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Literature Review and Bibliography
for
Research project: Refining the NAS-ILAB Matrix

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PART ONE: BACKGROUND

In 2004, the National Academy of Sciences (NAS), in cooperation with the Bureau of International Labor Affairs (ILAB) of the United States Department of Labor (DOL), published a methodology for assessing labor rights compliance and other labor market conditions of trading partners of the United States.¹ The methodology included batteries of indicators, a matrix instrument, and a database of information sources for applying the indicators and the matrix to particular countries. Social scientists at the University of Michigan pilot-tested and evaluated the NAS-ILAB indicators, matrix, and database, and submitted their findings on February 23, 2009.² The Michigan evaluation revealed significant areas in the indicators, matrix, and database calling for improvement.

On September 10, 2009, ILAB and this author entered a contract for a research project on Refining the NAS-ILAB Matrix. The subject of my research proposal is to apply legal and compliance analysis to formulate a body of indicators dedicated to making determinations whether trading partners are compliant with United States trade legislation and trade agreements. The proposal is to develop a body of indicators (for freedom of association, non-discrimination, and acceptable conditions of work) that are relevant,

¹ National Research Council, *Monitoring International Labor Standards: Techniques and Sources of Information*. Washington, DC: The National Academies Press (2004).

² Lawrence Root and Ada Verloren, *Evaluation of the NAS-ILAB Matrix for Monitoring International Labor Standards: Project Report*, Submitted to Bureau of International Labor Affairs, Department of Labor (February 23, 2009).

simple, consistent, and systematic, and to propose and analyze alternative methodologies for prioritizing and aggregating the indicators.

The Statement of Work enumerates eight Tasks. This document is submitted in fulfillment of the third task. The Statement of Work defines the third task as follows:

Task 3: Complete a bibliography and Literature Review of work related to the research to be undertaken. Among sources included should be the 2004 NAS publication Monitoring International Labor Standards: Techniques and Sources of Information and the ILAB-sponsored evaluation of the NAS-ILAB matrix conducted by the University of Michigan. Upon request, copies of articles included in the bibliography and/or Literature Review will be provided to ILAB.

I. NAS-ILAB Research

1. NAS-ILAB Reports 2003-2004

In 2001, the ILAB engaged the National Academy of Science to formulate a methodology and information base for the assessment of countries' compliance with labor rights and acceptable conditions of work. The NAS's final 2004 *Report* generated the existing body of indicators, matrix methodology, and WebMILS database. The content of that research and the source material on which it relies are well-known to ILAB, are systematically presented and summarized in the final published volume, and are summarized again in the Michigan evaluation. I will therefore provide a relatively brief summary of those documents. Nor, for the most part, will I repeat bibliographic items contained in those *Reports*. Instead, I will highlight the ways in which the *Reports'* analyses – and therefore their bibliographies – require supplementation for purposes of the current research.

The NAS research produced five volumes, published in 2003 and 2004, summarizing the content of workshops and fora in the areas of quality of information, domestic regulation, national legal frameworks, international perspectives, and regional regulation. (National Research Council, 2004b; 2003a; 2003b; 2003c; 2003d).

The sixth and key volume, published in 2004, is entitled *International Labor Standards: Techniques and Sources of Information* (hereafter "NAS-ILAB Report"). (National Research Council, 2004). It sets out the indicators and matrix methodology, and explains the WebMILS database. Chapters Two and Three of the *NAS-ILAB Report*

provide an overview of sources of information on international labor rights from international organizations, national governments, academics, and non-governmental organizations, including private organizations. Chapter Four explains the formulation of indicators of freedom of association and collective bargaining, Chapter Seven the indicators of employment discrimination, and Chapter Eight the indicators of acceptable conditions of work.

The major categories of information cited in Chapters Two and Three remain the same in 2011, although within each category many additional relevant papers, reports, and books have been published since 2004. These new items are cited and summarized in subsequent sections of this *Literature Review*.

