

**ASSESSMENT OF THE PROGRESS OF NATIONS ON CORE LABOR STANDARDS:  
MEASURES OF FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING**

Sarosh Kuruvilla,  
Cornell University

Jakir Hossain  
University of Trento, Italy

Stephen Berger  
Cornell University

Address Correspondence to Sarosh Kuruvilla  
([sck4@cornell.edu](mailto:sck4@cornell.edu))

## **Abstract**

The linkage between labor standards and trade agreements pursued by the US, and the burgeoning corporate codes of conduct that seek to strengthen core labor standards in global supply chains, has resulted in interest in the development of measures (or indicators) of core labor standards by a variety of organizations, such as the US dept of Labor, the ILO and several NGOs. We argue in this paper that measures of freedom of association and collective bargaining that are in use currently are incomplete and flawed, partly because they focus almost exclusively on whether the rights exist, without regard to practice, and partly because they tend to focus on easily available quantitative indicators that are necessary but insufficient indicators of the freedom of association and collective bargaining process. We develop new measures that draw on decades of comparative industrial relations research and which are based on the existing cross-national variation in industrial relations practice. Our suggested measures require national experts to use both quantitative data and qualitative research and judgment in their evaluation, and report it in consistent and transparent ways. Given that the connection between trade and labor standards makes the consequences of violation quite severe for developing countries, reliance on imperfect measures to make decisions about country performance on core labor standards is problematic. The measures advanced in this paper reduce that risk.

## I. INTRODUCTION

Interest in the assessment of labor standards in different countries has grown ever since the US government began the process of linking trade with labor standards. For example, legislation during President Clinton's era mandated that the US Trade Representative must have information about the labor conditions of trading partners. This led to a plethora of efforts to develop effective measures (or indicators) to assess countries' performance on the "core labor standards" (i.e. freedom of association and the right to collective bargaining, elimination of all forms of forced and compulsory labor, the abolition of child labor, and the elimination of discrimination in respect of employment and occupation).

Interest in indicators of labor standards also received a strong impetus with the global development of corporate social responsibility strategies. Over the last 15 years, as consumers and investors have demanded more "ethical" behavior from corporations, corporations have responded with codes of conduct for their global supply chains (either in response to consumer pressure, or as a "preventive" against adverse public opinion). The proliferation of corporate codes of conduct has resulted in a proliferation of firms (e.g., Global Social Compliance) and NGOs (e.g., Verite, Fair Labor Association, Workers Rights Consortium) who "monitor" these codes for compliance, and some of these NGOs have also been in the forefront of the development of "indicators" of core labor standards. More recently, the focus on indicators of labor standards has heightened after the United States-Peru Trade Promotion Agreement Implementation Act (commonly referred to as the Peru Free Trade Agreement) which came into force on December 14, 2007. Hailed by many as the first real attempt to tie U.S. trade policy to enforceable labor standards, the act received broad bi-partisan support.<sup>1</sup> The US department of

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<sup>1</sup> The measure passed by a margin of 285-132 in the House of Representatives and 77-18 in the Senate (<http://www.govtrack.us/congress/vote.xpd?vote=h2007-1060>). One of the key reasons for this law's bipartisan

labor has developed new indicators of core labor standards, and the ILO published in October 2008, a new report on the measurement of decent work.

The goal of this paper is to briefly review existing indicators and develop new ones for one of the four core labor standards: the right to freedom of association and collective bargaining (FOA and CB). We focus on this particular labor standard for three reasons. First, agencies that monitor codes of conduct have often highlighted FOA and CB as the most difficult labor standard to assess. Second, corporations with codes of conduct have found that this is the labor standard which their supply chain is often least interested in complying with. Third, there is dissatisfaction with existing measures; a frequent criticism is that current indicators do not adequately capture the “processes” involved in labor relations.

This last reason is particularly important. Given that freedom of association and collective bargaining are both processes, each with many underpinning institutions, rules, and sub-processes whose effectiveness is heavily mediated by individual and collective human behavior, it is difficult to arrive at quantitative indicators to capture these processes. We argue in this paper that the indicators regarding FOA and CB that have been developed thus far are problematic in several ways. They tend to be rather mechanistic and focus on quantitative indicators that say little about the processes of FOA and CB. They tend to focus almost exclusively on whether the rights exist, with little attention to whether those rights are actually exercised in practice. And, they are based on easily available information rather than on information that is more relevant but difficult and expensive to gather. We argue further that any assessment of FOA and CB requires an understanding of the variety of institutions and processes

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support, particularly within the Democratic caucus, centered around the inclusion of enforceable labor and human rights guarantees in the bill. For the first time in any free trade agreement, both the United States and Peru were required “to adopt and maintain domestic laws to implement the five core standards incorporated in the 1998 ILO Declaration on Fundamental Principles and Rights at Work”.

underlying them, and the fine-grained qualitative judgments by experts familiar with that context. We therefore develop in this paper, new indicators of FOA and CB that can be added to the ones currently in use to improve overall assessment efforts.

These new indicators are advanced based on several principles. The first principle is that the development of any indicator with respect to FOA and CB must be rooted in an understanding of rights, the administrative procedures involved and actual practices in any given context. Quantitative measures of rights are insufficient in and of themselves. Second, since FOA and CB are complicated processes in each national context, there is need for subjective and qualitative interpretation of rules and practices by national experts. Third, the development of indicators that can be used universally must recognize that the practice of FOA and CB varies dramatically from country to country, i.e industrial relations systems have not converged, but remain distinct and strongly embedded in a national institutional structure<sup>2</sup>, although practices tend to converge<sup>3</sup>. Thus, the new indicators that we develop are based on the existing knowledge of the variation in the practices of FOA and CB around the world. This knowledge draws on decades of research by scholars (mostly in labor relations and sociology) who have become expert in the use of qualitative research and judgment to describe how FOA and CB actually work in different countries. These principles make our indicators more relevant in the assessment of how nations make progress on this core labor standard. And given that FOA and CB are seen as foundational rights (a necessary condition for progress on the other core labor standards), it is crucial that they are measured realistically.

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<sup>2</sup> See, e.g., Lowell Turner & John Windmuller, *Convergence and Diversity in International and Comparative Industrial Relations*, in *INDUSTRIAL RELATIONS AT THE DAWN OF THE NEW MILLENNIUM* 192-208 (Maruice Neufeld & Jean JcKelvey eds., 1998); Sarosh Kuruvilla & Christopher L Erickson, *Change and Transformation in Asian Industrial Relations*, 41 *IND. RELATIONS*. 171-228 (2002).

<sup>3</sup> See HARRY C KATZ & OWEN DARBISHIRE, *CONVERGING DIVERGENCES: WORLDWIDE CHANGE IN EMPLOYMENT RELATIONS* (2000).

In the next section we briefly review existing indicators, highlighting their advantages and disadvantages, followed by a section introducing new indicators.

## II. CURRENTLY USED INDICATORS OF FOA AND CB

Our literature review reveals 28 different indicators of FOA and CB that are currently in use by a variety of organizations active in the assessment of core labor standards (Table 1). This is not an exhaustive list of indicators in the academic literature however,<sup>4</sup> but are the ones that are used contemporaneously in monitoring and assessment. The indicators in Table 1 are roughly classified into four groups, and we briefly discuss each group in turn.<sup>5</sup>

Table 1 about here

Group 1 consists of available quantitative or quantifiable information. These include whether countries have signed the relevant ILO conventions, union density, collective bargaining coverage, and the number of strikes and lockouts. With regard to whether countries have signed the basic ILO conventions relating to freedom of association and collective bargaining, the advantage of this indicator is that the ratification status is easily compiled and found in publicly

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<sup>4</sup> See, e.g., Lance Compa, *Assessing Assessments: A Survey of Efforts to Measure Countries' Compliance with Freedom of Association Standards*, 24-2 COMP. LAB. L & POL'Y J. 283-319 (2003); Sarosh Kuruvilla, *Social Dialogue for Decent Work*, in DECENT WORK: OBJECTIVES AND STRATEGIES, (Dharam Ghai ed. 2006) for a more exhaustive list. We specifically excluded many Western-Europe-centric indicators. The academic literature on industrial relations in Western Europe has over the years developed measures of particularistic European labor relations phenomena such as tripartite FOA and CB, centralization of wage bargaining, union concentration etc. See for examples FRANZ TRAXLER, SABINE BLASCHKE & BERNHARD KITTEL, NATIONAL LABOUR RELATIONS IN INTERNATIONALIZED MARKETS: A COMPARATIVE STUDY OF INSTITUTIONS, CHANGE AND PERFORMANCE (2001); Golden, Miriam, Peter Lange & Michael Wallerstein, *Union Centralization among Advanced Industrial Societies: An Empirical Study*, available at [www.shelley.polisci.ucla.edu/data](http://www.shelley.polisci.ucla.edu/data); LANE KENWORTHY, IN SEARCH OF NATIONAL ECONOMIC SUCCESS: BALANCING COMPETITION AND COOPERATION (1995); TORBEN IVERSEN, CONTESTED ECONOMIC INSTITUTIONS: THE POLITICS OF MACROECONOMICS AND WAGE BARGAINING IN ADVANCED DEMOCRACIES (1999). These Western European indicators do not transfer well to countries without established systems of FOA and CB and centralized bargaining regimes (a majority of Third World countries fit this description).

