Comparing the NAALC and the European Union Social Charter (Transcript)

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Abstract
This is a transcript of Professor Lance Compa's presentation to the North American Agreement on Labor Cooperation Conference held in Washington, DC on November 12, 1996 and published in the American University Journal of International Law and Policy.

[Excerpt] After all of the excellent comments this morning and so far this afternoon, both from the panelists and from the floor, I am not sure that I can say anything new about the NAALC. So, what I want to do in this intervention is add some comparative discussion with respect to the European Union and the social charter of the European Union. It has always been a key point of reference for people analyzing the NAALC and, particularly, for critics of the North American Agreement on Labor Cooperation.

Keywords
North American Agreement on Labor Cooperation, NAALC, North American Free Trade Agreement, NAFTA, Canada, United States, Mexico, labor law, standards, administration, European Union

Disciplines
International and Comparative Labor Relations | Labor and Employment Law

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PRESENTATION BY LANCE COMPA, DIRECTOR, LABOR LAW & ECONOMIC RESEARCH, SECRETARIAT, COMMISSION FOR LABOR COOPERATION OF THE NAALC

After all of the excellent comments this morning and so far this afternoon, both from the panelists and from the floor, I am not sure that I can say anything new about the NAALC. So, what I want to do in this intervention is add some comparative discussion with respect to the European Union and the social charter of the European Union. It has always been a key point of reference for people analyzing the NAALC and, particularly, for critics of the North American Agreement on Labor Cooperation. Let me give you a couple of quick examples:

First, “We should study the European Community for lessons on the process of creating new institutions to address the social consequences of economic integration.” This quotation was part of a document titled JUST AND SUSTAINABLE TRADE AND DEVELOPMENT INITIATIVE, by the Alliance for Responsible Trade, the Citizens Trade Campaign, and the Mexican Free Trade Action Network.

Second, “We need minimum global standards for labor rights. The European Community’s social dimension provides one possible model for minimum standards.” This quotation, written by Jeremy Brecher and Tim Costello, appears in the excellent book GLOBAL VILLAGE OR GLOBAL PILLAGE which examines this whole question of international labor rights.

Third, “The NAALC is based on national enforcement of national law, rather than on a single set of common labor rights standards for the three countries. The European Union’s model of a social charter, mandatory for all member countries, was abandoned by NAALC negotiators.” That was written by me in a paper that I presented in 1994. This is generally the impressionistic take on the European Union’s social dimension, as compared to the NAALC.

While there are many ways in which the European Union structure and process is more developed than that of the NAFTA institutions, you must keep in mind that they’ve have had practically 40 years to work on these issues. With respect to the European Union’s social dimension and the NAALC, there are surprisingly similar features which should be noted while closely analyzing these two important instruments.

The NAALC sets forth the 11 labor principles that are contained in the annex to the agreement. This represents the key definitions of the labor rights issues that are going to be addressed under this instrument. Under the European Union over the years, there have actually been several social charters. Their current central one is called the Community Charter of Fundamental Social Rights of Workers. It contains 12 points, which largely overlap with the 11 points of the NAALC.

The definitions, however, are a little different, and you can find one in the other. A key difference is that the first principle or the first fundamental social right that the Europeans define is the right of free movement of workers among the countries partnered to that arrangement. This right is obviously something not present in the North American agreement. By and large, both of these instruments set forth a se-
There are two big criticisms of the NAALC which have already been voiced here this morning—or at least implied in the discussions. In many other forums, the European Union arrangement is held out as an alternative, another way of handling these points. I think that on close inspection, the similarities are more surprising than you might expect.

The first big criticism of the NAALC is that there are no common trinational, harmonized, uniform, minimum, mandatory, enforceable standards. I probably could have shortened that, but you get the idea. The idea is that instead of having a common set of standards to which the countries must adhere, you have this formulation: that the NAALC is all about national enforcement of national law; that each country remains sovereign to establish its own domestic labor law and set its own labor standards; and that what the NAALC is concerned with is effective enforcement of domestic laws, and not adjusting domestic laws to some new harmonized minimum standard to which everybody must adhere.

In theory, this is not an unfair criticism. In the best of all worlds, everybody would agree on a common set of standards, stick to them, and establish some mechanism to back them up.