However, the *Report's* specific sources – and the *Report's* analysis of those sources – do not entirely map onto the topic and methodology of the current research. The reason is this: The *NAS-ILAB Report*, including the indicators and matrix, did not systematically interpret United States trade legislation and trade agreements as *legal* documents. Indeed, the *NAS-ILAB Report* did not use traditional (or non-traditional) jurisprudential techniques of labor lawyers or international lawyers to systematically interpret ILO Conventions and Recommendations pertaining to core labor rights and standards – even though “rights” and “standards” are legal concepts, and, more important, are understood as such by the ILO itself, by domestic agencies and courts, by human rights organizations, by labor federations, by business federations, and by scholars. The juridical nature of labor rights is exemplified by the fact that every member of the ILO Committee of Experts on the Application of Conventions and Recommendations – the ILO

body that authoritatively determines whether a country is complying with ratified ILO Conventions – is a professor of labor or international law, a labor or high court judge, or other distinguished labor or international lawyer.

As a result of the decision by the NAS to not apply systematic legal analysis, the bibliography and analysis of the *NAS Report* diverge from the bibliography and analysis pertinent to the current research in several inter-related respects.

First, at key points in the analysis, the *Report* relies on secondary legal sources rather than authoritative legal documents. The *Report* explicitly states a preference for secondary sources. (National Research Council, 2004, p. 36.) It is true that, at times, the *NAS-ILAB Report* referred to authoritative legal sources, such as determinations made by ILO supervisory bodies. But in constructing its indicators, the *Report* did not anchor its analysis in the structure and logic of primary legal texts, even when formulating indicators of the legal norms contained in “legal frameworks.”

Second, the Indicators on “legal frameworks” appropriately require analysts to determine the prevailing domestic labor law of the trading partners in question. But the *Report* asks analysts to rely principally on reports of international organizations and nongovernmental bodies, even as to matters of domestic labor law. Determining the content of domestic labor law is, however, an exercise in comparative labor law research. That is, to determine the legal framework of a country, in the first instance an analyst should turn to the up-to-date constitution, labor code, and regulations of the country in question – in other words, the primary texts at the national level. For many countries, there is a well-known, authoritative digest on domestic labor law (an official publication) and one

or more equally well-known, pre-eminent treatises on domestic labor law (by leading legal scholars or labor judges) which comprehensively collect or summarize the constitution, labor code, regulations, judicial and administrative interpretations, and practice. In addition, there are analogous digests and treatises on civil procedure, criminal procedure, and administrative law, which are relevant to identifying the authority and procedures of courts of general jurisdiction (which, in many countries, hear labor cases of various kinds) and administrative agencies (such as labor boards, inspectorates, and prosecutorates). An analyst who instead starts with international reports will often find partial and out-of-date national laws and regulations, and therefore can have little confidence that indicators will assess actual prevailing legal frameworks.³ Even if an analyst finds in an international report a seemingly solid compendium of national labor laws for a given country, the analyst will still have to turn to the primary texts (constitution, labor code, regulations) to be sure that the compendium is in fact comprehensive and up-to-date.

Third, the *Report* devoted an entire chapter (Chapter Three) to a catalogue of private systems of labor monitoring – that is, corporate codes of conduct and multi-stakeholder consortia for monitoring those codes. But the *Report* did not discuss the relationship (if any) between the private codes and the authoritative national laws, regulations, and governmental enforcement activities that constitute the “legal framework” and “government performance” to which the NAS-ILAB indicators must be applied. That is, the current research will refine the indicators to measure the degree to which each

³ This is true even of the ILO’s database of national labor law, which is incomplete and out-of-date for some countries.

country's *sovereign* laws and enforcement agencies comply with the legal rights and standards set out in U.S. legislation, U.S. trade agreements, and ILO Conventions. The refined indicators will not, in principle, be measures of the internal compliance-systems of private corporations in global supply chains.

This is not to say that Chapter Three has no value for the current research. To the contrary. The corporate and multi-stakeholder codes may be relevant to “outcome” indicators showing the degree to which government enforcement achieves actual compliance by employers. For example, it may be worth considering whether we should formulate indicators to measure the government’s success in encouraging corporations to adopt and effectively monitor private codes.⁴ The private codes may also be of interest in providing examples of efforts to refine indicators that capture international norms – although, in fact, many such codes simply state (unhelpfully for our purposes) that corporations must comply with international labor rights and domestic labor law.

