

ASSESSING ASSESSMENTS: A SURVEY OF EFFORTS TO MEASURE COUNTRIES' COMPLIANCE WITH FREEDOM OF ASSOCIATION STANDARDS

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I. INTRODUCTION

This article surveys efforts by governmental and non-governmental organizations to assess countries' compliance with core labor standards on workers' freedom of association. The relevant standards are Conventions 87 and 98 of the International Labor Organization (ILO) and the ILO's 1998 Declaration on Fundamental Principles and Rights at Work.

Part II sets out key conceptual issues, particularly the distinction between "negative" and "positive" rights. Part III discusses the challenge of generating and getting accurate information about workers' freedom of association, especially when so much subjective judgment is inherent in the effort. Part IV reviews and summarizes the work of several organizations that evaluate countries' compliance with core labor standards on workers' freedom of association. Part V offers a conclusion and recommendations.

II. CLARIFYING THE ELEMENTS OF FREEDOM OF ASSOCIATION

International standards on freedom of association for workers have several component parts that any compliance measurement system must consider. While they can be further subdivided, these include freedom of association, the right to organize, the right to bargain collectively, and the right to strike. In human rights terms, these are "negative rights." That is, for the right to be honored, the state need do nothing—just leave workers alone. Don't harass them, don't arrest them, don't imprison them, don't kill them for trying to

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exercise these rights. Here, the key analytical question for compliance is whether the state is leaving workers alone to exercise these rights.

But for each of these, protection of the right is critically important. They are also "positive rights" requiring governments to act affirmatively to afford the rights.¹ A government that respects workers' negative rights is not meeting its international human rights obligations if private individuals or groups can violate workers' rights with impunity. The state must protect the rights by providing effective recourse and remedies for violations.

To take a simple example, it is not enough that in a particular country the government refrains from punishing workers who try to organize unions. What is also needed is a positive right to form and join unions coupled with an effective protection and enforcement structure that deters employers from punishing workers who try to organize unions. Here the analyst must examine the legal structure and the content of laws protecting workers' rights, the extent of their coverage, and the effectiveness of the legal machinery designed to implement the laws. Remedies and sanctions are important, too, for determining if the legal system creates a deterrent to violations.

An assessment system must also appreciate the complexities in judging labor rights compliance. Collective bargaining fits well with the concept of a negative right that workers could achieve through their own struggles if the government leaves them alone. But real world experience upsets this neat concept. Without laws to enable collective bargaining, many employers refuse to bargain and dismiss workers who join unions.² Workers have to act politically to obtain laws allowing them to bargain collectively. This makes collective bargaining a positive right afforded by government action.

The analysis must consider not just whether a government intervenes in the collective bargaining process, but whether the intervention allows ample space for workers to defend their interests or whether it chokes workers into tight bargaining spaces dictated by government policy. This analysis is perforce subjective. Few

1. The distinction between "negative" and "positive" rights is standard in human rights discourse. *See, e.g.*, HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* (1996); JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* (1989).

2. This was the situation under U.S. labor law before passage of the Norris-LaGuardia Act of 1932 and the Wagner Act of 1935. Before those laws, employers often made workers sign a contract never to join a union, as a condition of gaining employment. Where workers succeeded in forming unions, employers often refused to deal with them, leading to strikes and a poisoned labor-management relationship. *See, e.g.*, JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW, 1933-1937* (1974).

countries prohibit collective bargaining outright, but the narrowness or breadth of bargaining capacity vary greatly.

The right to strike is another complex matter. In concept, it is another negative right—workers could freely exercise it if left alone by the state. A threshold question, therefore, is whether a government bans strikes or acts to break strikes by military or police force. Beyond these cases, however, the situation gets more complicated and moves to the area of positive rights that need protection by the state.

As with collective bargaining, governments everywhere intervene to condition, limit, or channel the right to strike—by excluding certain groups of workers or industries, by limiting its exercise to certain time periods, by restricting associated tactics like picketing or distributing literature, and so on. The problem is to decide what limits are reasonable and what limits constitute an effective denial of the right.

A properly designed system for assessing country performance in meeting international standards on workers' freedom of association should examine each of these elements. In evaluating assessment efforts discussed in this paper, the main criteria applied is the extent to which they:

- cover all the key elements in freedom of association for workers—the right to organize, the right to bargain collectively, and the right to strike;
- consider both the negative and positive aspects of workers' right to freedom of association—the role of government non-intervention, leaving workers alone so that they might exercise their rights, as well as government intervention to protect workers' exercise of their rights; and,
- appreciate and reflect the complexities of freedom of association by probing, through consistent methods (questionnaires, interviews, on-the-ground investigation, etc.), the real-world context in which to fix their findings.

III. THE SLIPPERINESS OF INFORMATION AND THE DIFFICULTY OF GETTING ACCURATE COMPARABLE MEASURES

A. Problems With Indirect Measures

Indirect measures of freedom of association do not measure compliance directly, but instead are proxies built on assumptions about what the results of genuine freedom of association will be—for example, that freedom of association will be associated with a higher

level of ILO convention ratifications, with higher union density, and so on. These assumptions may or may not be correct. Individually, these and other indirect measures are not very good proxies.

1. Using ILO Ratifications and Industrial Relations Indicators

Several problems inhere in any effort to quantify countries' compliance with freedom of association requirements by objectively measured proxy indicators. Analysts have mostly used, either alone or together, ratification of ILO conventions and union density (the percentage of union-represented workers in the labor force) to reflect freedom of association.³

The crudeness of ILO ratifications as an indicator of respect for workers' freedom of association does not need elaboration. Many of the worst labor rights violators have duly ratified ILO Conventions 87 and 98. Some countries with better records have not.

Union density may be a better indicator than ILO convention ratifications, but unless it is contextualized, union density by itself does not say much. The first problem is that union density numbers are not fully reliable. The ILO's description of its methodology for calculating union membership suggests the intricacy of this exercise.⁴ Trade unions often inflate their membership numbers to give an impression of strength. Official statistics are not always accurate, either.

Even where union density numbers are accurate, one still finds a lot of room for interpretation. France has extraordinarily low density in terms of dues-paying union membership, less than 10%. But it has relatively high density in terms of the percentage of workers covered by collective agreements, estimated at 80%. It also has a very high "mobilization capacity" indicating robust freedom of association for workers. This is an indicator more likely to be captured by social

3. See, e.g., Drusilla K. Brown, *International Trade and Core Labour Standards: A Survey of the Recent Literature*, OECD LABOUR MARKET AND SOCIAL POLICY OCCASIONAL PAPERS No. 43 (2000), available at [http://www.oilis.oecd.org/OLIS/2000DOC.NSF/LINKTO/DEELSA-ELSA-WD\(2000\)4](http://www.oilis.oecd.org/OLIS/2000DOC.NSF/LINKTO/DEELSA-ELSA-WD(2000)4); J.S. Mah, *Core Labor Standards and Export Performance in Developing Countries*, 20 WORLD ECON. 773 (1997); M. Rama, *Do Labor Market Policies and Institutions Matter? The Adjustment Experience in Latin America and the Caribbean*, LABOR, Special Issue, at S243-S268 (1995); Dani Rodrik, *Labor Standards in International Trade: Do They Matter and What Do We Do About Them?*, in EMERGING AGENDA FOR GLOBAL TRADE: HIGH STAKES FOR DEVELOPING COUNTRIES, OVERSEAS DEVELOPMENT COUNCIL ESSAY NO. 20 (R. Lawrence, D. Rodrik & J. Whalley eds., 1996).

4. See ILO, Task Force on Industrial Relations (GT/RP), *Industrial Relations, Democracy and Social Stability, Technical Notes, Industrial Relations Indicators*, WORLD LABOUR REPORT 1997-98, at <http://www.ilo.org/public/english/bureau/inf/pkits/wlr97.htm>.

movement scholars, not by economists or industrial relations researchers.

Strike data, such as frequency, length, and person-days of strikes, can indicate respect for the right to strike and a healthy collective bargaining system. But the data would always have to be interpreted. Few strikes might mean that labor and management bargain freely and readily compromise to reach agreements without stoppages. They can also suggest a repressive system where workers are afraid to strike for fear of reprisals or replacement.

Even the most reliable of these measures does not by itself fully capture the dimensions of freedom of association or answer the query whether the state is affording negative rights (leaving workers alone to exercise their rights) and acting to afford positive rights. The key is to put these indicators together. That is, it may be possible to include and analyze multiple measures or indicators based on such objective information, creating a composite index that can be consistently applied. But each needs a heavy dose of interpretation if it is to factor accurately in an overall assessment of country compliance with freedom of association standards.

