Trade Union Responses to Globalization: What Can be Learned from the Clash Between U.S. Labor Unions and the WTO?

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The labor laws of the United States are different in many respects from those of other countries represented at this conference of the International Industrial Relations Association. Nevertheless, it is worthwhile to consider the clash which has occurred at the intersection of labor law and international law in the U.S. A founding member of the World Trade Organization (WTO), the U.S. has struggled for years to find an appropriate balance between the interests of labor and the interests of employers who are seeking to expand international trade relations.

The globalization of commerce is one of the most significant developments of the late twentieth century, and the primary institution driving this process is the WTO. The WTO was created by the United States and 124 other countries during the final stages of the Uruguay Round of Multilateral Trade Negotiations that began in 1986 under the auspices of the General Agreement on Tariffs and Trade (GATT). As a democratic rule-making body, the WTO is part of the fabric of the rule of law that has spread over the world since the collapse of Soviet-style communism. Unfortunately, the international trade system ended the century on a sour note as the WTO faced a firestorm of opposition from labor unions and environmentalists at its meeting in Seattle during December, 1999.

From the day the WTO was created in 1994, the Clinton administration had lobbied for the inclusion of labor standards on its agenda. With labor support a critical factor in the upcoming presidential election, President Clinton made the inclusion of labor standards one of his major goals at the WTO's meeting in Seattle in December, 1999. By then, however, third world opposition to the proposed Labor Rights Committee had hardened, as had the resolve of labor unions and environmen-

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talists who believed that the WTO was running roughshod over their concerns. Several seaports along the Washington waterways were idled as hundreds of longshoremen joined the massive protest against the WTO.

The vast majority of the WTO's 135 members are developing countries that view U.S. efforts to raise the issue of labor rights as a mere pretext to legitimize U.S. protectionism. Many of the developing countries consider the WTO to be a club of rich countries that does not take into account the legitimate interests of the developing world. Arguments over labor issues raised by the U.S. and its allies had almost paralyzed the WTO ministerial conference in Singapore in 1996. The WTO Director-General Designate, who also was the Deputy Prime Minister of Thailand, cautioned that using trade sanctions to bolster labor rights would be "highly detrimental," and that such a proposal could frustrate the launch of a new round of trade negotiations and cause some developing countries to simply walk away from the table.

The crisis in Seattle is only one indicator of a much broader challenge facing the system of global commerce. Thirty years ago, Harvard University economics Professor Raymond Vernon predicted that increased international economic activity would create profound political problems. Like other aspects of economic activity worldwide, labor markets have been increasingly globalized and thereby subject to the same political pressures. As a result of capital movements from north to south and labor movements from south to north, it is appropriate to ask whether labor markets can still be considered national markets.

It is obvious that organized labor has a legitimate role in the standard-setting process, as do management representatives and non-governmental organizations whose interests may be affected. Although labor's concerns are often couched in terms suggesting altruistic motivations, it is clear that labor is concerned about wages and quality of worker's life. One fear is that low priced goods produced with cheap foreign labor will unfairly compete with higher priced American goods produced by better-paid and more well protected workers. Another fear is that capital flight will take American jobs to other countries. If foreign goods are produced with labor that is well paid and working under high workplace standards, the price of foreign goods will be driven higher, thereby leveling the playing field. Many proponents of free trade argue that these negative impacts of capital flight and wage competition are nonexistent, or at least are overstated. Others admit that while free trade may bring some undesirable effects for American labor, the benefits far outweigh the liabilities. Although many manufacturing jobs will move to less developed countries, workers in the United States, they argue, will move into higher skilled and better paying jobs.

As U.S. labor markets increasingly become globalized, more unfettered power is placed in the hands of multinational employers, while the relative power of national and sub-national governments and trade unions weakens. Labor fears that the result will be a downward spiral of competition in which labor losses. This has encouraged the

popular perception that multinational corporations operate in a "free trade" environment, a virtual state of nature, free of national and international regulation and inhibited only by market forces. The truth is, however, that a large amount of lawmaking and institution building has occurred since World War II, and especially in recent years, to govern the marketplace and provide a modicum of protection for workers. Much of that lawmaking effort, at least outside the U.S., has been encouraged by the International Labor Organization.