Fourth, the *Report* did not catalogue and comparing the structure, functioning, and resources of labor inspectorates, labor courts, labor boards, and prosecuteriats. This again reflects the fact that the *Report* did not systematically treat the enforcement of labor rights as an exercise by *legal* institutions. There is an extensive literature by comparative labor law scholars, labor law sociologists, and labor relations scholars on these subjects. Some relevant information on these subjects will also be found in the primary and secondary sources noted above (that is, codes, digests, and treatises on the legal

⁴ Although the *NAS Report* devoted half its analysis of information sources to provide codes of conduct, it did not attempt to incorporate those issues into its indicators.

authority and procedures of labor tribunals, labor boards, and other relevant administrative bodies). Indeed, as I describe in Sections V and XI of this Literature Review, there is a substantial and growing literature by comparative labor law scholars on the direct question of developing valid worker rights indicators, and applying those indicators to cross-country databases.

Fifth, there is an equally substantial literature, much of it produced after the *NAS Reports* were published, on the more general subject of Indicator-driven methodology – on forms of regulation based on production of metrics and evaluation of government’s regulatory achievement of those metrics. Such indicator-driven methodology is rooted both in practical experience in regulation and in theorization of that practical experience, and covers a broad gamut of subject domains, including but not limited to labor regulation.

Sixth, the NAS catalogue of sources combined empirical sources and sources about the meaning of labor standards. These two types of sources have different conceptual implications for construction of Indicators. The sources on the meaning of labor standards provide concepts that are direct components of legal rights and therefore direct foundations for Indicators, at least those indicators that measure legal norms (as opposed to measures of government performance and outcomes). The empirical sources do not necessarily bear this conceptual relationship to legal matters. It is true that empirical social-science sources will be invaluable, both for formulating labor market definitions and metrics that map onto legal elements, and for providing essential outcome data. But whether *particular* empirical sources in fact serve these purposes is a matter of careful conceptual analysis.

Seventh, and perhaps most important, the NAS indicators use concepts that have no well-defined, precise meaning in the legal interpretation of trade legislation, trade agreements, ILO Conventions, and domestic labor rights and standards. The indicators use novel terminology, and formulate novel definitions of rights and standards. As a result, in many indicators several distinct legal rules or subject-matters are combined. Some pairs of indicators repeat the same legal rule, or the same facet of a legal rule, but use varying, inconsistent terminology.

2. Michigan Evaluation

In order to test and evaluate the NAS indicators and methodology, the ILAB engaged social scientists of the Institute for Research on Labor, Employment and the Economy of the University of Michigan. The results of the evaluation were published in the 2009 *Michigan Report*. (Root and Verloren, 2009).

The Michigan researchers assembled three-person panels to apply the indicators to three countries. The panelists were experts and consultants, with varying expertise and experience in labor relations, labor policy, labor conditions, and labor rights. All three panels applied the indicators for freedom of association and rights to bargain collectively. In addition, one panel applied the indicators for acceptable conditions of work, another panel applied the Indicators for forced or compulsory labor, and the third panel applied the indicators for discrimination. Each panel member independently applied the indicators, drawing on the WebMILS database. After convening to discuss the variation in their individual assessments the panelists, again independently, revised their assessments. In

their written assessments, the panelists used the 3 by 3 matrix of the NAS Report. For each indicator, the analyst assessed the “level of compliance”: (1) “some problems,” (2) “more extensive problems,” or (3) “severe problems.” The analyst also assessed, for each indicator, the “direction of change”: (1) “improving,” (2) “steady state,” or (3) “worsening.” In practice, the panelists used a 4 by 4 matrix by adding a “no assessment” option along each axis.

The Michigan evaluation is a model of its kind. It made several important findings. Rates of “non-assessment” were high, indicating either confusion in the meaning of indicators or lack of available information in the WebMILS database or other sources. Indicators with at least one non-assessment (per panel) ranged up to 81.3 percent, with a rate of non-assessment less than 50 percent for only one Indicator. The rates of initial agreement among all three panelists on “levels of compliance” were exceptionally low – ranging from 0 percent to 34.2 percent, but in four out of six cases falling below 15.8 percent per Indicator. Rates of initial agreement among all three panelists on “direction of change” were somewhat higher, but still low – from 13.5 percent to 73.7 percent, with all but one falling below 31.6 percent. Pairwise agreements among panelists (that is, agreement between two panelists) ranged from 30 to 70 percent. In other words, if ILAB analysts use the NAS methodology, the outcome of assessments will more often than not depend on the individual staff person assigned to the task – at least, if the Michigan test is a good predictor of ILAB assessments.