2. Measuring Enforcement Capacity

Another possible proxy for countries' compliance with freedom of association standards is measuring quantifiable factors like labor ministry budgets and staff, numbers of workplace inspections, caseloads of administrative and judicial bodies, number of workers reinstated, amounts of fines and penalties, and other features of a labor law enforcement system that can be reduced to numbers. Adjusted for size of the labor force, number of firms, distribution of firms by size, level of development, and other variables, comparative measures of country enforcement efforts can be achieved.

But problems arise here, too. Take cases at the extremes. Country A, where labor law enforcement is efficient and has a deterrent effect, has a relatively small workers' rights enforcement budget, staff, caseload, etc. Country B, where reprisals against workers are common, but workers have no faith that the legal system will vindicate their rights, also has a relatively small enforcement capacity. The numbers come out the same, but only intimate knowledge, interpretation, and judgment can tell what the numbers mean.

3. Evaluating Legislation

Labor legislation straddles indirect and direct measurement of compliance with core labor standards. Laws and regulations that clearly infringe workers' rights are direct indicators of failure to comply. Laws and regulations that purport to protect workers rights, however, are still uncertain proxies until showing that they are effectively enforced.

Threshold evaluations can examine laws with relative ease to determine whether the right legal framework is in place to afford freedom of association to workers. Laws that require membership in government-run federations, that prohibit company-wide or industry-wide bargaining, or that ban strikes either outright or in "essential" industries based on government economic policy, are clear markers of failure to meet international labor standards, as defined by the ILO.

Most countries' laws are not so clear-cut. They are usually mixed bags, with some features that comport with freedom of association standards and some that fall short. U.S. law, for example, forbids discrimination against workers because of union activity, a *sine qua non* for protection of the right to organize. However, U.S. law also excludes from coverage of such protection vast swaths of the labor force—agricultural workers, domestic workers, low-level supervisors, and "independent contractors" who are really quite dependent on one employer for their livelihoods.

Mexico's constitution guarantees the right to organize, but Mexican law prohibits the formation of independent public sector unions. Chile claims to have met international standards by granting workers the right to bargain at a company-wide or industry-wide level, where before only single workplace-level bargaining was permitted. But the law allows employers to unilaterally veto bargaining above the single workplace level, and unions are not permitted to strike to obtain broader bargaining rights.

Examples like these are almost infinite. The point is that once researchers pass a threshold of "easy" analysis of labor law texts for obvious conflict with freedom of association guarantees, a myriad of complications come into play that require detailed examination. In the end, careful judgment must be applied to conclude whether a country's laws and legal system, on balance, comport with international standards.

IV. REVIEW OF EXISTING REPORTING EFFORTS AND THEIR SOURCES, METHODOLOGY, INDICATORS, ETC.

Existing reporting mechanisms and their possible use as models for development of a systematic evaluation of compliance with freedom of association standards are divided here into three broad groups, with some subdivision within them.

- In a first group are a large number of eclectic reporting efforts by various NGOs, corporations, government agencies, international agencies, and other organizations that take up international labor rights in their work. These reports can be regular, occasional, or one-time. They can be focused on one country or one region, or focused on one factory or one industry. They can be prompted by complaints under a legal enforcement process or under a quasi-legal oversight mechanism. They can be any combination of these.
- In a second group are annual or other periodic descriptive reports on many countries using a consistent evaluation scheme. All draw on a variety of sources of information to develop country-by-country descriptions and evaluations of the extent to which workers' freedom of association is implemented. These reporting systems stop short of comparing countries. However, their content can be used by others to carry out comparative assessments.
- In a third group are those reporting systems that are explicitly comparative. These draw heavily on sources from the second group, attempting to extract objective indicators from descriptive reports. They also use other types of indices to evaluate countries' performance on respect for workers' rights. These reports combine a variety of sources to develop composite scores and comparative rankings of countries.

A. Group One: Selected Country and Complaint-Based Descriptive Reports

Descriptive labor rights reporting outlined here provide a valuable source of information about particular countries, and some are helpful as sources of ideas for the broader goal of establishing precise country criteria. However, these reports must be used with caution. Many are selective in their coverage, especially one-time

reports. Many focus on a single case of a country, an industry, a company, or one factory. This means they are not comparable or generalizable. They sometimes reflect interests of the organization doing the report, compromising independence.

The reports in group one do not offer a model for comparative assessment. However, these comparative weaknesses are a substantive strength. The reports often provide in-depth, factually rich information that can usefully be incorporated into broader evaluation systems.

1. Government Agency Reports

a. *USTR/Trade Policy Staff Committee*

Chaired by the United States Trade Representative (USTR), the Trade Policy Staff Committee (TPSC) is the interagency group that reviews labor rights complaints under the Generalized System of Preferences (GSP). It also takes up complaints under labor rights clauses in Caribbean Basin, Andean Pact, Africa Growth, and other trade statutes.

The TPSC assesses a country's worker rights performance to determine if GSP beneficiary status should be maintained or cut off. TPSC decisions to remove a country from GSP beneficiary status because of labor rights violations are important markers for State Department reports and other U.S. trade programs. The Overseas Private Investment Corporation (OPIC) "rides" TPSC decisions in GSP cases to determine if countries remain eligible for OPIC coverage.

Economic and foreign policy concerns have dominated TPSC labor rights decisions, producing inconsistent results. For several years in the late 1980s and early 1990s the TPSC rejected labor rights petitions on Guatemala and El Salvador on the grounds that evidence of trade unionists victimized by arrests, beatings, and assassinations made a case for human rights violations, but not labor rights violations. The TPSC also said that the mere introduction of legislation advancing worker protection, although such legislation had no chance of passage, was "taking steps" to meet GSP labor rights requirements.⁵

5. See, e.g., GSP Subcommittee of the Trade Policy Staff Committee, *Workers Rights Review Summary: Petitions Not Accepted For Review (Guatemala 1988, 1989, 1990, 1991)* (on file with USTR). TPSC and related OPIC decisions are generally not available in libraries or at agency Web sites; they must be viewed in public documents rooms at agency headquarters.

When the Chilean and Paraguayan military dictatorships began to wobble in the late 1980s, the TPSC gave them a shove by suspending GSP benefits. But equally reprehensible labor rights records in Indonesia and Malaysia were ignored when U.S. multinational corporations with extensive investments in those countries insisted that GSP benefits be maintained there.⁶ Until USTR and the TPSC evince consistent, balanced, on-the-merits labor rights analysis, their reporting on workers' freedom of association should be used with caution.

b. NAO Reports under the North American Agreement on Labor Cooperation

NAFTA's labor side agreement, the North American Agreement on Labor Cooperation (NAALC), lets trade unions, NGOs, and other groups file workers' rights complaints to an agency in each country's labor department called the National Administrative Office (NAO). In an unusual "cross-border" system, complaints are filed with the NAO of another country—not the country where claimed violations occurred.

NAO's have no enforcement power. Instead, they undertake investigations and produce reports. Such reports by the U.S. NAO on freedom of association complaints in Mexico and Canada usually reflect careful analysis and reporting. The NAO has held public hearings in the United States with witnesses from those other countries. It has also engaged consultants and independent researchers who provided valuable information based on in-country research and interviews.

As noted earlier, the U.S. NAO's mandate is limited to labor law matters arising in Mexico and Canada. However, its use of varied information sources, public hearings, and independent consultants provides another valuable model of key components in a new country assessment system.

Canada's NAO has produced thorough reports on important freedom of association complaints involving Mexico under the NAALC. The problem, as noted earlier, is that this trove of information on workers' freedom of association is all devoted to one country. The challenge in constructing an assessment system

6. For a detailed treatment of TPSC actions, see Lance Compa & Jeffrey S. Vogt, *Labor Rights in the Generalized System of Preferences: A 20-Year Review*, 22 COMP. LAB L. & POL'Y J. 199 (2001).

applicable worldwide is to approach the same depth and sophistication in examining all countries' labor rights performance.

2. International Agency Reports

a. *International Labor Organization Review of Government Follow-up Reports*

The ILO's 1998 Declaration of Fundamental Principles and Rights at Work requires countries to self-report their efforts to meet the declaration's goals, including the goals of freedom of association and collective bargaining. Nearly half of the ILO's 175 member countries did not report on their performance regarding freedom of association under the declaration.⁷ The reports of many others were mostly self-serving, though the U.S. government for the first time acknowledged problems with protection of workers' right to organize.

