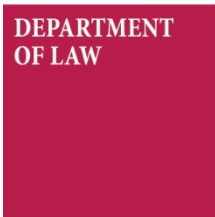




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Justice in a Globalizing World:
Resolving Conflicts Involving Workers Rights
Beyond the Nation State

Judy Fudge and Guy Mundlak

European University Institute
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Abstract

This paper focuses on two examples – first, the imposition of tariffs on tires made in China and exported to the United States, which culminated in a decision of World Trade Organization’s (WTO) appellate body to uphold the US tariffs, and, second, the development of the European law, especially the decisions of the Court of Justice of the European Union, on posted workers in the context of public procurement – in which labour concerns transcend the nation state’s borders and the relevant agents (states, municipalities, NGOs, trade unions, employers, industry associations) are in conflict outside the familiar space of the nation state. The examples refer to different markets – goods and capital, on the one hand, and services and labour, on the other, and they operate on different scales, the international in one case and the transnational (or regional) in the other. They also focus on qualitatively different governance regimes, which involve different constellations of political and social actors and different relationships between economic and social/political integration. Drawing on Fraser’s discussion of “abnormal justice”, a situation in which the traditional discourse and grammar of justice are being doubted, the paper juxtaposes the case studies in order to highlight three political dilemmas (“what”, “who”, and “how”) that arise in the context of abnormal justice and to illustrate how these dilemmas are interconnected. Although both cases exemplify the “what” question, the paper emphasizes the “who” and “how” dimensions of justice, arguing that if the process for resolving the conflict is fair, inclusive, and dynamically open to challenges, then its outcomes on distributive justice are more likely to be considered legitimate and persuasive.

Keywords

Labour law, globalization, social dumping, posted workers, European Union, World Trade Organization

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**JUSTICE IN A GLOBALIZING WORLD:
RESOLVING CONFLICTS INVOLVING WORKERS RIGHTS BEYOND THE NATION STATE**

*Judy Fudge and Guy Mundlak**

I. Introduction

Globalization has often been described as a threat to labour standards and rights. Various accounts of the problem emphasize the perspective of labour in the developing countries, focusing on the perils of off shoring, the associated risks of “the race to the bottom,” and “social dumping”.¹ Labour’s relative success in previous decades in securing protection was dependent on embedding the full ambit of the market within the social and political realm of the nation state. Advocating for protective legislation, raising the floor of workers’ rights, and advancing comprehensive collective agreements, succeeded in protecting workers’ rights from competition. Admittedly, different labour and welfare regimes offered different levels of protection for labour rights and standards. However, there were clear rules for labour and capital to make their competing claims; the nation-state created these rules and mediated the claims.

The empirical evidence on the race to the bottom is mixed.² At the same time, economic growth in developing economies also highlights the potential gains for workers abroad. There are ongoing and vociferous empirical debates about the gains of globalization, how they should be measured (by growth, share of exports, poverty, or inequality and whether comparatively within nation states or between nation states), and how they are distributed.³ Arguments about the perils of the race to the bottom have been countered with more optimistic views about the potential of globalization as an engine for the race to the top.⁴

Debates over globalization’s effects have abandoned the simplistic arguments of either good or bad. Globalization is accepted as a given, and the question that emerges is how to rethink the rules governing the movement of the core components – inter alia, commodities, capital, workers, and services – of the global market across borders. It is also acknowledged that globalization is not an exogenous process; instead, it is stirred by rules and norms that can give globalization many different hues and affect the distribution of gains.

* From the University of Victoria, Canada, Fernand Braudel Senior Fellow 2012, and the University of Tel Aviv respectively.

¹ David Vogel and Robert Kagan, eds., *THE DYNAMICS OF REGULATORY CHANGE: HOW GLOBALIZATION AFFECTS NATIONAL REGULATORY POLICIES* (Berkeley: University of California Press, 2004).

² *INTERNATIONAL TRADE AND CORE LABOUR STANDARDS* (Paris: OECD, 2000); Daniel Drezner, *ALL POLITICS IS GLOBAL: EXPLAINING INTERNATIONAL REGULATORY REGIMES* (Princeton: Princeton University Press 2007).

³ Bernhard Gunter, Rolph van der Hoeven, *The Social Dimension of Globalization: A Review of the Literature* 143(1-2) *INTERNATIONAL LABOUR REVIEW* 7 (2004); Kevin Banks, *The Impact of Globalization on Labour Standards* in John D. Craig and S. Michael Lynk, eds., *GLOBALIZATION AND THE FUTURE OF LABOUR LAW* (Cambridge: Cambridge University Press, 2006), 77-107; Michael Huberman, *ODD COUPLE: INTERNATIONAL TRADE AND LABOR STANDARDS IN HISTORY* (New Haven: Yale University Press, 2012).

⁴ Bob Hepple, *LABOUR LAWS AND GLOBAL TRADE* (Oxford and Portland: Hart Publishing, 2005); Kimberly Ann Elliott and Richard Freeman, *CAN LABOUR STANDARDS IMPROVE UNDER GLOBALIZATION?* (Wash.D.C.: Institute for International Economics 2003); Layna Mosley and Saika Uno, *Racing to the Bottom or Climbing to the Top? Economic Globalization and Collective Labour Rights*, 40 *COMPARATIVE POLITICAL STUDIES* 923 (2007).

In this renewed form of the debate, the scales of justice are an essential problematic.⁵ The political space that mediates conflicting claims, which was centered at the nation state, has less salience under conditions of globalization. What is the merit of conflicting justice claims? What empirical facts (if any) should be considered in implementing the choice of justice principles? Who are the eligible agents to pose such arguments and how they are selected? Although the traditional solutions varied from one state to another, they were for the most part state-centered. Globalization de-centered the locus of decision-making. Furthermore, with the loss of the nation-state's primacy as the sole (or dominant) venue of political mediation, numerous agents make an attempt to be recognized across borders.

The de-centering process is closely related to the argument that a democratic deficit has evolved in the governance of global markets.⁶ The democratic deficit designates the loss of familiar venues, institutions, and rules for conducting democratic debates on the nature of justice and to formulate legitimate solutions. Traditionally the democratic deficit was associated with labour's weakening power to influence the rules of the game. Labour's protection relied on the state's regulatory power – directly (through protective legislation) or indirectly (through prescriptions that secure the autonomous sphere of collective bargaining). However, over time, workers also identified opportunities in the institutions that compose the new global governance. Labour unions conducted strikes in solidarity of their peers in other countries,⁷ created cross-border alliances,⁸ cooperated with NGOs in making firms accountable to their CSR commitments,⁹ and concluded international framework agreements.¹⁰

To what extent has this cross-border innovation forged a new sense of political sphere for contestation? Are these changes conducive to a better understanding of global justice? These developments pose a challenge to the traditional territorial scale of justice, which was the nation-state. Cosmopolitanists on the one hand,¹¹ and those who attribute importance to the state-based

⁵ The term "scales of justice" is drawn from Nancy Fraser, *SCALES OF JUSTICE: REIMAGING POLITICAL SPACE IN A GLOBALIZING WORK* (New York: Columbia, 2009) 1, which provides the analytical framework for the following discussion. By scales, Fraser is referring both to how to measure justice and a metric on a map to display territory.

⁶ Dani Rodrik, *THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY* (NY: W.W. Norton 2010).

⁷ Noel Castree, *Geographic Scale and Grass-Roots Internationalism: The Liverpool Dock Dispute, 1995–1998*, 76(3) *ECON. GEOG.* 272 (2000).

⁸ Some examples are more developed, particularly in the maritime context, Nathan Lillie, *A GLOBAL UNION FOR GLOBAL WORKERS: COLLECTIVE BARGAINING AND REGULATORY POLITICS IN MARITIME SHIPPING* (Routledge 2010). Other examples that demonstrate such alliances include large mergers between national unions, as discussed by Nathan Lillie and Miguel Martinez Lucio, *International Trade Union Revitalization: the Role of National Union Approaches*, in: *VARIETIES OF UNIONISM: STRUGGLES FOR UNION REVITALIZATION IN A GLOBALIZING ECONOMY*, Carola Frege and John Kelly (eds.), (Oxford University Press, 2004)159-180; Alan Hyde and Mona Ressaissi, *Unions Without Borders: Recent Developments in the Theory, Practice and Law of Transnational Unionism* 14 *Canadian Labour and Employment Law Journal* 47 (2009-10); M.E. Gordon and L. Turner (eds.), *TRANSNATIONAL CO-OPERATION AMONG TRADE UNIONS: PHILOSOPHY, STRUCTURE ANF PRACTICE* (Cornell U.P., 2000).

⁹ Lance Compa, *Trade Unions, NGOs, and Corporate Codes of Conduct*, 14 *DEVELOPMENT IN PRACTICE* 205 (2004)

¹⁰ Lone Riisgaard, *International Framework Agreements: A New Model for Securing Workers Rights?* 44(4) *INDUSTRIAL RELATIONS* 707 (2005).

¹¹ Cosmopolitan views are diverse and are founded on different assumptions, but share the premise that the basic unit for the analysis of justice is encompassing and global. See for example, Peter Singer, *ONE WORLD* (New Haven: Yale University Press, 2002); Thomas Pogge, *WORLD POVERTY AND HUMAN RIGHTS* (Cambridge: Polity 2008, 2nd ed); Gillian Brock, *SOCIAL JUSTICE: A COSMOPOLITAN ACCOUNT* (Oxford: Oxford University Press 2009).

community,¹² with many variations in between, have all addressed the question of the scale of global justice. While we think that that the question of scale has a significant moral component that is of the utmost importance, we want to adopt an approach that treats it as a question that emphasizes the structure and quality of the political process and not simply one of empirical and moral analyses.¹³ This approach is at the basis of this paper.

In this paper, we examine two examples in which labour concerns transcend the nation state's borders and the relevant agents (states, municipalities, NGOs, trade unions, employers, industry associations) are in conflict outside the familiar space of the nation state. One example refers to the debate over the imposition of tariffs on tires made in China and exported to the United States, culminating in the recent decision of World Trade Organization's (WTO) appellate body to uphold the US tariffs. The second example refers to the development of the European law on posted workers, that is, workers who are moved across borders by the services providers to work temporarily in another country outside their home state.

To analyze these examples, we seek to draw on Nancy Fraser's discussion of abnormal justice for the resolution of controversies that transcend the "Keynesian-Westphalian state".¹⁴ Fraser views abnormal justice as a situation in which the traditional order and, more importantly, the traditional discourse and grammar of justice are being doubted. Such doubts touch at the familiar question of justice, such as "*what* constitutes just distribution of wealth and resources? What counts as reciprocal recognition or equal respect? What counts as fair terms of political representation and equal voice?"¹⁵ However, what makes situations of abnormal justice special is that they involve a dispute on the "topography of the debate", that is, they challenge the basic premises regarding "*who* is entitled to address claims," and "*how* such claims should be vetted and who is obliged to redress them."¹⁶

The two examples we will discuss are helpful for illustrating the problem of abnormal justice because they highlight the different dimensions of justice (*what*, *who*, and *how*) as well as their interrelationship. They also provide important contrasts; they refer to different markets – goods and capital, on the one hand, and services and labour, on the other. Although neither example nests within the boundaries of a nation state, they operate on different scales, the international in one case and the transnational (or regional) in the other. They also focus on qualitatively different governance regimes, which involve different constellations of political and social actors and different relationships between economic and social/political integration.