<sup>5</sup> For a detailed review, see the special issue 24-2 COMP. LAB. L & POL'Y J. 281-401 (2003), especially see e.g., Margaret Hilton, *Introduction: Monitoring International labor Standards*, and Compa, *supra* note 4.

available ILO databases. Several studies have used this data to examine growth<sup>6</sup>, export performance<sup>7</sup> and trade performance<sup>8</sup>. Chau and Kanbur<sup>9</sup> even find that standards are higher in countries which ratify conventions than in countries that do not. The disadvantage of the measure is that not all countries have signed the relevant conventions. The US for example is not a signatory to the FOA and CB conventions, but FOA and CB rights are present in US law and practiced widely. Conversely, there are many countries that have signed the relevant conventions but have found ways to circumscribe these rights<sup>10</sup>. Thus the central assumption here that signing the convention is suggestive of a basic commitment of a country to ensure that core labor rights are protected, or at a minimum, and at a minimum, not repressed, is questionable. Despite the problems with the measure, it has tactical value, because it is on the basis of violations of these rights that the ILO can use its powers of persuasion to convince countries to follow the conventions in practice. From the perspective of monitoring agencies that seek to measure the state of FOA and CB in countries, it is important to remember that signing the convention has relatively little to say about actual practices on the ground.

Union density is perhaps the most commonly used measure amongst the quantitative indicators. It is a measure of the number of union members expressed generally either as a percentage of the “non agricultural” workforce or as a percentage of “wage and salary” workers.

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<sup>6</sup> Rama Martin, *Do Labor Market Policies and Institutions Matter? The Adjustment Experience in Latin America and the Caribbean*, 9 *LABOUR* 243-68 (1995).

<sup>7</sup> Jai S. Mah, *Core Labor Standards and Export Performance in Developing Countries*, 20 *WORLD ECONOMY* 773-85 (1997).

<sup>8</sup> 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* 35-79 (ROBERT Z LAWRENCE, JOHN WHALLEY & DANI RODRIK, eds., 1996).

<sup>9</sup> Nancy H. Chau & Ravi Kanbur, *The Adoption of International Labor Standards Conventions: Who, When, and Why?* *BROOKINGS TRADE FORUM* 113- 56 (2001).

<sup>10</sup> See the ILO’s Committee on Freedom of Association -COFA reports (available at <http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?hdroff=1>) that provide several examples of systemic violations in countries that have signed the conventions; For a detailed treatment of this measure, please see HEPPLER ROBERT, *RIGHTS AT WORK* (2003).

It has been used in several ways, including as a measure of union strength. It has been seen an important indicator of the potential for FOA and CB, the argument being that higher union density would be associated with more FOA and CB in a country. The key advantage is that it is easy to collect and the information is available for most countries. Research on Western European countries (where FOA and CB tend to be highly developed) invariably show a positive correlation between union density and a variety of positive macro-economic outcomes over time, including lower inequality. However, more global research shows that the relationship between union density and collective bargaining coverage is not linear<sup>11</sup>.

There are several problems with the measure as well. First, there are problems in the way data is collected to measure union density. In most countries the number of union members (the numerator in the union density calculation) is based on self-reports from unions, and there is a strong tendency for unions to overstate their membership numbers. For example, the Philippines shows reported union density of 21% in 1998 (equivalent to 3 million members) at a time when only 600,000 members were covered by collective bargaining agreements<sup>12</sup>. Second, most countries outside of Europe do not evidence the positive correlation noted above. Third, union density as a proxy for union strength and as a basis for effective CB is questionable in countries where unions are not independent and subject to authoritarian control (e.g. China and Zimbabwe both report high union densities, with little or no CB). Finally, it is possible to have good FOA and CB rights in countries where union density is very low (for a variety of reasons, such as a very small industrial labor force). India's union density is between 2 and 5%, but given that

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<sup>11</sup> Sarosh Kuruvilla, Subesh Das, Hyunji Kwon & Soon-won Kwon, *Union Growth, Decline and Revitalization in Asia*, 40-3 BRITISH JOURNAL OF INDUSTRIAL RELATIONS 431-463 (2002).

<sup>12</sup> For a variety of union density measurement problems, see e.g., Kuruvilla, Das, Kwon & Kwon, *Id.* and Compa, *supra* note 4.

almost 90% of India's labor force is in either agriculture or informal sectors, a low union density is not surprising.

The third quantitative indicator frequently used is collective bargaining coverage (the percentage of the population that is covered by collective bargaining agreements). This figure tends to be very high in Western Europe, where some countries report almost 90% (often due to institutions such as centralized bargaining and the principle of extension), but in other countries tends to correspond more to union density. The advantage of this measure is that high coverage generally signifies healthy collective bargaining and healthy FOA as well. The disadvantage of this measure is that it is very difficult to collect this information systematically and on a regular basis. The ILO collected this information once in 1995, but has yet to update it.

Data on strikes and lockouts are frequently used as well to signify whether the collective bargaining works in practice. On the one hand, a large number of strikes tends to indicate that the right to CB is routinely exercised, and in that sense, it is a good indicator. On the other hand, a small number of strikes might mean that labor relations are convivial or that the right to CB is not being allowed to be exercised. The supposedly "objective" data give rise to differing interpretations.

Indicators in Group 2 focus broadly on rights with respect to FOA. These include whether the right exists, and a variety of variables that underpin the basic FOA right such as whether it is possible for trade unions to be independent, whether there are any restrictions in organizing rights, whether there is any weakening of FOA, whether workers are protected from discrimination for union joining or formation, whether the unions have the freedom to affiliate with higher union organizations or political parties, whether workers have genuine freedom to elect union representatives of their own choice, employer interference in the FOA process, and

whether the employer is allowed to make threats of the closure of factories to thwart freedom of association.

Interestingly, these indicators, while relevant, tend to focus on what is stated in the law, rather than whether the law is practiced. For example, Malaysia's labor law permits local unions to affiliate with national or industry level unions. This is an important right since local unions often need the help of industry level or national unions in order to organize. However, Malaysia limits the right to affiliation in certain industries, such as electronics. As a result, there are very few unions in Malaysia's electronics industry, one of its largest exporters and employers<sup>13</sup>. Other countries limit the right to affiliation by mandating that a union can only affiliate with a designated federation (which is often sponsored by the government). In the case of the US, this right does exist in the law. But in practice, it does not effectively deter employees from firing workers for forming unions or other union activity, largely because the penalties for the violations of these provisions are not strong enough to deter employers, who repeatedly fire union activists<sup>14</sup>.

Many of the indicators in this group are based on a simple perusal of labor law in different countries. One problem here is that the law is often not clear. As Compa notes "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. However, most countries laws

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<sup>13</sup> Sarosh Kuruvilla & Ponniah Arudsothy, *Economic Development, National Industrial Relations Policies, and Workplace IR/HR Practices in Malaysia*, in *INDUSTRIAL RELATIONS AND HUMAN RESOURCE MANAGEMENT IN AN ERA OF GLOBAL MARKETS: AN ASIA-PACIFIC PERSPECTIVE* (Thomas A. Kochan, Anil Verma & Russell Lansbury eds., 1995).

