striking a balance between the right to freedom of establishment and the right to collective action

As an introduction to answering this third question, AG Maduro makes some unusually forthright remarks concerning the rationale behind the freedom of establishment and the social consequences that the exercise of this freedom may entail. Drawing on basic insights into the benefits of free trade, he argues that the exercise of the right to freedom of establishment is instrumental to increasing the economic welfare of all the Member States. At the same time, however, he also recognizes that the exercise of this right often has "painful consequences," in particular for the workers of companies that decide to relocate.[160]

To solve this contradiction, the AG argues that it is enshrined in the preambles of the Treaty that the European economic order is "firmly anchored in a social contract: workers throughout Europe must accept the recurring negative consequences that are inherent to the common market's creation of increasing prosperity, in exchange for which society must commit itself to the general improvement of their living and working conditions, and to the provisions of economic support to those workers who, as a consequence of market forces, come into difficulties."[161] Thus, he argues that the right to take collective action is an essential instrument for workers to make sure that the social side of this contract is maintained, and that the key question therefore is "to what ends collective action may be used and how far it may go."[162]

In answering this question, the Advocate General distinguishes between two types of possible collective action: (1) collective action to persuade Viking Line to maintain the jobs and working conditions of the current crew, and (2) collective action to improve the terms of employment of seafarers throughout the Community.[163]

As regards the first type, the AG acknowledges that this type of collective action may restrict an undertaking from exercising its right to freedom of establishment, but that it is nonetheless pursuing a legitimate goal, and is not precluded from doing so by Community law. However, this right to collective action does not extend to a right to restrict an undertaking from making use of its freedom to provide services once it has relocated. Such a

[158] Maduro AG Opinion in *Viking*, paras 43 and 48.
[159] Ibid., para 55.
[160] Ibid., para 58.
[161] Ibid., para 59.
[162] Ibid., para 60.
[163] Ibid., para 63.

right, the AG argues, would create an atmosphere of constant retaliation between social groups in different Member States, and has already been ruled-against in *Commission* v *France* (French Farmers).[164]

The second type of collective action, finally, is deemed by the AG to be allowed, in principle, under Community law. However, he also recognizes the risk that trade unions and trade union associations across the Member States, by coordinating their actions, could abuse this right in order to partition the common labor market. This is, of course, exactly what the ITF sought to do when issuing its circular. The AG, however, does not say so explicitly in his Opinion, but rather leaves it to the referring court to establish if this was the case.[165]

4.2.3 Judgment of the Court

As mentioned previously, the Court structures its judgment in the same way as AG Maduro, by condensing the referred questions into three main issues. Before tackling these questions, however, it makes the same preliminary observation as the AG, by noting that Regulation No 4055/86 concerns the freedom to provide services, whereas the issue in the main proceedings dealt with the freedom of establishment. Unlike the AG, however, it explicitly notes that this amounts to the questions concerning the regulation being hypothetical, and that they are therefore inadmissible. Consequently, it only answers the questions referred by the national court as they concern the interpretation of Article 43 EC.

The first question

In answering the first question, the Court once again dismisses outright the argument that Article 137 EC precludes Community law from regulating the right to collective action. Furthermore, it agrees with the defendants that the right to resort to collective action is a fundamental right and a general principle of Community law, but also notes that this does not make it an *absolute* right. Citing the *Schmidberger* and *Omega* line of case law, it argues that the exercise of the right to resort to collective action must be reconciled with the provisions of the Treaty relating to the fundamental freedoms of movement.[166] It concludes that collective actions, such as those under consideration in the main proceedings, are not excluded from the scope of Article 43 EC.

The second question

Concerning the question of the horizontal application of Article 43 EC, the Court points out that "the abolition, as between Member States, of obstacles to freedom of movement for persons and freedom to provide services would

[164] Case C-265/95 *Commission* v *France* [1997] ECR I-6959.
[165] Maduro AG Opinion in *Viking*, para 72.
[166] *Viking*, paras 44-46.

be compromised if the abolition of State barriers could be neutralized by obstacles resulting from the exercise, by associations or organizations not governed by public law, of their legal autonomy."[167] As the FSU and the ITF are just such associations not governed by public law, the Court finds that Article 43 EC must be interpreted as having horizontal effect, and that Viking Line is thus able to invoke this provision against the FSU and the ITF.