The *Michigan Report* concluded that a significant problem is the lack of clarity in the Indicators: “[M]any, if not most, of the individual indicators are themselves complex and

subject to interpretation....” (Root and Verloren, 2009, p. 16). The *Report* concluded that instances in which panelists rested their judgment on different information were “[t]he easiest to resolve,” since the same information could be shared in the second round of assessments. (Root and Verloren, 2009, p. 18). But “differences in the interpretation of an indicator” were “less likely to be resolved.” (Root and Verloren, 2009, p. 18). Likewise for panelists’ differing views about whether indicators should be assessed relative to an absolute baseline or instead relative to similarly situated countries. (Root and Verloren, 2009, p.18). Note that the latter problem is also a question of clarity in the definition of Indicators.

The most prevalent problems in the clarity of indicators were: double-barreled questions; ambiguously worded Indicators; inconsistent terminology from indicator to indicator; indicators covering similar subject matter yet differently worded and therefore inconsistent; disjuncture between indicators and international standards; indicators that intrinsically called for 2 by 3 rather than 3 by 3 assessment; and conceptually problematic and therefore confusing indicators (e.g., does a high rate of complaint-filing indicate a high rate of non-compliance or instead a higher level of effective enforcement?) (Root and Verloren, 2009, p. 32).

The panelists also expressed concern about the limited information available through the WebMILS database, including the assumption that research would be conducted exclusively through online reports. “[T]here was a recurring theme that what one needed was a local expert – someone ‘on the ground’ – who could provide up-to-date and contextual information.” (Root and Verloren, 2009, p. 42). This reflects not only a

problem in the database. It also reflects the *NAS Report's* reliance secondary reports, whose coverage of relevant legal norms and institutions may be partial or happenstance – as opposed to reliance in the first instance on relatively easily-obtained, up-to-date, comprehensive, primary, authoritative legal texts for each country. I say “relatively easily-obtained” because, even if the primary texts are not presently available online or in law libraries in the United States, the problem can often be cured by a phone call or email to easily identified country or regional experts in labor law or by a request to an international reference librarian in United States law schools.

Finally, the *Michigan Report* found that “[t]he effort in the pilot test to make an overall assessment of the legal framework, government performance, and outcomes continually came up against the question of how one pulls together the individual assessments of indicators. This was often articulated in terms of establishing priorities reflecting the relative importance of indicators.... [D]eveloping some guidance for how to move from the specifics to an overall assessment would be a significant advance in the use of the indicators.” (Root and Verloren, 2009, p. 44).

PART TWO: INDICATOR METHODOLOGY AND INITIATIVES

II. State of the Art Indicator Methodology

As noted, this researcher was contracted by ILAB to refine the NAS indicators using systematic legal analysis and to present and evaluate alternative strategies for prioritizing and aggregating the indicators.

In principle, finalizing the task of prioritization (weighting) and aggregation (producing a composite index) entails canvassing and evaluating alternative strategies for coding and weighting indicators; data collection to test the system of weighted indicators against subjective assessments or other baselines; reliability testing (verification) of data; missing data analysis; strategies for re-balancing categories of indicators for which data is missing; and ultimate validity testing of the composite index.

Comprehensive completion of these tasks evidently exceeds the boundaries of the current research proposal and contract. Nonetheless, in formulating the body of indicators and presenting alternative strategies for prioritization and aggregation, the current research must be attuned to, and informed by, state-of-the-art methodologies for generating and testing composite indices. In that light, this section reviews the literature on the subject.

The formulation of composite indicators is a growth industry. This section begins with the most authoritative work on the subject (the EU-OECD Handbook). The section then summarizes the as-yet unpublished and therefore anonymous effort to apply state-

of-the-art methodology to the creation of an index for one core labor right. Subsequent sections review several other leading exercises in formulating indicators and composite indices for labor rights and standards.

1. EU-OECD Handbook and Website

The OECD and the European Commission collaborated in authoring the *Handbook on Constructing Composite Indicators: Methodology and User Guide* (OECD, 2008) (“*Handbook*”). The 158-page *Handbook* gives an in-depth, comprehensive treatment of the subject. I have carefully read and assimilated the *Handbook*. In addition, the Joint Research Centre of the European Commission sponsors a website on the same subject. (See <http://composite-indicators.jrc.ec.europa.eu>) (“*Website*”).