<sup>14</sup> Kate Bronfenbrenner, *Employer Behavior in Certification Elections and First Contracts: Implications for Labor Law Reform*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 75-89 (Sheldon Friedman, Richard Hurd, Rudy Oswald & Ronald Seeber eds., 1994).

are not clear cut”<sup>15</sup>. For example, while US law forbids discrimination against workers for union activities, it excludes large swathes of the labor force from this protection.

Thus, beyond a superficial level of analysis, the use of laws as indicators of FOA and CB requires very careful in-depth analysis and expert knowledge of national labor law systems. The variation within nations on how the law is established and administered, and knowledge of the administrative rules surrounding these rights is critical. Interpretation and judgment are important if one has to interpret legal positions and opinions, especially when one examines violations and uses violations as a basis to score countries. Not all violations of the law are reported or documented. The nature of the violations differs within and across systems in their intensity; violations may only take place within one or two sectors within a country. It may also be possible that a high incidence of complaints pertaining to violations might be indicative of the vibrancy and robustness of the rights regime in that country. While there are substantial variations in labor law across countries, it is also true that the availability of data regarding labor law systems is not uniform across countries, we know a lot about some countries systems but less about others.

The use of complaints or violations as indicators is interesting. They tend to have been developed into quantitative indices by individual researchers exercising judgment and based on qualitative research. The OECD follows such an approach, coding and assigning numerical values to countries regarding compliance with freedom of association<sup>16</sup>. The problem with this approach is that the numerical scores are only as good as the input data, they are not

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<sup>15</sup> Compa, *supra* note 4.

<sup>16</sup> They base this on qualitative and descriptive data drawn from a multiplicity of sources, including the ICFTU annual survey, US State Department Section 6 reports and ILO Committees (Committee of Experts on Application of Conventions and Recommendations- CEARC) and COFA) reports.

comprehensive reviews of freedom of association in any given country. Kucera's approach<sup>17</sup> innovatively uses descriptive reports to generate country scores on freedom of association, but there are many data gaps for most countries<sup>18</sup>. Similarly the ITUC's Annual Survey of Violations of Trade Union Rights evaluates broadly the status of collective bargaining and freedom of association in countries all over the world. The survey covers both trade union rights in law and also details how some of those rights work in practice by reporting on specific nation-specific violations and problems. These qualitative and subjective indicators are still relevant but are incapable of being used in a "standardized" way, given that they reflect the peculiar practices and constraints of industrial relations in each country.

Indicators in Group 3 concern collective bargaining rights. The indicator regarding whether the right to collective bargaining exists, is quite popular, but suffers from the problems noted above with regard to indicators based on labor law. A second indicator concerns whether there is government interference in the collective bargaining process, an indicator that has been used by many, including the US DOL, Verite, Kucera and the ITUC. However, each uses very different ways of measuring this, based on different sources and coding schemes.

A final indicator concerns the right to strike, an important one, since collective bargaining is meaningless without the right to strike. Here too there is a "gap" between rights and practice. What the indicator looks at is whether the workers have the right to strike in the legislation. What the indicator does not reveal is whether workers can go on strike in practice. There are often many institutional rules and regulations that circumscribe the ability of workers to go on strike, that vary dramatically from country to country. For example a country like

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<sup>17</sup> David Kucera, *Decent Work and Rights at Work: New Measures of Freedom of Association and Collective Bargaining*, in *THE ILO AND SOCIAL CHALLENGES OF THE 21ST CENTURY: THE GENEVA LECTURES* (Roger Blanpain, Christian Engelss & Peter Auer eds., 2001); *QUALITATIVE INDICATORS OF LABOUR STANDARDS: COMPARATIVE METHODS AND APPLICATIONS* (David Kucera ed., 2007).

<sup>18</sup> Compa, *supra* note 4.

Singapore (where the right to strike exists) reports zero strikes from the mid 1980s onwards, largely because of administrative rules that effectively prevent workers from striking<sup>19</sup>. In other cases, there are limits on the right to strike (such as for workers in essential services. The problem here as Compa notes, is “how to decide what limits [on the right to strike] are reasonable and what limits constitute an effective denial of the right.”<sup>20</sup>”

The indicators of Group 4 focus on the role of government, including the extent of government interference, and the institutional capacity of governments to enforce laws, and is typically measured by data such as the number of inspections, or the number of fines for violations of laws, or the adequacy of government inspection staff and so forth. On the one hand, finding that some countries do not have enough inspectors to inspect rights violations tells us that there is low capacity. On the other hand, most governments do not have large inspection staff, yet enforcement of laws is better in some than in others. Where the penalty for violations is high, the number of staff may not matter as long as inspection is random or complaint based. However, corruption may render inspections meaningless in many countries. Simply having measures of the number of people employed by the department of labor is mechanistic. What is important is an evaluation of the entire enforcement regime, i.e., the ability of the government to enforce, the way establishments are sampled, the penalties for violation and whether that constitutes adequate deterrence, and how corruption and inefficiency affects the enforcement regime. Evaluating enforcement regimes requires the services of national experts who understand the variety of institutions that are relevant in this case and can provide based on their close study of these issues an overall picture of enforcement in the country, at the same time noting regional and state-to state differences.

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<sup>19</sup> Sarosh Kuruvilla, *Industrialization Strategies and National industrial relations Policy in Southeast Asia: Singapore, Malaysia and the Philippines*, 49-4 HUMAN RESOURCE MANAGEMENT J. 635-657 (1996).

<sup>20</sup> Compa *supra* note 4

Our admittedly brief review of the available indicators suggest the following conclusions. First, there is very little agreement amongst the variety of actors interested in FOA and CB around the world as to what are the most appropriate indicators to use. No indicator is used by all the organizations listed in Table 1, a serious problem in our view since some degree of agreement by relevant actors about which indicators are useful is a pre-condition for progress in assessment generally!. If any agreement exists at all, it is found in a general tendency to adopt indicators that are easily available and easily quantifiable (e.g., such as union density and the ratification of ILO conventions), which might be necessary, but do not reveal much about FOA and CB conditions in a given country. Second, the focus of the indicators is skewed towards measuring rights provided in law (with a greater focus on FOA rights than CB rights), but not how FOA and CB works in practice. Third, evaluation of the merits of a variety of indicators highlights the need and role for qualitative judgment by experts. Finally, efforts to develop indicators via scoring qualitative data (such as data on complaints regarding FOA and CB, specific violations of FOA and CB) yield relevant information, but does not provide a uniform and consistent indicator. In general, there appears to be a trade-off between having highly relevant information based on the unique aspects of FOA and CB in each country and having a set of uniform measures that encompass more countries, but are often less relevant. As we get closer to the relevance side of this continuum, the tendency is to provide information but let readers decide about the FOA and CB status in each country.<sup>21</sup> The closer we get to providing uniform indicators, we tend to lose relevance. In the next section, we attempt to solve this trade-off.

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<sup>21</sup> See e.g., ITUC's annual survey (<http://www.ituc-csi.org/>) and ILO's COFA reports (<http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?hdroff=1>)

### **III. DEVELOPMENT OF NEW INDICATORS**

Below, we present our indicators. We balance the need for relevant information while simultaneously having universally applicable indicators in two ways. First we rely on the judgment of national experts, but our methodology requires the national experts to provide additional data to justify the classification of a country on a specific indicator. In fact, each indicator we develop comes with specific guidelines for the national expert and a universally applicable classification scheme. Second, the indicators are designed in ways that the national experts can use both quantitative data as well as qualitative information regarding violations and complaints to support their decision. All of the indicators are based on comparative industrial relations research, and therefore sensitive to the variation and diversity in industrial relations systems across the world. The five classes of indicators we introduce below includes a category called Background Indicators (some of which are used currently, yet require improvement) apart from indicators of Freedom of Association (both rights and practice), Indicators of Collective Bargaining (rights and practice), Indicators of Outcomes of FOA and CB, and Indicators of Labor Law Enforcement.

Table 2 lists all of the indicators, the categorization schemes that we are suggesting and guidelines for national experts who are making judgments in reporting about the state of FOA and CB in different countries. Below, we amplify and justify the description of indicators found in Table 2.