Despite the limited country reporting, the ILO did an excellent job in distilling the reports and adding its own independent knowledge of information, producing the global report, *Your Voice at Work*. In this report, the ILO named names of countries failing to comply with important elements of conventions 87 and 98.⁸ For example, it cites fifteen countries that fail to protect agricultural workers' right to organize (including Afghanistan, Canada, the United Arab Emirates, and the United States). The *Your Voice at Work* report set markers for many countries on freedom of association issues they need to address. Any new compliance measurement system should use these markers and examine whether countries have improved their performance.

b. *World Bank*

The World Bank has begun to take core labor rights into account in formulating Bank policy with respect to member countries. Bank staff are advised to undertake a four-part analysis of core labor standards in preparing a Country Assistance Strategy (CAS):

- (1) legal and institutional assessment;
- (2) factual assessment;

7. INTERNATIONAL LABOUR ORGANIZATION, REVIEW OF ANNUAL REPORTS UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK (2000), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb277/d1-index.htm>

8. See INTERNATIONAL LABOUR ORGANIZATION, YOUR VOICE AT WORK, at http://www.ilo.org/public/english/standards/decl/vaw/pdf/fullreport/part_1.pdf.

- (3) actions taken to rectify abuses; and,
- (4) Bank strategy for addressing potential negative impacts on the country's development, due to its treatment of core labor standards.

The legal and institutional assessment includes the ratification status of ILO core conventions, a brief assessment of national laws relating to core labor standards, and discussion of enforcement provisions and government capacity. For its "factual assessment," the Bank calls on staff to "report briefly what is happening in practice regarding the core standards, despite what protections might be guaranteed in law. For example . . . are workers prevented from organizing?"

Applying this approach, the World Bank has included discussions of core labor standards in recent CAS's involving India, Bangladesh, Cambodia, Armenia, Indonesia, and Uganda. However, these analyses are very thin and mostly address child labor issues. Freedom of association is barely touched. In fact, the Bank appears to hedge on whether freedom of association is as important a core labor standard as child labor. The Bank sometimes views workers' organizing and bargaining rights as economic privileges that can be afforded or restricted to achieve desired economic outcomes. It acknowledges that its treatment of association, organizing, and bargaining rights, as distinct from child labor, forced labor, and discrimination, "is complicated by (a) the potential political nature of the standards and (b) research showing ambiguous economic outcomes."¹⁰

c. *NAFTA Labor Secretariat*

The Secretariat of the North American Commission for Labor Cooperation has produced, in addition to labor market reports and studies, substantive analyses of workers' freedom of association in the three member countries.¹¹ These are 200-page books covering vital aspects of association, organizing, and bargaining rights, compared

9. See WORLD BANK, CORE LABOR STANDARDS TOOLKIT—DIAGNOSING CORE LABOR STANDARDS IN THE CAS, at <http://wbln0018.worldbank.org/HDNet/HDdocs.nsf/2d5135ecbf351de6852566a90069b8b6/98df7256b3dd946185256946006b5256?OpenDocument>.

10. See WORLD BANK, CORE LABOR STANDARDS AND THE WORLD BANK (July 2000), at <http://wbln0018.worldbank.org/HDNet/HDdocs.nsf/2d5135ecbf351de6852566a90069b8b6/65510796ed04ac1685256961004c6e7c?OpenDocument>.

11. Most important, PLANT CLOSINGS AND LABOR RIGHTS (1997), available at <http://www.naalc.org/english/publications.htm>; LABOR RELATIONS LAW IN NORTH AMERICA (2000), available at <http://www.naalc.org/english/publications.htm>.

with a few paragraphs on freedom of association and collective bargaining in State Department Section 6 reports.

Nonetheless, these reports provide a model of completeness for analyzing a country's labor law system. The Secretariat's methodology for producing these reports is also worth emulating with features like selection of outside experts to provide independent background papers, a rigorous internal editing process, dialogue with government officials and key actors in trade union, employer, and NGO communities and a final level of review by outside experts before publication.

3. Private Actors' Reports

a. AFL-CIO

The AFL-CIO has not before now undertaken formal country assessments, but its American Center for International Labor Solidarity launched a new project producing in-depth reports on two countries, Mexico and Sri Lanka. The reports cover all the core labor standards. If the project goes forward after this experiment, it will expand to cover more countries. With expert staff in field offices around the world working closely with local trade unionists, the Solidarity Center has a solid base for thorough labor rights reporting. This bears watching as a potentially important source of information in the future.

b. U.S. NGO reports

Within the limits of this paper, two U.S. NGOs most often cited in connection with labor rights reporting are examined in some detail: Freedom House and Human Rights Watch. Other U.S. NGOs engaged in labor rights reporting are discussed in more summary fashion.

i. Freedom House (FH)

As noted earlier, several analysts use Freedom House rankings¹² as a factor in assessing countries' compliance with core labor standards. Dani Rodrik used FH's "democracy" index. In work

12. See <http://www.freedomhouse.org/ratings/index.htm>.

discussed below, David Kucera of the ILO used three different FH indices, on civil liberties, political rights, and democracy.¹³

FH reports do not fully treat labor rights issues. The only template questions posed are “Are there free trade unions and peasant organizations or equivalents” and “Is there effective collective bargaining?” FH does not make a systematic effort to probe deeper into the multiple elements and the complexities of association, organizing, bargaining, and striking.

This is not to fault Freedom House for these shortfalls on labor rights. It is not a labor-oriented organization or one with particular labor expertise. FH has its hands full producing a worldwide survey of “freedom” broadly defined. It would be unfair to demand that it also thoroughly treat workers’ rights.

ii. Human Rights Watch (HRW)

Nearly every analyst looking at labor rights points to Human Rights Watch’s annual report as an important source of information on workers’ freedom of association.¹⁴ But HRW has some of the same limitations as Freedom House. It is not a labor-oriented or labor-expert group. Focus on workers’ rights is idiosyncratic, depending on the interests and priorities of area and thematic directors and of country researchers.

HRW’s annual report leaves out a lot of countries. The 2002 report did not cover the Dominican Republic, Honduras, Costa Rica, El Salvador, Nicaragua, Panama, Paraguay, Uruguay, or Ecuador, all countries with freedom of association issues worth examining from a human rights perspective.

From time to time, HRW publishes a major country report on workers’ rights. A 2000 report examined workers’ freedom of association in the United States.¹⁵ Recent reports dealt with child labor in U.S. agriculture, discrimination against women in Guatemalan *maquila* factories, and freedom of association and child labor in Ecuador’s banana sector.¹⁶ These reports are focused and

13. See Rodrik, *supra* note 3; David Kucera, *Decent Work and Rights of Work: New Measures of Freedom and Collective Bargaining*, in *THE ILO AND THE SOCIAL CHALLENGE OF THE 21ST CENTURY* 125, 134 (R. Blanpain & C. Engels eds., 2001).

14. See the annually issued HUMAN RIGHTS WATCH, *WORLD REPORT*, available at <http://www.hrw.org>.

15. See HUMAN RIGHTS WATCH, *UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS* (2000), at <http://www.hrw.org/reports/2000/uslabor>.

16. See HUMAN RIGHTS WATCH, *FINGERS TO THE BONE: UNITED STATES FAILURE TO PROTECT CHILD FARMWORKERS* (2000), at <http://www.hrw.org/reports/2000/frmwrkr>; HUMAN

thorough, providing valuable information and analysis. They are accordingly more reliable than HRW's annual report for assessing workers' freedom of association in a country. Unfortunately, only a handful of countries undergo in-depth labor rights studies by HRW.

As with Freedom House, because of their haphazardness on labor rights, HRW's annual reports should not be an initial part of a systematic rating system for countries' compliance with core standards. If HRW commits itself to regular reporting on workers' rights in its annual reports, given its track record for thorough, reliable, high-quality human rights reporting, it would be appropriate to use the contents of HRW annual reports in a new database. In the meantime, HRW's more focused country and company reports on workers' rights should be included in any assessment system.

iii. Human Rights First (HRF)

HRF is a New York-based NGO and a founding member of the Fair Labor Association (see Codes of conduct monitors reports, below). HRF has created a "Workers Rights Information Project" (WRIP) aimed at corporate performance. It explains:

As globalization pushes the workplace farther and farther out of our direct view, a system of transparency becomes ever more important. The project's goal is to help create that system and make this kind of information directly available to the public in quick, accurate, and useful form.

The project is putting an early focus on the accuracy and usefulness of information already being collected in this field. It is preparing a database that compiles the full range of different yardsticks now being used to try to assess the treatment of workers in particular factories.

The database collects and organizes these measurements in their thousands of individual components, from over a hundred different sources in the labor standards field. This effort will lay the groundwork for improvements and help target the areas where improvement is most needed. It should also help the development of more systematic and consistent practices in this field, leading to better information and better assessments of compliance with workers rights standards.¹⁷

RIGHTS WATCH, FROM THE HOUSEHOLD TO THE FACTORY: SEX DISCRIMINATION IN THE GUATEMALAN LABOR FORCE (2002), at <http://hrw.org/reports/2002/guat>; HUMAN RIGHTS WATCH, TAINTED HARVEST: CHILD LABOR AND OBSTACLES TO ORGANIZING ON ECUADOR'S BANANA PLANTATIONS (2002), at <http://hrw.org/reports/2002/ecuador>.