THE INTERNATIONAL LABOR ORGANIZATION

Following World War I, the parties to the 1919 Paris Peace Conference created a Commission on International Labor Legislation to examine employment conditions from an international perspective and to establish a permanent agency that would conduct such inquiries under the direction of the League of Nations. This was the beginning of the International Labor Organization (ILO), which outlived the League of Nations. Today, the ILO is a specialized U.N. agency based in Geneva, Switzerland. It consists of more than 170 member nations and provides more comprehensive coverage of labor issues than any other international organization in the world.

The ILO International Labor Code, adopted in 1977, lists procedures for the review of labor standards and promotes a tripartite approach to the participation and consensus of labor rights groups, employers, and local governments. The ILO attempts set international labor standards through more than 176 conventions and 182 recommendations. It also provides technical assistance to nations and administers vocational and management training programs. Conventions are legally binding formal obligations, but the recommendations are less formal and are not legally binding. Because the ILO does not suspend countries for failure to comply with ILO standards, the organization has very little enforcement power. It can only make moral appeals and publicize violations in an effort to pressure a recalcitrant member nation into compliance.

When the ILO was first established in 1919, the United States had very few labor and employment laws. National labor standards began to emerge in the United States during the Great Depression of the 1930s, including laws relating to a minimum wage, limits on child labor, requirements for overtime pay, social security, protection of union rights and encouragement of collective bargaining. The second period of significant legislative activity in the U.S. occurred during the 1960s and 1970s, when national standard-setting efforts focused upon the prohibition of employment discrimination, protection of pension plans, and workplace safety and health regulation. A different kind of lawmaking activity characterized the 1980s and 1990s, when Congress promulgated new laws requiring pre-notification of mass layoffs, family leave, and portability of health insurance.

The United States has shunned the ILO throughout most of the organization's life. Although it finally became a reluctant member, it has adopted very few of the ILO recommendations. With the exception of the Abolition of Forced Labor Convention, the United States has failed to ratify any of the ILO's conventions dealing with "basic human rights" related to freedom of association, forced labor, and equality of opportunity and treatment. The U.S. has taken the position that it meets and exceeds the standards in these conventions and that it has already enacted domestic laws guaranteeing these rights. The United States has often preferred to take a unilateral approach, conditioning trade benefits on compliance with U.S. norms, coupled with the threat of sanctions for noncompliance. This causes our trading partners to criticize the U.S. for using its power to impose its domestic values and policies on foreign countries.

Regional Trade Agreements

Shortly after World War II ended, the victorious nations established the system for negotiating the General Agreement on Tariffs and Trade (GATT). The periodic rounds of GATT negotiations eventually involved more than 100 nations, focusing primarily on reducing the barriers to trade in goods across national boundaries. Because of its limited focus on trade in goods, some of the GATT member countries turned to the negotiation of regional agreements to address issues beyond the narrow parameters of GATT. The best example of a successful regional approach is the European Economic Community, which was founded in the 1950s and ultimately grew into the massive legal infrastructure of the European Union (EU). The EU governs not only trade in goods and services, but many aspects of the European labor market as well.

The success of the European Community and its successor, the EU, encouraged other nations, including the U.S., to negotiate regional trade agreements, although none are as comprehensive as the EU. In part due to the sensitive political issues raised by domestic labor policies, labor standards in general have been included in such regional agreements only as peripheral side agreements. For example, the North American Free Trade Agreement (NAFTA) included a side agreement on labor rights called the North American Agreement on Labor Cooperation (NAALC). This labor side agreement has been invoked a number of times, but its enforcement provisions are weak.

Government Labor Standards at Sub-National Level

Labor standards may be adopted at the state and local government level. In some cases, these local labor standards may have international implications. For example, during the campaign against South African apartheid, some local or state governments adopted anti-apartheid policies that had an impact on labor rights. There are limits on how far state and local legislation can go without being preempted by federal law, however, or interfering with superior foreign policy powers of the federal government.