The second major criticism of the NAALC concerns the division of the 11 labor principles into 3 tiers of treatment under the agreement, as has already been outlined this morning. Certain specified labor rights are excluded from the NAALC process of enforcement. These include, namely, the freedom of association and the right to organize, the right to collective bargaining, and the right to strike. These subjects can only be treated by the NAO review and a ministerial consultation. They cannot go forward to evaluation or arbitration.

This is also a fair criticism. Is something a principle or isn't it? Is it a right or isn't it? Because you cannot have rights that are less rights or more rights. When it is a fundamental right, it ought to be treated equally.

But what is the reality in the European Union as it compares to the NAALC? First, there is this criticism that the NAALC does not contain trinational standards, while the European social charter does set uniform, enforceable international standards to which all the member countries must adhere. It is just not the case.

The Community Charter of Fundamental Social Rights of Workers is "a solemn declaration of the member countries of the European Union." That is all it is. It is not some sort of European law to which all the countries must adhere and adjust their laws. It is a solemn declaration. In fact, the last paragraph of the Community Charter of Fundamental Social Rights of Workers issued by the European Union states: "It is the responsibility of the member states, in accordance with national practices, through domestic legislation, to guarantee the social rights in this charter." This represents the starting point and the ending point of this Community Charter of Fundamental Social Rights.

At the same time the European Union structure does contain a mechanism for the adoption of what are called "Directives." A European Union Directive is, in
effect, a European law that is applicable to all the member countries. All member
countries must come into compliance with a Directive. If they do not comply with
a Directive or if member countries’ national courts do not enforce the Directive,
there is recourse through the European Union structure.

This brings us to another important point of comparison between the two in-
struments. As mentioned, the NAALC divides the labor principles into three tiers,
which excludes the freedom of association and the right to organize, the right to
collective bargaining, and the right to strike from anything but the minimal initial
 treatment under the agreement.

Many people believe that in the European Union all the labor rights—all of
these 12 points of this Community Charter of Fundamental Social Rights—are
treated equally. It is not so. In reality, the European Union’s fundamental rights are
also divided into three tiers in the way that the Community is able to adopt Direc-
tives with regard to the subject matter at hand.

The first tier is where rights can be enforced against countries that vote against
a Directive. On these matters, European law applicable across the board can be
adopted by qualified majority voting. It is very complicated in that voting is not
exactly “one person, one vote” by population, but the votes are weighted somewhat
according to country size.

In this first tier of European Union labor rights, the countries that vote against it
would still be bound. The subject matters susceptible to this first level of treatment
include: health and safety; equal pay for equal work; and information and consul-
tation for workers. These are subjects that are, relatively speaking, non-controver-
sial.

There is a middle tier of labor rights in the European Union, much like there is a
middle tier under the NAALC that can get NAO review and ECE evaluation, but
cannot go forward to arbitration. Directives concerning this middle tier of labor
rights in Europe can be adopted by unanimity, rather than by qualified majority,
thus creating Europe-wide legislation. That is, all countries must agree prior to the
adoption of a mandatory minimum standard to which all countries must adhere.
Unanimity is a much higher threshold than the qualified majority vote required in
the first tier.

This middle tier area of labor rights includes matters of health insurance, work-
ers’ compensation, and “social security.” In Europe, “social security” is a much
broader field than what we in the United States commonly think of as Social Secu-

rity. In addition, the middle tier includes the discharge of individual employees, the
termination of the individual contract of employment, migrant worker rights and
protections, and works councils and co-determination. It is important to keep in
mind that works councils in the European setup are not unions, nor do they engage
in collective bargaining. They are something else. They are a form of consultation,
a form of what we, in U.S. terms, would call “meet and confer” procedures, with-
out really any obligations on either side. Those are the areas that are subject to this
middle tier, where you must have unanimous consent of all the countries to estab-
lish Europe-wide, binding Directives.

The third tier of labor rights under the European Union master treaty includes three subject matters in the social charter that cannot be the subject of Directives, of Europe-wide legislation. They are, lo and behold, the freedom of association and the right to organize, the right to collective bargaining, and the right to strike. These are off the table, excluded from even the possibility of becoming subject to Europe-wide Directives, even by unanimity. The countries were so concerned about not opening up these subject areas to Europe-wide mandatory treatment that they said, “Even if we all agreed at one time, we don’t want to even allow that possibility to take place.”