Drawing on Fraser's conceptual framework, the juxtaposition of the two cases spells out the three political dilemmas that arise in the context of abnormal justice and illustrates how they are interconnected. Although both cases exemplify the "what question", our focus is on the "who" and "how" dimensions because we believe that if the process for resolving the conflict is fair, inclusive, and dynamically open to challenges, then its outcomes on distributive justice are more likely to be legitimate and persuasive.

¹² Anti-cosmopolitan theories can be based on liberal as well as communitarian theories, with different types of justification and reasoning. See for example, John Rawls, *THE LAW OF PEOPLES* (Cambridge MA: Harvard University Press 2001); David Miller, *CITIZENSHIP AND NATIONAL IDENTITY* (Cambridge: Polity Press, 2000).

¹³ Fraser, *supra* note 5, at 34-36.

¹⁴ *Ibid.*, at 13 and 161, footnote 1 where Fraser defines this term. The term "abnormal justice" is not meant to imply that "normal" justice under the Keynesian state was, in fact, just. Rather, the adjective "normal" indicates that the frame of justice as the national state was accepted almost without question by citizens of developed countries.

¹⁵ *Ibid.*, at 51.

¹⁶ *Ibid.*, at 52, 53.

We find that the two examples highlight similar moral problems that are associated with claims of a race to the bottom and social dumping, but that both cases do not lend themselves to simple moral or empirical judgments. When comparing the processes, the WTO and the Court of Justice of the European Union (CJEU)¹⁷ offer new opportunities for addressing global and transnational cases of abnormal justice. However, the WTO offers a narrow forum for engagement, limited access to non-state actors, and little flexibility in re-framing seemingly zero-sum problems. The CJEU is nested in a more complex framework that is more inclusive and allows more opportunities for non-state actors to take a proactive stand, forge cross-boundary alliances and forge new solutions. However, the two examples do not fully resonate with an attempt to create participative parity between multiple parties with reflexive capacities, which is what we regard as the features of a fair and just process.

In the next section we will explain the problem of abnormal justice that Fraser identifies and briefly sketch how she proposes to address it. We view her conceptual framework favorably and regard it as instructive to thinking about labour standards in a globalizing world. In section 3 we detail the abovementioned examples – the WTO tires case and the EU’s law on posted workers. After describing these two examples, we will discuss what they tell us about abnormal justice and how to resolve claims about labour standards in a globalized world. We recognize that both examples do not conform with the “how” Fraser imagines, but we draw on them to see whether they can be instructive about how to build more radical democratic forums for resolving abnormal disputes or shed doubt on the possibility of implementing the radical democratic option Fraser advocates.

II. The Problem of Abnormal Justice: What, Who, and How in a Globalizing World

In *Scales of Justice*, Nancy Fraser is concerned with how we understand politics and governance in a political and economic context in which the Keynesian-Westphalian state is not the exclusive site of legitimacy and authority. This question troubles her because, as she explains, modern theories of justice have not succeeded in adapting to the fact that the nation state is no longer the pre-eminent space of politics. The problem is, as Fraser notes, “the structural causes of many injustices in the globalizing world,” including financial markets, offshore factories, investment regimes, and global media, are not located within the territory and authority of the nation state.¹⁸

We agree with Fraser that globalization has created a misalignment between political and economic space that results in a democratic deficit that has a disparate impact on labour and social matters. Goods and capital are much more mobile factors than are services and labour. Corporations can move around the globe quite freely and without specific allegiance to the nation state. Labour and social matters need regulation and redistribution and, thus, are much more closely tied to political arrangements located in the “community”, which typically is represented by the nation state.

The misalignment caused by globalization reveals what Fraser calls the “politics of framing,” by which she means “the boundary setting aspect of the political”, where distinctions between members and non-members of the political space are drawn.¹⁹ Globalization challenges the “taken-for-granted frame of justice,” which is the nation state.²⁰ It destabilizes the previous hegemonic grammar of citizenship claims against the welfare state and de-centers the previous grammars of justice about what

¹⁷ With the entry into force of the Treaty of Lisbon in 2009, court changed to its current name and comprises formally the *Court of Justice* alongside its two subordinate chambers: the *General Court* (formerly the Court of First Instance) and specialized courts of which one exists, the *Civil Service Tribunal*. Article 19 of the Treaty of the European Union, the Court of Justice of the European Union shall include the Court of Justice, the General Court and specialized courts.

¹⁸ Fraser, *supra* note 5, at 23.

¹⁹ *Ibid.*, at 22.

²⁰ *Ibid.*, at 30.

claims and interests ought to be considered.²¹ Struggles against misframing challenge the democratic deficit in the globalizing world in which the majority of people affected by decisions of nation states and transnational elites have no say. These struggles raise questions of justice: What is the proper frame for reflecting on justice? Whose needs and interests deserve consideration?

Globalization gives rise to what Fraser calls “abnormal” justice, in which there are no shared norms about how to resolve disputes. She does not, however, consider abnormal justice to be an altogether bad state of affairs; it opens the possibility for counter-hegemonic claims and calls into question the basis on which political claims are decided.²² For example, in the sphere of work, trade unions, the traditional representatives of labour, are gradually moving from being objects of globalization to becoming active agents that are helping to shape the transnational political space. Thus, rather than call for a new “normal”, which would approach the problems of justice with a pre-defined singular conception of justice, we share Fraser’s view that it is critical to structure a forum where competing notions of justice receive attention. However, as Fraser also notes, “expanded contestation cannot by itself overcome injustice.”²³ The meta-political struggle of representation is to design and to implement institutions that enable people who are excluded from participating in political decisions that shape their lives to participate as peers in creating the boundaries of political space.

Controversies over justice currently span three nodes of abnormality. The “what” question calls our attention to the substance of justice in a global environment. There are competing variations of justice, let alone of global justice. Fraser notes, “even those who agree that the status quo is unjust disagree on how to describe it... The effect is lack of consensus, even among professed democrats and egalitarians as how understand injustice, let alone on how to redress it”.²⁴ In fact, labour and migration issues strongly challenge those who often times side with the “left”. In both cases, there are tradeoffs and hard choices to be made in the distribution of opportunities and rewards. In both cases, the social claims of one community may collide with those of another.

While there are attempts to identify a single formulation of justice for allocating opportunities and rewards for labour globally, multiple conceptions of justice remain. Empirical evidence alone cannot resolve such controversies. What counts as the relevant empirical evidence as well as the findings themselves are deeply contested. Moreover, not all moral claims rely on empirical assumptions.

In seeking a just debate on the desirability of different moral formulations and the method of their implementation, the disagreement on justice cannot be resolved without identifying two complementary types of abnormality, “who” and “how”. The “who” problem questions the frame of justice (the space within which justice claims are made), whether it is domestic, territorial, regional, transnational, or global. The question at stake is who’s interests and claims count; who should count as a subject of justice? The “how” question is primarily procedural and concerns the method of bringing together the various agents and making sure they have equal access in making their claims. Fraser is trying to describe a new grammar of political-claims making in which the issue is not just first-order questions of justice, but also meta-questions about how first order questions ought to be framed. She asserts that contemporary arguments about redistribution, recognition and representation which prescribe the “what” and “who” *should* be deliberated and considered to be up for grabs.

At the same time as Fraser’s approach appreciates the multi-dimensional nature of the question of justice, she also provides a common measure for evaluating the justice of the different dimensions. Participative parity is Fraser’s overarching normative principle, and it is what unites her three

²¹ *Ibid.*, at 49.

²² *Ibid.*, at 57.

²³ *Ibid.*

²⁴ *Ibid.*, at 53.

dimensions of justice.²⁵ Justice is about dismantling obstacles to parity that are institutionalized in unjust social arrangements. Fraser provides a radical democratic interpretation of the norm of equal respect for, and autonomy of, all human beings. It is a political conception of justice that is non-sectarian, and that is compatible with a variety of different philosophical anthropologies and power asymmetries.

With regard to the “who” question, Fraser argues for an approach to the politics of framing that seeks to supplement the state-territorial principle and democratize the process of frame setting.²⁶ She evaluates three candidates that have been proposed for determining the “who” of justice – the membership principle, the humanity principle, and the all-affected principle. Rejecting the first as ratifying exclusionary nationalism, the second as too abstract, and the third as unable to specify morally relevant social relations, she proposes the “all subjected” principle. According to this principle, “what turns a collection of people into fellow subjects of justice” is “their joint subjection to a structure of governance that sets the ground rules that govern their interaction.”²⁷ Endorsing a broad understanding of “subjection to structure of governance”, which encompasses relations of power of various types (including private corporate power and public state power), Fraser claims that this principle affords “a critical standard for assessing the (in)justice of frames.”²⁸

Holding a-priori assumptions regarding the relevant “who” risks the misframing of justice. To remedy such misframing, we need to consider the “how”. The “how” question is therefore the most challenging question and it is the question that is the most explicitly political and rooted in the social context. Meta-political misrepresentation designates situations in which the process fails to institutionalize parity of participation in deliberations and decisions. Fraser advocates a dialogic and institutional approach to the question of frame that she refers as a meta-democracy. This view resonates with precepts of radical (and similar strands of) democracy – one that emphasizes deliberations but also seeks to question the actual rules governing deliberations.²⁹ Radical venues that can allow transformative practices should seek and admit agents who are jointly subjected to a structure of governance and whose voice would otherwise remain unheard, and should allow them to make the case on their actual relevance to the dispute. Rather than deciding a-priori on one substantive principle of justice (“what is the just distribution of opportunities and rewards?”), this view asks, “what is the just method of deciding between competing claims of just distribution”?

Such an approach raises many problems of implementation. How can a deliberative forum ensure equal voice and representation? How can it preserve acceptable and practical rules for deliberations and still be open to all those who make a claim that they are subjected? Refraining from giving a fixed answer to a singular perception of justice that can resolve all current challenges to the Westphalian paradigm, and, instead, leaving the answer to deliberations between all the subjected agents, runs the risk of circularity. We seek a forum that structures just responses to global problems, yet we also seek to challenge that structure. A deliberative forum assumes some kind of stability and its radical stance seeks its instability.

These problems are accentuated in the context of disputes that concern work. A meta-democratic process must bring together multiple agents who represent interests that are no longer confined to the

²⁵ *Ibid.*, at 58-61.

²⁶ *Ibid.* at 26.

²⁷ *Ibid.* at 65.

²⁸ *Ibid.*

²⁹ Chantal Mouffe, *Democracy, Power, and the 'Political'*. In Seyla Benhabib, (ed.) *DEMOCRACY AND DIFFERENCE* (Princeton: Princeton University Press 1996) 245-255; Roberto Mangabeira Unger, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* (Cambridge: Cambridge University Press 1987); Nancy Fraser, *JUSTICE INTERRUPTUS : CRITICAL REFLECTIONS ON THE “POSTSOCIALIST” CONDITION* (Routledge 1996).

nation state. There are many agents who care about matters that take place outside of their own nation-state, including some whose modus operandi is based on community, voice, and loyalty, while others who operate according to the dictates of markets and the power of exit. The different logics of operation impose a heavy burden in designing the appropriate process.

Fraser suggests in passing that “we need to start with good enough deliberations”.³⁰ We will use this idea of “good enough deliberations” as a starting point from which to examine institutions that extend beyond the boundaries of the nation-state. This starting point must be continuously assessed and criticized, and particular attention must be paid to actors who should have parity of access but who do not in fact enjoy it. It may be that there is no end-point to this process, but, instead, a search for continuous innovation.