LABOR STANDARDS OF NON-GOVERNMENT ORGANIZATIONS

Anti-apartheid policies were adopted by many private non-government organizations (NGOs), and some NGOs or private corporations have adopted procurement and other policies directly affecting labor rights in supplier countries. Similarly, Duke University adopted a policy in the late 1990s that requires companies that are licensed to carry its name on sports clothing to identify the factories and sub-contractors that make the products and to require such factories to give access to independent monitors. Some manufacturing companies in the U.S. have also adopted similar "anti- sweatshop" policies. Levi Strauss and Reebok, for example, have adopted highly publicized codes regarding labor and related matters.

INDUSTRY-WIDE VOLUNTARY CODES OF CONDUCT

Sometimes such private rule making is accomplished on an industry-wide basis. Various organizations of private enterprises have adopted voluntary codes of conduct without the benefit of national or international legislative involvement. For example, the Coalition for Justice in the Maquiladoras developed a code of conduct for maquila factories, and has promoted compliance for companies that are active in the U.S.-Mexico border. Some of these codes enjoy the sponsorship or support of government agencies. The U.S. Department of Labor promotes a voluntary code of conduct for manufacturers that produce or contract for garments in the third world. In 1997, the so-called "Sullivan Principles" Code of Conduct provided a rationale for U.S. firms doing business in South Africa to become actively opposed to apartheid in that country through nondiscriminatory labor standards. A similar approach was used under the MacBride Principles, established in the mid-1980s and applied to protestant-majority Northern Ireland, giving protection against discrimination to catholic workers in U.S.-based businesses.

LABOR STANDARDS IN AGREEMENTS WITH MULTINATIONAL EMPLOYERS

If a union is sufficiently strong in one location, it may be able to force a multinational employer to adopt higher labor standards in another location in a less-developed country. A domestic example is the case of agricultural holdings owned by subsidiaries of the Coca Cola Company in the U.S. Although Florida does not have an agricultural employee collective bargaining law, farm workers in Florida have negotiated contracts with Minute Maid Corporation (owned by Coca Cola) in response to pressures exerted by the union against the parent corporation in states that do have such laws. Inclusion of labor standards in collective bargaining agreements with multi-national employers, however, has not been a very widespread or productive means of expanding labor standards to developing countries.

JUDICIAL IMPOSITION OF LABOR STANDARDS

Although parties have had limited success in a few cases, the U.S. courts generally have not been responsive to efforts to extend U.S. labor protections to workers in other countries, notwithstanding the fact that the foreign workers may be employed by U.S.-based multinationals. This is because the U.S. courts have not been inclined to apply U.S. labor law extraterritorially. In an early non-labor case, the U.S. Supreme Court stated in 1909 that courts should presume that the jurisdiction of U.S. statutes is restricted to U.S. territory. The Supreme Court applied this no-extra-territorial jurisdiction presumption to a labor case for the first time in 1925, holding that the Federal Employer's Liability Act (Railway Workers Compensation Statute) did not apply to U.S. citizens injured in Canada while working for U.S. railroads. Although courts later recognized that Congress had the authority to enforce its laws beyond the territorial boundary of the United States, that intent must be expressly indicated in the legislation itself.

In more recent years, the Supreme Court and lower federal courts have applied this presumption against extraterritorial jurisdiction to preclude the application of many federal labor laws to workers outside the United States. These cases have involved, for example, minimum wage laws, collective bargaining laws, the Age Discrimination in Employment Act, and provisions of the Interstate Commerce Act relating to labor protections. There were some departures from this approach in commercial law cases, and by 1993, the only limitation on the extraterritorial reach of the Sherman Act and other commercial laws was congressional intent.

The courts continued refusing to apply extraterritorial jurisdiction in labor cases for many years. Eventually, the rationale for finding no extraterritorial jurisdiction shifted away from the "presumption" approach toward an "international law/comity" approach. In 1991, the Supreme Court adopted an international law/comity approach to extraterritorial jurisdiction in the case of *EEOC v. Arabian American Oil Co.* (ARAMCO). In refusing to apply Title VII of the Equal Employment Opportunity Act to a U.S. citizen working for a U.S. firm in Saudi Arabia, the Court did not rely upon the implied or express territorial reach of the legislation. In fact, Title VII contains both statutory language and legislative history that manifests a congressional intent that the statute should be applied to extraterritorial conduct. Instead, the court relied entirely upon international law principles in declining to assume jurisdiction, stating that it should not interpret a statute in a way that causes conflict with the laws of another nation.