The *Handbook* and *Website* suggest a ten-step methodology for constructing a composite indicator: (1) developing a theoretical framework, (2) identifying indicators (“variables”) and applying the indicators to relevant data, (3) imputing missing data, (4) applying multivariate analysis to analyze the underlying structure of the data, (5) normalizing the data, (6) attaching weights to, and aggregating, indicators, (7) applying uncertainty and sensitivity analysis to gauge the robustness of the composite index, (8) de-constructing composite indicators to identify and analyze the contribution of individual indicators and sub-categories of indicators, (9) testing the explanatory power of the composite indicator by linking it to well-known and measurable phenomena, and (10) effectively communicating the indicator to end-users.

The *Handbook* and *Website* canvass and explain alternative strategies for

addressing each of these ten steps. The following subsection summarizes some of the key problems and strategies in the highly relevant context of child labor.

2. Unpublished, Anonymous Research on Core Labor Right Index

A capable research organization has produced an as-yet unpublished research report on the formulation and validation of an index measuring a given government's effort to eradicate violations of one core labor right and tracking such efforts over time.

(Anonymous, 2009.) ILAB staff have a copy of the *Unpublished Report*.

The *Unpublished Report* discusses alternative strategies – set out at length in the EU-OECD *Handbook* – for addressing several of the key steps in constructing the child labor index. The *Unpublished Report* begins by identifying two major sets of constraints that produce the major challenges in creating the index. The first set – “institutional” constraints – includes the goals of producing an index that is credible (defensible), sustainable, and clear about what it measures. The second set – data constraints – includes the commitment to objective data (as opposed to subjective expert opinions); the difficulty in interpreting complex laws and reducing them to discrete indicators; the fact that binary indicators require large volumes of data in order to produce the desired variance; the unreliability and inconsistency in data sources; and the unavailability of data (data is unavailable for some 17 percent of variables in the *Unpublished Report*).

The problem of unavailable data resulted in the scaling back of indicators and in imbalances among major categories of indicators. These problems, in turn, posed two inter-related challenges: How to code indicators for which data is missing? How to

construct weights and aggregation methods to compensate for imbalances among major categories of indicators?

On the question of coding missing data, the *Unpublished Report* presented four alternative strategies: binary positive coding, balanced coding, asymmetric coding, and dual variable principal component coding. On the question of weighting, the *Unpublished Report* discussed the pros and cons of three weighting strategies: equal weighting, principal components analysis (“PCA”), and principal components analysis with a subjective anchor. The *Unpublished Report* then discussed four alternative strategies to test the coding and weighting alternatives: correlation to mean subjective assessment score, correlation to number of missing values, number of quintile classifications outside the median, and observed anomalies. These tests indicated that the best performing coding strategy is asymmetric coding, and the best performing weighting strategy is PCA, with little marginal gain from applying subjective anchors to PCA.

The *Unpublished Report* noted, however, that the balancing achieved by PCA has a downside: while it achieves a balance across major categories of indicators (“sub-indices”), the consequence is that individual indicators within each sub-indicator take on widely varying weights. For example, the average weight of each indicator of “laws and regulations” is one-sixth of the average weight of all other indicators; and some individual indicators account for only one thousandth of the index while others account for as much as four percent of the index. The *Unpublished Report* discussed four strategies for dealing with this problem: using PCA but eliminating sub-indices; weighting sub-indices to the amount of indicators within each sub-index; breaking up the large sub-index of “laws and

regulations” into three sub-indices; using regression analysis to determine weights when aggregating the sub-indices. After applying the four testing strategies mentioned above, the *Unpublished Report* provisionally concluded that the various balancing strategies improved the quality of the overall index, without undermining the conceptual framework that generates imbalanced Indicators designed to capture “the essence of what is being measured.”

Interestingly, the *Unpublished Report* stated that, in the pilot-testing of the indicator questionnaire, the greatest difficulty faced by analysts in reliably interpreting data sources (that is, in unambiguously applying questionnaire items) was “to interpret complex laws and regulations and [it was] even more difficult, at times, to summarize these laws into concise index systems that are applicable to all countries.” This is analogous to the problems found in the Michigan evaluation of the NAS-ILAB indicators, although the room for improvement of the NAS-ILAB indicators is even broader than those found in the much more precisely drafted indicators in the *Unpublished Report*.

