Katherine Van Wezel Stone

The Prospects for Transnational Labor Regulation: Reconciling Globalization and Labor Rights In The EU and NAFTA[1]

Abstract

This article describes and analyzes the ways in which nation-states are attempting to regulate labor relations across national borders at the present time, with particular reference to labor regulation by the European Union and NAFTA. It begins with a discussion of the reasons why some groups have advocated transnational labor regulation. It then identifies four distinct models of transnational labor regulation that have emerged in recent years – preemptive legislation, harmonization, cross-border monitoring, and extraterritorial jurisdiction. The article concludes that we must develop a new model of transnational labor regulation that draws on the strengths of each of the existing models.

Introduction: Globalization is Not Free Trade

Globalization means the interpenetration of economic life across national borders. It is manifest in many ways: Direct foreign investment by multinational corporations has increased dramatically in the past decade. The nations of the world are dividing themselves into trading blocs. Telecommunication and computer technologies have made it easier for firms to engage in production, distribution, and marketing all over the world. Trade barriers are falling, foreign exchange restrictions are disappearing, and national borders are becoming permeable. World trade, not domestic trade, is now the engine of economic growth.

Many labor lawyers, legal scholars, economists and political scientists share a view that globalization will mean the demise of justice, equality, and workplace rights in the Western world. They claim that globalization, to wit, the inexorable spread of free trade, will supplant and marginalize national politics. This is because, they claim the global economy undermines the capacity of nation-states to regulate their own domestic economies. The diminished regulatory capability of the nation-

[1] An expanded version of this article appeared in Katherine Van Wezel Stone, 'Labor and the Global Economy: Four Approaches to Transnational Labor Regulation,' 16 *Michigan Journal of International Law* 987-1028 (1995).

state is the result of two distinct factors. First, within trading blocs, much domestic regulation is superseded by multilateral treaties and tribunals that have *de facto*, if not *de jure* trumping power. Second, there is a practical limitation on the ability of one nation to regulate its domestic affairs in a world where labor and capital move freely in, out, and across national borders. Thus such academics conclude that globalization will lead to the demise of the Western welfare state, the decline of Western labor movements, and the deterioration of labor law.

This gloomy view, sometimes described as 'Euro-pessimism,'[2] takes as its premise that there is an iron law of free trade that will bring about an inexorable march of globalization. Here I want to challenge this thesis so that we can break out of this globalized version of the Weberian iron cage and begin to think constructively about the shape that our transnational institutions should take.

In today's world, *free trade* is a highly charged idea, an idea that is intensely normative and highly privileged in policy debates. The phrase 'free trade' acts as a trump card in discussions of economic, legal or social policy, providing justification for some policies and silencing consideration of others. In the realm of public policy, it seems that we are all Ricardians – we all believe that the freer the trade, the better off we will all be.

While the Ricardian theory of comparative advantage and free trade might have powerful claim to truth-status, we must remember that globalization is *not* the same as free trade. In the past twenty years, we have not seen the development of free trade at all. Rather, the rules of trade have changed dramatically. The most salient change is that trade has been reorganized into trading blocs. The trading bloc system means that there is one set of trading rules for nations inside a bloc and another set of rules to govern relations between nations in the bloc and the rest of the world. Thus, in the last twenty years, as trading blocs have been formed or fortified, the nations involved have changed their relationship to those within the same bloc from relations governed by diplomacy and unilaterally-promulgated trading rules to relations governed by bureaucratic and quasi-democratic devices of representation and administration. Trading blocs are not free trade, they are instead a new map of the boundaries and entities of trade, a new definition of insiders and outsiders, new decision-making bodies and new rules of trade.

If we understand the recent past as characterized by a restructuring of the rules of trade rather than a freeing up of trade, we can ask questions like:

- within trading blocs, what role is there for politics at the national level?
- what role is there for interest groups, especially labor?
- what constitutes progressive politics within trading blocs?
- what constitutes progressive politics between trading blocs and the rest of the world?