Now, why do we see that in Europe, and why did we see it in the NAALC context, and why is it such a compelling issue? I think it is because, first of all, there are terrific technical problems if you start trying to create uniform standards in this area. In the European context, some countries have a principle of exclusive representation: Only one union can exist in a workplace and represent the same category of workers. Other countries permit multiple unions in the same workplace, which bargain and represent the same categories of workers at the same time. I am not talking about craft unions for different crafts, but about competing unions that represent workers in the same jobs. Some countries require majority status for unions to operate, while other countries permit minority unions to operate. Although some countries severely limit the right to strike, others have pretty liberal provisions for the right to strike.

Once you get past the generalities of saying that we are going to all have freedom of association, bargaining, and the right to strike, you would have a very difficult time setting any kind of uniform standard.

More importantly, I think that this issue is so critical these issues are so basic in a society that nobody, no government, and no citizenry wants to yield sovereign capacity in this area. Regardless of the balance which has been struck in a given country, it has been struck as a result of history, culture, class conflict, and political struggle. Each country’s system of labor-management relations represents the compromise that has been reached.

It is unrealistic to expect that an international agreement, especially the first time out of the box in something like the NAALC negotiation, is going to come in and sweep away these relations that have been built up over decades, or even centuries, of these kinds of social struggles.

I think it’s asking too much if you expect the NAALC to come in all at once and change Mexico’s system of labor relations, any more than you could expect the NAALC to come in and be used to overturn “the anti-labor” aspects of the Taft-Hartley Act or to overturn “the anti-labor” aspects of Bill 7 in Ontario, which has outraged the trade union community in Ontario and in much of Canada. It is, after all, the bill that was produced by the elected legislature of that province.

I think we have to be very careful about expecting a new international entity to come in with a supra national power and upset these relationships that have been
very carefully constructed over the decades with a lot of struggle, turmoil, and sacrifice.

PRESENTATION BY MARIA COOK, PROFESSOR, SCHOOL OF INDUSTRIAL & LABOR RELATIONS, CORNELL UNIVERSITY

I want to raise a question that has not really been asked with regard to the NAALC, although there have been some references to it here. That is, can the NAALC influence domestic debates and outcomes on labor law reform? In particular, can the NAALC play a role in stemming or even reverting the erosion of worker protections in national labor legislation?

I think the question is relevant here because in the NAALC, the parties commit themselves to the effective enforcement of domestic labor legislation. Critics have often pointed to this as a sort of escape clause for countries who might have weaker legal protection for workers’ rights or who might wish to change their domestic labor legislation in a weaker direction.

I am going to focus my comments on Mexico because it is the case I know the best, and it has had the most NAALC submissions so far. This discussion should also be applicable to the United States and Canada, which are also facing questions of whether domestic legislation is strong enough to protect workers’ rights to organize and to strike, in the case of the United States, and the privatization of labor law enforcement in the case of the Canadian province of Alberta, for example.

The other, related objective of my talk today is to give you some sense of the status of the domestic debate in Mexico over labor law reform. I want to start with this discussion and then end by pointing out some areas where the NAALC may link up with the Mexico labor law reform discussion.

As many of you are probably already aware—and as became clear during the NAFTA debates in this country—Mexico has fairly strong and detailed worker protection legislation in its federal labor law and in Article 123 of the Mexican Constitution. Several groups in recent years have begun to call for changes in this labor legislation, arguing that both economic liberalization in Mexico and greater democratization require changes in the law and in labor institutions.

I want to discuss briefly three takes on this labor law reform debate in Mexico. While these are not the only proposals that have weighed in on the reform question, these are among the most complete or the most discussed contributions to the debate. The three are employer group proposals for changes, the National Action Party proposal and, finally, recent discussions between employer and labor groups on what they have termed “a new labor culture” or “a new culture of employment relations.”

Employer organizations in Mexico have been pushing for labor law reform for some time. In general, employers have been pushing for greater flexibility and lower costs and for restricting union involvement in politics. They argue that such changes are necessary in the current economic environment so that employers can be more competitive.