III. A Methodological Prologue: Why Survey the Vast Literature on Outcome Indicators in the Labor Field?

The current research proposes to construct indicators using legal and regulatory analysis. That is, we start with the obligations set out in U.S. legislation and trade agreements, break those obligations down into simple, concise, single-barreled indicators (that is, well-specified sub-rules), and prioritize and aggregate the indicators based on the authoritative legal sources' explicit or implicit prioritization of the indicators. In line with this approach, the indicators in the anonymous *Unpublished Report* discussed above have, thus far, focused entirely on legal “inputs” – that is, the substantive legal rules stipulated in national legal systems, and the procedures and institutions for enforcing those rules. The indicators do not include “output” or “outcome” indicators – such as the actual incidence of violations of the particular labor right in question.

Nonetheless, I have chosen in this Literature Review to cover the large literature on leading systems of Indicators that focus on labor market and workplace outcomes – in addition, of course, to the literature on input indicators and on various types of legal analysis of labor regulation, including the jurisprudence of the ILO and of comparative national legal systems, the scholarly commentary on that jurisprudence, material describing national enforcement institutions, scholarship analyzing those institutions, and so on.

What, then are the reasons for surveying the literature on outcome indicators? There are at least nine reasons. First, unlike the indicators in the *Unpublished Report*, the

NAS-ILAB indicators themselves include “overall outcome” indicators, in addition to input indicators (“legal framework” and “government performance”). Hence, the leading efforts to construct outcome indicators in the labor field are directly relevant. Second, there are authoritative international instruments that require governments, when protecting substantive worker rights, to monitor their performance by using existing outcome indicators and statistical definitions. In other words, the outcome Indicator systems are incorporated in the legal definition of the substantive obligations themselves. For example, the International Covenant on Economic, Social and Cultural Rights obligates governments to comply with many elements of the rights that concern us, and to monitor government compliance by use of ILO outcome indicators and statistical definitions. (See Section X below).

Third, in many cases, the efforts to construct outcome indicators seek to uncover the relationships between outcome indicators and underlying concepts that, in many instances, pertain to quality of inputs. That is, the indicator systems in some instances probe the question whether output indicators are good measures of government structure, government performance, and legal regulation. Fourth, even when the methodologies do not seek to relate outcome indices to legal norms or government enforcement, they sometimes construct definitions for particular indicators that can be adapted for use as input indicators, and analyze data sources relevant to those indicators.

Fifth, the methodologies in some instances offer lessons about the legal and statistical sources that might be taken as guides for indicator construction when authoritative, binding jurisprudence is silent or ambiguous about a particular question.

Sixth, some of the methodologies attempt to adjust indicators for country groups, based on national income, productivity, qualitative legal traditions, qualitative labor relations systems, and so on. These exercises too may provide lessons for us.

Seventh, some of the research on outcome indicators discusses other important methodological questions pertaining to comparative institutional analysis – for example, the question whether national institutions are interdependent in ways that make it more difficult for certain governments to perform well on an indicator for one specific institutional element or that, conversely, call for greater effort by a government as to the indicator.

Eighth, understanding how our indicator project fits into the larger constellation of indicator systems may be useful, not just for scholastic reasons but for grasping the potential political relationship between US/ILAB strategies and those of other important actors. And finally, the literature on outcome Indicators may convey general methodological lessons in the art of constructing composite indicators – lessons on such issues as weighting, aggregation, sensitivity and validity testing, and so on.

These issues will be discussed as they arise in summarizing and analyzing the categories of literature below.

IV. Labor Indicator Initiatives of the ILO

The ILO undertakes several overlapping initiatives that construct conceptual definitions of workplace and labor market conditions and standards, and that collect data pertaining to those concepts. Five of these initiatives, in which official or unofficial indicators have been constructed, are: the Decent Work Agenda; the Better Work Program (undertaken in conjunction with the International Finance Corporation); the Cambodia Indicators; the ILO's various statistical databases; and the collaboration with the United Nations Economic Commission for Europe (UNECE) on a Quality of Employment Framework. This section discusses the key literature on the first four of these initiatives, in turn. The fifth is discussed below in Section VI. The discussion focuses on literature published after the 2004 *NAS-ILAB Report*.

1. ILO Decent Work Indicators

The ILO Director-General announced in 1999 that the promotion of decent work would be a central component of ILO activities. (ILO, 1999). The so-called "Decent Work Agenda" marked a shift in ILO strategies from a predominant focus on ILO Conventions (rights and standards) to a combined focus on the goals of employment, social protection, and social dialogue, together with rights and standards. Not long after the Director-General's announcement, various efforts to construct decent work indicators began. As early as December, 1999, an ILO Workshop held a special session on constructing a decent work index. (Bonnet, et al., 2003, p. 213 n.1).