17. See <http://workersrights.humanrightsfirst.org>.

This project is not far enough along to include here, but it should be examined when it is up and running.

HRF has also produced brief reports on workers' rights in Cambodia, China, Guatemala, India, Indonesia, Jordan, and South Korea.¹⁸ However, these are not detailed enough to use for a rigorous evaluation system.

iv. International Labor Rights Fund (ILRF)

The Washington, D.C.-based ILRF does not undertake regular country reporting. It has produced occasional country reports. Now outdated ILRF reports covered Haiti, India, and Chile. More recently, ILRF produced reports rich with information on child labor in the Ivory Coast and discrimination against women in Kenya.¹⁹

But beyond occasional country reports, ILRF collects a great deal of relevant country information in connection with GSP petitions, NAALC complaints, and civil lawsuits on behalf of workers' rights. The ILRF was a lead petitioner in GSP cases involving Guatemala, Colombia, Chile, Malaysia, Indonesia, Sri Lanka, and several other countries. It was the first NGO to actively engage the NAALC complaint process in Mexico-based cases. It is serving as plaintiffs' counsel in civil lawsuits against companies implicated in workers' rights violations in Guatemala, Colombia, Ecuador, Indonesia, and Burma.²⁰ These petitions, complaints, and related briefs can be mined for information on both company and country behavior that is thoroughly documented.

v. Campaign for Labor Rights (CLR)

Washington, D.C.-based CLR focuses on "rapid action network" campaigns for public attention and reaction to workers' rights violations in countries around the world. Most recently, CLR promoted campaigns on Noboa banana plantations in Ecuador, a Samsonite luggage facility in Thailand, and an apparel factory in El Salvador producing for Gap, Ann Taylor, and other retailers.²¹

18. *Id.*

19. For these reports and others that follow, see the ILRF Web site at <http://www.laborrights.org>.

20. ILRF won a dramatic legal victory September 18, 2002 when a U.S. federal appeals court overturned a district judge's dismissal of a lawsuit against Unocal Corp. for forced labor abuses in Burma. The appeals court ordered the case to go forward to trial. See Lisa Girion, *U.S. Ruling Says Firms Liable for Abuse Abroad*, LOS ANGELES TIMES, Sept. 19, 2002, at A1.

21. See the CLR Web site at <http://www.campaignforlaborrights.org>.

Working under tight deadlines with a goal of urgent action, CLR does not undertake longer-term, systematic research. But its information is usually well founded, and it serves an important "early warning signal" function pointing to freedom of association issues in different countries susceptible to deeper research.

vi. National Labor Committee (NLC)

Based in New York City, the NLC is an advocacy group that organizes delegations of workers and investigators from the United States to foreign countries, and speaking tours by foreign workers in the United States, dealing with sweatshop conditions in factories making apparel, footwear, toys, and other products for the U.S. market. The NLC emphasizes what it calls a "high profile campaign style" aggressively using the media to publicize workers' rights violations and to bring pressure on U.S. companies that subcontract with supplier firms abroad.²²

The NLC has done extensive firm-focused reporting on Wal-Mart, Walt Disney Company, Nike, Liz Claiborne, Ralph Lauren, and, in one of its most dramatic media campaigns, on clothes carrying the Kathie Lee Gifford label. NLC country reports have covered Bangladesh, Burma, China, Colombia, El Salvador, Haiti, Honduras, and Nicaragua. Most of the country reports have been short, punchy, popular-style calls to action by readers, but they always contain detailed information listing factory locations by name, and the U.S. retailers they supply.

c. *Foreign NGOs and Web sites*

A broad variety of NGOs based in other countries produce credible reports on workers' freedom of association. Their reports vary in quality, but using the best ones would bring more of an international and an NGO cast to a new comparative country compliance assessment system that otherwise relies on "official" government and trade union reports. Both to have international credibility and to draw on the merits of these NGOs' work, analysts should systematically review such reports and include relevant information in assessing countries' performance on workers' rights.

- Based in London, Amnesty International (AI)²³ is probably the most prominent and most often cited

22. See the NLC Web site at <http://www.nlcnet.org>.

23. See the AI Web site at <http://www.amnesty.org>.

foreign NGO. Treatment of Amnesty International's worker rights reporting is forgone here because the discussion above on Human Rights Watch applies equally to AI. Both groups' reports should be scrutinized for workers' rights information, but keeping in mind that they are haphazard in covering this field.

- Solidar is another European NGO that deals with labor rights.²⁴ Formerly International Workers Aid, renamed Solidar in 1995, this Brussels-based group is an alliance of European NGOs and trade unions that takes up social justice issues, usually focusing on the European Union and its relations with developing countries. Solidar publishes regular "International Updates" on labor in the global economy. These are mostly news snippets on trade and labor standards, with special attention to the role of the European Union in the World Trade Organization. But these reports contain occasional links to more substantive workers' rights reports.
- Hong Kong-based Asia Monitor Resource Centre²⁵ produced high quality worker rights reports covering Asia-Pacific regions for more than a quarter century. Its quarterly Asia Labour Update is an important source of timely information. Current research and reporting efforts focus on comparative labor law in Asia-Pacific countries, layoffs in China's special economic zones, women workers in Asian EPZs, the impact of transnational corporations' subcontracting on workers, transnational subcontracting and social development, migrant workers in Southern China, and monitoring workers' conditions and workers' rights in the sports shoe, garment, and toy industries.
- Established in 1987, the London-based International Centre for Trade Union Rights (ICTUR)²⁶ produces a high quality quarterly journal called *International Union Rights* covering labor rights issues around the world. It is particularly good in its coverage of African countries, which get much less attention than other developing country regions. ICTUR recently

24. See the Solidar Web site at <http://www.solidar.org>.

25. See the Asia Minor Resource Centre Web site at <http://www.amrc.org.hk>.

26. See the ICTUR Web site at <http://www.ictur.labournet.org>.

created an International Commission for Labour Rights to undertake country-specific research and reporting projects in years ahead.²⁷

- China Labour Bulletin²⁸ and Human Rights in China²⁹ are just two of several NGOs reporting on workers' rights issues in China. NGOs working on China suffer some degree of factionalism, so some independent advice would be needed to sort out the players and their biases. The two groups noted here produce regular, well-documented reports on labor rights in China. A similar effort by a new NGO called Global Standards focuses on Vietnam.³⁰
- Brazilian trade union researchers produce an independent bimonthly report called *Correio Sindical Mercosur* that is indispensable for monitoring worker rights developments in the four Mercosur countries (Brazil, Argentina, Paraguay, and Uruguay, plus more on Chile, Peru, and other Mercosur associates). In January 2002, supported by several North American unions and trade union federations, they added an English edition, titled *Mercosur Union Post*, available by email free of charge to persons requesting it.³¹
- United Kingdom-based *Labourstart* is an independent Web site providing daily news feeds from around the world on labor issues.³² While it includes trade union organs among its sources, most links are to articles in respected mainstream newspapers. The articles are sorted by country, permitting a continuing, updated account of the state of workers' exercise of rights to organize, bargain, and strike in each country.
- Based in Geneva, the Global Unions Web site is a project of global union federations (which used to be called International Trade Secretariats, ITS's) affiliated with the ICFTU. It provides regular, updated reports on events within sectors of industry and within specific multinational corporations.³³

27. See information at <http://www.labourcommission.org>.

28. See <http://iso.china-labour.org.hk/iso>.

29. See <http://iso.hrichina.org/iso>.

30. See <http://www.global-standards.com>.

31. See <http://www.sindicatomecosul.com.br>.

32. See <http://www.labourstart.org>.

33. See <http://www.global-unions.org>.

*d. Codes of Conduct Monitors' Reports*³⁴

The proliferation of corporate codes of conduct has led to creation of several monitoring systems that can inform a systematic effort to assess countries' compliance with freedom of association standards. But there are limits to these efforts. First, they focus mostly on plant-specific conditions in developing country factories that produce, usually on a subcontracting basis, for U.S. and European-based multinationals. Still, recurring violations in a country suggest government failure to protect workers' rights and can be taken into account in assessing a country's performance. Some of the most prominent "stakeholder" codes are the European-based Ethical Trading Initiative (ETI) and Clean Clothes Campaign (CCC), and the U.S.-based Fair Labor Association (FLA), Worker Rights Consortium (WRC), and the Social Accountability 8000 (SA8000) plan of Social Accountability International (SAI).

