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

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

Comments

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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-

ries of fundamental labor rights.

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 trilateral, 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 trilateral 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 instruments. 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 Directives 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 consultation for workers. These are subjects that are, relatively speaking, non-controversial.

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, workers' 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 Security. 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, without 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

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very carefully constructed over the decades with a lot of struggle, turmoil, and sacrifice.