UNILATERAL TRADE CONDITIONS IN NATIONAL TRADE LAWS

One of the most deeply resented initiatives of the United States in linking labor and other issues to trade benefits is Section 301 of the Trade Act of 1974. Section 301 empowers the U.S. trade representative to threaten and to take retaliatory action against a foreign country to

induce it to discontinue any act, policy or practice that burdens U.S. commerce, provided it meets at least one of the following standards:

1. violates the rights of, or denies benefits to, the Unites States under a trade agreement, or
2. is otherwise unjustified, unreasonable or discriminatory.

Section 301 was originally designed as a "market access" provision to open foreign markets to American products, services and investments. The statute defines an "unreasonable" act, policy or practice to include any "persistent pattern of conduct" that:

1. denies workers the right of association or the right to bargain collectively,
2. permits any form of forced or compulsory labor,
3. fails to provide a minimum wage for children, or
4. fails to provide minimum wages , hours or work and occupational safety and health standards for workers.

A recent decision of the WTO dispute resolution body held that § 301 is discriminatory on its face, but failed to strike it down because the Clinton administration had agreed to withhold application of § 301 until WTO dispute resolution procedures were exhausted. The future of § 301 as an effective foreign policy tool is doubtful, however, in view of its inconsistency with the WTO.

The U.S. Generalized System of Preferences (GSP) provides that trade benefits extended by the U.S. to developing countries may be withdrawn if the country violates "internationally-recognized worker rights." This linking of trade privileges with an insistence upon labor standards has been criticized by other countries as protectionist. Bowing to political pressures, President Clinton in 1994 advocated voluntary corporate codes of conduct as an alternative to linking China's most favored nation (MFN) status to its human rights performance. Many have criticized the voluntary model business principles as inadequate to combat labor standard violations in developing countries.

The U.S. Generalized System of Preferences (GSP) Program authorized under the 1974 Trade Act is another form of conditional trade benefits linked to possible sanctions. The law provides that the President shall not extend GSP rights to any country if the country has not taken or is not taking steps to afford internationally recognized worker rights to workers in the country. Other statutory trade and foreign assistance provisions that address worker rights in foreign countries include the Caribbean Basin Economic Recovery Act (CBERA) of 1983, the Overseas Private Investment Corporation (OPIC) Amendment Act of 1985, and the Omnibus Trade and Competitiveness Act of 1988.

U.N. INITIATIVES AND OTHER MULTINATIONAL CONVENTIONS

The United Nations has been active in promoting labor rights in a series of international instruments promulgated in the latter half of the twentieth century. For example, the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes "the right of everyone to the enjoyment of just and favorable conditions of work," particularly "fair wages and equal remuneration for work of equal value without distinction of any kind ...[and] safe and healthy working conditions." Similarly, the International Covenant on Civil and Political Rights (ICCPR) prohibits slavery or requirements "to perform forced or compulsory labor." These covenants, however, are not much more than statements of principle, with very little by way of enforceable rights.

In 1974, the U.N. Commission on Transnational Corporations was established in recognition of the need to regulate transnational corporations. The commission was formed in response to an unsavory history of interference by multi-national corporations in national political affairs of foreign countries. The Code contains a general reference to human rights. The United Nations failed to adopt the draft code but a process was begun in which the activities of multi-national corporations were subjected to greater scrutiny.

The United States is a member of the Organization for Economic Cooperation and Development (OECD), serving as a coordinating body of 26 developed nations, which among other things can review compliance with labor rights. The OECD issued guidelines for multi-national corporations in 1976 providing that complaints of labor rights violations in member countries may be reviewed by OECD committees; however, no sanctions are provided against violations.