The ETI brings together NGOs, companies, unions, and non-governmental organizations to identify and promote good practices in the implementation of codes of conduct, including monitoring and independent verification. The ETI has developed a multi-sectoral "Base Code" based on ILO standards. It includes provisions for a living wage, freedom of association, and security of employment.³⁵ The CCC was successful in bringing together Dutch NGOs, national trade union federations and associations of apparel retailers and manufacturers in a five-year process of negotiations for an industry-wide code of conduct that includes strong provisions on freedom of association, hours of work, and a living wage and contains provisions for independent monitoring and certification.³⁶

Major U.S. apparel companies are participating in the FLA along with NGO representatives. Their monitoring system establishes a systematic process for evaluating factories' (not countries') compliance with its code of conduct, which includes respect for workers' freedom of association. The code sets forth a strong, detailed, eighteen-point set of "benchmarks" on freedom of association that cover key elements of workers' right to organize and bargain collectively (though it is silent on the right to strike). Sources for FLA reporting include on-the-ground interviews with workers and

34. The best NGO providing comprehensive information on labor rights codes of conduct is the Canadian Maquila Solidarity Network, at <http://www.maquilasolidarity.org/resources/codes>.

35. See <http://www.ethicaltrade.org>.

36. See <http://www.cleanclothes.org>.

managers, records review, visual inspection, and related analysis and reporting.³⁷

With recent moves to make its monitoring results publicly available, the FLA promises to be an important source of information on events inside countries where factories are monitored. However, labor conditions in particular factories selling to major multinationals may not reflect general labor conditions in a country.

The WRC grew out of the anti-sweatshop campaigns of the United Students Against Sweatshops in the U.S. The consortium aims to ensure that university-licensed apparel is manufactured according to the WRC Model Code of Conduct or other university codes that comport with the WRC model.³⁸ The consortium stresses that companies whose suppliers are found to violate WRC standards should not adopt a "cut and run" policy canceling contracts and leaving workers unemployed, but should stay and work to correct problems.

The WRC's is a complaint-driven system, not a comprehensive monitoring program. It has completed fewer than ten factory reports.³⁹ WRC reports reflect high quality, intensive on-the-ground research, including treatment of government performance on workers' rights. But since its work is so *ad hoc*, it can really only supplement more systematic reporting on the country involved.

New York-based Social Accountability International calls SA8000 "a comprehensive global verification standard for auditing and certifying corporate responsibility." SA8000 aims to bring consistency to labor rights standards in various codes and in procedures for social auditing. Its standards are drawn from the Universal Declaration of Human Rights, from U.N. human rights covenants, and ILO conventions.⁴⁰ Unlike some of the other U.S. monitoring organizations, the SAI leadership includes organized labor (the International Textile, Garment and Leather Workers' Federation).

SAI trains and accredits social auditing firms and individual auditors, who then are hired by companies to certify that they or their suppliers comply with SA8000 standards.⁴¹ SAI is also training union leaders in Asia, Latin America, and Africa to monitor compliance

37. For more details, see <http://www.fairlabor.org/html/monitoring.html>.

38. See <http://www.workersrights.org>.

39. See <http://www.workersrights.org/freports.asp>.

40. See <http://www.sa-intl.org>.

41. A list of accredited auditors is available at <http://www.sa-intl.org/Accreditation/CertificationBodies.htm>.

with corporate codes of conduct. SA8000 reports do not report violations, they only report certified factories.⁴²

B. Group Two: Comprehensive Descriptive Labor Rights Reports

The organizations in this group perform comprehensive annual reporting on workers' rights in most countries, generally applying the same methods to each. They stop short of a country comparison, ranking or scoring system. Instead, they lay descriptive reports of country experiences side-by-side and leave it to others to score results and make comparisons.

There are several important features of these reports. First, they are broad in coverage, including all or most countries in the world. They look at all the components of freedom of association, including organizing, bargaining, and the right to strike. They examine whether governments, through state action, are interfering with these rights, and also whether governments are providing effective protection of the rights. Most important from a methodological point of view, they seek to apply a standard formula in a systematic way to all countries. In sum, they provide a rich source of raw data that can be mined for comparative purposes. Three reporting initiatives stand out in this category: 1) the U.S. State Department and its annual "Section 6" reports on workers' rights in every country, 2) the ICFTU and its annual survey of violations of trade union rights in every country, and 3) annual reports by the ILO's Committee of Experts and Committee on Freedom of Association, which together address workers' rights in practically every country.

1. U.S. State Department

The State Department's annual human rights report's Section 6 for each country is the most universal and systematic reporting on workers' freedom of association.⁴³ It is a descriptive reporting mechanism, not a ranking mechanism that assigns comparative value to a country's performance. While still mixed in quality, the reports have greatly improved in recent years, benefiting from higher priority, a consistent reporting template, and embassy labor officers (formerly called *attachés*) who are better trained and motivated by the new

42. See the list of certified factories at <http://www.sa-intl.org/Accreditation/CertifiedFacilitiesIntroduction.htm>.

43. The most recent report, for 2002, is available at <http://www.state.gov/g/drl/rls/hrrpt/2002/index.htm>.

importance given their work. Labor officers have an on-the-ground presence that allows them to interview key actors and get the necessary "feel" for the labor rights situation that they can then translate into objective reporting.

The department's instructions to labor officers advise them first to note any ILO, GSP, and OPIC cases involving the country, as well as information in ICFTU and other NGO reports.⁴⁴ The instructions then set out fifteen general questions on rights of association, organizing, and bargaining (with several sub-questions) and require an answer to each, with explanatory detail.

Some of the questions are factual ("Note the percentage of the total work force that is organized. . . . Were there legal or illegal strikes during the year? If so, how many? . . . Has the government lost GSP or OPIC benefits on worker rights grounds?"). Some require legal analysis ("Cite any categories of workers that are not permitted to join a union. . . . Does the law protect workers from employer interference in their right to organize and administer their unions?"). Still others require interpretation and judgment ("Are unions subordinate to the government, political parties, or any other political forces in law or in practice? . . . Do labor administrative and judicial bodies function independently? . . . Is collective bargaining freely practiced? . . . Is the law effectively enforced? . . . Are there significant restrictions in EPZ's?").

The later questions, those needing interpretation and judgment, go to the heart of a country's performance on labor rights. It may be possible to develop a quantitative reflection of the Section 6 reports by laying the questions alongside the responses for each country and assigning value to yes and no answers, to factual responses, and to qualitative terminology (e.g., "significant restrictions").

However, this should only be part of a systematic approach. Section 6 reports are not definitive. Their mixed quality is due to a number of factors. For one, while some labor officers are committed to promoting workers' rights, others are not really attuned to or enthusiastic about workers' rights compared with investors' or executives' concerns that get more embassy attention.

Even the best labor officers are not free agents. Ambassadors, their deputy chiefs, and other embassy officers review Section 6 drafts before they are sent to the Bureau of Democracy, Human Rights and Labor (DLR) in Washington. They sometimes trim the drafts to

44. U.S. DEPARTMENT OF STATE, 2001 HUMAN RIGHTS REPORTING INSTRUCTIONS (unclassified memo on file with author).

avoid offending host countries. Still, considering their scope and overall reliability, the Section 6 reports are an indispensable starting point for measuring countries' performance on labor rights.

2. ICFTU

The ICFTU's *Annual Survey of Violations of Trade Union Rights* has become a standard reference on workers' freedom of association.⁴⁵ The survey does not rank countries in a quantitative fashion. It provides an overview of labor law and practice, and describes specific cases of violations during the year reported. Parallel to this effort and replicating it in most instances, the ICFTU has also produced several country reports to the World Trade Organization in recent years.⁴⁶

The quality of the ICFTU's reports has improved markedly. Earlier efforts were spotty, with wide variations in country reports, and sometimes more argumentative than informative. Lately, though, the reports have gotten more consistent, more thorough, and more dispassionate, letting facts speak for themselves. The reports are still "one-sided" in the sense that they present trade unionists' accounts of assaults on their rights during the past year for each country reported. But they are carefully documented and provide a comprehensive overview of the situation worldwide, lending themselves well to the kind of quantitative use put to them in comparative reports.

3. ILO Committee Reports

The ILO maintains an extensive supervisory system generating detailed reports on workers' freedom of association in every country. The main supervisory organisms are the Committee of Experts on the Application of Conventions and Recommendations (CEARC) and the Committee on Freedom of Association (CFA). The ILO also has commissions of inquiry, committees of experts, fact-finding committees, *ad hoc* committees, *ad hoc* special representatives, and other reporting mechanisms.