Rather than imagining such a forum from whole-cloth, we will look at two contemporary institutional arrangements as models that can serve as potential starting points: the WTO and the CJEU). Both forums operate outside the Keynesian-Westphalian paradigm and they both are emerging as important venues for articulating competing claims of justice (the “what”). They bring together agents from many countries that seek to redefine the meaning of their borders, and they separate geo-political borders from social and economic boundaries. At the same time, these forums increasingly allow the interests and claims of non-state actors (trade unions, employers associations, commercial actors), whether directly or indirectly (the “who”), to be voiced. Despite these similarities, these are two very different starting points of analysis. The WTO is market-oriented and seeks to advance the power of exit. It is therefore oftentimes considered antithetical to social and labour interests. The European Union (EU) and its institutions, including the CJEU, were established to construct a new sense of a European community, which endorses free movement within, but also erects barriers outside. Arguably, the quest for the European social model that guides European institutions suggests that the EU is a more conducive starting point for redefining a meta-democratic forum of deliberation.

In the two examples that follow, labour, capital, and states participate as distinct agents. In both, the “what” of justice is contested. After describing our examples, we will question whether they meet the standard of “good enough deliberations” or whether they fail the criteria of radical democracy and cannot correct the problem of meta-political misrepresentation.

III. The Politics of Framing: International Market in Goods and Transnational Markets in Services

1. Market Distortion and the WTO: China, the US, and Tires

The WTO is generally not considered to be a conducive venue to the protection of workers' interests in a transnational regime. Its main mission is to promote free trade, which is in tension with national attempts to advance internal social interests. This tension is most visible in the ongoing controversy over the introduction of a “social clause” in the WTO treaties, raising the question of whether free trade principles can (or should) be balanced and restricted by social objectives, most notably – the protection of workers' rights. Although various options exist in the various treaties to acknowledge workers interests, these have not been, to date, influential on the outcomes of trade disputes.³¹ However, the debates surrounding the WTO are reflective of the elusive nature of global justice for labour. They cannot be simply sorted into a neatly organized axis on which capital and labour are

³⁰ Fraser, *supra* note 5, 45.

³¹ Gabrielle Marceau, *Trade and Labour*, in: THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW (2009) 539-570; Marion Jansen & Eddy Lee, *TRADE AND EMPLOYMENT – CHALLENGES FOR POLICY RESEARCH* (Geneva: WTO-ILO 2007).

positioned on opposite sides. First, the direct parties to the WTO are states and not capital/labour. In this respect, the dynamics of labour conflicts are not institutionalized, as is the case in the ILO, with its unique tripartite representation. Consequently, the labour/capital conflict is presented by states, after taking into account the interests, voices, and pressures they exert on the national political branches.

Second, in the process of channeling labour's and capital's claims to the singular political positions of states, resistance to a social clause has been primarily voiced by developing countries. These countries are concerned with maintaining their comparative advantage of lower labour costs. The position of the developed countries is mixed. On the one hand they sometimes object to the introduction of social considerations into a free trade regime. Other times, they endorse it as a way of leveling off the global playing field. Endorsement of social considerations can therefore be the result of (negative) protectionism, (positive) morality, or seemingly neutral concern with establishing proper "rules of the game".

Interpreting the various positions is all the more problematic when we consider the intersection of capital/labour interests within each state with those of developing/developed states. Western trade unions and capital alike may prefer to pressure their states to promote social considerations within the free trade regime so as to improve their economic position. However this position would place capital in a conflictual place. Although less obvious, this position would also risk transnational labour solidarity, which may have important implications for new globalized strategies of trade unions. The opposite may hold true for the developing countries, where labour and capital alike may resist social considerations that can lead to a decrease in the influx of capital to their domestic markets. However, such a position would place independent trade unions in a conflictual place. Civil society in the developing and developed countries may also take conflicting positions on social matters.

Summarizing these tradeoffs, three themes appear: (a) it is possible that capital and labour may have to compromise their traditional positions in the shift between the national and global; (b) the compromises labour makes are more evident than those capital will make, which reflects the asymmetry between labour and capital. Labour is generally political and dialectic, whereby capital is more economic and geared towards a unitary utility function of profitability; (c) the shift of the labour/capital conflict from the local to the global is mediated by the states.

To observe how these themes interact, it is interesting to examine the recent decision of the WTO's appellate Body *in the matter of the Us-China dispute on Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tires From China*.³²

The general framework of the dispute resonates with the nature of inter-state trade disputes, and particularly with the problem of trade between countries with disparate working conditions and costs. The WTO rules encourage the removal of all barriers to trade, but leave certain exceptional permissions for barriers that govern trade between countries with disparate conditions, such as the permission to impose anti-dumping tariffs. However, the dispute is also about a specific relationship – that between China and the US.

China's accession process to the WTO was long (1986-2001) and difficult, given the need to align China's internal and external economic regime with the Organization's requirements. In addition, the inclusion of China, given its massive economic heft, raised concerns among the developed countries. These concerns led to exceptional provisions in the accession Protocol, allowing states to adopt temporary measures that are aimed at attenuating the economic impact of imports from China. Both the general General Agreement on Trade and Tariffs (GATT) principles and the particular provisions of the Protocol seek to distinguish between the normal course of events and abnormal harsh consequences of free trade.

³² WT/DS399/AB/R. Decision given on September, 5, 2011.

Section 16 in the Protocol on the Accession of the People's Republic of China to the WTO (hereon the Protocol)³³ states:

1. In cases where products of Chinese origin are being imported into the territory of any WTO Member in such increased quantities or under such conditions as to cause or threaten to cause **market disruption** to the domestic producers of like or directly competitive products, the WTO Member so affected may request consultations with China with a view to seeking a mutually satisfactory solution, including whether the affected WTO Member should pursue application of a measure under the Agreement on Safeguards. Any such request shall be notified immediately to the Committee on Safeguards.

4. **Market disruption** shall exist whenever imports of an article, like or directly competitive with an article produced by the domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry. In determining if market disruption exists, the affected WTO Member shall consider objective factors, including the volume of imports, the effect of imports on prices for like or directly competitive articles, and the effect of such imports on the domestic industry producing like or directly competitive products.

During the years 2004-2008, the share of imported Chinese-made tires into the United States grew. At the same time, major tire manufacturing plants in the United States were being shut down. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), the union representing tire workers, filed a petition with the US International Trade Commission (USITC) that China's tires were causing a market disruption.

The tire manufacturers did not support the USW's petition. The WTO Panel noted that: "While it is true that none of the US producers expressed support for the petition, only four of the ten producers said they were not materially injured by subject imports. ... Furthermore, although some producers said they would not change their operations in the event that a remedy was imposed, this fact is hardly surprising given that a remedy of only three years duration was under consideration. There would be little value in adapting to a market situation that would likely only last for three years, whereupon subject imports would resume."³⁴

Although this was not the first case brought before USITC that was filed by a trade union, it is more common for these cases to surface in the form of joint petitions by the trade union and the manufacturers – an uncommon moment of labour-capital cooperation in the adversarial setting of American industrial relations. In the tires case, manufacturers remained outside of the legal process and labour was on its own in seeking the government's protection.

USITC conducted an investigation, and in April 2009, it issued a report, which determined that (a) increased quantities of imported tires from China (b) are significantly causing a (c) market disruption in the United States.³⁵ In September 2009, the US President imposed additional import duties on tires that are imported from China for a period of three years. China challenged this decision, claiming it was inconsistent with the Protocol and with Articles I:1 and II:1(b) of the GATT, which underscore the fundamental principles of free trade. In December 2010, a WTO Panel issued a report, holding that in imposing the additional duties the United States did not act inconsistently with its obligations under the Protocol and the GATT. China contested the Panel's report on various grounds – some related to the text of the Protocol, some were factual, and others related to the applicable standard of review. In a nutshell, China argued that it was wrong to determine that imports of tires from China were *increasing*

³³ WT/L/432 (emphases added).

³⁴ Panel Report, WT/DS399/R, 13 December 2010

³⁵ USITC, Certain Passenger Vehicle and Light Truck Tires from China, Investigation no. TA-421-7, Publication 4085 (July 2009)

rapidly, that the increase was a *significant cause* of material injury to the US tires industry, and that the remedy imposed by the President was the appropriate response. In a detailed decision, the appellate body rejected all of the Chinese claims.

It is generally accepted that free trade may lead to displacement of industry, and indirectly to unemployment or deteriorating labour conditions. However, it is also assumed that such disruptions will lead to changing industrial policy that over time will gain from a more efficient allocation of resources and a better division of labour in a global regime. Hence, the rules permitting the use of instruments that may serve as an obstacle to free trade are framed in a language that seeks to distinguish “normal” disruptions from ones that cause “material injury” to domestic industry. This borderline was the field of China's contestation. Among the main arguments that were raised before the WTO Panel and the Appellate Body, China claimed that the injury to domestic industry was a consequence of domestic industrial policy in the United States, and not of the import of tires from China.

It is of particular interest to note China's arguments against the causal connection between the Chinese imports and the injury to the domestic industry. The Panel remarked that the “majority (in the USTIC opinion) took the view that the strategy to reduce US production and locate production in China was itself a response to increased imports and thus it was not an alternative cause that prevented the increasing imports from China to be a significant cause”.³⁶ This point was raised as part of a discussion regarding causality. It is clear that two processes took place at the same time; there was increased imports of cheap tires from China (and other low-cost production countries) at the same time as plants owned by the big manufacturers in the U.S were being closed. However, the question of causality remained in dispute. The closure of plants was partially due to slacking demand, but it was also due to a decision to produce high-end tires in the US and move the production of low cost tires to countries where production is cheaper. China explained its increase in exports to the US as a result of the void that emerged from declining production in the US. The majority of the USTIC preferred the opposite causality, explaining that increased exports and the dearth in US productive capacity were due to the removal of production overseas.

Surprisingly, China's position resonates with the position of the Tire Industry Association (TIA), which actively opposed the USW's initiative.³⁷ The TIA is an international association of tire manufacturers, with affiliation and membership of manufacturers from all over the world, although its leadership and membership are heavily associated with the American market. The reasons for the TIA's position are difficult to decipher from its communications,³⁸ which state:

Why is TIA opposed to the tariffs?

This tariff will not be a "job saver;" rather, when you take into account the thousands of tire industry jobs - from the technician who services tires, to the tire shop owner (many of whom are small businesspeople) to the tire wholesalers, we predict it will be a "job killer." A study by economics professor Thomas J. Prusa of Rutgers University found that American workers in the tire distribution and installation sectors, "have every reason to be concerned about their future. The punitive tariff on Chinese tires would lead to a loss of at least 25,000 U. S. jobs."

How does this affect the consumer?

This tariff will price these tires out of reach of many consumers, and will lead to a tightening in the remaining supply of lower-cost tires. Also, given that the lower-cost tires imported from China help those most vulnerable in this current economy - working-class citizens - we are deeply concerned that many consumers may delay or even defer replacing their tires when necessary, thus creating a potential safety hazard on America's roads.

³⁶ Panel Report, *supra* note 34 at .

³⁷ <http://www.tireindustry.org/default.aspx?id=1598/...2362/...2028/...1276/...1242>

³⁸ *Ibid* at doc 1276

The ITA disputed the alleged gains the USW attributed to the tariff barriers imposed by the US, particularly the claim that such protective tariffs will bring jobs back to tire manufacturing in the United States. However, the TIA did not claim that the alternative, namely – free trade, would eventually bring more jobs. Its position was that the manufacturing of low-end tires would move to other countries with low labour costs. Seeking legitimacy for its position, the TIA further emphasized the rollover of costs to consumers, and their subsequent risk-taking response.