Insert Table 2 about here.

## **A. Background Data (BD)**

This category of indicators provides necessary background data to place FOA and CB in perspective. They are included here because they are germane to FOA and CB, but also because they have been widely used in the past, thus facilitating longitudinal comparisons. However, we suggest improvements in how the National Experts should report and interpret these data, and the need for additional data.

### BD 1: Union Density and Changes in Density

Since this measure is almost universally available for most countries, it is worthwhile to use, although we need to recognize that union density is not a sufficient indicator regarding FOA and CB. There is some scope for improvement of the union density measure. The national expert must make clear the following four issues. First, the expert must clarify what the denominator is in the calculation of union density. Some countries calculate density as part of the wage and salaried workforce (e.g., OECD countries), while others (e.g., US) calculate it as a percentage of the non agricultural workforce, while yet others report it as a percentage of the civilian workforce (e.g. ILO). We would recommend against the use of the US-centric non agricultural workforce measure, largely because agricultural workers in many countries do have unionization rights, and agriculture is often the largest sector in many third world countries. Second, to the extent possible, the national expert should provide union density data for men and women separately. Third, the national expert must report the data source. Many countries use unions themselves as the primary source for union membership data (which often results in highly inflated union membership figures), while others use national surveys. Where possible, the national expert needs to triangulate. Finally, the national expert must report longitudinal data, so that trends in union density can be displayed.

BD 2: Ratification Status of the ILO Conventions 87, and 98, and the Number of violations during the last five year period.

Data on countries' ratification status of the ILO conventions 87, and 98, and the number of violations of each of these conventions during the last five year period exists currently. Monitoring and reporting this might induce more countries to sign the conventions. Although signing the conventions by itself does not guarantee FOA and CB, countries that have signed the convention can be persuaded to uphold these rights. Also important to report trend data, since we are interested in how countries make progress.

It is thus necessary to use multiple sources of information for this background data. National statistics are the obvious first stop, though not all countries have or keep statistics on violations of these two conventions. The second stop must include ILO CEARC data and COFA data, which can be made available to national experts. Third, other sources of data can be consulted. There are obviously many sources (the US State department is an annual source) that can be consulted. The key issue here is for the National Experts to report the data, but to also make clear the judgment as to on what grounds this is a partial or comprehensive picture of violations.

BD 3: Labor Force Statistics

This indicator provides basic information about the labor force in both numbers and as a percentage of the population, as well as the size of the labor force in different sectors. The sector wise distribution is important for FOA and CB because some sectors tend to evidence more FOA and CB than others (e.g., manufacturing over services). Data for this indicator is easily available from national or international statistics for most countries. It is important to report employment

in each sector along with subject to availability some measure of unionization or collective bargaining per sector rather than the contribution of each sector to GDP.

#### BD 4: FOA and CB rights Coverage and Exclusion

Who are covered by FOA and CB rights, and who are excluded are critical background data since it informs us regarding the percentage of the labor force that has the right to FOA and CB, and also tells us of the categories of people who do not. This is also a dynamic measure, since it allows us to see whether countries progressively expand the population who has access to FOA and CB . If for example one examines this in the Korean case, one will see that in the last four years new categories of people like teachers have been given the right to form unions and bargain collectively. This data need to be calculated based on the laws in each country, and with labor force statistics since in many countries this information is not easily available. Experts must provide gender segregated data of exclusion of rights and make clear the denominator that is being used.

#### **B. Freedom of Association (FOA)**

The right to form representative organizations of their own choosing is a primary determinant of FOA and CB . This section focuses on how employer and union organizations are formed, whether they are free to operate without government oversight or interference, whether members of these organizations are protected against discrimination from joining them, whether these rights can be taken away either temporarily or at government whim.

##### FOA 1. Union (and Employer Association) Formation Process

There is a great variety in the laws and processes of union formation in the world. In some countries, the process is both simple and easy. An example of a simple and easy process is

where a majority of workers in a workplace indicate their preference for a union and the union is formed. In others the process is long drawn out and difficult, and often having significant ramifications for the unions ability to bargain collectively, such as in the US. In the US, 30% of members must indicate preference for a union in which case the NLRB conducts elections. Until the elections are over, both sides (employer and union advocates) campaign with the workers to join or not to join. It is possible for the employer to legally delay the process of union formation through tactical actions. In some countries, unions can only be formed if the government permits and the government has the absolute right to grant union registration or withhold it, as is the case, for example, in Malaysia.

A categorization scheme (A to D) of union formation process is provided to guide the judgment of national experts<sup>22</sup>. For instance, the US would fall in Category C on this scale, (since the union formation process is quite complex and can be challenged on various occasions by the employer) while Malaysia (where the Registrar of Trade Unions has near absolute power to accord or withhold registration) will fall into category D. Incidentally, in this indicator, we do not take into account the situations where unions are banned from forming in some sectors, since that is covered elsewhere in this framework.

#### FOA 2. Independence of Unions and Employer Associations

FOA and CB depends heavily on unions and employer associations being independent of government control. There is variation here as well. In most countries, unions at the local level or national level are independent. But in some countries, unions are heavily controlled by governments, which limit their ability to effectively voice the concerns of workers. Assessing the degree of government control is not easy. Verite for example has created a four point scale in

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<sup>22</sup> We focus only on the union formation process since in general, there is not as much variation in case of the formation of employers associations in most countries, and the process of formation is quite simple. Moreover, often there is no legislation limiting the formation of employer associations.

which a score of 3 means that multiple unions can organize without government interference, a score of 2 for some interference, a score of 1 where unions are closely affiliated with the government and 0 for not independent. The literature on corporatism is particularly relevant here since different models of corporatism tend to evidence different levels of government control over unions<sup>23</sup>. We use the corporatism literature as a basis for the development of categories here, and bearing in mind the difficulty of subjective judgment, recommend a three point scale. As example, the US would be classified in Category A (Independent) , while Singapore would be in Category B (Unclear) (there is much controversial research that links the People's Action Party and the Singapore National Trade Union Congress, making this arguable) while Korea before 1997 would be a good example of category C (Not Independent).

#### FOA 3: Protection against Discrimination for Union Joining or Union Activity

The key issue here is whether nations provide protections from employer or government retaliation against those individuals who are active in union organizing or those who join unions. Without such protection, FOA and CB cannot move forward. Here too there is variation (categorized as A to D), although the extremes are easy to measure. There are many Western European countries where the laws do not spell out such violations, but no violation takes place due to the institutional history and structure (IR is socially embedded!). The long list of unfair labor practices outlined in US legislation might merit its placement in category A (strong protections with full recourse or institutional conditions do not permit such violations), but the general ineffectiveness of the law as a deterrent to such behavior (which is well documented in

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<sup>23</sup> See e.g., Lane Kenworthy & Bernhard Kittel, *Indicators of Social Dialogue: Concepts and Measurements*, 5 ILO WORKING PAPER (2003), available at <http://ssrn.com/abstract=907429>; LANE KENWORTHY , IN SEARCH OF NATIONAL ECONOMIC SUCCESS: BALANCING COMPETITION AND COOPERATION (1995); Lane Kenworthy, *Unions, Wages and the Common Interest*, 28 COM'P POL. S. 491-524 (1996); Lane Kenworthy, *Quantitative Indicators of Corporatism*, 00-4 MAX PLANCK INS'T STUDY OF SOCIETIES DISCUSSION PAPER (2000).

the academic literature) and the continuing evidence of violations would only give it at best, a place in category B (partial protection with full recourse). In Malaysia, where there is protection against discrimination to some extent, but a variety of other actions are *de facto* permissible under the law (e.g., the practice of closing a factory due to union activity and then reopening it again with non union employees—indirectly discriminating against union members) would merit it, at best, a place in category C. Countries where no protections exist would be placed in category D (no protection).