The third question

In answering the third question, the Court performs a strict two-fold test of whether (1) the collective actions by the FSU and the ITF constituted a restriction within the meaning of Article 43 EC, and, (2) if that is the case, to what extent such a restriction may be justified. As regards the first part of the test, the Court finds that "it cannot be disputed that collective actions such as that envisaged by the FSU has the effect of making less attractive, or even pointless … Viking's exercise of its right to freedom of establishment".[168] It finds the same to be true for the ITF policy of combating the use of flags of convenience.

On the issue of justifications, the Court acknowledges that the protection of workers is a legitimate interest, for which the taking of restrictive collective action can be justified.[169] However, it also states that the provisions of the Treaty on the freedoms of movement "must be balanced" against the objectives pursued by social policy.[170] In making this assessment, the ECJ tells the national court that it must, first, investigate whether the collective actions were, in fact, aimed at protecting the jobs and conditions of employment of the crew of *Rosella*, and, second, assess whether the collective action initiated by the FSU was suitable, and did not go beyond what was necessary, for ensuring this objective. When making this latter assessment, the national court must examine whether the FSU did not have other means at its disposal that were less restrictive on the right to freedom of establishment, and whether it had exhausted such means before initiating its collective actions.[171]

[167] *Viking*, para 57.
[168] Ibid., para 72.
[169] Ibid., para 77.
[170] Ibid., para 79.
[171] Ibid., para 87.

5 Analysis

5.1 General Observations

Having discussed the three elements relevant to this analysis – Stone Sweet's theory, the Swedish model of industrial relations, and the two cases *Laval* and *Viking* – the time has now come to combine these into a coherent whole, to analyze their relationships, and to make some predictions about the future. Before this can be done, however, a few outstanding theoretical issues need to be addressed now that the reader is acquainted with the study's three elements.

The first issue, which has already been addressed above but which deserves to be repeated, is the relationship between, on the one side, Stone Sweet's model, and, on the other side, the Swedish model of industrial relations and the ECJ case law. This relationship is fundamentally one of *abstract theory – empirical facts*. That is, Stone Sweet's model provides a conceptual framework in which empirical facts can be "plugged into" in order to trace processes and establish causality.

The second issue is the question of on what level of abstraction the model can (or should) be employed; that is, can it be employed to follow the logics of a single dispute, or should it be reserved for processes where aggregate data is available and relationships can be traced through the use of statistical analysis? In his empirical studies, Stone Sweet has used the model to derive hypotheses testable using statistical methods as well as through more detailed process tracking, in domains such as environmental protection, sex equality, and the free movement of goods in the EU.[172] As far as I know, however, he has never employed his model on an individual case to trace the causality of the move to TDR, the tactics employed by the court to solve the dispute, etc. Although the explanatory value of such a study may be debatable, I do not see why such a study could not be undertaken, given Stone Sweet's insistence on the micro-foundations of his model and his thoroughness in explicating these.

The third issue concerns the timing of my study. Social science models such as Stone Sweet's are usually employed *ex post facto* in order to *explain* certain events or processes – not to *predict* them. However, a study that actually *does* have predictive aspects is obviously more interesting than one that is merely explanatory. Thus, if any of the predictions of my study were actually to be borne out over the next few years, that would be a major indication of the usefulness and predictive powers of Stone Sweet's model. Moreover, the fact that I am doing my study before any long-term impacts

[172] See Stone Sweet (2004), chapters 3, 4, 5.

of the *Laval* and *Viking* cases have become apparent means that I cannot be accused of predicting something that has already occurred.[173]

The fourth issue is to clarify how the *Viking* case, which concerned a dispute between a Finnish company and a Finnish trade union, is to be related to the domain of Swedish industrial relations. I deal with this issue in a very pragmatic way, by noting that, for all intents and purposes of the study, the Finnish labor market is regulated in the same way as the Swedish, and that the conflict thus could have erupted in Sweden just as well.[174] That being said, I do acknowledge that a study of the impact of the case law of the ECJ on the *Scandinavian* model of industrial relations would have been better supported by an analysis of *Laval* and *Viking*. Alas, limitations on time and space did not allow for such an extensive study.