It appears that the manufacturers' position was directly opposite to that of the trade union. Most of the American manufacturers operate tire-manufacturing plants in China. In their decision to move manufacturing from the United States to China, they did not have to compromise their interest in profitability. While imposing tariffs on China-made tires can motivate renewed manufacturing in the US, other options remained available. Given that the tariffs were not imposed on all imported tires, but only on those made in China, the manufacturers could continue moving their production to other low-cost countries.

What is striking is that labour's and capital's interests remained different, even in the context where shared interests could have developed. American workers remained stationary, while capital had much flexibility in its choice of manufacturing sites. For regulatory measures to be effective in influencing the strategies of those who are affected, they must overlap with the market. However, tariffs that are tailored to the Chinese-made tires do not overlap with the much broader scope of the market.

Despite the fact that the WTO process served as a focal point of interaction, and the potential for alliances that overcome traditional cleavages, the basic nature of the capital-labour and developed-developing conflicts remained. As to the former, the USW's reliance on the political process substituted economic bargaining. As manufacturers moved production lines offshore, collective bargaining has become more strained and the union's bargaining leverage diminished. The American industrial relations system is also not conducive to trade unions and political attempts to make it more labour-friendly have thus far failed. Under these circumstances, trade unions seek forms of political pressure that are not dependent on wholesale structural change of the labour law system.³⁹ Evidently, the US President had greater political capacity to impose tariffs on Chinese imports than to pass comprehensive labour law reform.

At the same time, the manufacturers have grown to rely on the power of exit and their capacity to move production to the most favored venues. Unlike the TIA, they did not vehemently object to the process, although they did not join the USW's petition. They can consider the terms of trade and choose whether to manufacture in the United States, China, or simply locate elsewhere. The large manufacturers diversify their sites of production and the companies' websites list numerous countries in which they produce.⁴⁰

On the Chinese side, there seemed to be a united front consisting of the state, the manufacturers, and the trade unions. The state was the dominant player, and we found no evidence of either objections or dissent on the part of the manufacturers and the unions. This unanimity is partially a result of the relatively weak democratic institutions in the arena of the industrial relations arena. It is noteworthy that throughout the case, no mention was made of the Chinese workers who produce the tires. We do not know whether their working conditions improved with the increase in exports to the United States. There are indications that China's industrial policy has a significant positive effect on Chinese

³⁹ Samuel Estreicher, *Trade Unionism Under globalization: The Demise of Voluntarism* 54 ST. LOUIS UNIVERSITY LAW JOURNAL 415 (2009)

⁴⁰ See for example - <http://www.michelin.com/corporate/EN/group/michelin-worldwide/locations>; <http://www.goodyear.com/corporate/about/facilities.html> . Richard McCormak, *Workers Are On Their Own To Defend American Jobs From Surging Chinese Imports; American Companies Are Conflicted Because They Now Produce In China*, 16 (11) MANUFACTURING AND TECHNOLOGY NEWS (30.6.2009).

workers. At the political level, China succeeded in passing a major labour law reform in 2008.⁴¹ The improved statutory regime combined with the continuous inflow of capital and a relatively rapid growth rate fueled the rising employment and wage rates in China.⁴²

Other countries (Japan, Chinese Taipei, Turkey, and Viet Nam) and the European Union took sides in this debate and joined the process as third parties. Countries may join as third parties merely for the purpose of monitoring the process, or to ascertain that their direct interests are not compromised. They may submit their position in writing, but are not required to do so. In this matter, there are no records with regard to their position, but it can be hypothesized to go in different paths: uphold the US position to ensure against similar threats to developed economies (Japan and the EU), joining China in an attempt to defy the tariffs policies of the large target countries for their exports (Taipei); or opposing China and hoping manufacturers will re-locate out of China (Turkey and Vietnam who may compete to produce tires).⁴³

2. The Free Movement of Services and the Posted Workers Directive in the European Union

The European Community Treaty, the 1957 Treaty of Rome, was designed to create an integrated common market by guaranteeing the free movement of factors of production – goods, persons, services, and capital – and prohibiting Member State action that distorted competition. Member States bore principal responsibility for social policy in general, and labour law in particular, with only limited European competence provided in the Treaty of Rome, that was given effect through directives and regulations.⁴⁴ Differences in labour regulation across the Member States were not regarded as distorting the common market or segmenting the market along national lines. According to the theory of competitive advantage that influenced the architects of the common market, wage differentials and social and fiscal charges, like labour regulation, reflected differences in productivity and could be accommodated by differences in national exchange rate fluctuations.⁴⁵ The prevailing wisdom was that differences between state's labour law and industrial relations would be absorbed in the process of creating a common market, which would result in increased prosperity for all the Member States.⁴⁶

The internal market architecture that was devised in the 1957 Treaty of Rome needs to be put in its context. In the mid-1950s, the six original members states were all committed to maintaining strong welfare states, provided legal support for collective bargaining, and had closely aligned cost levels. Moreover, most had adopted post-war constitutions that treated labour rights on par with civil and political rights. Under these conditions it was plausible to believe that leveling up of wages and social standards does not require labour law harmonization.⁴⁷

However, the deepening and expansion of the common market have shaken these assumptions. As Bertola and Mola note, the tension between economic and policy integration has different intensity in

⁴¹ The Labour Contract Law (2008); s. Cooney, S., Biddulph, K. Li, and Y. Zhu, *China's New Labour Contract Law: responding to the growing complexity of labour relations in the PRC*. 30 UNIVERSITY OF NEW SOUTH WALES LAW JOURNAL, 786–801 (2007).

⁴² The End of Cheap China, THE ECONOMIST (10.3.2012)

⁴³ On the rights of third parties generally, see: Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the WTO Agreement

⁴⁴ Catherine Barnard, *EC EMPLOYMENT LAW*, 3rd edn. (Oxford: Oxford University Press, 2006); J. Kenner, *EU EMPLOYMENT LAW: FROM ROME TO AMSTERDAM AND BEYOND* (Oxford: Hart, 2008).

⁴⁵ Diamond Ashiagbor, *Collective Labour Rights and the European Social Model* 3 LAW AND ETHICS OF HUMAN RIGHTS 223 (2009); Simon Deakin, *Regulatory Competition after Laval* 10 THE CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES 581 (2007-8).

⁴⁶ Ashiagbor, *supra* note 45, at 229.

⁴⁷ Deakin, *supra* note 45, 604.

different contexts. For example, concerns about redistribution policies are not as strong when economic integration occurs across countries with similar levels of development and factor endowments – such as the original Community members – as they are when trade is liberalized between countries at widely different levels of development.⁴⁸

The initial six Member States has grown to twenty-seven. The arrival of the euro and the accession of Member States with wages costs and social entitlements that were not aligned to those of existing members raised the threat of a race to the bottom for wages and labour standards.⁴⁹ Greater economic integration has created pressure for greater political and social integration, and the Lisbon Treaty of 2010 attempted to increase the democratic legitimacy of the EU by enhancing the powers of the European Parliament. However, Member States jealously guard their jurisdiction over labour and social policy.

These differences help to explain why goods and capital markets have been easier to integrate than markets in labour and services. In the European Union, the trade in services that involves the temporary transfer of workers across borders is “an interesting middle ground between (so far) relatively uncontroversial goods trade liberalization and hugely controversial immigration.”⁵⁰ Workers who are moved by their employer across the national borders of one Member State (called the home state) in order to provide services and work for a temporary period in another Member State (called the host state) are known as “posted” workers. Lelanne explains that the “wide wage gaps that have resulted from the EU’s enlargements made postings within the internal market look like postings between developed and developing countries.”⁵¹ Posted workers raise the question of social dumping directly, and they illustrate the extent to which the European union has “become a testing ground for globalization.”⁵² They embody the quintessential challenge to the principle of territoriality when it comes to the application of labour law “because they cannot be neatly classified into the category of labour migration (local application within the territory) or capital migration (non-intervention in the employer’s choice of law).”⁵³ Which country’s law applies to posted workers – the host or the home state – has important consequences for a range of different interests including home and host country workers and service providers as well as consumers and taxpayers.

In *Rush Portuguesa*, which was decided in 1990, the CJEU, which provides authoritative interpretations of the treaties that establish the European Union, opened the door very widely to posted workers.⁵⁴ The case concerned a Portuguese company, which was carrying out a construction contract in France using Portuguese workers. Although Portugal was a Member State, because of the transitional period applicable after Portugal’s accession to the EU, the Portuguese workers did not

⁴⁸ Guiseppe Bertola and Lorenza Mola, *Service Provision and Temporary Mobility: Freedoms and Regulation in the EU*, 33(4) THE WORK ECONOMY 633 (2010), FIRST PUBLISHED AS LSE “EUROPE IN QUESTION” DISCUSSION PAPER SERIES, LEQS Paper No. 09/2009, 9.

⁴⁹ See, for example, Charles Woolfson and Jeffrey Sommers, *Labour Mobility in Construction: European Implications of the Latvian Laval un Partneri Dispute with Swedish Labour* 12(1) EUROPEAN JOURNAL OF INDUSTRIAL RELATIONS 49-68 (2006).

⁵⁰ Bertola and Mola, *supra* note 48, at 7. The middle ground to which Bertola and Mola refer is legitimacy; under the Treaty, services and goods are governed by the principle of freedom of movement. The failure of many countries to adopt GATS Mode IV suggests the cross-border posting of workers as part of the free movement of services is as controversial at the international level. See Jane Kelsey, *SERVING WHOSE INTERESTS? THE POLITICAL ECONOMY OF TRADE IN SERVICES AGREEMENTS* (Milton Park: Routledge-Cavendish, 2008) chapter 6.

⁵¹ Stéphanie Lelanne, *The posting of workers, EU enlargement and the globalization of trade in services*,” 150 (3-4) INTERNATIONAL LABOUR REVIEW 211 (2011) 230.

⁵² *Ibid.*

⁵³ Guy Mundlak, *Deterritorialising Labour Law* 3(2) LAW AND ETHICS OF HUMAN RIGHTS 189-222, 202 (2009).

⁵⁴ C-113/89 *Rush Portuguesa*, [1990] ECR I-1417.

have their own right to work in France; they crossed the border with the company that employed them. The question was whether France was entitled to enforce its work permit rules with respect to these workers or whether the permits constituted a restriction to the free movement of services. The CJEU ruled that Articles 56 and 57 Treaty of the Functioning of the European Union (TFEU) required that the company be entitled to “move freely with all [its] staff” when carrying out a contract in another Member State and that if the work permits were to apply the free movement of services would be restricted. Significantly, the Court did not limit the right to core staff, defined by reference to a managerial role or the possession of specialized skills.⁵⁵ The CJEU’s premise was that posted workers “return to their country of origin after the completion of their work without at any time gaining access to the labour market of the host Member State.”⁵⁶ However, the Court provided some solace to Member States who were concerned to protect their national labour regimes; it stated “Community law does not preclude Member States from extending their legislation, or collective labour agreements, entered into by both sides of industry, to any person who is employed temporarily, within their territory, no matter in which country the employer is established.”⁵⁷

The CJEU’s remark in *Rush Portuguesa* provided the impetus for a directive that was specifically designed to deal with the problem of social dumping by requiring host countries to apply key labour standards to posted workers. In the negotiations, a large majority of the Member States favored an approach oriented to protecting national regimes of labour regulation.⁵⁸ However, Portugal and the United Kingdom opposed the legislation because they were interested in exporting services within the European Union.⁵⁹

After extensive debate in the Council of Ministers, political agreement was reached in March 1996, and the Posted Workers Directive (PWD) directive was formally adopted in December 1996.⁶⁰ The PWD applies when an undertaking established in one Member State transfers an employee to work temporarily in another Member State in the context of the provision of services.⁶¹ Within that general principle, three distinct scenarios are identified: posting to perform a contract obtained by the employer, intra-company transfer, and the hiring-out of workers. Article 3(1) places a duty upon host states to extend a range of labour standards to posted workers, including: maximum work periods and minimum rest periods; minimum paid annual holidays; minimum pay; the hiring-out of workers (including the regulation of agencies); health and safety at work; protective measures for women who are pregnant or who have recently given birth, for children and for young people; and equality of treatment between men and women and other provisions on non-discrimination. Significant aspects of labour law, such as protection against dismissal, and all aspects of collective labour law (concerning representation, bargaining, association, and industrial action), are not included in Article 3(1).