#### FOA 4: Right to Tripartite Processes

Tripartism is an important dimension of FOA and CB since it provides workers “voice” at the national level and it depends heavily on whether the laws provide for it. Many countries explicitly provide for tripartism in their national legislations. It is also possible that countries make no provision for tripartite relationships, but they are practiced (hence we will differentiate between rights and practice). It is also possible that countries provide for tripartism in some limited form, i.e. for specific subjects. In addition, the rise of legislation regarding tripartism is not an autonomous process, since it is often a result of demands by strong unions. Whatever the origins of tripartite rights, it is clear however that tripartism flourishes when it is backed by legislation. Thus, this indicator may be assessed by three categories (Category A to C). Countries where the legislation explicitly requires some form of tripartite consultation may be grouped in Category A. Category B refers to countries where the law does not specify any requirement or form of tripartite practice and does not disallow it in any form. Countries where tripartite processes are explicitly prohibited may be grouped as Category C.

#### FOA 5: Right to Affiliate with Peak Level Unions or Federations

Even if countries explicitly require or do not prohibit tripartism, there are several ways in which the ability of actors to effectively engage in tripartite activity is reduced or enhanced. One issue is whether unions or employer associations have the right to affiliate to federations or industry level bodies. Most countries do not prohibit such affiliations. However, there are two ways in which the right to free affiliation can be limited. The first way reflects those countries that prohibit an affiliation. As an example, Malaysia permits enterprise level unions in its electronics industry but does not permit those unions to affiliate with industry level unions. In other cases, unions are only allowed to affiliate with a specific federation often sponsored by the government, without the freedom to affiliate with alternative or competing federations. This is also a limitation of tripartite rights. We provide two categories here. Category A includes countries which do not prohibit the right to affiliate to higher level organizations or federations. Category B explicitly prohibits such affiliation or requires affiliation to a preferred federation to the exclusion of other federations.

#### FOA 6: Rights of Trade Unions to be Politically Active

Tripartite FOA and CB has generally been conceived such that employers and union organizations participate broadly in economic and political discourse. Yet, many countries restrict the ability of unions and employer organizations from doing so. There are two ways in which this can be done. One method is to limit the ability of unions and employer associations to affiliate with political parties. The second is to expressly forbid peak trade union or employer organizations from participating in politics. For example, Malaysian law does not merit unions

to be active in politics and requires that peak federations be registered as societies rather than as unions<sup>24</sup>.

Comparative research provides support for three categories here. The first category (Category A) refers to countries where there are no restrictions on union or employer abilities to participate in politics or affiliate themselves with higher level organizations or federations. Category B will include countries where there are restrictions on the ability of unions and employer organizations to affiliate with higher level bodies. Experts can put countries where unions and employers are prohibited from participating in political activities and debates in Category C.

### **C. Indicators of Rights and Practice of Collective Bargaining (CB)**

#### **CB 1: Union Recognition and Obligation to Bargain**

FOA and CB on a bilateral basis cannot take place if there is no obligation on the employer to bargain or if bargaining can be delayed. Once unions have formed successfully, it is not always automatic that bargaining can start. In some countries, there is a distinction between union formation and the recognition of the union as the bargaining agent, an intermediary step before the employer is obligated to bargain. In other countries, recognition as the bargaining agent takes place at the formation stage. Even after formation and recognition, there is variation regarding whether the employer is obligated to bargain. Some countries impose an obligation to bargain. Others impose the obligation, but the process is riddled with loopholes such that the start of bargaining can be delayed. For instance, in the United States, research shows that in roughly 25% of the cases where unions win representation elections, there are delays in

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<sup>24</sup> Kuruvilla & Arudsoth, *Supra* note 13; Stephen Frenkel & Sarosh Kuruvilla, *Logics of Action, Globalization, and Employment Relations Change in China, India, Malaysia, and the Philippines*, 55-3 INDUSTRIAL AND LABOR RELATIONS REVIEW 387-412 (2002)

bargaining. There are countries which do not impose an obligation to bargain on the employer. To take into account the variation in these institutional procedures, three categories (A: Clear Recognition and Obligation to Bargain Rules; B: Problems in Recognition or Problems with the Obligation to Bargain; and C: No Recognition rules or no obligation to bargain) may be used by national experts in assessing their countries on this dimension. As always, the national expert is required to justify his/her classification with supporting rationales.

### CB 2: Scope and Subject Matter of Bargaining

The obligation to bargain by itself does not guarantee that CB will take place. Countries differ on what they will allow the parties to bargain about. At one end of the continuum are countries (e.g., Sweden) in which co-determination legislation mandates that any subject that is of interest to either union or management is subject to bargaining. In the middle of the continuum are countries that make a distinction with regard to bargaining subjects. The United States, for example uses the “Mandatory” versus “Permissive” distinction<sup>25</sup>. At the other end of the continuum are countries which do not permit bargaining on certain issues. Singapore and Malaysia do not permit bargaining on transfers, promotions, job assignments, retrenchment and layoffs. Taiwan does not permit bargaining regarding any issue connected with the introduction of new technology. Thus, the scope of bargaining directly affects the extent of FOA and CB. There are some systems within countries that restrict bargaining subjects for some jurisdictions, like in the public sector in some states in the US<sup>26</sup>. The categorization of this indicator into

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<sup>25</sup> Mandatory subjects such as hours, wages, and working conditions are normal subjects of bargaining, while permissive subjects such as management rights or union security issues will be bargained only if both parties agree that they are bargainable. This approach gives rise to continual debates on what is a mandatory subject and what is permissive. If a decision to subcontract is deemed by management to be part of management rights (accordingly permissive subject), the union could argue that the effect of such a decision would be related to wages, hours and working conditions of the employees (thus making it a mandatory subject).

<sup>26</sup> We do not include that here since we think the public sector should be treated differently in a separate category.

broad, intermediate and narrow/restricted scope (See Table 2) is based on the variations on the scope of subject matter of bargaining to serve as a guide to national experts.

CB 3: Rights to Strike, Restrictions on the Right to Strike, and Weakening of the right to Strike

Free collective bargaining requires the free right to lockout (for employers) or strike (by unions). Many countries have national emergency procedures that restrict the right to strike in national emergencies, but we will not take that into consideration here. Similarly, the strike is often banned in essential services in most nations, and that too we shall not take into consideration here (although some countries may choose to take a broad view of “essential” that could be a significant threat to the operation of the right to strike).

This is a case where the judgment of national experts is key, given the vast variation there are in systems, rules and procedures with regard to the right to strike. At one end of the continuum are countries that freely permit the right to strike for non essential service workers, or at least the private sector. The Western European countries are good examples of this category. Then there are countries that freely permit the right to strike to workers directly involved in an industrial dispute, but do not permit the workers to go on sympathy strikes. The US and UK are good examples that fit into this category. Then there are countries that freely permit the right to strike, but significantly weaken the right in certain ways. The US is a good example here since it permits the employer to permanently replace striking workers, (thus taking away the power of the strike as a bargaining tool) in cases of disputes where there is no unfair labor practice involved, such as disputes connected with interests such as wages. Other countries freely permit the right to strike, but then *de facto* take away that right through a plethora of administrative

rules and restrictions. For instance, India and Singapore's dispute resolution rules require that a notice of strike be given 14 days in advance. If either party calls for mediation, then the strike must be withdrawn and the parties must enter the mediation process. If mediation is not successful, the government may refer the dispute to binding arbitration, or to an industrial court or tribunal (the two countries differ on this approach), and the disputes gets resolved at that level. Theoretically then, strikes will not take place if this procedure is followed. Singapore has not reported a strike in the last 12 years, while India reports strikes on a daily basis (which shows that the procedure does not work that well in India). Finally, some countries e.g., China, still do not permit the right to strike. There are more subtle variations in rules that cannot be captured by a simple scoring mechanism, thus requiring national experts to exercise their judgment based on research. One such subtle rule that is prone to much variation is the definition of legal or illegal strikes under national laws.

The guideline for experts (See Table 2) takes into account the broad categories noted above and is divided into five categories - from unfettered right to strike to no such right at all. Unlike several other indicators, we do not place a great emphasis on data regarding strikes, since the numbers of strikes and lockouts are affected by a number of issues other than rules, such as the economic cycle and shifts in bargaining power etc. We also know that the number of strikes have decreased steadily in most countries with the decline in trade union membership.