The last issue relates to the concept of *Europeanization*, which was mentioned in the introduction. In his empirical studies of the EU, Stone Sweet has exclusively dealt with the construction of a supranational polity; that is, how actors in Member States engaged in transnational exchange worked with national courts and the ECJ, as it were, to construct a polity not under the direct control of its constituent Member States. Conversely, the term "Europeanization" is taken to mean the process whereby activity at the supranational level (within the EU institutions) comes to affect the national legal systems of the Member States. It is with this latter process that my study concerns itself. To put it in scientific terms: whereas in Stone Sweet's studies, the construction of a supranational polity is the dependent variable, my study takes this as its independent variable, and takes the Europeanization (and, as a corollary, the *judicialization*) of Swedish industrial relations as its dependent variable.

5.2 Stone Sweet's Model Applied

5.2.1 Normative Structure

The natural point of departure when employing Stone Sweet's model to analyze a single dispute or a more general process of change is to evaluate the *ex ante* normative structure. In the case of *Laval* and the Swedish model of industrial relations, this would be the system described in section three of this paper.

As we know from that discussion, the Swedish model is characterized by an extensive party autonomy and a corresponding lack of state intervention. The laws that do exist in the domain of industrial relations do not so much

[173] See Shapiro, Stone Sweet (2002), p. 221-222 for a similar discussion.
[174] The reverse (i.e. a *Laval* type dispute erupting in Finland) does not hold true, however, since Finland has made use of the mechanism provided for in Article 3(8) of Directive 96/71.

regulate the relationship between employers and employees – by providing substantive provisions on minimum wages etc. – as it *frames* it. The framing of the relationship is mainly provided for by the MBL, which contains provisions on when the two sides must enter into negotiations, when good labor relations must be observed, and so on. This system, moreover, was instituted by the social partners (the Saltsjöbaden Agreement), and it still today enjoys wide support in Parliament.

As also mentioned in the previous discussion, the Swedish Labor Court has a narrowly circumscribed jurisdiction when deciding on the rulefulness of a collective action, and has, essentially, only to determine whether or not the parties are bound by a collective agreement; if they are, then both parties are under an obligation to maintain good labor relations. Unlike labor courts in other countries, it cannot take questions of equity or proportionality into consideration.[175]

Essentially, therefore, the normative structure of the Swedish model of industrial relations can be understood as emphasizing dyadic dispute resolution and as generally eschewing TDR. Just like in the early days of the international trade regime under the GATT then, the Swedish model of industrial relations was devised in a way so as to keep lawyers and judges out of the process, and leave disputes to be settled through negotiations and power-bargaining.

5.2.2 From Dyad to Triad

If we accept the above characterization of the dispute resolution system of the Swedish model of industrial relations as being of an essentially consensual nature and of eschewing TDR, the two cases *Laval* and *Viking* give rise to two questions: Do these cases represent a change in the system, i.e. a move from dyadic to triadic dispute resolution? If so, how can this move to TDR be explained?

As for the first question, a distinction must be made between the empirical facts of *Laval* and *Viking*, and the question of whether these facts amount to, or result in, a change in the system. It is obvious that the disputes in *Laval* and *Viking* involved a substantial element of TDR; after all, they were both adjudicated by the ECJ. On a trivial level, therefore, the first question must be answered in the affirmative. The interesting question, however, is whether the move to TDR in these two cases should be viewed as mere anomalies, or as harbingers of change. In other words, did they set in motion the self-perpetuating process of judicialization, as predicted by Stone

[175] A recent and notable example of a court prohibiting a trade union from striking, even though it was unbound by collective agreements, is the interim decision by the Labor Court of Nuremberg during the conflict between *Deutsche Bahn* and the *Gewerkschaft Deutscher Lokbahnführer* in the summer and autumn of 2007; Arbeitsgericht Nürnberg, Beschluss 13 Ga 65/07 of 08/08/2007.

Sweet's model, whereby the dyadic exchange between employers and employees will "inevitably be placed in the 'shadow' of triadic rule-making"?[176] Unfortunately, answering this all-important question must be deferred until we know both what enabled the move to TDR in *Laval* and *Viking* (question two above), and how the ECJ dealt with those cases (next section).