With some exceptions, the ILO's Web site contains helpful information on these bodies in its "International Labour Standards" pages. Researchers can access reports on a country-by-country basis, making it possible to systematically examine countries' compliance.⁴⁷

45. The most recent *Survey of Violations of Trade Union Rights* is available at <http://www.icftu.org/survey2003.asp?language=EN>.

46. These reports are at <http://www.icftu.org/list.asp?Language=EN&Order=Date&Type=WTOReports&Subject=ILS>; <http://www.icftu.org/www/pdf/survey2001en.pdf>.

47. See ILOLEX database at <http://www.ilo.org/ilolex/english>.

However, some key country documents such as reports by technical assistance missions, direct contacts missions, and commissions of inquiry do not get posted on the Web site.

The CEARC reports, published annually,⁴⁸ are quite technical, usually involving texts of laws and how they comport with conventions already ratified. COFA reports are usually more pointed because they respond to complaints and address concrete problems of workers' rights violations.

Under the constraints of diplomatic niceties, most ILO reports use very guarded language. The reader has to search for a declarative sentence or a firm conclusion. The best the COFA could do addressing the United States' permanent striker replacement doctrine was to say that it "entails a risk of derogation from the right to strike."⁴⁹ Nonetheless, these reports provide a consistent, formulaic approach susceptible to systematic analysis of code phrases, which was the use the OECD made of them (see below).

One important caution with the richer COFA reports is that they are complaint-driven. This skews country assessment toward those whose trade unions avail themselves of the COFA complaint procedure, or countries targeted by trade unionists elsewhere if in-country trade unions are not in a position to file complaints. Approximately half of all COFA complaints involve Latin American countries in part because Latin American unions have become accustomed to using this mechanism.⁵⁰ The ILO's procedures are less familiar to many trade unionists and their allies in Asia and Africa. This underscores the obvious point that several sources of information are needed to construct a valid assessment system.

C. Group Three: Comparative Scoring and Ranking Systems

These studies explicitly compare or rank countries according to a measured degree of compliance with core labor standards on freedom of association. They cover and comparatively rank a sizeable number of countries. They review all aspects of freedom of association using

48. INTERNATIONAL LABOUR ORGANIZATION, REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS: GENERAL REPORT AND OBSERVATIONS CONCERNING PARTICULAR COUNTRIES (2002), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc90/rep-iii-1a.htm>.

49. See ILO COFA, *Complaint against the Government of the United States of America presented by the AFL-CIO*, ¶ 92, Report No. 278, Case No. 1543 (1991).

50. See ILO, *Cases before the Committee on Freedom of Association*, at the ILO Web site at <http://www.ilo.org>. Cases are organized by region and by country for calculating numbers and sources of complaints.

detailed sets of evaluation criteria. They draw on a wide variety of data, but rely heavily on the three reporting systems from group two. They transform the data into a weighted index of compliance. At the same time, each acknowledges that at some point in their process subjective judgments have to be made.

The three reporting systems in this group are: 1) a 1996 OECD study (updated in 2000) that developed an index of compliance with freedom of association standards as part of an investigation of the link between labor standards and trade and investment flows; 2) a study conducted by David Kucera at the International Institute for Labor Studies (IILS) with an index of freedom of association and collective bargaining as part of a broader look at the relationship between workers' rights, labor costs, and investment flows; and 3) a study carried out by the Massachusetts-based NGO Verité for the California Public Employees Retirement System to assess labor rights in emerging country markets to guide the pension fund's investment choices.

1. OECD

The OECD's seminal 1996 report *Trade, Employment and Labour Standards* is a good example of the challenge of constructing a labor rights assessment system. Using reports by the ILO's CEARC and COFA committees, U.S. State Department Section 6 reports, and information from ICFTU reports, the OECD tried to wring out subjective judgment by calculating an index of compliance with freedom of association for each country studied (twenty-four OECD members and fifty others).

The index was based on values assigned first to findings of violations, rated on a 1–5 scale covering “most severe violation” (5 points), “severe violation” (4 points), “major restriction” (3 points), “moderately severe restriction” (2 points), and “least severe restriction” (1 point). A second category ranked findings in COFA and CEARC reports on a 0–4 scale between “most critical” findings (4 points), “critical” (3 points), “moderately critical” (2 points), “least critical” (1 point), and “favorable” (0 points).⁵¹ These findings were based on formulaic parsing of CEARC and COFA reports for phrase-based indicators in a range between “no efforts” by government under scrutiny to comply with ILO standards to finding “with satisfaction”

51. See OECD, *TRADE, EMPLOYMENT AND LABOUR STANDARDS* 234-235 (1996).

that government has come into compliance, and assigning a 0-4 numerical value to key phrases.

The OECD used its findings to place countries into four groups based on their level of compliance with freedom of association standards. Group 1, with most OECD member countries and a handful of others, includes those where freedom of association "is by and large guaranteed in law and practice." Group 2 was comprised of sixteen countries where "some restrictions exist, but it is possible to establish independent workers' organizations and union confederations." Group 3, the largest, had countries where "restrictions on freedom of association are significant." Group 4 included seven countries where "freedom of association is practically non-existent."⁵²

The OECD acknowledged that its index "inevitably embodies an element of Secretariat judgment" in categorizing violations and committee evaluations. The OECD's "most severe" category is unarguable, including murders and attacks on union members. But the other end of the scale is questionable. The OECD rated as a "least severe" restriction a government's prohibition of trade union political activity. This is a serious abridgment of workers' freedom of association in most contexts. The OECD rated higher (i.e., worse), as a "moderately severe" restriction, laws establishing eligibility requirements for union leaders. This is indeed a problem in many countries, but to say it is a greater problem than prohibiting trade union political activity is a questionable approach undermining confidence in the overall analysis.

The problems with the OECD's approach show up in the results. For Sri Lanka, the 1996 report noted only that "Unions must submit reports to labour authorities, otherwise they are deregistered," without addressing widespread interference with workers' freedom of association in the Free Trade Zone (FTZ) factories.⁵³ For Colombia, the problem is that "government officials can attend union meetings," hardly the main problem when union activists are more likely to be assassinated. In Ecuador, the OECD noted, "The number of workers

52. *Id.* at 43. In 2000, the OECD published an updated report, INTERNATIONAL TRADE AND CORE LABOUR STANDARDS, taking into account U.S. State Department reports, ICFTU reports, and ILO committee reports since the first study was published in 1996. The rankings from 1996 were generally maintained, with the exceptions of Korea, Mexico, and Turkey. Each advanced one group (to groups 3, 3, and 2, respectively).

53. In the 2000 update, at 96, the OECD's comment on Sri Lanka said, "Update: No substantial changes noted. Workers have the right to form trade unions and there are many operating. However, union organisers do not have access to EPZs and there are reportedly no unions functioning in these zones."

required to establish an enterprise union is too high.” This may well be true and a problem, but it pales in comparison with widespread firings, violence, and other reprisals against worker activists. Chilean trade unionists would take issue with the OECD’s findings that, when it comes to protection of union members and collective bargaining rights, “protection is adequate.”

In the United States, millions of workers excluded from protection of the right to organize and bargain collectively—agricultural workers, domestic workers, low-level supervisors, independent contractors who are really dependent, and public employees in many states—find no mention of their predicament in the OECD report. Canadian workers in many provinces that severely restrict the right to strike, and public sector workers forced back to their jobs by strike-ending legislation, would be surprised to learn that the OECD finds Canada with “no noticeable restrictions” on the right to strike.

The OECD did commendable work in trying to devise a systematic approach to evaluating countries’ compliance with freedom of association standards. The use of ILO committee reports, Section 6 reports, and ICFTU surveys is essential in any new system, but many other sources should be used to blend out the weaknesses and biases in those. The effort to devise a neutral scoring system based on carefully differentiated categories is also an important initiative, but it needs more careful calibration and more adjustment based on information best obtained by intensive in-country work.

2. ILO International Institute for Labour Studies

David Kucera’s paper for the IILS builds on the OECD report and makes a significant contribution to the new field of labor rights assessment.⁵⁴ Kucera uses the three basic sources that the OECD employed: U.S. State Department Section 6 reports, the ICFTU’s annual survey, and ILO committee reports. To these he adds unionization rates, EPZ violations, and Freedom House findings.

Kucera’s main value added is the skillful use of thirty-seven very detailed criteria on freedom of association in his review of the three textual sources.⁵⁵ Not all thirty-seven are listed here, but they include,

54. See ILO INTERNATIONAL INSTITUTE FOR LABOUR STUDIES, THE EFFECTS OF CORE WORKER RIGHTS ON LABOUR COSTS AND FOREIGN DIRECT INVESTMENT: EVALUATING THE “CONVENTIONAL WISDOM” (2001), available at <http://www.ilo.org/public/english/bureau/inst/download/dp13001.pdf>.