#### CB 4: Parallel Workplace Representation

FOA and CB is improved if employees have avenues (besides unions) of participation at work. In the absence of unions as well, these avenues are important. The most well known example of parallel representation is the works council, which is common in most Western

European countries. There is great variation in terms of the scope and functions of works councils or similar institutions across countries, however. In addition, there is a debate regarding whether works councils in fact substitute for unions, and it is this argument that has been cited by many unions to oppose government plans to introduce works councils (e.g., USA). However, the European experience shows that unions have been able to work well with works councils, in many instances exercising significant control over them. And, works councils evolved long after unions were formed in most European nations. It is possible that works councils or other parallel representative structures represent an evolution in traditional industrial relations concomitant with “new forms of work organization” accompanied by high flexible wages, wages tied to skill acquisition, high participation, flexible deployment or in other words “functional flexibility”.

Accordingly, national experts can categorize countries as Category A, where the law prescribes the works council or committee with a wide scope and mandates regular meetings. Category B would include where the law prescribes some form of workplace level committee, even if the scope is restricted. Safety and Health committees are good examples for this category. Countries with no provision for workplace level representation may be included in Category C.

#### **D. Outcome Measures (OM)**

While the measures above deal with both rights and processes underlining FOA and CB, it is also important to have some measures of the outcomes of FOA and CB. These are broader measures that provide some relatively objective indicators of whether FOA and CB are functioning well, and whether the institutions are increasing or decreasing over time.

##### OM 1: Collective Bargaining Coverage

A measure of collective bargaining coverage is essential since it informs us as to how many employees are covered by collective bargaining agreements. The number of union

members or union density may not be closely related to collective bargaining coverage for a number of reasons. In many developing countries (e.g., Philippines), the number of union members (based on union records) is much higher than the number of employees covered under collective bargaining agreements. This is due to overstatement of union members on the one hand, and the presence of unions of unemployed persons, on the other. In France, for example collective bargaining coverage rates are very high (almost 80%), although union density figures are very low. This is due to the principle of “extension” where agreements reached by some unions and employers are extended to the rest of the industry. A second problem with collective bargaining coverage is that while some countries have the data, others do not.

For this indicator to be useful, the national experts need to report the data over time (e.g., for the last five years), segregate data according to gender and occupational groups, identify how the data was collected, and provide an explanation for why there is a variance between this measure and a measure of union density.

#### OM 2: Number of Collective Agreements

The number of collective bargaining agreements tells us whether CB is increasing or decreasing. It is a direct measure of the growth of collective bargaining. Although the number of agreements might be related to coverage, note that coverage is partly due to other institutional forces (e.g., France). It is also possible that coverage could be large even if the number of agreements is small if the size of the workforce covered by each agreement is large. Hence, both measures are necessary. Note that the number of agreements in any given year will vary based on the length of agreements, typically collective bargaining agreements range between 1 and 5 years

in duration. Thus, report on the number of collective bargaining agreements annually for at least the last five years is essential for this indicator.

### OM 3: Parallel Workplace Arrangements in Practice

Since we have a measure of rights regarding parallel workplace arrangements it is also necessary to see how those rights translate into practice. The international variation in terms of how parallel representation arrangements work in practice is great, as is the availability of good data. Some countries (e.g., Japan) report the number of joint labor management councils in firms, while others do not. In most Western European countries works councils are mandatory, yet there is systematic information regarding what they do in practice. These institutions also differ substantially in terms of the scope. Works councils in Europe typically are involved in all aspects of the employment relationship (excepting wages). There is some evidence in Germany for example, that the works councils over time have increased the scope of their decision making activities. In contrast there are many countries where the scope is limited. In the Philippines for example, labor-management councils typically discuss only safety, health, and welfare issues.

The national experts must draw on previous research and data on the distribution of parallel workplace arrangements to make an assessment for categorizing countries. Countries where parallel workplace arrangements generally exist in most firms, and where these institutions take substantial decisions regarding the day-to-day workplace issues i.e. where the scope is broad may be grouped as Category A. Where a minority of firms only has parallel representation arrangements and where they take substantial decisions i.e. where the scope is broad may be grouped in Category B. The Category C countries would be where parallel representation institutions widely exist, but with a limited scope (e.g., safety and health only, or

welfare only or some other combination that suggests limited scope). Category D refers to countries where exist limited scope (only in a minority of firms), and Category E country would be where no such institutions exist, or if they exist but are not routinely used.

#### OM 4: Strikes and Lockouts.

The concept of free collective bargaining requires that employers and employees have the free right to lockout and strike. This is one measure of the health of FOA and CB, and a key element of FOA and CB in practice. The actual numbers of strikes and lockouts by themselves are open to differential interpretations, as discussed in the previous section. Nonetheless, we consider that the data is worth reporting since it is so embedded in national institutions. However, national experts should report number of strikes and lockouts over time (preferably for last five years) with their judgment on the reasons of such strikes and lockouts including the quality of labor-management relations, administrative and political drivers.

#### OM 5: Grievances or Industrial Disputes

This is yet another (and more important) measure of the health of bipartite labor relations. It is possible that unions may not strike due to weaknesses in bargaining power, or it is possible that employers may not lockout due to weaknesses in bargaining power. However, disputes between labor and management are resolved through means other than the strike. For FOA and CB to work well, it is essential that employees and employers use these alternative means to settle their differences. In addition, in countries where the right to strike is administratively restricted<sup>27</sup> the number of disputes and grievances may be high, as employees seek alternative ways to settle their disputes.

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<sup>27</sup> Robert Hebdon & Robert Stern, *Do Public Sector Strike Bans Really Prevent Conflict?*, 42-3 INDUSTRIAL RELATIONS 493 (2003)

The variation in terms of the availability of data is great. Most countries report data on the number of disputes or grievances that go to arbitration or other third party resolution mechanisms. Some countries also report disputes by cause, which provides even more information regarding the health of FOA and CB, since it tells us which aspects of freedom of association and collective bargaining are being violated. Here too, given the difficulties of interpretation, our suggestion is that the data be reported by national experts without a formal assessment, other than to show the trend on the number of disputes and if possible the number of disputes by causes for the last five years.

#### OM 6: Measure of Tripartite Process in Practice

Since tripartism is key to FOA and CB, it is necessary to examine how it works in practice. The variation across countries is great, even within Western Europe, where tripartism is most developed. The literature on corporatism (which is heavily focused on Europe) is a good basis for the development and refinement of this measure, although in this paper, we rely on the research on comparative industrial relations in developing countries to create categories that take into account the variation across countries. Arguably this indicator will not be as sophisticated as those available in the corporatism literature, but this measure developed here takes into account the greater variation across the world.

This indicator too, is based on the judgment of the national experts, but backed up by research. In countries where there is evidence of regular meetings and cooperation between the social partners, and there is clear and documented evidence of the partners participation in key macro economic decisions may be grouped as Category A. Data on the regularity of meetings is necessary but not a sufficient condition here. It is important that the national expert provide concrete examples of national decisions. This could involve wages too. Category B countries

would be where there is no regular interaction between the social partners, but when they come together when occasion demands it and there are concrete decisions regarding national economic and social issues coming out of this decision. Category C refers to countries where there are occasional forums that result in meetings between the social partners, primarily for information and consultation where the social partners may make recommendations, which may or may not be accepted by the government. Pseudo-tripartism, where it is clear that social partners meet but not to discuss substantial issues can be grouped as Category D, while Category E would refer to no participation in any issue at the national level.

#### OM 7: Tripartism Outcomes: Wages.

Although the measure above focuses on both process and outcomes based on judgment backed by research, we consider it useful to have an objective measure as well. Although there are a number of measures available in the literature<sup>28</sup>, we choose the simplest one, *i.e.* a measure of wage drift. Although wage drift may be more appropriate in countries with centralized bargaining, it is clear that it is equally relevant in decentralized bargaining situations where there is some informal coordination (e.g., Japan). Accordingly, national experts may make judgments in grouping countries. Category A countries would be where data on wage drift for countries in which bargaining is highly centralized on tripartite or industry level is reported. And Category B would be countries where the measure is not applicable and do not report data and bargaining is primarily decentralized.