In answering the second question – how to explain the move to TDR in *Laval* and *Viking* – we shall focus on the elements necessary for explaining the move to TDR in *Laval* and *Viking*: the strategic behavior of the actors, the internal logic of Stone Sweet's model, and any relevant exogenous factors. In the following, I will consider the disputing parties to be "management vs. labor", and not "Laval un Partneri/Viking Line vs. Byggnads/ITF/FSU". I consider this generalization valid and necessary for several reasons. It is *valid* because Laval un Partneri's legal expenses were paid for by Svenskt Näringsliv.[177] It is *necessary* because an inquiry into the strategic behavior of two companies would be a fairly trivial exercise, and would not add much to our understanding of the underlying dynamics of the process.

Strategic behavior of the disputants

The behavior of the two parties in both cases makes it abundantly clear what their respective positions on the question of moving to TDR were: the plaintiffs obviously supported such a move, whereas the defendants' argument that the ECJ lacked jurisdiction show that they did not.[178] In technical terminology, it was thus a matter of moving to *compulsory* TDR. Now, since Stone Sweet's model assumes that the actors are rational, it follows that the two parties deemed it in their self-interest to take the positions that they did. It also follows that they both deemed the eschewing of TDR in the Saltsjöbaden Agreement to have been in their self-interest in 1938. The question to be answer thus becomes: What occurred in the intervening years (from 1938 to 2005) to make the employers change their position?

What mainly occurred, I argue, was that the relative power of the methods of collective action (strike, lockout, blockade) gradually shifted in favor of the trade unions. In 1938, lockouts and strikes were both feasible options as means of putting pressure on the other side in negotiations, and were arguably also of roughly equal strength.[179] As we saw in section 3, this led

[176] See *supra* note 36.
[177] Anna Danielsson, *Svenskt Näringsliv backar upp lettiskt Laval*, Svenska Dagbladet, 14 May 2005, <http://www.svd.se/naringsliv/arkivnyheter/artikel_1053879.svd> (accessed: 19 April 2008).
[178] Of course, it cannot be inferred from the trade unions' role as defendants that they opposed the move to TDR; one can very well be a defendant and still support taking the dispute to court.
[179] Erik Moberg, *Lockout, Strejk och Blockad – en strategisk analys av konfliktvapnen på den svenska arbetsmarknaden* (Stockholm: Ratio, 2006) [hereinafter Moberg (2006)], pp. 41-45.

to a conflict-ridden society that was detrimental to both employers and employees. As a result, they entered into the Saltsjöbaden Agreement, which recognized the right to resort to collective action, but also codified an understanding of when these should be employed. Nominally, the system codified in the Saltsjöbaden Agreement is still in force, but in practice, Swedish industrial relations are today totally dominated by the trade unions.[180] This, at least, is the argument made by political scientist Erik Moberg (2006).

Moberg argues that structural changes – in society in general and in the labor market in particular – have skewed the relative power of employers and employees in favor of the latter. In short, Moberg's argument is that strikes have become very effective through the rise of welfare and unemployment benefits (making it possible for trade unions to maintain strikes for longer period) and the increased specialization of the workforce (making it easier to disrupt the production in a company with pin-pointed strikes), while the power of lockouts have been correspondingly weakened. Coupled with the power of blockades, this has led to a situation on the Swedish labor market where trade unions "can dictate the conditions on the private labor market" and where "the function of the employers is merely to inform where the boundaries for bankruptcy or offshoring lie."[181]

As could be expected, Moberg's argument has been contested by union-friendly commentators.[182] However, the actual merit of his argument has no bearing on my argument, viz., that Svenskt Näringsliv supported the move to TDR because they believed that it would be more conducive to their interests than the status quo of dyadic dispute resolution. What matters is that Svenskt Näringsliv *believed* that this shift in relative power on the labor market had occurred; and it demonstrably did believe so.[183] This conclusion – that Svenskt Näringsliv acted extremely rational, i.e. by surveying its situation, identifying its options and pursuing the option most in line with its self-interest – is also supported by earlier studies of Svenskt Näringsliv's strategic behavior on issues of industrial relations.[184]

Factors enabling move to TDR

We have thus established the disputants' positions on the issue of moving to TDR, as well as the rationales for adopting that behavior. Had this been a case of moving to consensual TDR, this would conclude the analysis of the