Some decent work Indicator schemes have been constructed by independent researchers; most have been formulated by research staff of the International Labor Office (hereafter “Office”), which is the Secretariat of the International Labor Organization (ILO). None of the trial indicators have yet been ratified by the ILO Governing Body or Conference (the two major governing bodies of the ILO) and, so, they lack authoritative force. In that sense, all decent work indicators to date are “proposed” or “trial” Indicators.

For at least four reasons, it is worth a relatively close review of the literature on decent work indicators – although for obvious reasons, the overview below will focus on freedom of association and the right to bargain collectively; rights to non-discrimination and equality; minimum wages; hours of work; and occupational safety and health. First, even though not yet ratified by the ILO governing bodies and therefore not yet binding or authoritative, the Office research provides weighty guidance about indicator construction by the secretariat of the most important international organization in the field of labor rights and standards. The research provides “guidance” in two senses. In a jurisprudential sense, the decent work indicators (where relevant to the current project) provide some weighty precedent, even if not binding precedent. In a practical sense, the various decent work methodologies, and the research that explains, defends and in some cases criticizes them, offer lessons for the construction of individual and composite indicators in the labor field.

Second, more specifically, the major categories of some of the proposed sets of decent work indicators encompass both of the core rights that are the subject of this research – freedom of association and collective bargaining under the label “social

dialogue,” and non-discrimination and equality under the label “equal employment opportunity and treatment in employment.” The proposed indicators also include major categories covering the three conditions of work: wages (under the label “earnings”), hours (under the label “decent hours”), and health and safety (under the label “safe work environment”). Most of these are outcome indicators; but some are indicators of legal norms and enforcement institutions.

Third, the fact that on some matters the decent work categories are not homologous with the rights and standards in the current research may have a hidden virtue. The conceptual and empirical relationship among those rights and standards which *are* included in the decent work framework, on the one hand, and various “other” decent work Indicators, on the other, may be quite relevant to our task of understanding the relationship between economic context and compliance with rights and standards. That is, some of the “other” decent work metrics may prove to be important variables for adjusting the indicators applicable to different categories of countries or for assessing (and perhaps justifying) a government’s performance in complying with the rights and standards. We might therefore learn something from the treatment of those relationships in the decent work models.

Fourth, as recounted in some detail below, under the urging of a Tripartite Meeting of Experts, the Office at least provisionally committed itself in late 2008 to developing new quantitative indicators for compliance with core labor rights, as components of the decent work Indicators. The Office thereafter published pilot tests for Austria and Brazil, giving some indication of the direction of these efforts. In addition, the deliberations of the Office

and the Tripartite Meeting in 2008 indicated that certain previous research efforts – especially a 2007 paper by David Kucera – would guide or at least inform the new indicator development. In January, 2011, however, the Office published a working paper indicating that the Office was not pursuing the formulation of quantitative indicators or an aggregate index as to freedom of association and collective bargaining, but was instead constructing a table for compiling the information already gathering by the ILO supervisory mechanism. The cells in that table were designated as “evaluation criteria” rather than Indicators. For readers who wish to jump directly to the Office’s most recently published list of Revised Proposed Indicators (November 2008) and the new Freedom of Association evaluation criteria (2011), see subsections (g) and (i) below.

It is important to recount the evolution of decent work indicator methodologies, since some of those methodologies provide the conceptual foundation of the ILO’s more recent projects of fashioning Proposed Indicators and evaluation criteria.

a. Early Research on Decent Work Indicators

An early effort to construct indicators of decent work was a set of statistical measures intended to capture the four main pillars of decent work. (Anker et al., 2002). These statistical indicators were aired before the 17th International Conference on Labor Statistics (ICLS) in 2003 and the Conference Working Group on Decent Work Indicators. (ILO, 2003, 2004).

In 2003, the *International Labor Review* published a special issue on *Measuring Decent Work*, including the Anker paper and five others. (Anker et al., 2003; Ghai, 2003;

Bescond, et al., 2003; Bonnet, et al., 2003; Fields, 2003; Ahmed, 2003).