55. *Id.* at Table 1 (the OECD lists half as many criteria but calls them “examples;” it is not clear if it used the same criteria as Kucera, *supra* note 13).

for example, "arrest, detention, imprisonment or forced exile for union membership or activities," "employment conditional on non-membership in union," "union control of finances," "exclusion of tradeable industrial sectors from right to collectively bargain," "previous authorization required by authorities [to strike]," and "restricted rights in EPZs." He assigns 0 to "no evidence" of violations and 1 to "evidence," and weights each criterion on a scale of 1-1.25-1.50-1.75-2, "with greater weight indicating what are judged to be more severe problems" based in part on the qualitative language used in COFA reports.⁵⁶

Kucera's attention to such details advances the labor rights evaluation enterprise, but his method still has important limits. In any one country subject to this method, only a fraction of the thirty-seven criteria will show results based on one of his textual sources, and only a fraction of these will have results based on more than one source. In the hypothetical example for one country in Table 1, for example, thirteen of the thirty-seven criteria show "evidence" or "no evidence." The rest of the criteria have no findings either way. Of the thirteen "scorable" criteria, six are based on one source—the ICFTU survey, the Section 6 report, or a COFA decision. Six criteria are based on findings of violations in two of these three sources. Only one is based on all three sources.

This was a hypothetical example to demonstrate his scoring system. Unfortunately, Kucera's paper does not contain country-by-country freedom of association scores for named countries (one may presume this was an ILO mandate so as to not offend a low-ranking member country). Thus, it is not possible to compare his findings with those of the OECD or Verité scoring systems, nor with a reader's own knowledge of particular countries.

This is a limited foundation that could be strengthened by use of more textual sources like independent NGO reports, publicly available code of conduct monitoring reports, reports from other governmental and intergovernmental agencies, articles by independent scholars and others. Naming and ranking countries would also help.

Each of Kucera's sources has its own problems and limitations, some of which are discussed below, but each adds a corrective to the biases of others. Kucera himself said it clearly and well in another paper describing his methodology: "Consider the problem of union dismissal. The Institute's measure treats one dismissal the same as a

56. *Id.* at 12.

thousand dismissals. The OECD approach need not. . . . Different approaches have different strengths and weaknesses, and the study of relationships between rights at work and other desired outcomes would be deepened through the use of multiple approaches and measures.”⁵⁷

3. Verité’s CalPERS Labor Rights Screen⁵⁸

One of the most important efforts at quantitative and comparative evaluation of countries’ compliance with core labor standards has taken shape in the field of socially responsible investing. The California Public Employees Retirement System (CalPERS) is the single largest pension fund in the United States. In 2000, it contracted with Verité, an NGO that monitors companies’ corporate social responsibility, to provide a quantitative ranking of twenty-seven “emerging market” countries to determine the appropriateness of CalPERS investments in those countries. Based on these findings, CalPERS announced withdrawal of its investments in four Asian countries because of labor rights violations.⁵⁹

Verité ranked each country on its performance in forty-seven separate indicators of labor rights compliance. Of these, thirteen indicators addressed freedom of association. The indicators were plugged into four weighted categories and a top score of 40 points:

- *ratification of ILO core conventions* (10% of total score; maximum 4 points);
- *laws and legal system* (25% of total score; maximum 10 points);
- *institutional capacity*—“each government’s capacity to implement its laws and policies” (15% of total score; maximum 6 points); and,
- *implementation effectiveness*—“the actual level of compliance with or violations of the standards” (50% of total score; maximum 20 points).

Scoring ILO convention ratification was a rote exercise assigning 0.5 points for each ratification. Scoring the adequacy of laws and legal system was more complex, requiring careful legal analysis to award a

57. See Kucera, *supra* note 13, at 134.

58. See VERITÉ, REPORT TO CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM (CALPERS): EMERGING MARKETS RESEARCH PROJECT, available at <http://www.calpers.ca.gov/eip-docs/about/press/news/invest-corp/verite-report-2003.pdf>.

59. See Elizabeth Wine, *Calpers Withdraws From Investments in Asia: Latest Move Stems From Pension Fund’s Concern Over Social Responsibility*, FIN. TIMES (LONDON), Feb. 22, 2002, at 25.

full score where laws fully protect the right described in the relevant ILO convention, deductions where the law lacks a key provision or partially contradicts the ILO convention, and no points where the law directly contradicts the convention. Here Verité used a template of seven yes/no propositions on freedom of association (one example: “workers are protected from discrimination if they join a union or participate in union activities”). The proposition “the right to strike is protected by law” was broken into three scoring options: 1) no or few restrictions on the right to strike, 2) some restrictions, 3) significant restrictions.

For institutional capacity measurement, Verité conducted in-country interviews and examined statistical data using a five-question template addressing the following issues:

- breadth of administrative coverage within enforcement departments;
- adequacy of personnel and budgets compared to number of workplaces;
- frequency and adequacy of inspections;
- scale and frequency of labor-related corruption; and,
- severity and frequency of fines levied for violations.

The results of this examination were boiled down to a single indicator expressed as the “effectiveness of governmental capacity to develop, monitor, correct, and implement labor laws.”

Interviewers also examined NGO capacity in the country and whether NGOs are legally or informally restricted from advocating for workers’ rights. Government capacity comprised 80% of the overall institutional capacity score. NGO capacity was 20% of the score. These two institutional capacity indicators were converted to percentages and then combined for a weighted percentage, multiplied by the six points available in this category to arrive at the total points.

To measure implementation effectiveness, Verité focused on the scale of problems in each area, reducing scores where violations are significant. It also looked at the quality of government responses to problems, reducing scores where governments failed to adopt programs and policies to address specified problems and assessing the effectiveness of programs where they exist.

For freedom of association issues, Verité looked at four items, three of them with a 0–3 scoring assignment and one with a yes/no result. They are:

- *Independence of trade unions*: fully independent (3 points), somewhat independent (2 points), limited independence (1 point), government-controlled (0 points).
- *Non-formal restrictions on organizing rights*: rare or insignificant restrictions (3 points), restrictions of limited impact (2 points), moderately significant restrictions (1 point), significant restrictions (0 points).
- *Collective bargaining without government or business interference*: widely used and generally effective (3 points), used in limited circumstances and/or with some limitations (2 points), used in limited circumstances with significant limitations (1 point), ineffective and/or not widely used (0 points).
- *De-facto weakening or suspension of freedom of association in EPZs*: yes/no result—yes results in deduction of 25% from implementation effectiveness score for freedom of association; no results in no change to score.

Verité's overall rankings for CalPERS put Hungary at the top and China at the bottom of the twenty-seven countries reviewed. These rankings are based on all the core labor standards—forced labor, child labor, and discrimination, in addition to freedom of association. Rankings for freedom of association or any other single core standard are not presented. The overall rankings are credible, but it is questionable whether freedom of association scoring by itself would find Chile (fourth overall) or South Korea (tenth overall) as highly placed.

Verité has carved out an important niche in the labor rights monitoring field, and its work should certainly be considered in constructing a new compliance measurement system. Its CalPERS project reflects a careful evaluation and scoring system in an effort to attain objective, quantitative results. But once past the rote recording of ILO convention ratification, scoring the other three categories—laws and legal system, institutional capacity, and implementation effectiveness—requires increasingly sophisticated interpretation and analysis.

What appears to be an objective toting up of scores is really an exercise in subjective judgment. This is not a criticism; there is no other way to do it. Verité acknowledges as much when it notes that, regarding data collection, “a range of sources was used to determine a country's performance on each of the forty-four indicators. Where

sources disagreed, Verité researchers relied on the organization's institutional experience and the opinions of in-country consultants to determine the best measure."

D. Academic Research

It is not an organization or institution producing "reports" in the usual public policy sense, but the community of scholars working on international labor issues is an important, underused resource for assessing countries' compliance with core labor standards. The reporting organizations discussed in this paper, especially governmental and international institutions, look almost exclusively at economists' research. Many of these reports probe the links between labor rights and economic performance, so economists' work is central. But this focus on economics misses a rich well of information in other disciplines produced by scholars with deep country and regional expertise.

Reserves of expertise can be found at many research institutions in the United States and around the world in law, industrial relations, political science, sociology, and other academic disciplines. In many fields, researchers from different institutions collaborate to produce significant contributions on labor issues. University researchers also usually have valuable networks of foreign colleagues who bring their own national expertise to joint research and writing projects.

Looking at the programs of major academic congresses like the Industrial Relations Research Association (and its international counterpart, the International Industrial Relations Association), the American Political Science Association, the Latin American Studies Association, the American Sociological Association, and others, one finds a huge amount of valuable country-specific research on labor issues.