[180] Moberg (2006), pp. 113-114.
[181] Ibid., p. 114.
[182] See, *inter alia*, LO-Tidningen, *Globaliseringen dämpar stridslusten*, http://www.lotidningen.se/?id_site=8&id_item=7150 (accessed: 20-04-2008).
[183] See Svenskt Näringsliv, *Den svenska modellen har kantrat* (2005), <http://www.svensktnaringsliv.se/multimedia/archive/00000/Den_svenska_modellen_h_474a.pdf> (accessed: 20 April 2008).
[184] See, *inter alia*, Joakim Johansson, "Undermining Corporatism" in PerOla Öberg and Torsten Svensson (eds.), *Power and institutions in industrial relation regimes: political science perspectives on the transition of the Swedish model* (Stockholm: Arbetsinstitutet, 2005).

second shift of Stone Sweet's model. However, since this was a case of moving to *compulsory* TDR, we must now investigate what factors enabled the employers to impose their will to move to TDR on the trade unions.

The principal enabling factor, I argue, was the Article 234 framework, discussed in section 2.2.3. It shall be recalled that in the *Laval* case, the Swedish Labor Court rejected an injunction filed by Laval on the grounds that, *prima facie*, the actions undertaken by Byggnads and Elektrikerförbundet were lawful. This action by the Labor Court could be viewed as a rejection of the employers' attempted move to TDR, since, although it accepted jurisdiction to try the injunction, it found that there was no collective agreement between the disputants, and that it did not have the jurisdiction to decide the case on any other grounds (e.g. proportionality). It was not until the main proceedings that Laval (and its financial backers) were able to forcefully argue that there was a significant element of Community law involved in the case, and that under the Article 234 doctrine, the Labor Court was obligated to file a reference for a preliminary ruling to the ECJ.

Now, from the perspective of legal dogmatism, it would suffice to say that the Labor Court was under an obligation to ask for a preliminary ruling from the ECJ. However, from the perspective of political jurisprudence, courts are self-interested actors just like everybody else, albeit with some idiosyncratic rituals and value systems, so even their behavior must be expressed in terms of rational choice. So why was it in the Swedish Labor Court's interest to make an Article 234 reference to the ECJ? The answer to this question, I argue, is the same as why national courts in general have accepted the ECJ's Article 234 strategy: because it empowers the national courts by making them "Community judges" whenever questions of Community law arise. As we have seen, the Swedish model of industrial relations affords the Labor Court very narrow jurisdiction when deciding on the rulefulness of a collective action. If we accept the central proposition in political jurisprudence that all courts strive toward more power and greater influence, it follows that it was in the interest of the Swedish Labor Court to make an Article 234 reference for preliminary ruling.

Another explanation, which is wholly reconcilable with the previous one, is that the Article 234 framework allows for a "dispersion of responsibility".[185] The Labor Court's decision to make an Article 234 reference received strong criticism from commentators, and one can rest assured that, had the Labor Court asserted jurisdiction and adjudicated the dispute using Community law provisions, the criticism would have been even stronger. However, with the long-standing doctrine of a "division of labor" in Article 234 procedures – whereby the ECJ interprets the Community provision in question and the national court applies this interpretation to the facts of the case – the Swedish Labor Court could

[185] This tactic of "dispersion of responsibility", which is my own term, is quite similar to the tactic of separating a case into "questions of law" and "questions of fact", as discussed in section 2.1.2 (Shift 3).

deflect much of this criticism, by "blaming" any unwanted results on the ECJ. Conversely, in response to criticism, the ECJ could do the same by saying that it merely interpreted the provision, and "blame" the national court for handing down the actual judgment being criticized.

The last factor that I shall address in explaining the move to TDR is *the 2004 enlargement of the European Union*, which brought in ten new Member States to the Union. The average wage of workers in these new Member States was (and still is) markedly lower than that of the older Member States, which meant that employers employing workers from these so-called low-wage countries to do work in the "old" Member States would enjoy a comparative advantage over employers employing host country workers. Consequently, this raised the specter of "social dumping", which meant that trade unions would fiercely oppose any such attempt to import foreign labor. Of course, this is exactly what happened in both the *Laval* and the *Viking* cases. I point this out because, just like the constitutionalization of the EC Treaty System (discussed in section 2.2.3) depended upon a steady stream of traders challenging national regulations in court, so is the judicialization and Europeanization of national labor markets dependant upon private employers challenging labor regulations in court. In other words, the motors that perpetuate Stone Sweet's model are private litigants, and the incentive to litigate labor disputes have increased greatly following the enlargement of the EU, leading to an increase in potential litigants. To the extent that the ECJ's rulings are favorable to these litigants, we can thus expect more and more litigation in this field, which in turn can be expected to produce a self-sustaining process of judicialization.