CONCLUSION

The current efforts to link labor rights with WTO trade rules stem from frustration over the lack of international enforcement mechanisms for worker rights. The WTO does have some powers to sanction unfair trade practices. In 1994, as the complex GATT negotiations were brought to a successful conclusion, the negotiators agreed to formally exclude labor rights from the sanctions available to the newly formed WTO. Instead, they agreed to include the issue of workers' rights on the agenda of the subsequent WTO negotiations. In 1996, at the WTO's first ministerial conference, the ministers of 128 countries reluctantly agreed to acknowledge "internationally-recognized core labor standards," but refused to create specific standards or allow sanctions. In its final declaration made in December 1996, however, the WTO made no mention of trade sanctions nor did it include any provisions for additional work on labor standards enforcement, other than a nod toward collaboration with the ILO.

Any attempts to harmonize labor rules across transnational boundaries must be tempered by the realization that significant

differences in national economic systems limit the extent to which some rules can be harmonized. The harmonization of rules in the European Union has been difficult and has required an ongoing process over many years. Notable success has been achieved there, however, because the EU consists of member states with relatively similar types of national economic systems and national competition policy rules. Likewise, the harmonization effort in the Australia-New Zealand Closer Economic Relations Trade Agreement has been facilitated by the similar economic systems of the member countries. The harmonization of rules across the U.S.-Canadian border is possible because the member countries have similar economic systems and traditions. Such cross-border harmonization of labor rules will be much more difficult under NAFTA with Mexico added to the equation.

It is not realistic to expect early progress on the harmonization of labor standards in those regions or organizations of nations where the member countries are dissimilar in significant respects. Rather, it is most likely that the development of cross-border labor standards, or the linking of trade and labor rules, will proceed on a regional basis rather than a global basis and that the rate of progress will depend on similarities in the economic systems involved.

The North American model of transnational labor regulation, embodied in NAFTA, takes into account the differences of the three economic systems involved. It is quite different from the European model. The cross-border application of labor laws under NAFTA is neither cumulative nor ongoing, as is the case in the EU. NAFTA contains provisions for cross border monitoring and enforcement of the respective member countries' own labor laws through a multi-national tribunal. This model does not require the changing of labor laws in the member country. In contrast, there is a determined effort in the EU to harmonize the wide variety of labor laws, moving closer to a unitary model. The NAFTA model does not seek to equalize or establish minimum standards for labor rights among the three member countries of Canada, Mexico and the U.S. Unlike the EU, the agencies established by the NAFTA Labor Side Agreement do not have authority over the actual labor standards of the member countries. There is no attempt under NAFTA to harmonize collective bargaining regulation or to bring labor conditions among the three countries into equilibrium. In short, the NAFTA Labor Side Agreement simply says that each member country should enforce its own existing labor laws. Labor representatives continue to question whether the NAFTA Labor Side Agreement produces any significant benefits for labor in the U.S.

As may be seen from some of the examples discussed above, the creation of labor standards norms is not restricted to the lawmaking powers of the nation-state. In the future, the development of international labor rights may spring not so much from legislation by nation states as from a variety of other rule-making bodies, including non-government organizations. One approach is the tripartite determination

of labor rules. For example, the Railway Labor Act was largely the product of a negotiated agreement between the railway industry and the railway unions, submitted to and accepted by the Congress as a basis for legislation.

The tripartite approach is much more widely used in Europe. There are a number of EU directives in effect in a variety of areas of labor regulation. In 1992 at Maestricht, the Netherlands, 11 of the 12 EU member states agreed to a new protocol on social policy. The Maestricht Protocol, commonly known as the Social Agreement, made a number of changes in the way in which labor directives are implemented in the EU. Among other things, it provides that labor directives may be implemented through collective bargaining agreements as well as through legislation and administrative regulation.

Labor unions have finally recognized that one of the products of globalization is the weakening of labor's political power when the locus of labor regulation moves from the national to the international arena. The national labor movement in the United States has traditionally operated in a context of the regulatory environment specific to this country, and the rules that are created in this environment have been determined at the level of national politics. When the locus of labor rule-making shifts to the trans-national level, all of those previous efforts to mobilize and press for gains through the domestic political process may have very little impact on transnational decision makers. In short, the labor organization that focuses only on the nation-state of its domestic jurisdiction may lose the political influence needed to influence transnational rule-making.