#### OM 8: Tripartism Outcomes: Inequality

There are multiple reasons why this measure should be included in any assessment. While it is true that inequality is caused by a number of factors (such as skill differentiation), there is also very strong evidence that inequality increases when bargaining systems become

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<sup>28</sup> See Kenworthy & Kittel *supra* note 23.

decentralized<sup>29</sup>. Thus, high inequality is likely to be associated with a decrease in tripartite activity or no tripartite activity at all<sup>30</sup>. Apart from this, inequality is also a general measure of all components of decent work, and particularly relevant for workers outside the formal sector. Income inequality data is reported by the World Bank for most countries. It is important to report the Gini-Coefficient over time, but also to report the source of the data, as multiple sources exist for several countries.

### **E. Government Enforcement of Labor Legislation (GE)**

An important indicator of FOA and CB concerns whether laws are enforced in ways that make the practice of FOA and CB possible. In general, there are two means by labor law can be enforced effectively. The first is when there the incentives to follow the law are very high given the high penalties for non compliance. The second is where there exists an inspection regime that is reliable and forces employers and unions to follow the law.

#### GE 1: Severity of Penalties for Violations of laws regarding FOA and CB

The presence of laws pertaining to FOA and CB is not sufficient to ensure that FOA and CB takes place. It is possible for actors to break the law or ignore it on a routine basis. For example US employers continually violate the law that prohibits firing union organizers. Research suggests that they do this given that the penalties or violation are minor compared to the savings in costs by keeping a union from forming in their establishments.

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<sup>29</sup> See Kuruvilla, Das, Kwon & Kwon *supra* note 13

<sup>30</sup> The strong association between industrial relations institutions and inequality suggests the use of this measure despite varying doubts regarding the extent to which this is a causal relationship. Income inequality (rather than wage inequality) includes more components of decent work. It is thus an important indicator of tripartism but also of decent work generally.

This subject requires the national experts to exercise judgment, similar to the approach taken by Verite. However, to help guide the national experts, we propose two categories, where judgment of national experts would draw from trend data for over past five years on penalties of violations. Category A refers to countries where the penalties for violations are sufficient to deter law breaking. Category B would be countries where the penalties for violation of laws pertaining to freedom of association and collective bargaining are not sufficient to deter actors from violating the laws.

## GE 2. Governmental Administrative Capacity

For government inspections to work, governments must have an administrative system to conduct the inspections, a sampling procedure that is relevant to the needs of the country, and adequate budgets and personnel to make the inspections an effective means of enforcement of laws related to FOA and CB. Here too, the national experts must exercise judgment, although that judgment should be based on (a) adequacy of personnel and budgets compared to the number of workplaces; (b) adequacy of inspections; (c) coverage of establishments; and (d) data on violations. Many countries provide sampling schemes and annual data on the number of establishments inspected, so there is data available. Based on these issues, the National experts can use two primary categories. Based on the above four sets of data, Category A would refer to countries where governments have the institutional capacity to monitor labor laws in their country, and countries where such institutional capacity is lacking may be grouped in Category B.

## Summary

In summary, the design of our scheme requires national experts to support and justify their classification of a country on a particular indicator with additional data and research, thus enhancing relevance, but also enhancing consistency across different national experts. In order to enhance consistency in reporting over time, it is essential that the classifications of countries on these indicators by national experts be displayed in a transparent format, i.e., kept on the web, where the comments and reactions of other experts and readers may yield information that might influence a national expert to change his or her mind, but also help readers, monitoring agencies, to put the expert's classifications in perspective<sup>31</sup>.

## IV. CONCLUSION

The purpose of this paper was to develop new indicators of FOA and CB, given both the dissatisfaction with several currently used indicators and the general lack of progress in FOA and CB over the world (in fact, even in countries where FOA and CB have strong foundations, such as the countries of Western Europe, there is decline). The indicators that are presented in this paper are based on decades of comparative research in industrial relations around the world, and therefore sensitive to the international variation in the practice of FOA and CB. Further, they include indicators on the practice of FOA and CB, going beyond the limited focus of existing indicators on rights only. And, they capture essential processes and how FOA and CB institutions work in practice.

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<sup>31</sup> This would make it more transparent than WebMILS, the electronic database at US Department of Labor containing information relating to national compliance with international labor standards (<http://webapps.dol.gov/webmils/>).

A key implication of using these measures is that any serious evaluation must be done on the basis of reports by national experts who are best situated, through their expertise, to make fine-grained judgments about how FOA and CB rights are in place and are practiced across countries. Based on comparative research, we provide national experts a “frame” to classify their countries, but in every case, the national experts have to provide both arguments and evidence to support the classification of the country in particular category. This makes for more work, to be sure, but it would avoid the superficiality of current evaluation methods using only the easily available quantitative and less relevant indicators. In addition it is important to use “evidence based” indicators in order to take decisions about whether a country is making progress in FOA and collective bargaining over time. Given the increasing linkage between labor standards and free trade (e.g. the Peru free trade agreement), the consequences of violation of labor standards can be monumental, especially for developing countries that trade with the US. On the other hand, reliance on imperfect measures to make decisions that result in these consequences is also problematic. The measures advanced in this paper reduce that risk.

Finally, these indicators are also useful as a tool for compliance officers of corporations and the variety of agencies who participate in monitoring in subcontractor factories. The database on each country can be a useful guide against which monitors and compliance officers make fine grained judgments as to whether there is progress in FOA and CB, since they can assess whether their particular factory is doing better than the national average.

**Table 1: Measures of Progress of Countries on FOA and CB**

Indicators	Frequency	Group	Measures of Progress												
			OECD	Taxler	Kenworthy	ILO	Verite	USDOL	NRC	Ruig	Kucera	Freedom house	FLA	ITUC	Kuruvilla
Right to CB	11	1	X			X	X	X	X	X	X	X	X	X	
Right to strike	8	1	X			X		X		X	X		X	X	X
Right to establish and join trade union (simple process)	7	1	X			X			X	X		X		X	X
Collective bargaining coverage rate	4	2				X		X	X						X
Ratification of ILO conventions	5	4	X					X	X				X	X	
Restrictions on organizing rights	6	3	X				X	X		X			X	X	
Independence of trade union	8		X		X	X	X	X		X	X				X
Weakening / suspension of FOA	4	3					X	X		X			X		
No Govt. interference in CB	6	4 & 1				X	X	X		X	X			X	
Restrictions on trade union political participation	5	3			X			X			X			X	X
Protection from discrimination when joining union	6	1	X					X					X	X	X
Ability of workers to ratify/reject union's agreements	1	1						X							
Ability to dismiss striking workers / hire permanent replacements	4	3						X					X	X	X
Freedom of affiliation	5	1				X		X		X				X	X
Govt. efforts to educate workers on their rights	2	4				X		X							
Govt. Monitoring of labor relations	5	4	X			X	X	X							X
Trade union density	5	2			X	X		X			X				X
Incidents of discrimination against union members	4	3						X		X	X			X	
Employer interference	4	3								X	X		X	X	
Freedom to elect union representatives	4	1				X				X			X	X	
Compulsory arbitration	3	3				X				X	X				
Scope and subject matter of CB	2	4									X				X
Mandated parallel workplace representation	1	4													X
Right to tripartite processes	1	1													X



**Table 2 New Indicators, and Guidelines for National Experts**

No.	Indicators	Guidelines for National Experts
<b>BD</b>	<b>Background Data</b>	
BD 1	Union Density and Changes in Density	Indicator should be reported (i) separately for men and women in addition to the total; (ii) define denominator (as part of wage and salary earners / civilian / non-agricultural workforce) used; (iii) cite data source (unions as the primary source / national surveys); and (iv) provide trend data, for last five years, and/or the rate of change
BD 2	Ratification Status of the ILO Conventions 87, and 98, and the Number of Violations during the last five year period.	Report ratification status of ILO conventions 87 and 98, the number of violations of each of these conventions during the last five years, and clarify whether this data is a comprehensive or partial picture of violations.
BD 3	Labor Force Statistics	Provide data on employment in different sectors, union density or bargaining coverage per sector, and sectoral contribution to GDP. Also report data on fulltime versus part time employment. .
BD 4	FOA and CB rights Coverage and Exclusion	NE to provide a comprehensive picture of the percentage of the working population who have access to FOA and collective bargaining rights, and list the percentage of the working population who are specifically excluded.