5.2.3 Triadic Governance

Having exhausted the explanatory factors of the second shift of Stone Sweet's model, we now move on to analyzing what actually happened in the ECJ and how its judgments affected (or will come to affect) the normative structure in question. In other words, we are now focusing on shifts three and four of Stone Sweet's model. In dealing with the former, we will look at how the ECJ employed the different tactics available to the triadic dispute resolver (discussed in section 2.1.2) in the *Laval* and *Viking* cases, whereas our analysis of the latter will show how the Court's actual rulings in those cases will change the *ex ante* rules governing the Swedish labor market, and what impact this will have on the Swedish model of industrial relations.

The most notable features of the AGs' opinions and the rulings of the Court in both *Laval* and *Viking* are (1) the establishment of the right to resort to collective action as a fundamental principle of Community law, and (2) the balancing of this fundamental principle against another fundamental principle (the freedom to provide services in Laval, and the freedom of establishment in Viking). Although these two features are intimately related, for the sake of clarity, I shall analyze them separately.

Collective action as fundamental right

In my opinion, the Court acted extremely shrewdly when formally declaring the right to resort to collective action a fundamental principle of Community law. By doing this, it placated the trade unions' worst fears – that the Court would continue its alleged hard-line neoliberalist approach to liberalization of the common market – by recognizing that their most cherished right (i.e. the right to resort to collective action) was on par with the "business rights" (i.e. the four freedoms of movement) in the hierarchy of Community norms. In a sense, therefore, the recognition of the right to resort to collective action was as much a matter of symbolism as it was a matter of legal dogmatism.

This assertion is supported by the fact that Sweden had been guaranteed in an annex to its Accession Treaty that joining the European Community would in no way affect the Swedish model of industrial relations.[186] Since the right to resort to collective action is the very keystone of that model, it was always, in my opinion, unlikely that the ECJ would flout this guarantee. By instead formally recognizing it as a fundamental principle of Community law, then, the Court did not actually make any radical changes to legal doctrine, but rather gave the trade unions something that superficially seemed like a partial victory. This whole exercise, therefore, should be seen as the Court trying to adjudicate the dispute in a way that furthers its own agenda, while at the same time making sure that doing so does not put its social legitimacy at risk.

Proportionality tests

After having recognized the right to resort to collective action as a fundamental principle of Community law in both *Laval* and *Viking*, the Court is quick to point out that this recognition does not mean that the right is without exceptions. In both cases it immediately points out that this right may impinge on the rights of freedom of movement, and that, therefore, the two opposing rights must be *balanced* against each other.[187] This balancing exercise is then governed by a proportionality (or "least means") test.

Of course, this sequence of events is precisely what Stone Sweet's model predicts. Having established that both rights at issue were (a) of equivalent status in the hierarchy of norms, and (b) opposed to one another in the specific conflict at hand, the model predicts that the Court would adopt the tactic of proportionality tests.[188] By doing so, the Court in effect admits that protecting two opposing fundamental rights is very difficult; that it therefore "must possess and wield wide discretionary powers" in order for it to do its job properly; and that "no firm or fast rules for protecting rights can be

[186] Documents concerning the accession of the Republic of Autria, the Kingdom of Sweden, the Republic of Finland and the Kingdom of Norway to the European Union, Official Journal C 241, 29 August 1994, declaration J. 46.
[187] See *supra* notes 136 and 168.
[188] Stone Sweet (2000), p. 98.

articulated".[189] The effect of this is that the Court becomes deeply involved in the *social context* of the dispute. This is something that especially AG Maduro is very candid about in his Opinion, when he discusses the virtues and vices of free trade and writes that "the European economic order is firmly anchored in a social contract".[190]

This mode of decision-making has two features worth discussing here. First, when employing these kinds of proportionality tests, it is "the policy dimension that varies, not the law *per se*",[191] which means that in a situation doctrinally identical to the disputes in *Laval* and *Viking*, the proportionality test may give a different result if the policy dimension is different. Second, Stone Sweet's model predicts that proportionality tests will inevitably become least-means tests, which the tests in *Laval* and *Viking* arguably already were.[192] As was shown in the discussion on least means tests above,[193] these tests inevitably involve the court adopting the perspective of the defendant, in order to determine whether he or she could have acted in a way that infringed less on the opposing right. In the case of *Laval*, the ECJ performed this test itself, whereas in *Viking* it deferred it to the national court. Regardless of where the test is performed, however, the profound effect that proportionality tests have on the nature of triadic dispute resolution remains the same.