Two provisions appeared to permit host Member States to go beyond Article 3(1) in extending labour standards to posted workers. Article 3(7) provides that Article 3 “shall not prevent application of terms

⁵⁵ *Ibid.*, Opinion of the Advocate General van Gerven, para 16 and 17.

⁵⁶ *Ibid.*, at para 15

⁵⁷ *Ibid.*, at para 18

⁵⁸ See Marco Biagi, *Fortune Smiles on the Italian EU Presidency: Talking half-seriously about the posted workers and parental leave directive* 12 INTERNATIONAL JOURNAL OF COMPARATIVE LABOUR RELATIONS AND INDUSTRIAL RELATIONS 97 (1996), 99-105. The number of Member States increased from twelve to fifteen on 1 January 1995.

⁵⁹ Ireland and Spain also opposed the directive at first, in the interests of their service sectors, but supported it after a relaxation of the provisions in relation to collective agreements during the negotiations. *Ibid.*

⁶⁰ Directive 96/71 concerning the posting of workers in the framework of the provision of services, OJ 1997 L 18/1. For a discussion of the directive see Paul Davies, *Posted Workers: Single Market or Protection of National Labour Law Systems?* 34 COMMON MARKET LAW REVIEW 571 (1997).

⁶¹ Directive 96/71, Article 1(3).

and conditions of employment which are more favorable to workers.” In addition, Article 3(10) gives a more general power of extension to member states, provided they act “in compliance with the Treaty” (now Article 56 TFEU). Article 3(10) allows the extension of other “terms and conditions of employment” to posted workers, if these are “public policy provisions”. It also permits a Member State to extend terms and conditions laid down in collective agreements or awards – as defined in Article 3(8) – in sectors other than construction. However, there are clear restrictions on what kinds of collective agreements can be extended for fear that collective agreements can be used as protectionist devices.⁶²

The balance that the PWD struck between internal market integration and the concern to prevent social dumping was initially regarded as very protective of national labour law regimes.⁶³ But, even so, it was also “an important derogation from the prohibition of discrimination on the basis of nationality” guaranteed in the Treaty and “the territorial application of the law of Member States” since it only provides a core of mandatory host state labour standards.⁶⁴

This political balance that was achieved by the EU-15 in the posted workers directive was profoundly disrupted by the accession of several low-wage former-Soviet states in 2004, which confronted “the legislative and judicial processes ... simultaneously ... with the same issues.”⁶⁵ The proposed services directive, which was negotiated in the shadow of enlargement, was an attempt to remove obstacles to economic activity within Europe. Since services account for the majority of employment in Europe, the Directive proved to be a focal point for the conflict between market integration and labour rights. Initially, the draft directive was premised on the country of origin principle, which would subject service providers only to the laws applying in the country in which they were based. Trade unions feared that service providers based in Eastern European and Baltic States that had low wages and labour standards as well as ineffective trade union representation would use this comparative advantage to compete with service providers in Member States’ with strong regimes of labour regulation. Unions lobbied to exclude labour law from the provisions of the directive, so that the labour law of the host state, instead of home country, would apply to service providers. The final version of the Directive dropped the country of origin principle for labour law and preserved the Posted Workers Directive.⁶⁶

While the exemption for labour law seemed to uphold the balance that was forged in the PWD, a series of judicial interventions changed it. Beginning with *Laval* in 2007, the CJEU decided a series of cases that raised the issue of a host state’s right to impose national or regional labour standards and collective agreements on posted workers. The Court dramatically restricted when host-state labour standards can be applied to posted workers.⁶⁷ In doing so, the CJEU reversed the hitherto prevailing understanding of the legislation. It did this by making the minimum floor in the Directive a ceiling; the

⁶² Davies, *supra* note 60.

⁶³ *Ibid.*, at 573.

⁶⁴ Herwig Verschueren, *Cross-Border Workers in the European Internal Market; Trojan Horses for Member States Labour and Social Security?* 24(2) INTERNATIONAL JOURNAL OF COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS 167 at 181 (2008).

⁶⁵ Brian Bercusson, *The Trade Union Movement and the European Union: Judgment Day* 13 EUROPEAN LAW JOURNAL 279 (2007), 279-80.

⁶⁶ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the Internal Market, OJ L 376, 27 December, 2006, 36-68; Gareth Davies, *The Services Directive: Extending the Country of Origin Principle, and Reforming Public Administration*, 32(2) EUROPEAN LAW REVIEW (2007) 232-45; Bertola and Mola, *supra* note 48, 13-14.

⁶⁷ C-341/05 *Laval* [2007] ECR I-11767 (Grand Chamber); C-319/06 *Commission v Luxembourg* [2008] ECR I-4323 (First Chamber); C-346/06 *Rüffert* [2008] ECR I-1989 (second Chamber); C-271/08 *Commission v Germany* (occupational pension procurement), judgment of 15 July 2010 (Grand Chamber).

Court referred to Article 3(1) PWD as “an exhaustive list”.⁶⁸ Under the new approach, the Court also interpreted Article 3(7) to mean that it permits more favorable home-state (and not host-state) rules to apply to posted workers, as well as allowing service-providers in host states voluntarily to provide more favorable terms for posted workers. To emphasize, when the labour-capital conflict transcends national borders, traditional institutions of labour law gain new meaning. In the case of posted workers, minimum labour standards were transformed into maximum employment standards.

The 2008 *Rüffert* case epitomizes the swing in the CJEU’s approach to the interpretation of the PWD and the debate over social dumping. The case involved Polish construction workers posted to work in Germany asking whether a Member State can impose social conditions in the public procurement process.⁶⁹ A Polish subcontractor obtained a contract to build a prison in Lower Saxony, a German Länder. The Lower Saxony public procurement law required as a condition of the contract that the service provider abide by a specified collective agreement. The purpose of the Law was to counteract distortions of competition that arise in the field of construction and public transport services resulting from the use of cheap labour and alleviate burdens on social security schemes. It provides, to that end, that public contracting authorities may award contracts for building works and public transport services only to undertakings that pay the wage laid down in the collective agreements at the place where the service is provided.⁷⁰

The Polish subcontractor was found to be paying its workforce less than half the minimum wage specified in the collective agreement. Action was taken against the main contractor (and subsequently its liquidator, Mr. Rüffert) for its failure to ensure, in accordance with its contract with the public authority, compliance by subcontractors with the wage levels laid down in the applicable collective agreement. Rüffert counter claimed, on behalf of the contractor, that such requirements for employers of posted workers to comply with host-state collective pay standards breached the Treaty’s freedom to provide services.

The German referring court clearly favored the view that the Lower Saxony public procurement law should not be allowed to stand:

In the case of foreign workers, the obligation to comply with the collective agreements does not enable them to achieve genuine equality of treatment with German workers but rather prevents workers originating in a Member State other than the Federal Republic of Germany from being employed in Germany because their employer is unable to exploit his cost advantage with regard to the competition.⁷¹

In effect, it invited the CJEU to become involved in what had proven to be a very contentious national issue about posted workers, public procurement, and social objectives.⁷²

⁶⁸ *Laval* [2007] ECR I-11767.

⁶⁹ General Procurement Directive (GPPD) on Supplies, Services and Public Works, Directive 2004/18/EC, OJ 2004, L 134/114.

⁷⁰ As quoted in Claire Kilpatrick, *Internal Market Architecture and the Accommodation of Labour Rights: As Good as it Gets?* EUI WORKING PAPERS, LAW 2011/04, 13.

⁷¹ *Rüffert*, *supra* note 67, para 15.

⁷² Kilpatrick, *supra* note 70, 13. The issue of which country’s labour law was applicable to posted workers was especially controversial in Germany, where the single market procurement rules meant that in the early 1990s “much East-German construction was performed by British, Portuguese and Italian firms posting workers to German construction sites, at the same time as many German construction workers were able to draw unemployment benefits of Bismarkian generosity.” The German government reduced construction workers’ entitlement to unemployment insurance benefits while simultaneously imposing a minimum wage for all construction work performed on German soil. Bertola and Mola, *supra* note 7, 8-9; Michael Blauburger, *With Luxembourg in mind ... The Remaking of National Policies in the Face of ECJ Jurisprudence* 19:1 JOURNAL OF EUROPEAN PUBLIC POLICY 109-126 (2012), 123.

The starting-point of the CJEU judgment was that Article 3(1) was inapplicable: the regional legislation did not specify a *minimum* rate of pay. Moreover, the collective agreement at issue had not been declared universally applicable in Germany, even though there was a system for making such a declaration.⁷³ The Court then repeated verbatim the interpretation of Article 3(7) had given in *Laval*: that it does not enable a host state (including a region) to extend terms to posted workers.⁷⁴

The Court placed further constraints upon Member States when it considered the case under Article 56 TFEU. The mere fact that service providers would face higher wages than in the home state meant that the legislation imposed an “additional economic burden” upon them, which was caught by Article 56.⁷⁵ Moreover, the Lower Saxony legislation could not be justified by reference to the objective of “ensuring the protection of workers” because it did not apply to private sector workers, and no evidence was offered as to why public construction workers alone should be protected.⁷⁶

Remarkably, despite the fact that the case involved public contracting authorities and legislation designed to promote social objective through procurement, the Court did not consider “the public procurement social *acquis*, the [public procurement] directives and its own progressive [procurement] jurisprudence.”⁷⁷

The CJEU could easily have taken a different approach to the Lower Saxony law, one that would have required the Polish service provider to adhere to the regional collective agreement with respect to the posted Polish workers. The Advocate General adopted an equal-treatment approach, noting that “by requiring respect for the German collective agreement by both domestic and foreign tenderer, Lower Saxony was complying with the key principle of equal treatment,” expressly articulated the public procurement directive.⁷⁸

The effect of Court’s interpretation of the PWD in *Rüffert* is to permit cross-border service providers to import the country of origin’s labour law regime subject to a mandatory core of maximum host country standards.⁷⁹ In fact, the decision raises the possibility that while domestic tenderers can be subject to social objectives in the procurement regime, unless the provisions implementing these objectives fall within Article 3 (1) of the PWD, service providers from outside the Member State will not be required to observe them.⁸⁰ This state of affairs could lead service providers located in the host country to complain that they are being treated unequally in comparison with a cross-border service provider who is not required to adhere to the social objectives imposed in the contract in the public procurement process.

⁷³ *Rüffert*, *supra* note 67, paras 24-27.

⁷⁴ *Ibid.*, paras 33 and 34.