In asking thse questions, we must remember that domestic politics produced the trading blocs in the first place. Also, domestic trading blocs produced different trading

[2] Trubek, 1995.

blocs, with different rules, in different places. For example, the European Union attempts to create a free internal market in capital, goods and labor, whereas the North American Free Trade Agreement attempts to create a free internal market in capital and goods but not in labor. As shall be shown, this difference has great significance for the operation of the trading rules in each bloc and for the impact of the rules on labor.

Once trading blocs exist, they have an impact on the possibilities for political action within nations. Trading rules operate to privilege some groups over others and to make some forms of collective and political action easier to exercise, while rendering other forms less effective. However, even rules of trade that operate to disempower for labor and advantage labor's opponents leave a considerable role for politics at the domestic level, as well as at the level of the trading bloc's decision-making agencies. Trading blocs and the rules of trade they embody are not products of an inexorable march of globalization, they are products of political choices made by national governments. Thus they can be tailored, modified, and even repealed.

This paper presents four models of transnational labor regulation that currently exist within the trading blocs of the West. I present the models as general regulatory structures rather than as specific codes or doctrines because at this level of generality, we can evaluate each one's impact on labor rights. I do this with the belief that it is possible to influence or even design the institutional forms which will define the 'global economy' and that to do so, we must first develop a vision of what types of regulatory structures are most likely to produce fair and equitable outcomes both within trading blocs and between blocs and the rest of the world.

The Impact of Globalization on Labour

By now, the various problems that globalizations causes for labor organizations are well known. First, globalization diminishes labor's bargaining power in several respects. As capital mobility increases, businesses go to countries with lower labor standards. This is known as the problem of the runaway shop. Further, when firms can relocate easily, unions have less power at the bargaining table in their home countries because they are always bargaining against the threat of relocation. In practice this means that companies will be less likely to yield to union demands, and unions will not make demands out of fear of triggering business flight.

Second, globalization diminishes the level of domestic labor-protective regulations. This is known as the problem of the 'race-to-the-bottom.' Companies prefer to produce in legal environments that offer the least protections for labor. This fact places labor in a prisonners' dilemma: It both wants domestic protective legislation to improve labor standards but is acutely vulnerable to the capital flight that increased labor standards can trigger. This dilemma is intensified as economic life becomes more global, rendering labor less effective as a political actor.

Third, globalization encourages regulatory competition. Regulatory competition occurs when nations compete for business using lower labor standards to attract businesses. Regulatory competition caues non-labor groups to oppose labor regulation on

the ground that business flight hurts them. Thus regulatory competition could trigger a downward spiral, in which nations compete with each other for lower labor standards, and labor loses its historic allies at the domestic level and is thus rendered powerless to resist.

Fourth, globalization, with its runaway shops and races-to-the-bottom pits labor organizations in one country or region against those in another, thus leading to organizational fragmentation. One strategy unions could use to diminish the possibilities of purely domestic runaway shops and races-to-the-bottom would be to advocate supra-national legislation that would equalize labor standards. Another possible union strategy would be to organize in low-wage nations and regions and bargain for parity. However, these strategies, which can work within a single country, and problemmatic when corporations move beyond national boundaries. Countries have labor laws and collective bargaining systems that differ markedly from each other, even within the Western world. Thus it is difficult for unions in one country to collaborate with unions in other countries in a way that jointly harnesses their economic weapons and furthers their joint bargaining goals.

Finally, globalization can lead to the deterioration of labor's political role. National labor movements operate in the context of a particular regulatory environment. Labor's political power is undermined when the locus of labor regulation moves from a national to an international arena. Further, if labor ceases to be a voice in national politics, then the democratic nature of government is also undermined. Unions function not merely as economic workplace-based organizations, but also as political lobbying groups and electoral blocs. Collectively, labor unions articulate the interests and public policy concerns of a large segment of the population. Without labor unions continued presence in national politics, this segment of the population would be silenced.

Four Models of Transnational Regulation

Given the many respects in which globalization is a threat to domestic labor movements and labor regulatory regimes, most trade unionists and many labor relations professionals have viewed the rapid march of globalization with alarm. It is sometimes posited that transnational labor institutions will be developed, and transnational labor standards will be adopted that will replace a national labor regulatory regime with an international one. This scenario suggests that transnational labor standards will emerge, along with transnational labor movements to implement them and multilateral tribunals to enforce them, which will recreate at the international level the protections labor currently enjoys domestically.