With all the new attention to globalization and related issues, scholarly journals contain a wealth of articles on countries and regions that can contribute to assessing countries' compliance with international labor standards. Moreover, the peer-review process in academic publishing provides an extra layer of quality guarantee of these sources in ways not found in trade union, NGO, and government reporting.

The field of international labor law has a large literature on labor rights, most of it very recent, with carefully researched articles on specific countries. Yet the *Comparative Labor Law and Policy Journal*, the *International Journal of Comparative Labour Law and*

Industrial Relations, or any one of a dozen more high quality law journals devoted to global labor issues, are rarely cited by the reporting bodies reviewed here.

Labor law experts are equally guilty of ignoring other disciplines. Like economists cite economists, political scientists cite political scientists, and so on, legal scholars mostly cite other law journal articles. No one has full acquaintance with academic sources and publications in all fields touching on international labor rights.⁶⁰ An ambitious new effort to create a comprehensive system for assessing countries' compliance with core labor standards ought to have high on its agenda a plan for linking these divided disciplines.

V. CONCLUSION AND RECOMMENDATIONS

This brief survey of various organizations' efforts to assess country compliance with freedom of association standards, as defined by the ILO, ranges over many methodological strengths and weaknesses. There are proxy measures like ratification of ILO conventions, whose strength in objectivity goes hand-in-hand with shakiness in real-world relevance. There is descriptive reporting like human rights NGO reports or code of conduct factory reports, which do not by themselves provide quantitative or comparative measurement of country performance. One finds qualitative reporting based on sophisticated use of carefully constructed questionnaires, as well as evaluations based on unsystematic but still probing meetings and discussions with key actors. One finds reports that cover more than one hundred countries, and reports that cover just a few or even one.

The OECD's seminal work and the more recent, sophisticated efforts in Kucera's ILS research and in Verité's CalPERS screen are the best examples of combining the strengths of quantitative measures alongside carefully extracted qualitative data for many countries. These three works are indispensable starting points, and recommendations to follow are built on those models. With this background, following are recommendations for constructing a database of information to evaluate countries' performance on workers' freedom of association.

60. A project at the University of Michigan is making the attempt, at least among researchers willing to join the project. See Labor and Global Change Program of the University of Michigan at <http://www.ilir.umich.edu/lagn>.

A. Ask The Right Questions

An indispensable first step in developing a freedom of association database is to formulate the questions or checklist whose answers will supply the information needed to construct comparative measures. A planning team should construct a template of questions going to all aspects of freedom of association, one that probes both government non-interference with workers' exercise of their rights and government action to protect the exercise.

B. Develop A Composite Measure of Industrial Relations Indicators

Union density, collective bargaining agreements across sectors, the fraction of the workforce covered by collective agreements, levels of bargaining (single workplace, company-wide, industry wide, regional/national, etc.), strike incidence, and other industrial relations data are relevant indicators, but they need careful interpretation to extract relevant measures. An advisory group of industrial relations scholars could help devise a composite index that captures how various measures serve as proxies for respect of the right to association, organize, bargain, and strike.

C. Develop An "Unfair Labor Practice" Index of Reprisals Against Workers

One proxy that may be most reflective of a country's compliance or lack of compliance with freedom of association standards is the number of workers fired for union activity—the most common violation of workers' freedom of association. A new assessment system should seek to quantify the volume of reprisals against workers in a country because of their organizing and bargaining efforts or because they take collective action to defend their rights. This can be done first based on records of relevant enforcement bodies (labor board and court decisions), but it would have to be supplemented by in-depth interviews with trade unionists, employers, and labor lawyers who live the system daily.

D. Develop Further the Use and Quantifiability of "Capacity" Indicators

Institutional and enforcement capacity indicators like those examined most intently in the CalPERS screen—budgets, personnel,

caseloads, enforcement actions, and the like—are susceptible to quantifiable analysis. These would have to be adjusted for size of the labor force, firm size and distribution, a country's level of development, and other factors. Of special importance are institutional structures meant to protect the right to organize and bargain—labor boards, labor courts, labor commissioners, and others who should act swiftly to remedy acts of anti-union discrimination.

E. Expand the Range of Descriptive Sources

The OECD, ILS, and Verité reports' reliance on three documentary sources (ILO, ICFTU, and State Department reports) is too limited. A new and comprehensive worker rights assessment program should systematically amass information from more descriptive sources, many but not all signaled here, to buttress a scoring system for performance of any country under scrutiny. For example, the OECD found that for Mexico's protection of union members and collective bargaining rights, "the situation is difficult to assess." The difficulty might be overcome by taking into account U.S. NAO reports, Human Rights Watch reports, code of conduct reports on Mexican *maquiladora* factories, Verité's Mexico report for CalPERS, social science journal articles on labor in Mexico, and other credible sources. Besides strengthening country-by-country analysis, a wider range of descriptive sources can help create accurate sets of industrial relations indicators, unfair labor practice indicators, and enforcement capacity indicators.

F. Include Firm and Sector Reports in Gathering Information, Not Just Country Reports

The goal is objective assessment of countries' performance on labor rights. But in most cases, workers' rights are respected or violated at the workplace, in specific companies operating in specific economic sectors. The performance of private sector firms is an important element in gauging the level of respect for freedom of association in a country. A large body of reporting on companies' performance has grown up in recent years. It ranges from self-reporting under some corporate codes of conduct to extremely critical reports by NGOs and advocacy groups. Most of these reports deal as well with firms' and industries' relationship with government officials and agencies, too. The growing array of reporting on firm-level activity is an important asset in building a database that conveys an

accurate and insightful perspective on countries' compliance with core labor standards.

G. Emphasize Systematic and Probing Interviewing of Key Actors in a Country

The best qualitative indicators are based on intensive in-country research using information templates that probe the complexities of a labor relations system. A well-designed questionnaire can serve as a basis for systematic follow-up through interviews with key actors, posing the same questions to get at the subtleties in a country's labor life.

Interviews with key actors are essential. In Mexico, for example, a community of activists and intellectuals linked to the independent trade union movement can explain in detail how these unions and their supporters suffer discrimination compared with "official" unions related to the PRI.

Careful thought needs to be given to exactly who would conduct these interviews and how they would be carried out. It could be done by embassy labor officers who are already on the ground and have relationships with social actors. Unfortunately, in many countries U.S. government officials carry heavy baggage of a history of intervention, the image of U.S. bullying of smaller countries, the recent assertion of U.S. unilateralism in international affairs, and so on.

The ILO might launch a proactive "clean slate" general review with a standardized questionnaire and field interviews, in addition to reviewing government self-reports and responding to complaints. But this might be asking too much of an institution that is already swamped with new work. The best "neutral" interviewers using standardized questionnaires might be respected local labor law scholars in each country or region. They are also on the ground, they know the players, and they know the issues.

H. Acknowledge and Apply Consistent, Dispassionate Interpretation and Judgment

No purely quantifiable system for assessing countries' compliance with freedom of association standards is possible. Even the three most sophisticated efforts at quantifying labor rights compliance—the OECD, IILS, and Verité schemes—acknowledged that in the end someone sitting in a room in Paris or Geneva or Boston said "2

points? 3 points? Let's give it a 3," or something like that, in constructing their country scores.

One had to read closely to find these admissions. The OECD acknowledged that its index "inevitably embodies an element of Secretariat judgment." According to Kucera, an OECD "panel of evaluators" gave each country its 1–4 score for weakest or strongest rights.⁶¹ Kucera used the passive voice to describe his scoring method: "with greater weight indicating what are judged to be more severe problems." Verité said it relied on "the organization's institutional experience and the opinions of in-country consultants to determine the best measure." Their results reflect differing judgments: the OECD gave India a relatively high "Group 2" ranking; Verité rated India sixth from the bottom of its twenty-seven countries.

In developing a new system for assessing countries' performance on labor rights, analysts should in the end use the best judgment of experts to help measure compliance, acknowledging the importance of interpretation and judgment. The important thing is consistency in applying the same standards of judgment to all countries alike.

I. Assess the United States

For an assessment system to have international credibility, freedom of association in the United States should undergo the same evaluation as every other country and the results should be included in country rankings. The ICFTU and the ILO's Committee on Freedom of Association have produced numerous reports on violations of American workers' organizing and bargaining rights. Human Rights Watch did an in-depth report on workers' freedom of association in the United States. Industrial relations data is extensive and reliable. Enforcement bodies have a wealth of information about unfair labor practices. In-country interviewing of key actors is relatively easy.

DOL could apply the "first draft" of a labor rights assessment system to the United States. It can then open up the results to debate and comment within the U.S. labor relations community, and use their critiques to refine the assessment system for application to other countries—including the United States again, this time with the final system.

61. ILO, *supra* note 46, at 9.