⁷⁵ *Ibid.*, para 37

⁷⁶ *Ibid.*, paras 39-40. The first indent of Article 3(10) of the PWD allows the extension of other “terms and conditions of employment” to posted workers, if these are “public policy provisions”.

⁷⁷ Kilpatrick, *supra* note 70, 15. The failure of the Court to consider the procurement directive or its own procurement jurisprudence suggests that the panel’s decision may be overturned by the Grand Chamber if it has an opportunity to do so. Thanks to Claire Kilpatrick for this observation.

⁷⁸ Catherine Barnard, *Using Procurement Law to Enforce Labour Standards* in Guy Davidov and Brian Langille, eds., *THE IDEA OF LABOUR LAW* (Oxford: Oxford University Press, 2011) 256-72, 268 discussing Directive 2004/18 on the award of public works contracts, public supply contracts, and public service contracts.

⁷⁹ Deakin, *supra* note 45, 587.

⁸⁰ Barnard, *supra* note 78, 268-9.

IV. Discussion

Our discussion of the two cases will focus on three broad themes. The first theme concerns what Fraser calls the “what” question; what is the moral problem at stake and how does the “abnormality” resulting from the globalized basis of the two cases affect our perceptions of what is the just resolution of the problem. The second theme draws on the uncertain outcomes regarding the first-order problem. We therefore turn to assess the questions of “why” and “how”; that is, we seek to identify the agents who are taking part in the two processes, who is included and whose voices remain unheard. We also seek to assess whether the agents meet under circumstances of participative parity. Thirdly, we seek to assess the degree of flexibility in the process. To what extent is the process self-reflective, radically democratic, and capable of identifying just solutions to the underlying problems?

a. The "What" – Exploring the Scope of the Moral Problem

While the two examples involve very different actors and a different dispute resolution forum, they raise very similar moral dilemmas. The US-China case demonstrates the concern that industry flees to countries where production costs are lower. The case does not discuss the nature of these costs, but it is obvious that in this industrial sector, low labour costs affect the cost of producing tires. In the *Rüffert* case, the sector at stake is construction, and therefore the possibility of shifting the economic activity is not feasible. Instead, the CJEU's decision effectively allows a large part of Poland's labour regime to be imported, albeit subject to a minimum core of German labour standards, into Germany. If we take the Chinese example to extreme, production can be transferred to Free Export Trade Zones enclaves where labour standards and wages are low. By analogy, the example of posted workers in Europe illustrates how the law permits the dynamic creation of low-cost enclaves within Germany. Thus, despite the obvious differences between the two cases, they raise essentially similar normative dilemmas.

In the United States, jobs are disappearing,⁸¹ while they are moving to China. In Germany, there are still jobs, but construction increasingly looks like an “enclave” that excludes German workers who seek to work according to German wages and conditions. American workers have some legal leverage to contest the problem of ‘runaway shops’ when an employer moves its production to a non-union site within the United States.⁸² However, labour cannot prevent the off shoring of production. German workers cannot legally waive their employment rights in order to compete with the posted workers, although at the same time German and non-German service providers are entitled to equal treatment in local procurement processes.⁸³ In both situations, the movement of capital (industrialists and contractors) is viewed as a given. In the post-Westphalian regime, enterprises can relocate to take advantage of lower wage costs and labour standards and then sell in other member states with higher labour standards. They can also take advantage of lower wages costs and labour standards that were established in another jurisdiction by posting workers temporarily to perform services.⁸⁴

⁸¹ This is not to conclude a debate about whether employment rates, in the aggregate, are necessarily a function of globalization or of other factors, such as better utilization of technology. This statement holds a narrower position, holding some jobs are lost due to the move of industry to other countries. Production workers who lost their jobs may find other jobs in manufacturing or services, but they suffer displacement, temporary or long-term, which is not necessarily compensated by job-creation in other sectors.

⁸² Jan Sturmer, *An Analysis of the NLRB's "Runaway Shop" Doctrine* 17 HOFSTRA LABOUR & EMPLOYMENT LAW JOURNAL 289 (1999-2000).

⁸³ Bernard, *supra* note 78, views such situations as "reverse discrimination", because the option of lower labour costs is not available to local contractors only to foreign contractors.

⁸⁴ Davies, *supra* note 60, 599-601.

The type and the source of rules that apply to posted workers within the EU are controversial because they constitute the thin line between social dumping and comparative advantage. Similarly, the rules governing free trade permit exceptional barriers to trade by drawing a thin line between the normal course of trade and competition, on the one hand, and unusual market disruption, on the other hand. In both situations the dividing line is contested since social dumping and unusual market disruptions are, arguably, merely the extension of comparative advantage and free trade. The former are not qualitatively distinct situations from the normal adjustments of competitive markets, but merely a more “grotesque” appearance of what is arguably the nature of economic globalization.

In order to resolve these conflicts, it is possible to develop a moral stance that unequivocally denies the arguments on comparative advantage and free trade, or alternatively, rejects the concerns about social dumping and the hardship that is experienced by local (German and American) workers. Instead, attempts to draw the line in between suggest that compromises must be made. These compromises can be based on economic argumentation that distinguish between the “normal course of markets”, on the one hand, and undesirable market failures and negative externalities that cannot be captured, on the other. Other moral theories can seek a fair distribution of rewards and opportunities. Political pragmatism, combined with an array of different types of moral argumentation, result in legislation and individual cases that are often contradictory and ambiguous.

For example, there are three largely inconsistent objectives for PWD: the promotion of cross-border services (which is the Treaty basis of the PWD), protecting posted workers, and protecting host state workers and national labour regimes.⁸⁵ Observing the question at stake from a political-economic view, these different objectives tend to line up with different interests and different actors. Market integration can be opposed not only by providers who enjoy monopoly rents, but also be opposed by consumers concerned with the quality of the services they purchase. While customers and taxpayers may want the best value for the services, as citizens they also may believe that it is important for Member States to use public procurement for social objectives. Hence, the point of controversy has several non-commensurable dimensions, because economic gains and losses are as important as the consequence of different borderlines to the social fabric of local communities.

Empiricism in such disputes is vital, but does not easily lend itself to a simple algorithm to resolve the problems. The empirical debate in the tires case aptly demonstrates the difficulty in relying on empiricism as the ultimate arbiter. A large part of the WTO's decision engages in empirical questions, including mundane issues, such as the choice of year that serves as the baseline to demonstrate the flooding of imports into the United States, or the more thorny issue of determining the causality in the correlation between increased imports and plant closures.

Similarly, unions in the European high-income host counties fear that the entry of service providers from low-income countries will result in social dumping. However, it is not clear that free movement of services will lead to lower wages in host countries. At the same time, commentators question whether harmonizing up the terms and conditions for the posted workers will promote greater employment for workers in the low-cost locations.⁸⁶ Nor is it obvious that lower wages necessarily mean cheaper services as better paid workers may be more productive.⁸⁷ Alternatively, services may remain at the same price because the service contractors will extract higher quasi-rents from the transaction. In assessing the gains and losses, high-income workers in host countries may well benefit from service providers from low-income home countries, and workers in lower-cost states may gain from employment created by the cross-border trade in services.⁸⁸ Losses in local employment may be

⁸⁵ Paul Davies, *Case C-346/06, Rüffert v Land Niedersachsen [2008] ILRL 467 (CJEU) 37(3) INDUSTRIAL LAW JOURNAL* 295 (2008).

⁸⁶ *Ibid.*

⁸⁷ Davies, *supra* note 60, 573.

⁸⁸ Bertola and Mola, *supra* note 48, 11; Hepple, *supra* note 4, 165.

offset by more efficient uses of public resources that enable governments to set aside some public expenditure in favor of domestic job creation and cushion the hardship of unemployment. However, public expenditures may also be earmarked and otherwise trapped, and the changes in the composition of the labour force may simply translate into growing inequality in the host country.

Moral and empirical debates are essential for thinking about the effects of cross-border movement on the labour market and the capacity of states, localities, and communities to improve their share of the gains. However, ethical and empirical positions are part of the debate and are at the core of contestation. Framing the debate as ethical does not determine the choice of moral theory. Similarly, framing it as empirical does not establish the choice of empirical metrics and how they are used. It is crucial to allow multiple agents to make claims about ethical and empirical choices. In this process, the actual choice of whose interests shall prevail is not simply a technical and complex empirical question; it is, as Fraser indicated, a normative and political one too.

b. The "Who" and the "How": Towards Participative Parity?

Shifting from the search for a singular moral logic to resolve abnormal global disputes, Fraser calls our attention to the process of decision-making. Here she emphasizes the need to incorporate all those who are being affected, allowing them to voice their interests and concerns. Moreover, she points at the need to construct a process that is measured by participative parity; that is, the process must be open and avoid structural biases that favor one group over another.

In assessing the two cases according to the benchmark of participative parity, we abstain from addressing the end-outcome of the two processes. A process may result in a decision that does not conform to our moral view; it may result in a mistaken decision; or it may be corrected in future decisions. We therefore bracket the end outcome and look at solely at the participating agents and the rules that govern their interaction.

An additional preliminary concern is that both the WTO's appellate decision and the CJEU case are not standalone discrete events. Both decisions are part of an incremental and iterative process. These processes are incremental because we cannot observe only the confrontation in court without looking at the process that brought it about. Moreover, the court's decision may have diverse effects in the aftermath – it may be ignored and have unanticipated political consequences, it may be overturned by another body, or it may be diminished by alternative economic measures. It is also an iterative process because a single decision may be repeated in later stages, amended, or distinguished to oblivion.

Starting first with the WTO, its dispute resolution process allows interaction that crosses geo-political borders, but at its core states remain the sole disputants. China files a complaint against the United States; the United States responds; the Dispute Settlement Body (which is identical to the General Council) is based on representatives from different countries, and it is responsible for appointing the Panel and the appellate bench; other countries ('third parties') may ask to be heard because they have an interest in the dispute ('a substantial trade interest'). In this process there is no formal standing to non-state agents.⁸⁹

Consequently, positions that are presented in the WTO dispute resolution process provide a seemingly uniform state-based position. The United States defends its tariffs policy, despite the fact that some corporations and associations in the United States oppose these measures. Prior deliberations in the USITC allow trade groups to testify before the commission, but upon hearing the parties the Commission "resolves" conflicting claims, and on the basis of democratic principles, it presents a

⁸⁹ Marcos A Orellana, *WTO and Civil Society*, in *THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW* (Oxford: Oxford University Press 2009) 671-694

uniform US position. Such prior deliberations vary from country to country, but none are all inclusive, in the sense of admitting in all interests to be heard.⁹⁰

More interesting is the case of the respondent – China. While the USTIC heard conflicting positions within the US, the Chinese government does not need to go through similar motions in order to file a complaint. There was no prior process of hearing, and, clearly, no process of deliberations between the various groups affected within China. Arguably, in the particular case of the tires exports, there may be no disagreement. However, the remaining deficit remains – interests within each state cannot coalesce with similar interests in other states, if the states themselves are in a conflicting position. All interests are filtered through the state interest. In the next section we will discuss the limited range of remedial power the WTO dispute resolution proposes. However, at the outset it is important to note that while internal Chinese agents may be unified in their position against the US tariffs, they may have differing views about the situation of industrial workers in China and its relevance to the global sector of (tire) manufacturing. Even if the Chinese Federation of Trade Unions and the member-unions are acquiescent with the State, and may even perceive their role as akin to that of a State's agency, there are signs of independent unions and NGOs that present different claims, engage in protest, and seek to secure independent voice for the workers' interests.⁹¹

The effect of mediating all interests through the nation state is to occlude alternative framings of the dispute. The processes collapse all inter-state conflicts into one position. They do not facilitate alternative scales, for example at the sector level, for framing the dispute. The WTO proceedings do not allow trade unions or employers associations to prepare independent positions that cross the state borders. NGOs advocating for human rights, workers rights, or consumer rights are not entitled to join the process. Over the last few years, the WTO has gradually been willing to admit amicus briefs by agents in the civil society.⁹² However, this has not become a routine matter, it is still strongly contested, and analyses of the dispute resolution process agree that amicus briefs were not influential on the outcomes.⁹³ Thus far, amicus briefs have only been accepted in the context of trade disputes that touch on environmental issues. Similar to other doctrinal and institutional issues in the WTO, environmental concerns have thus far made more headway into trade considerations in comparison to labour issues.⁹⁴ The rationale for “closing” the process is to avoid the excessive crowding of the expedited process, prevent barriers to states' compromises during the dispute resolution process (which eventually take place in a large share of disputes), and side-step the flourishing industry of legal lobbyists (that may add considerable weight to those interests that are backed by more resources). Although some of these rationales for closing the process resonate with the attempt to ensure parity representation, this solution to the problem of addressing participative disparity removes rights of participation altogether. Opening the process, by means of conducting public hearings and admitting amicus briefs, has thus far been experimental and anecdotal.