However, this view begs the question of which regulations will prevail at the multilateral level and how they will be enforced. Further, it ignores the problem of how the multilateral agencies – agencies whose relationship to any particular political constituency is attenuated to begin with – will be persuaded to provide labor protections in the first place.

Rather than embark on an imaginary journey into possible forms of labor regulation in a trading bloc world, I want to describe four types of transnational labor regulation

that are emerging in fact. They are (1) pre-emptive legislation; (2) harmonization; (3) cross bordern monitoring and enforcement; and (4) extraterritorial jurisdiction. Below I describe each of these briefly, and then suggest a framework for comparing and evaluating each of them. I conclude that none of these is an adequate solution to the problems that globalization poses for labor, but by examining them we can begin to imagine what a desirable model of transnational labor regulation would look like.

(a) Two European Approaches to Transnational Labor Regulation

The European Union provides transnational labor regulation in two ways. One approach, preemptive legislation, includes treaty provisions and EU regulations that are directly applicable to citizens of the member states. These regulations set uniform rules for certain labor rights, and have priority over conflicting national legislation. To date, the EU has promulgated only a few regulations on labor matters, in the areas of immigrant workers, gender equality, and occupational safety and health.

The other approach is harmonization. Harmonization refers to EU legal rules that induce the member states to bring their separate labor laws into conformity. Harmonization occurs both directly, through EU Directives, and indirectly through collateral regulations. It is a strategy of regulation that is based on the short-term acceptance of differences in regulatory regimes, and it embodies the assumption that, over time, differences will fade and there will emerge one set of norms, rules and procedures.

There are presently EU Directives in effect in several areas of labor regulation. In 1975 the EU lawmakers adopted a directive on collective redundancies, also known as dismissals for economic reasons. In 1977, a directive was adopted to protect workers faced with takeovers and other changes in their ownership of their firms. It called for protection of the workers' preexisting contracutal rights and imposed these contractual obligations on the new entity.[3] In 1980, a directive was adopted on insolvencies that requires firms to guarantee payment of workers' outstanding wage claims and benefits prior to the commencement of insolvency proceedings.[4] There have also been directives addressing workplace safety and health,[5] and equal treatment for men and men.[6]

In 1992, at Maastricht, eleven of the twelve EU member states agreed to a Protocol on Social Policy,[7] which set out a series of issues on which the EU could legislate on

[3] Council Directive 77/187 O.J. (L 61) 26. See *Foreningen AF Arbejdsledere v. Daddy's Dance Hall*, Case 324/86 (1988) ECR 739 (employees' rights under acquired rights directive cannot be waived).
[4] Council Directive 80/987 O.J. (L 283) 23, October 20, 1980.
[5] See e.g. Council Directive 92/29 O.J. (L 113), March 31, 1992 (minimum safety and health requirements on board vessels); Council Directive 83/447 O.J. (L 206) June 25, 1991, (protections for workers from risks associated with asbestos exposure); see generally. Addiserv & Siebert, 1994 (charting out various directions that have passed or whose passage is imminent).
[6] Council Directive 76/207 O.J. (L39) and 86/378 O.J. (L 225).
[7] Protocol on Social Policy, European Social Policy, No. 16 (Feb. 13,1992). The United Kingdom refused to accept the Protocol on Social Policy. Because amending the EEC Treaty requires unanimity, the Protocol did not amend the Treaty and is not binding on the UK. *Id.* The Protocol thus constitutes a separate agreement that binds only the eleven member states that subscribed to it. See Lo Faro, 1992.

the basis of majority voting, rather than unanimity as had previously been required.[8] These areas include health and safety protection, working conditions, workers' information and consultation rights, and equality between men and women. It expressly does not include most collective labor rights, such as pay, the right of association, the right to strike or the right to impose lockouts, for which unanimous voting was retained.[9]

In September, 1994, the first Directive was issued under the new Social Agreement. It provided for the establishment of European Works Councils, or other consultative procedures by all European multinational enterprises.[10] These are workplace-based organizations established for the purpose of consultation and infomration-sharing, not for the purpose of providing worker representation. A number of multi-national corporations have begun to set up transnational Works Councils, and although it is not legally binding on the UK, some have included their UK workers in the arrangements.[11]

EU directives have force only to the extent that they are implemented by the member states. The 1992 Social Protocol provided that directives could be implemented through collective bargaining as well as through legislation or administrative regulation. Thus the actual application of the directives can vary greatly from state to state. In 1991, the European Court of Justice ruled that a member country could be held liable to an individual worker if the country failed to implement a labor protective directive.[12] This decision could lead to a more uniform application and enforcement of directives.