The normative structure reconstituted

The last shift of Stone Sweet's model is the reconstitution – through triadic rulemaking – of the *ex-ante* normative structure. In other words, the questions that we will now tackle are (1) how the Court's rulings in Laval and Viking will come to change the "rules of the game" on the Swedish labor market; (2) how this change will reconstruct the social relations of the actors on that same market; and (3) what the enabling factors for this change were. Finally, I will investigate the factors that, I believe, will assure that the moves to TDR in these two instances were not isolated events, but rather the starting point for an ever increasing judicialization of Swedish industrial relations.

The ways in which Laval and Viking will come to change the substantive rules regulating the labor market are two-fold. First, the ruling in *Laval* unequivocally struck down the Lex Britannia as being incompatible with Community law. In all likelihood, this means that Sweden will have to either abolish this law, or amend it so as to make it applicable only vis-à-vis

[189] Stone Sweet (2000), p. 99.
[190] *Supra* note 159.
[191] Stone Sweet (2000), p. 99.
[192] Note the wording of the judgments: "suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it" *supra* note 140, and "[it is for the national court to examine whether] FSU did not have other means at its disposal which were less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into with Viking", *supra* note 169.
[193] See section 2.1.2 (Shift 4).

third country nationals.[194] Doing so, however, would likely raise fears about "social dumping" and "unfair competition", i.e. employers in low-wage Member States entering into collective agreements in that Member State and then posting workers in Sweden. Without the exceptions to the MBL afforded by the Lex Britannia, the trade unions would be under obligation to observe good labor relations with such an employer, and would thus be precluded from resorting to collective action in order to raise those workers' wages. This in turn would put a downward pressure on Swedish workers in the concerned sector, argues the defenders of the Lex Britannia. As a result, it is not unlikely that Sweden would have to either legislate on minimum wage, or implement a system of declaring *erga omnes*-applicability of collective agreements.

The second change brought about by *Laval* and *Viking* is the introduction of proportionality tests in determining the rulefulness of a collective action. As we saw in the discussion on the Swedish model of industrial relations (section 3), the use of proportionality tests is wholly foreign to the Swedish model. The importance of this change cannot be overstated; considering the flexibility and inherent indeterminacy of proportionality tests, the Swedish Labor Court will become vested with jurisdiction and power vastly beyond that which it previously enjoyed.

Although the rules-changes necessitated and implicated by *Laval* and *Viking* are important in their own right, the most profound effect of these two cases will be their impact on the relationship between the social partners. In terms of Stone Sweet's model, we have thus completed the first "lap around the circle" and are now discussing the first shift of the second lap. In this regard, the change that cannot be emphasized enough is – again – the introduction of proportionality tests; for as shall be recalled from the previous discussion (section 2.1.2), proportionality tests do not only entail the judges adopting the perspective of legislators (or in this case *trade unions*), it also entails legislators/trade unions adopting the perspective of the courts. This is a simple, but nonetheless very profound, result of the introduction of proportionality tests, for it means that trade unions will now have to factor the current legal discourse into its calculations on whether to resort to collective action, by asking itself (a) whether such action would constitute a restriction on the freedom of movement of the employer, (b) whether the objective pursued is a legitimate one, and (c) whether it is suitable for securing the attainment of that objective and does not go beyond what is necessary in order to attain it. Compared with the traditional Swedish model of industrial relations, where such considerations would have been pointless, this change verges on the revolutionary.