FOA	Freedom of Association National Expert to Provide Justification for classifying countries into one of the following categories (for every indicator)	
FOA 1	Union (and Employer Association) Formation Process	<p>A: Where the process of union formation is simple and direct; where there is no oversight by government bodies including the need to conduct elections; where there is no scope for employer opposition;</p> <p>B: Where the laws prescribe a lengthy and time consuming process; where employers can influence the outcome of elections through campaigns or can influence the speed at which a union can form through tactical but legal actions;</p> <p>C: Where employers can <i>de facto</i> influence the outcome of a union election though legal and illegal actions; where these type of actions are widely used (substantiated with figures); Where the punishment for violations of the law are not enough of a deterrent;</p> <p>D: Where unions must seek government permission to form: Where government has a history of denying permission (figures needed).</p>
FOA 2	Independence of Unions and Employer Associations	<p>A. Where it is clear, based on historical studies, case studies, and the national expert's own research, that unions are independent from government control, where the government or ruling party is not a significant source of union finances, and where the government or ruling party does not have control over the union's strategic goal articulation;</p> <p>B. Where previous studies, case studies, or based on national experts research there is notional independence but some degree of government influence over national or local union decisions (examples needed), or when one federation is controlled by the government while other federations are free from government control;</p> <p>C: Where it is clear that the unions in general are controlled by government, or only one federation friendly to the government is permitted to exist.</p>
FOA 3	Protection against Discrimination for Union Joining or Union Activity	<p>A: Where a broad set of anti-union activities are outlined in the law as being illegal; Where law provides procedural recourse that is generally considered effective (previous research/case studies) or where the trend regarding the number of violations have steadily</p>

		<p>declined in the past five years (provide data), or where such violations are non-existent due to wider institutional forces;</p> <p>B: Where a much narrower set of practices are deemed illegal; Where there is a system of resolution provided by law that is generally considered effective (research/case studies), and where the data show a declining trend;</p> <p>C: Where the law does not clearly outlaw anti-union practices, or where there is no effective system to resolve alleged violations, and where the data show a persistence of violations (report data);</p> <p>D: Where there is no protection in the law against discrimination for union joining or union activity.</p>
FOA 4	Right to Tripartite Processes	<p>A. Where the legislation explicitly requires some form of tripartite consultation;</p> <p>B. Where the law does not specify any requirement or form of tripartite practice and does not disallow it in any form;</p> <p>C: Where tripartite processes are explicitly prohibited.</p>
FOA 5	Right to Affiliate with Peak Level Unions or Federations	<p>A: Which do not make any prohibition to this right to affiliate to higher level organizations or federations;</p> <p>B: Which explicitly prohibits such affiliation or requires affiliation to a preferred federation to the exclusion of other federations.</p>
FOA 6	Rights of Trade Unions to be Politically Active	<p>A: Where there are no restrictions on union or employer abilities to participate in politics or affiliate themselves with higher level organizations or federations;</p> <p>B: Where there are restrictions on the ability of unions and employer organizations to affiliate with higher level bodies;</p> <p>C: Where unions and employers are prohibited from participating in political activities and debates.</p>

CB	Indicators of Rights and Practice of Collective Bargaining	National Expert to provide justification for classification of countries into the following categories.
CB 1	Union Recognition and Obligation to Bargain	<p>A: Where relevant, there are clear rules regarding union recognition, and where the law imposes a clear duty on the employer to bargain; Where data shows no violation of the obligation to bargain; Where data shows that there are no delays in the union recognition process;</p> <p>B: Where the rules regarding bargaining and recognition is clear but where the practice shows that there are delays in either or both;</p> <p>C: Where there are no rules regarding recognition (in cases where recognition is required) such that it results in delays in the start of bargaining, and/or where there is no obligation on the part of the employer to bargain.</p>
CB 2	Scope and Subject Matter of Bargaining	<p>A: Where any item of interest to either party is bargainable ;</p> <p>B: Where the rules suggest that some items are bargainable only if both parties agree that they are bargainable;</p> <p>C: Where the subjects of bargaining are restricted by the legislation.</p>
CB 3	Rights to Strike, Restrictions on the Right to Strike, and Weakening of the right to Strike	<p>A: Where workers may go on strike even in cases where they are not directly linked to the dispute (e.g. sympathy strikes);</p> <p>B: When workers directly connected with the dispute are freely able to proceed on strike;</p> <p>C: Where industrial relations rules permit the replacement of striking workers, thus weakening the ability of labor to exercise their right to strike;</p> <p>D: Where the right to strike is curtailed by provisions that require withdrawal of strike of the use of compulsory arbitration or adjudication for private sector workers;</p> <p>E: When there is a ban on the right to strike.</p>
CB 4	Parallel Workplace Representation	<p>A: Where the law prescribes the works council or committee with a wide scope and mandates regular meetings;</p> <p>B: Where the law prescribes some form of workplace level</p>

		committee, even if the scope is restricted; C: Where there is no provision for workplace level representation.
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<b>OM</b>	<b>Outcome Measures</b>	
OM 1	Collective Bargaining Coverage	NE need to report the data over time (e.g., for the last five years), segregate data according to gender and occupational groups, identify how the data was collected, and provide an explanation for why there is a variance between this measure and a measure of union density.
OM 2	Number of Collective Agreements	NE to report on the number of collective bargaining agreements annually for at least the last five years.
OM 3	Parallel Workplace Arrangements	NE must draw on previous research and data on the distribution of parallel workplace arrangements to make an assessment for categorizing country.  A: Where parallel workplace arrangements generally exist in most firms, and where these institutions take substantial decisions regarding the day-to-day workplace issues; B: Where a minority of firms only have parallel representation arrangements and where they take substantial decisions i.e. where the scope is broad. C: Where parallel representation institutions widely exist, but with a limited scope (e.g., safety and health only, or welfare only or some other combination that suggests limited scope). D: Where exist limited scope (only in a minority of firms); E: Where no such institutions exist, or if they exist but are not routinely used.
OM 4	Strikes and Lockouts	NE should report number of strikes and lockouts over time (for last five years) with their judgment regarding the reasons for such strikes and lockouts.
OM 5	Grievances or Industrial Disputes	NE to report on longitudinal grievance and dispute data (for the last five years).
OM 6	Measure of Tripartite Process in Practice	A: Where there is evidence of regular meetings and cooperation between the social partners, and there is clear and documented

		<p>evidence of the partners participation in key macro economic decisions. NE should provide concrete examples of national decisions in addition to data on the regularity of meetings;</p> <p>B: Where there is no regular interaction between the social partners, but when they come together when occasion demands it and there are concrete decisions regarding national economic and social issues coming out of this decision;</p> <p>C: Where there are occasional forums that result in meetings between the social partners, primarily for information and consultation where the social partners may make recommendations, which may or may not be accepted by the government;</p> <p>D: Where it is clear that social partners meet but not to discuss substantial issues;</p> <p>E: Where there is no participation in any issue at the national level.</p>
OM 7	Tripartism Outcomes: Wages	<p>A: Where data on wage drift for countries in which bargaining is highly centralized on tripartite or industry level is reported;</p> <p>B: Where the measure is not applicable and do not report data and bargaining is primarily decentralized.</p>
OM 8	Tripartism Outcomes: Inequality	NE to report the Gini-Coefficient over time, but also to report the source of the data.

<b>GE</b>	<b>Government Enforcement of Labor Legislation</b>	
GE 1	Severity of Penalties for Violations of laws regarding FOA and CB	<p>NE to report trend data for over past five years on penalties of violations and require exercising judgment to categorize country based on laws and practices of severity of penalties for violations.</p> <p>A: Where the penalties for violations are sufficient to deter law breaking;</p> <p>B: Where the penalties for violation of laws pertaining to freedom of association and collective bargaining are not sufficient to deter actors from violating the laws.</p>
GE 2	Governmental	NE should exercise judgment to categorize country in terms of its

	Administrative Capacity	administrative capacity based on (a) adequacy of personnel and budgets compared to the number of workplaces; (b) adequacy of inspections; (c) coverage of establishments; and (d) data on violation; A: Where governments have the institutional capacity to monitor labor laws in their country; B: Where such institutional capacity is lacking.
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