(b) Two North American Approaches to Transnational Labor Regulation

In North America, there has been no attempt either to harmonize collective bargaining systems or to unify labor standards. But there has nonetheless been an expansion of transnational labor regulation. This has occurred in two ways: (1) NAFTA's mechanisms for cross-border monitoring and enforcement of labor standards; and (2) extraterritorial application of US domestic law. Both North American models of transnational labor regulation create mechanisms through which the labor laws of one country are applied to citizens or corporations in another country.

The North American models of transnational labor regulation differ from the European ones in that the cross-border application of labor laws in the North American models is neither cumulative nor on-going. Rather, the two North American models provide a means by which citizens of one country are given rights or obligations under another country's labor laws on a one-time, single-use basis. Thus the two North American models do not attempt to integrate the separate systems of labor

[8] See Bercusson, 1992.
[9] Blanpain, 1992.
[10] Council Directive 94/45, 1994 O.J. (L254) 64.
[11] Taylor, 1995, at 11.
[12] Francovich v. Italian Republic, 1991 ECR I-5357, 67 CMLR 66 (1993).

regulation. Rather, they embody an approach to transnational regulation that can be termed the *interpenetration* of two legal systems – the temporary incursion of one distinct and autonomous system of regulation into a separate and autonomous system.

I. CROSS-BORDER MONITORING AND ENFORCEMENT

The North American Free Trade Agreement (NAFTA) was signed by the heads of state of Mexico, Canada, and the United States in 1992. In August, 1993, before NAFTA was submitted to the US Congress for approval, President Clinton negotiated a Side Accord on Labor Cooperation, known as the North American Agreement on Labor Cooperation (NAALC).[13] He did this in an effort to address concerns about NAFTA raised by organized labor, particularly concerns that NAFTA would cause massive job loss.[14]

The NAALC Agreement seeks neither to equalize labor standards nor to establish a minimum floor of labor standards or labor rights.[15] Unlike the power of the EU Commission to enact labor regulations and directives, the agencies established by the NAALC Agreement have no authority over the actual labor standards of the member countries. The Agreement explicitly says that no country is required to alter its labor standards in any way.[16] Rather, it merely addresses the enforcement of each countries existing labor laws.

The NAALC does provide procedures to ensure that the countries enforce some of their labor laws, culminating in arbitration and the possibility of sanctions. However, not all labor laws have their enforcement safeguarded. Arbitation and sanctions are only available for non-enforcement of a country's laws pertaining to occupational health and safety, child labor, and minimum wages. And even within these three limited areas, the enforcement procedures are drawn-out, cumbersome, and riddled with qualifiers and exceptions. For example, the enforcement procedure calls for sanctions when there is a finding that a party has engaged in a '*persistent* pattern of failure... to *effectively* enforce its occupational safety and health, child labor, or minimum wage technical labor laws...'[17] In addition, Article 49 carves out an enormous exception to the cross-border enforcement procedure. Article 49 says that a party does not fail to 'effectively enforce its [labor laws]' if the action or inaction either

'(a) reflects a reasonable exercise of the agency's or the official's discretion with respect to investigatory, prosecutorial, regulatory or compliance matters; or

(b) results from bona fide decisions to allocate resources to enforcement in respect of other labor matters determined to have higher priority.'

[13] North American Agreement on Labor Cooperation, 1993 DER 177 (BNA, September 15, 1993).
[14] For a detailed chronology and analysis of organized labor's opposition to NAFTA, see Cowie, 1994.
[15] See Langille, 1996 (comparing EC labor regulation with NAFTA on basis that the former sets 'baseline norms' for labor regulation and the latter does not).
[16] North American Agreement on Labor Cooperation, Art. 2.
[17] Id. Article 35 (2)(b) (emphasis supplied).