⁹⁰ For example, the USTIC hears all trade unions and economic organizations, but does not allow users and consumers to initiate the process. By contrast, the European Commission admits end-users, but only allows recognized trade unions and employers associations. See Ruiger Wolfrom, Peter Tobias Stoll, Michael Koebel, *WTO – TRADE REMEDIES* (Leiden: Martinus Nijhoff Publishers 2008) 910.

⁹¹ Eli Friedman & Ching Kwan Lee, *Remaking the World of Chinese Labour: A 30 Year Perspective* 48(3) *BRITISH JOURNAL OF INDUSTRIAL RELATIONS* 507-533 (2010).

⁹² GATT Appellate Body Report on Eur. Cmty.—Measures Affecting Asbestos and Asbestos-Containing Prods., WT/DS135/AB/R (Mar. 12, 2001); GATT Appellate Body Report on U.S.—Imp. Prohibition of Certain Shrimp and Shrimp Prods., WT/DS58/AB/R.

⁹³ Orellana, *supra* note 89, at 689-690; William Davey, *The Limits of Judicial Processes*, in *THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW* (Oxford: Oxford University Press 2009) 460, at 474.

⁹⁴ On the imbalance between labour and environmental issues in the context of trade, see Marceu, *Trade and Labour*, *supra* note 31.

The exclusion of non-state based interests is evident in the decision of the appellate body. The decision resolved a trade dispute, but the employment opportunities and working conditions of American and Chinese workers were barely mentioned in the 150 pages of the decision. The appellate body's concern was to determine whether the trade disruption was part of the normal course of trade or an "abnormal" situation, but not in Fraser's sense of abnormal justice. Workers were not the subject of inquiry and remained invisible. The decision does not provide an account of the wages and working conditions of the Chinese tire workers or of the plight of the workers in the US who lost their jobs. The question of whether the tariffs will bring back jobs to the US is never answered because it is not the question addressed to begin with.

At the same time, the tires case demonstrates that even though the WTO dispute resolution process is exclusionary in itself, it still creates a space of strategic involvement *before* the process started. The fact that the USW has the political capacity to initiate the imposition of tariffs that will aid the union in its efforts to improve labour's lot is important. However, the problem is that attempts to address the consequences of the tire industry's flight outside the United States do not, and cannot, match the measures that were developed to prevent runaway shops within the United States.

In the processes leading up to the dispute resolution process, there is a fundamental asymmetry between the ambit of political and economic power. Trade unions are gradually resorting to the political arena. Employers, generally, can exercise their global economic power and, unlike unions, rely less upon political power. These distinctions are not altogether dichotomous. For example, employer groups were also aware of the need for political action. The TIA's objections to the tariffs policy in the United States, resonated with the action of other employers' organizations, such as the American Chamber of Commerce, which actively tried to pressure the Chinese government to water down the labour law reform in 2008 and make it less protective for workers.⁹⁵ Nevertheless, the power of exit augments the industrialists' global political power, while the political power of the trade union remains more local. Thus, while the USW, the multinational corporations, and the TIA resorted to political pressure that eventually led to the dispute resolution process, their political options remain different and do not correspond to the notion of participative parity. Moreover, the process does not affect the corporations' power of exit. They can adjust their production strategies and locations regardless of the outcomes. American and Chinese workers have no similar options.

To conclude, there is little in the WTO dispute resolution process that gives different weights to different interests or attempts to forge a community of interests. It remains a state-centered process, it conflates the voices of those who are affected by the decision to the state's position, it does not succeed in creating participatory parity for groups whose interests are not adequately voiced by the state, and in particular, it does not aid in placing non-state interests on par with the state.

Turning to the CJEU's decision, it seems that the process is more inclusive. While nation states are crucial actors in the EU, there is a much broader array of actors who participate in the process at the various stages. The EU resolves conflicts over market rules and social objectives through a "distinctive constellation of institutional actors"; some of these actors are involved in the development and implementation of internal market legislation and others play a role regarding the application and interpretation of the legislation.⁹⁶

The decision-making process in the EU remains, like in the WTO, state-centered. However, there are several distinct institutions that balance states' interests differently, allowing for conflictual positions to surface. At the legislative stage, there is a conflict between EU institutions, such as the Parliament, Committee, and Council. The European *Parliament* plays an important pro-labour role, and the co-

⁹⁵ US-China business council Comments on the Draft Labour Contract Law of the People's Republic of China (Draft of March 20, 2006) (19.04.2006), available at: www.uschina.org/public/documents/2006/04/uscbbc-comments-labour-law.pdf

⁹⁶ Kilpatrick, *supra* note 70, 3.

decision legislative procedure introduced by the Lisbon Treaty in 2010 has emphasized and expanded the Parliament's authority. Elected members sit by political orientation rather than by nationality, and this is the most democratic forum of the EU. By contrast, the *Commission*, which has the power to initiate legislation, has tended to place greater emphasis on market integration. However, different parts of the Commission have different roles and different positions when it comes to infringement actions against Member States or the extent to which national regimes of labour regulation should be protected.⁹⁷ Although their political and economic orientations may differ, both the Parliament and the Commission have a pro-Europe as opposed to Member-State bias. This bias is countered by that of the *Council*, which is composed of political representatives selected by each Member States. The Council has the primary legislative role in the EU. In the case of posted workers, Member States' positions tends to depend on whether the State views itself as primarily an importer or primarily an exporter of posted workers.⁹⁸

Although Member States dominate the legislative process through their role in the Council, social partners – trade unions and industry associations – also have an institutionalized role in the legislative process. The Commission has the task of consulting labour and management, and there is the possibility that they may agree to opt for the collective “limb of [the] twin track approach” to social legislation.⁹⁹ Unlike the WTO, civil society actors representing labour and capital are deeply institutionalized in the process. Despite this expanded notion of interests' representation, the role of other organizations in the civil society (community organizations, human rights organizations and labour/capital organizations that do not stand the formal tests of representative status) is still attenuated.¹⁰⁰

In moving from the legislative stage to litigation, states remain central participants, but the options for non-state interventions increase. Sometimes overlapping, but often different, agents and processes are involved in transposition and structure the interpretation of Treaty and the Directive than those agents and processes involved in its development and adoption.¹⁰¹ First, as the example of the PWD illustrates, Member States continue to be key actors because they must transpose the Directive, and they have a range of options. At this stage the lobbying of civil society actors is very important, and the social partners have a special role. In some jurisdictions, such as Sweden for example, the transposition took the form of collective agreements and not legislation. Typically, the approach of Member States to transposing the PWD has been determined by whether or not they are labour exporters or importers when it comes to cross-border services.¹⁰² However, there are also attempts by trans-European civil society actors, such as the European Trade Union Congress, to develop common platforms that transcend the interest of individual Member States and nationally based civil society

⁹⁷ *Ibid.*, referring to the Commission's internal labour market direction and the social affairs directorate.

⁹⁸ This is obvious from the way the Member States lined up in *Laval*; the new accession countries support the action brought against the union that engaged in strike action, whereas the older Member states opposed it. Bercusson, *supra* note 65.

⁹⁹ Barnard, *supra* note 44, 88.

¹⁰⁰ Annalisa Reale, *Representation of Interests, Participatory Democracy and Lawmaking in the European Union: Which Role and Which Rules for the Social Partners?* JEAN MONNET WORKING PAPER NO 15/03 20–21 (2003).

¹⁰¹ Kilpatrick, *supra* note 70, 3.

¹⁰² Sixteen member states have implemented only minimum protection under the PWD and they are mainly made up of newer accessions; only four of the EU 15 provide only minimum protection. By contrast, the eleven member states that provide a more protective (and, generally, expensive) approach are mostly likely to be one of the EU 15 and an importers of labour. Roberto Pedersini and Massimo Pallina, *Posted Workers in the European Union* (Ireland: European Foundation for the Improvement of Living and Working Conditions (Eurofound), 2010) 19 (<http://www.eurofound.europa.eu/docs/eiro/tn0908038s/tn0908038s.pdf> (date accessed: 16 December 2011)).

actors.¹⁰³ Thus, at the transposition stage, although the process is strongly state centred, in comparison with the WTO, it is much more open to interventions by the social partners and civil society actors.

Despite the latitude with which Member States can transpose directives, their freedom is constrained by EU institutions, especially the CJEU, which provides authoritative interpretations of Directives and determines whether Member States are in compliance. In the context of the PWD, the CJEU has played a very important role both in setting the initial ground rules that resulted in the Directive (*Rush*) and in interpreting it (*Rüffert*). The CJEU is composed of judges from each Member State, as well as eight Advocates General, who provide independent written opinions. Non-parties can challenge in national courts how Member States have transposed a directive, and, in turn, national courts can trigger a reference to the CJEU about the compatibility of Member State laws with EU legislation and the Treaty. In effect, references from national courts to the CJEU enable any European citizen to challenge applicable EU laws. All of the parties to the proceeding in the national court, Member States, and European institutions may take part in the reference before the CJEU. In addition, the Commission (as well as a Member State) can directly challenge a Member State's transposition of the Directive. Moreover, in both types of proceedings before the CJEU, interveners, including Member States and civil society actors, are entitled to participate. Thus, the litigation allows a wide range of voices, including civil society actors, to be heard. There is also the possibility of some interplay between the European Court of Justice and the European Court of Human Rights when it comes to the interpretation of such fundamental freedoms. The two courts have provided very different interpretations of freedom of association in the labour context.¹⁰⁴ The Lisbon Treaty, which, among other things, requires the EU to accede to the European Convention on Human Rights, may influence the CJEU from moving away from a "pure market orientation."¹⁰⁵

Nor does a CJEU decision end the matter. As Blauberger recounts in his analysis of the different German Länder responses to the CJEU's interpretation of the PWD in *Rüffert*, "even full compliance with an (CJEU) ruling may at least partly be reconciled with the preservation of autonomous domestic regulation."¹⁰⁶ While centre-right Länder governments took the "opportunity to abolish or disapply the requirement of collective agreement declarations", other Länder's "enacted legislation on collective agreement declarations, albeit less demanding than before the [CJEU] ruling."¹⁰⁷

By contrast with the WTO process, the EU process provides for overlapping engagement of various institutions and actors that present Member States' interests in a variety of different ways. Thus, there is no "single" position that can be adopted by a Member State because it is always open to contestation. Moreover, at the different stages of the EU process (legislation, transposition, and litigation) Member States and non-state actors play an important role. Although there is limited recognition for groups and interests that are not formally "social partners", there is a possibility that they can raise a legal challenge or intervene in litigation initiated by another party. The overlap between market-oriented and Member State's social interests, as well as the involvement of civil society actors, provides for participation, even if it does not achieve full parity, of a range of different actors with conflicting interests.