Before moving on to the factors that, I believe, will guarantee the perpetuation of this process of judicialization, we must briefly take a step

[194] The Swedish government recently commissioned an investigation into what legislative measures may be required in order to bring Swedish laws into conformity with the ECJ's ruling in *Laval*; see Dir. 2008:38 *Konsekvenser och åtgärder med anledning av Laval-domen*.

back to shift four of the first lap around the circle. We do so in order to establish what factors made it possible for the triadic rulemaking of the ECJ to reconstitute the normative structure in the first place. Fortunately, these factors are fairly obvious and straightforward; they are the twin-doctrines of *direct effect* and *supremacy of Community law*. Now, since these doctrines have already been thoroughly discussed, I will limit my remarks to emphasizing once again the vital importance of these doctrines in assuring the penetration of Community law in the national legal systems. Without the doctrine of direct effect, the plaintiffs in *Laval* and *Viking* would have lacked *locus standi*,[195] since their claim was that their rights of freedom of movement – which according to settled case law have direct effect – had been violated. Without the doctrine of supremacy, any incompatibility of national laws with Community law could easily have been overturned by the legislator, by simply passing a new law and relying on the maxim of *lex posteriori derogat legi priori*. It could furthermore be argued that the ECJ's recent extension of the doctrine of state liability – to include actions of national courts[196] – exerted an influence on the Swedish Labor Court not only to make an Article 234 reference in the first place, but also to adhere loyally to the resulting preliminary ruling in the national proceedings.

As promised, I shall conclude this analysis by looking at the two factors that, I believe, will ensure a continuation of the judicialization initiated by the move to TDR in *Laval* and *Viking*. The first of these factors is – once again – the ECJ's use of proportionality tests. Now, as the reader knows, these tests are inherently indeterminate and contextual. Moreover, under the so-called CILFIT criteria, national courts of last resort are under an obligation to make an Article 234 reference whenever there is the *slightest* doubt as to the correct interpretation of Community law.[197] It follows that the Swedish Labor Court – which is a court of last resort – will essentially always have to make a reference to the ECJ whenever it adjudicates a labor market dispute involving a foreign employer. To the extent that the ECJ maintains the pro-integrationist stance adopted in both *Laval* and *Viking*, this should assure a steady stream of private litigants, which, as the reader knows, is the engine that drives Stone Sweet's model.

The second factor concerns the ECJ's *zone of discretion*. As will be recalled from my explication of this concept above,[198] the Court's zone of discretion is the widest when interpreting the Treaty, since in order to overturn such an interpretation, the Treaty would have to be amended, which in turn requires the Member States to convene as an Intergovernmental Conference (IGC) and take decisions by unanimity. It is therefore interesting to note that the ECJ largely refrained from deciding Laval and Viking on the basis of

[195] In more correct terms, the national court would not have been under an obligation to refer questions to the ECJ, since there would have been no issues of Community law relevant to the outcome of the case.
[196] Case C-224/01 *Köbler* [2003] I-10239.
[197] Case 283/81 *CILFIT* [1982] ECR 3415. See Haltern (2007), p. 240-241 for an explanation of why the CILFIT criteria lead to this result.
[198] See section 2.2.3.

secondary legislation – Directive 96/71 and Regulation No 4055/86 – by instead inventing, as it were, the fundamental right to resort to collective action, and then decides both cases by balancing this right against the rights of freedom of movement. By doing so, the Court essentially "chooses" the wider zone of discretion, thereby guaranteeing that its ruling will not be overturned, since a unanimous decision of 27 Member States – some of which have a strong interest in not overturning the rulings – is very unlikely. We can thus expect the framework set out in *Laval* and *Viking* to remain in place for the foreseeable future.

6 Conclusion

With this study, I sought to accomplish two things. First, I wanted to show how fruitful the adoption of an interdisciplinary perspective can be in trying to understand the complex social processes that shape the law. Legal dogmatic research no doubt plays an important part in this endeavor, but the analysis and categorization of case law and legal principles is more of a means to an end – rather than an end unto itself – in this regard. Rather, once this kind of work is done, it should be situated in a wider social theoretical framework, in order to help us understand what motivated the actors, what the wider implications of a court ruling will be, and so on. Of course, this is exactly what Stone Sweet has done; both in developing and in employing his model on judicialization and the construction of governance.

The second thing I wanted to accomplish was to make an original contribution to our understanding of *Laval* and *Viking* – both the actual disputes and their judicial aftermaths. Despite the fact that the dispute between Byggnads and Laval un Partneri was one of the most highly publicized labor disputes in Sweden in more than a decade, I have not come across any scholarly study examining the motivations and strategies of the disputants, nor any studies situating the ECJ's rulings within the wider debate on judicialization and Europeanization. Thus, whatever this study may lack in merit, it makes up for in being first. Hopefully, it may also serve as inspiration for someone with more time and resources to undertake a similar, but more thorough, study.

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