There is almost no instance, at least under US labor law, in which government failure to enforce a labor law cannot be said to fall within one of these exceptions.

Thus the NAALC Agreement holds little prospect of equalizing labor standards within North America. Nor is it likely to harmonize or otherwise bring consistency to the vastly different collective bargaining systems that exist within North America. At best it might lead to more vigorous enforcement of each country's own pre-existing labor laws in some limited areas.

II. EXTRATERRITORIAL JURISDICTION

Another North American model of transnational labor regulation is the application of domestic labor regulation extraterritorially. From an American standpoint, this means applying US labor law to labor disputes that occur beyond US boundaries, or to parties who are not US citizens. Extraterritorial jurisdiction is becoming an increasingly important feature of American labor law. It is a trend that can be seen in all three branches of government: Courts are beginning to interpret some of the labor relations statutes in ways that give them extraterritorial reach; Congress has recently amended two major labor law statutes so as to make them expressly extraterritorial; and the Executive Branch has begun to condition trading privileges of foreign countries on compliance with American labor standards.

For example, the courts have recently modified their previous maxim that American labor law does not apply extraterritorially. In 1992 the Court of Appeals for the Eleventh Circuit applied the secondary boycott prohibitions to an American union which requested Japanese unions to exert economic pressure against their own, Japanese, employer.[18] And in 1994, the Court of Appeals for the Fifth Circuit held that the NLRB had jurisdiction over unfair labor practice charges filed by US nationals who were employed on a US vessel that was operating indefinitely in Hong Kong.[19] In that case, the National Labor Relations Board had required the shipper-employer to bargain with the union elected to represent the ship's crew. The Court affirmed the Board's assertion of jurisdiction, finding that there was no actual conflict between application of the NLRA and the requirements of Hong Kong law.[20]

Such cases indicate that there has been a change in the attitudes of courts and agencies about the scope of jurisdiction of US labor laws. In addition, on two occasions in the past ten years, Congress expressly made certain US labor laws extraterritorial. In 1984, it amended the Age Discrimination in Employment Act, and in 1991 it amended the Civil Rights Act, making both statutes applicable to US corporations employing US workers and operating overseas.[21] In addition, the Americans with Disabilities Act of 1990 is coextensive in its extraterritorial application with the Civil Rights Act of 1991, so that it too applies to American corporations operating overseas.[22]

[18] Dowd v. ILA, 975 F.2d 779 (11th Cir., 1992).
[19] NLRB v. Dredge Operators, Inc., 19 F.3d 206 (5th Cir. 1994).
[20] Id. at 3683-84.
[21] Older Americans Amendments of 1984 to the Age Discrimination in Employment Act of 1967, Pub.L.No.98-459 (age discrimination); Civil Rights Act of 1991, Pub.L.No. 102-166 (civil rights).
[22] 42 USC 1211 et. seq. (1988).

In addition to recent judicial and Congressional efforts to make US labor law extraterritorial and apply it as such, there have been similar developments by the Executive Branch. Prior to NAFTA, several US trade laws have contained provisions which permit the executive branch to withhold trade privileges with other countries that do not give their workers basic protections, including protection for the right to organize. Of these, the most notable are the 1983 Caribbean Basin Initiative (CBI) and the 1984 Amendments to the Generalized System of Preferences (GSP), the Omnibus Trade Act of 1988, and the Overseas Private Investment Corporation Act of 1985.[23] All of these acts give the US executive branch the power to give US labor laws extraterritorial scope by importing their norms into trade decisions. These provisions have been utilized from time to time by US Presidents and by other executive agencies that regulate trade.[24]