¹⁰³ European Trade Union Congress, *A Revision of the Posting Workers Directive, Eight Proposal for Improvement, Final Report from the ETUC Group on Posting*, Brussels, 31 May 2010.

¹⁰⁴ Judy Fudge, *Constitutionalizing Labour Rights in Europe*, in Tom Campbell, Keith Ewing and Adam Tompkins, eds., *THE LEGAL PROTECTION OF HUMAN RIGHTS: SKEPTICAL ESSAYS* (Oxford: Oxford University Press, 2011) 244-67.

¹⁰⁵ Catherine Barnard and Simon Deakin, *European Labour Law after Laval* in Marie-Ange. Moreau and Iryna Ulasiuk, ed.), *BEFORE AND AFTER THE ECONOMIC CRISIS: WHAT IMPLICATIONS FOR THE "EUROPEAN SOCIAL MODEL"?* (Cheltenham, Edward Elgar, 2011) 215 at 264.

¹⁰⁶ Blauberger, *supra* note 72 at 111.

¹⁰⁷ *Ibid.*, at 121.

c. Institutionalizing Meta-Democracy: Is there a Potential for Radical Re-Framing?

The WTO is not the most obvious forum for trade unions to successfully pursue their interests because its transformative capacities are rather limited. Although trade unions have some indirect political influence in the process, it is still controlled by states. The rules of the game in the dispute resolution process are oftentimes criticized for not being flexible, transparent, and inclusive, and the legitimacy of the process is therefore adversely affected.¹⁰⁸ The rules are considered in the disputes themselves, some panel hearings have been opened to the public, and some outreach was made to civil society.¹⁰⁹ Nevertheless, these changes have been incremental, slow and do not accommodate radical re-consideration of the rules of the game (or “grammar” using Fraser’s terminology). There are a limited number of agents who can participate in shaping the terms of the dispute and provide evidence of the gains or losses resulting from trade. Thus, it is very difficult to distinguish between protectionism and responsiveness to a state’s attempt to preserve the industry.

Moreover, the WTO has a very limited range of tools to “resolve” the dispute. It can either uphold the tariffs or void them. Deliberations between states may identify agreed-upon middle grounds. However, the WTO does not have the capacity to implement other possible solutions that may seem more just. For example, rather than impose 35 per cent tariffs that accrue to the benefit of the US government, it may have been more “just” to impose a 50 per cent wage hike on the manufacturers that would benefit the Chinese workers. Both “solutions” to the problem of market distortion may have a similar effect on the cost of Chinese tires; however, the gains of each would be distributed very differently. The WTO remedy does not really help the American and Chinese workers.

In a different, more radical, regime, it might have been possible to summon other countries (not as observers) and require the same tariff on tires (or wage hikes for tire workers) of all countries that import low cost tires into the US. Or it might be possible to develop a mechanism that would prevail upon the TIA and the largest tire manufacturers together to increase wages in the sector throughout the world, and accept responsibility for those workers who have lost their jobs in the US (and other importing countries). Non-territorial options, such as global industrial codes, may indicate such direction, although at present they are limited in scope, refrain from engaging in wage setting and are generally non-enforceable.¹¹⁰

These solutions may seem far-fetched, but, in part, both political imagination and political innovation are constrained by the rules of the game prescribed by the WTO. The forum itself tends to “frame” the way that questions are posed and the answers that are offered. The framing of the debate in these transnational venues limits the remedies available and casts the conflict as one of a zero-sum nature.

By contrast with the WTO, the example of posted workers in the EU illustrates the symbiotic relationship between actors at both the national and transnational levels and legislation and the Court’s *acquis*, in addition to the openness of the process to a range of different actors. National disputes, through references, can provide an opportunity for the CJEU to reconsider prior rulings. Moreover political developments, such as the accession of several new labour-exporting Member States after the adoption of the PWD and the political impasse that resulted in the Service Directive, may be treated by the CJEU as an opportunity to reconsider its approach to the balance between equal treatment (which

¹⁰⁸ Andrew Guzman, *Trade, Labour and legitimacy*, 91 CALIFORNIA LAW REVIEW 885 (2003); Steve Charnovitz, *Opening the WTO to Nongovernmental Interests* 24(1) FORDHAM INTERNATIONAL LAW JOURNAL 173 (2000-1)

¹⁰⁹ For positive accounts of the WTO’s changes see: Pieter Jan Kuijper, *WTO Institutional Aspects*, in: THE OXFORD HANDBOOK OF INTERNATIONAL TRADE, 79, 121 (2009); Alan Yanovich & Werner Zdouc, *Procedural and Evidentiary Issues*, in: THE OXFORD HANDBOOK OF INTERNATIONAL TRADE, 344 (2009)

¹¹⁰ Mundlak, *supra*, note 53; Guy Mundlak and Issi Rosen-Tzvi, *Signaling Virtue? A Comparison of Multinationals Codes of Conduct in the Fields of Labour and Environment* 12 THEORETICAL INQUIRIES IN LAW 205-265 (2011).

tends to protect host state labour law regimes) and market access for services (which tends to promote employment for more recent accession countries). The Grand Chamber also has the authority to overrule a decision of a panel of the Court of Justice of the European Union. This judicial recalibration of the balance may, in turn, provoke legislative action. For example, the CJEU's controversial posted workers decisions triggered a review of the PWD by the Commission and led to the presentation of a controversial enforcement directive.¹¹¹ It also promoted the development of transnational ties between civil society actors. Since the CJEU's controversial interpretation of the PWD, there have been "some new interesting cases of cooperation between trade unions of neighboring countries, which try to manage the system of cross-border and posted workers, providing them with information on the terms and condition of work to be applied."¹¹²

The CJEU also has a much wider range of remedies than the WTO. In addition to providing authoritative interpretations of directives that provide the foundation for redress – including damages to wronged parties – in national courts, the CJEU can impose fines against recalcitrant member states and provoke legislative action. Thus, it, unlike the WTO, has the flexibility to design remedies that enhance participation and facilitate on-going negotiation.

It is crucial for the EU's legitimacy to provide adequate mechanisms for Member States to take into account foreign identities and interests in the decision-making process.¹¹³ However, it is also crucial for its legitimacy that it not be seen as initiating a race to the bottom in terms of national welfare regimes. The goal of EU institutions, such as the CJEU, should be to "encourage procedural and substantive engagement on the ground with the mission of accommodating labour rights and internal market factors."¹¹⁴ The CJEU has not, however, done a good job at cultivating the participation of social partners such as trade unions. Not only has it subordinated freedom of association to market freedoms in its interpretation of the Treaty and PWD, it is very suspicious of collective action and norms established through autonomous collective bargaining processes.¹¹⁵ More troubling, the Commission's subsequent legislative initiative, the proposed Monti II regulation, reinforces the imbalance of freedom of movement over freedom of association.¹¹⁶ It is not simply the Court that has failed to foster civil society actors; it is a larger problem with the governance structure of the EU.

One of the key challenges is for EU institutions "to cultivate values such as participation, capacity building of nascent transnational civil society, learning, and innovation."¹¹⁷ Promoting and fostering transnational connections between civil society actors is a crucial element of a transnational justice. What is necessary is "a strengthened role of the social partners at national and possibly also at European level, with a view to establishing a monitoring system and providing some scope for regulating the employment and working conditions of posted workers would contribute to redressing a situation that at present appears to be characterized by the relative prevalence of the economic and European dimensions."¹¹⁸ Currently, it is extremely difficult for national trade unions to establish

¹¹¹ Proposal for Directive concerning the enforcement of the provision applicable to the posting of workers in the framework of the provision of services - COM(2012) 131

¹¹² Pedersini and Pallini, *supra* note 102, 26.

¹¹³ Christian Joerges and Jürgen Neyers, *From Intergovernmental Bargaining to Deliberative Political Processes*, 3 EUROPEAN LAW JOURNAL 273-99, 293 (1997).

¹¹⁴ Kilpatrick, *supra* note 70, 22.

¹¹⁵ Fudge, *supra* note 104.

¹¹⁶ Niklas Bruun, Andreas Bucker, and Filip Dorssemont, *Balancing Fundamental Social Rights and Economic Freedoms: Can the Monti II Initiative Solve the EU Dilemma?* 28 THE INTERNATIONAL JOURNAL OF COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS CERIC WORKING PAPER 279-306.

¹¹⁷ Kilpatrick, *supra* note 70, 22.

¹¹⁸ Pedersini and Pallini, *supra* note 102, 33.

structures for organizing migrant workers. Thus, it is crucial for the European Commission and other EU institutions, including the Court, to cultivate sectoral networks and institutions that could, in the long run lead to collaborative cross-border initiatives.¹¹⁹

Conclusion

Both the WTO and the CJEU have been drawn upon by labour to advance their claims. Labour is searching for new venues for claim making, on the basis of its understanding that traditional forms of action are no longer sufficient. In the tires case, the USW succeeded in reaching its objective. The effect of the CJEU decisions on posted workers seems to be harsher to labour. In both cases, the focus has been thus far on labour in the more developed countries. In this article we claimed that labour (and other) interests from all affected regions must take part in the deliberative over just solutions.

Despite the outcomes in the two particular examples, the analysis demonstrates that the EU is an important contrast to the WTO because it actually permits greater political integration at a transnational level. Nevertheless, there continues to be a misalignment between the political/social and market/economic space since labour standards and rights are primarily within the authority of Member States. Even in the EU, labour's power is mostly political, and not economic, and it depends upon democratic institutions, especially Member State legislatures and the European Parliament. However, the EU is also an open political system, with a range of different political actors representing different interests, characterized by periods of equilibrium that are punctuated by catalysts, such as Court decisions, that cause a political recalibration.¹²⁰ It is much closer to Fraser's vision of institutionalizing meta-democracy than is the WTO. Where the EU is at its weakest is in cultivating the development and participation of civil society organizations such as transnational sectoral trade unions that can co-operate across national borders. Even in Europe there remains an enduring problem for labour, which is that labour standards and collective bargaining remain, by and large, within the purview of the Member state and, as yet there is no direct enforcement of fundamental rights such as freedom of association in the transborder context.

¹¹⁹ Ian Greer, Zinovijus Ciuijus, and Nathan Lillie, *Organizing Mobile Workers in the Enlarged EU: A Case Study of the European Migrant Workers Union*, CERIC WORKING PAPER13/ 2011; Ian Greer, Zinovijus Ciuijus, and Nathan Lillie, *The European Migrant Workers Union: Union Organizing through Transnationalism* EUROPEAN JOURNAL OF INDUSTRIAL RELATIONS (FORTHCOMING); Guglielmo Meardi, *Union immobility? Trade unions and the freedoms of movement in the enlarged EU* 50 BRITISH JOURNAL OF INDUSTRIAL RELATIONS 99-120 (2012).

¹²⁰ Kilpatrick, *supra* note 70.