Comparing and Evaluating the Four Models

So far I have identified and described four models of transnational labor regulation that have emerged in recent years. The four models can be compared along two dimensions. First, the two European models of transnational labor regulation are *integrative*, seeking to unify labor norms and labor standards. In comparison, the two North American models are *interpenetrative*, seeking to enforce cross-border norms on a one-time situation-specific basis. Second, the models can be distinguished as to thier respective implementation requirements. Two of the models – preemptive legislation and cross-border enforcement – are *multilateral* in the sense that they rely for their implementation on actions by several countries jointly implementing a particular labor standard. That is, neither preemptive legislation nor cross-border enforcement can occur unless more than two or more nations decide to enforce a particular labor regulation. In contrast, the other two models – harmonization and extraterritorial jurisdiction – are *unilateral* in the sense that they can be implemented by unilateral action of one country. Extraterritorial jurisdiction is the ultimate unilateral form of transnational regulation: It involves one country imposing its own, unilaterally devised domestic labor standards on another country. Harmonization is also unilateral in its implementation – it permits each country to alter its own domestic laws however it chooses in order to 'approximate' the laws of others. One could argue that harmonization is multilateral in that a multilateral agency sets the norms and imposes the sanctions and incentives for a country to harmonize in the first place. However, within the context of a multilaterally-established harmonization directive, harmonization is be unilateral in the sense that it

[23] For a description of each of these measures and others that preceded them, see Charnovitz, 1987 and 1986. See also Howard, 1992; Ballon, 1987.

[24] For example, in 1987, President Reagan, acting pursuant to the 1984 amendments to the GSP, denied trade preferences to Nicaragua, Paraguay, and Romania on the basis of their alleged labor-rights violations. Also in 1987, the Overseas Private Investment Corporation withdrew insurance coverage from projects in Nicaragua, Paraguay, Romania, and Ethiopia for their failure to adopt internationally recognized worker rights. Charnovitz 1987, supra note 22, at 573-74.

requires each member state to act unilaterally in devising and revising its domestic regulations.

The four models of transnational labor regulation can thus be arranged in the following four-cell box:

Four Models of Transnational Labor Regulation

	multilateral implementation	*unilateral implementation*
integrative approaches	preemptive legislation	harmonization
interpenetration approaches	cross-border enforcement	extraterritorial jurisdiction

Seeing the dimensions of similarity and difference makes it possible to evaluate the four models and develop criteria to help decide which one to advocate.

(a) Preemptive Legislation

The model of regulation that is most likely to limit runaway shops, labor standards races-to-the-bottom, and regulatory competition is the one that is most effective at setting uniform labor standards across national boundaries. Where uniformity in labor regulation cannot be achieved for either political or pragmatic reasons, an alternative is to seek regulations that set a floor of rights – minimum labor standards – above which parties can negotiate. If the floor of rights is high enough, it will also have a deterrent effect on runaway shops and races-to-the-bottom although not as powerful a deterrent as uniform labor standards would have.

In theory, uniformity can be achieved most effectively through the EU model of preemptive legislation because the very purpose of this model is to set uniform employment standards. To the extent that the EU Commission has the power to set rules and enforceable regulations for labor standards in member countries, it minimizes the possibility of a labor standards race-to-the-bottom.

Preemptive legislation also holds out the possibility of creating a uniform system for regulating collective bargaining. This would make it more feasible for unions to organize and coordinate bargaining strategies on a transnational basis. Thus preemptive legislation is a strategy that could counter organizational fragmentation and the weakening of labor's bargaining power that globalization seems to entail.

The other strength of the preemptive legislation model is that it furthers the goal of encouraging international cooperation. Indeed, both of the European integrative

approaches have as their goal not merely integration, but actual unification of regulatory regimes. They hold out the prospect of developing, over time, shared norms and collaborative means to implement those norms.

The limitations on the preemptive legislation model are primarily practical ones. The model requires multilateral action for its implementation and thus it is extremely difficult to gain the necessary consensus to actually set labor standards. To date, the European Commission has not utilized its legislative power to set labor standards on more than a few issues, and it has not attempted to set any uniform rules for governing collective bargaining, strikes, and other forms of collective action. Thus, while the preemptive legislation model could theoretically eliminate barriers to trade by equalizing labor standards and labor rights, in practice is not likely to do so in the near future.

There is a further concern in the preemptive legislation model. While both integrative models are well suited to furthering the goals of international cooperation and world peace and the goals of establishing a floor of labor standards, they are not necessarily the models that will provide the *highest* labor standards or the *best* legal protection for workers. The integrative models rely on consensus between nations, so that there is a tendency for least common denominator regulations to emerge. This is the dynamic of 'harmonization downward' that has been widely discussed amongst scholars in the European Community.[25]

There is yet another problem with the model of preemptive legislation. One of the most important goals of transnational labor regulation is to preserve a role for labor in political life and to protect labor's political clout. The preemptive legislation model diminishes the role of labor unions in politics by taking issues of labor relations out of the reach of the national political processes and placing them in multilateral agencies.[26] By definition, it moves labor legislation out of the national political arena and into a multilateral arena. At present, unions exist in nation-specific environments; they are not major players in transnational decision-making bodies. In the EU Commission, votes are cast by country, not by political party or constituency-based group. Yet national unions are rarely powerful enough in their home countries to be empowered to speak for the national interest in an international policy-making setting. Therefore, under preemptive legislation, the influence of national unions is diluted and highly mediated.

(b) Harmonization

The harmonization model of transnational labor regulation is similar to preemptive legislation in most respects. That is, it fosters uniformity in labor standards, thus counteracting labor standards races-to-the-bottom. It can also set a floor of labor

[25] See McDowell, 1995; Streeck & Schmitter, 1991. See also Charny, 1991 (arguing that harmonization leads to levelling downward of disclosure requirements in corporate law).

[26] This has sometimes been called the 'democracy deficit' in the European Community. See Gill, 1992.

standards and foster international labor cooperation. However, there are some differences in the ability of the two integrative models to achieve the policy goals discussed above. First, harmonization, unlike preemptive legislation, relies on unilateral action by each member country for its implementation. This feature makes it highly unlikely that directives on labor standards will be implemented in the same way in all EU countries. Rather, harmonization permits a wide range of variation as to how directives are implemented. Thus, harmonization is less likely to create uniformity in labor regulations than will preemptive legislation. To the extent that uniformity in regulation is a goal of transnational labor regulation as an antidote to labor standards races-to-the-bottom, then harmonization is less effective than preemptive legislation.

Harmonization can, however, establish a floor of rights. But as with preemptive legislation, there is a problem of setting a least-common-denominator floor, and thus of levelling downward.

Harmonization has several advantages over the other models as well. First, harmonization relies on unilateral action for implementation once shared norms are articulated as directives. This means, from a practical vantage point, as difficult as it might be to enact labor directives at the transnational level due to the difficulties of reaching international consensus, it may be easier to reach consensus when countries know that they retain autonomy at the implementation stage.

Second, harmonization is a model of labor regulation that retains a larger role for labor in national politics than does preemptive legislation. Because harmonization directives require that the legal norms are set multilaterally, the role of domestic labor unions in the norm-setting process is greatly diminished from what it was previously. However, unlike preemptive legislation, harmonization requires legislation to be enacted at the domestic level to implement directives, and thus it presumes that labor regulations will be adopted, implemented, and interpreted at the level of the nation-state. Consequently, harmonization will enable, indeed require, unions to continue their efforts to influence lawmakers and other decision-makers at the national level.

(c) Cross-Border Monitoring

The NAFTA model of cross-border monitoring and enforcement has little to contribute to the goal of establishing a uniform labor standards or a floor of labor rights. The NAALC Agreement's cross-border enforcement model does not seek to raise or equalize labor standards. To the contrary, it provides disincentives for member countries to legislate labor protections. That is, because each country can be sanctioned for not enforcing its protective labor regulations, it will try to keep such regulations to a minimum. Furthermore, because NAFTA removes trade barriers without providing uniformity in labor regulation, each country stands to lose business if it imposes a higher level of regulation than the others do. Thus this model encourages races-to-the-bottom and regulatory competition for the lowering of labor standards.

(d) Extraterritorial Jurisdiction

The other North American model of labor regulation is extraterritorial jurisdiction of national law. This model, unlike cross-border monitoring, can also promote regulatory uniformity. Extraterritorial jurisdiction means the application of one country's labor laws to other countries. This method of achieving uniform labor standards requires only unilateral action, making it relatively easy to implement. However, extraterritorial application of domestic law unifies labor standards on a piecemeal basis – there is no systematic application or enforcement of an entire regulatory regime. Thus it is a model that cannot create uniformity on all facets of employment regulation and thus it has only limited ability to deter labor standards races-to-the-bottom or regulatory competition.

Extraterritorial jurisdiction, like cross-barder monitoring, is not integrative in its aspirations, and thus will not contribute to the formulation of shared norms and uniform standards between nations. In addition, the extraterritorial jurisdiction model is detrimental to the goal of world peace and cooperation. Nations react with intense hostility when foreign nations attempt to impose foreign rules and procedures on their own citizens and on activities within their own borders. Extraterritorial application of American law in the commercial law area has been a source of great controversy in recent years.[27] Some countries have enacted blocking legislation designed to prevent the application of U.S. law within their territories.[28] There is no reason to believe that extraterritorial application of U.S. labor law will not be similarly greeted with hostility by the international community. Extraterritorial jurisdiction is thus a model that is likely to produce international discord.

Despite its dangers, however, extraterritorial jurisdiction has some virtues to recommend it. If the goal of transnational labor regulation is not to encourage international cooperation, but to provide the best protection for labor, then extraterritorial jurisdiction might well be the preferred approach. Under this approach, one country simply imposes its domestic labor laws on others without having to achieve multilateral consensus. As a result, extraterritorial jurisdiction is a model that has some potential for raising labor standards in other countries. However, this will only occur if the country imposing its labor regulations on others has high labor standards and a well-developed system of labor rights in the first place.

There is an even more powerful argument in favor of extraterritorial jurisdiction. Both North American interpenetration models retain a central role for domestic governments to set domestic labor standards. Both cross-border monitoring and extraterritorial jurisdiction are models in which labor regulations are enacted domestically and enforced by domestic legal processes. Rather than eradicate the

[27] See Brilmeyer, 1987, at 11 (noting the hostility of other countries to extraterritorial application of Sherman Antitrust Act); Zimmerman, 1988 (describing international reactions to extraterritorial application of U.S. laws).
[28] Cira, 1982.

role of domestic legislatures and courts, the interpenetration models reinforce them. Therefore they also retain a much greater role for labor unions to influence labor standards by means of the domestic political process than do either of the integrative approaches. Indeed, both interpretrative models are less disruptive of existing organizations, constituencies, vested interests, and power relations than are the European ones.

Summary and Conclusion

To summarize, each of the four models of transnational labor regulation has different strengths and weaknesses in relation to the goals of transnational labor regulation. For example, preemptive legislation is appealing because it has the capacity to create uniform labor regulation, eliminate races-to-the-bottom, and promote international cooperation. But the price of adopting this model is to move the locus of labor regulation from a national to a transnational fora, thereby diminishing labor's role in politics. This price is potentially very high. Unless some mechanism is established at the EU level to reintroduce labor as a player, with the ability to articulate its interests separately from each nation's own 'national interest,' this model could lead to the gradual fragmentation, disorganization, and disintegration of organized labor throughout Europe.

At the other extreme, extraterritorial jurisdiction retains a strong role for labor in domestic politics. It also has the potential to provide uniformity, at least on some issues. However, this model also has a high price. It threatens to lead to the escalation of international tensions, and the potential for international conflict.

Harmonization could be the perfect mid-point – providing some uniformity while retaining some role for domestic politics. However, it could also be an unstable equilibrium, threatening to tip over into preemptive legislation if the directives become powerful mandates, and to a no-regulation regime if the directives permit too much evasion and opting-out.

Clearly, neither of these alternatives is ideal. And clearly, no one model can satisfy all objectives. However, by recognizing the limitations of each model and the trade-offs they pose, it might be possible to begin to imagine a new model of transnational labor regulation, one that draws from the strengths of each and that avoids the problems that inhere in each.

Consideration of any model which we might imagine requires us to engage in a multinational discussion about the goals of labor regulation, the institutions it seeks to promote, and the norms it seeks to instantiate. If, through such a process, we could develop a form of transnational labor regulation that met the many objectives discussed above, it would be a first step toward ensuring that the emerging global economy is fair, equitable and inclusive of all the citizens of a given trading bloc. Whether it would also provide workplace fairness and distributive justice to workers in countries beyond the boundaries of a given trading bloc is an important question, but one that must await another day.

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