Dharam Ghai's methodology, presented in that special issue, constructed four indicators for gender discrimination, designed to capture the concepts of ILO Convention No. 111 on Discrimination (Employment and Occupation) of 1958. Ghai states that "in principle the same kinds of indicators can be used in the case of discrimination on the other bases [besides gender]." (Ghai, 2003, p. 127). The four indicators are: ratio of employed women to female working age population; gender disparities in unemployment rate; gender differences in earnings and benefits; and gender distribution of skilled jobs. He notes that the first and second of these Indicators can be misleading, since official statistics do not count homework; in fact, women work more than men. Relying on a 1999 ILO report, he also notes that just over half of advanced countries and less than one-third of emerging and developing countries break down wage data by gender. (Ghai, 2003, p. 128). In his final analysis, Ghai drops the wage disparity index for lack of data. He also notes that data was inadequate to assess discrimination against ethnic minorities.

For freedom of association and collective bargaining, Ghai attempts to capture the concepts in ILO Convention No. 11 on the Right of Association (Agriculture) of 1921; Convention No. 87 on Freedom of Association and Protection of the Right to Organize of 1948; Convention No. 98 on the Right to Organize and Collective Bargaining of 1949; Convention No. 141 on Rural Workers' Organizations of 1975; and Convention No. 154 on

Collective Bargaining of 1981.⁵ Ghai distinguishes between “direct” measures and “outcome” measures for freedom of association. In the first category are (a) ratifications of Convention Nos. 87, 98, and 154; (b) criteria derived from reports of the International Trade Union Confederation (ITUC), ILO Committee on Freedom of Association, and U.S. State Department Country Reports, and (c) an index of civil rights, such as the Freedom House civil liberties index. Ghai argues that indicator (b) is more accurate because based on a larger number of (unspecified) evaluative criteria.

Ghai’s outcome indicators on freedom of association, collective bargaining, and social dialogue include: (a) union density, (b) proportion of employees covered by collective bargaining agreements, and (c) “detailed country-by-country examination of laws, institutions, procedures and practices” relating to the various aspects of worker’s participation at the enterprise and national levels. (Ghai, 2003, p. 134). Ghai warns, however, that (a) and (b) are difficult to interpret. Union density does not directly measure the right to organize but “depends upon historical traditions, political systems and industrial structures and relations.” (Ghai, 2003, p. 130.) In developing countries, union density and collective contract coverage are even more problematic proxies for the underlying rights, since only a small percentage of the workforce is in the formal sector. Ghai also mentions the much-noted case of France, where union density is low, but collective agreements are extended to ninety percent of workers. In any event, Ghai drops the indicator for collective bargaining coverage for lack of data, and does not attempt to measure worker

⁵ As shown in Appendix A to this *Literature Review*, there are other relevant ILO Conventions on freedom of association and collective bargaining, even though Conventions Nos. 87 and 98 are the only ones referenced in the ILO’s Declaration on Fundamental Principles and Rights at Work of 1998.

participation. In other words, union density is his sole indicator for freedom of association, collective bargaining, and social dialogue. It is important to note that Ghai encounters these data gaps, even though he applies his indicators exclusively to OECD countries.

Ghai's weighting and aggregation methodology is simple. He gives each indicator a score ranging from 1 to 22. Indicators are averaged (thereby giving them equal weight) within each sub-component of "decent work." The components are then averaged to yield a composite index (thereby giving equal weight to each sub-component.) Ghai's decent work profiles (for the OECD countries) break down roughly into four country groups: (1) the Nordic countries, which score high on all indicators except unemployment rates; (2) the Anglo-Saxon countries, which do well on gender discrimination, but average to poor on social dialogue; (3) the Continental countries, which rank in the middle on social dialogue and poorly on gender discrimination, and (4) the Industrializing countries (Ireland, Portugal, Spain, and Greece) which rank poorly, with some exceptions (Ireland is good on social dialogue; Ireland and Portugal are average on gender disparities.)

Anker and his colleagues construct a more elaborate methodology. (Anker, et al., 2003). They begin by identifying six conceptual dimensions of "decent work": opportunities for work; work in conditions of freedom; productive work; equity in work; security at work; and dignity at work. From these six concepts, they formulate eleven "measurement categories": employment opportunities; unacceptable work; adequate earnings and productive work; decent hours; stability and security of work; balancing work and family life; fair treatment in employment; safe work environment; social protection; social dialogue and workplace relations; and economic and social context of decent work.

Anker et al. then propose a list of thirty indicators – for which data is currently available – falling within these eleven measurement categories, as well as additional indicators for future statistical development. Since the current exercises in Indicator development by the ILO secretariat sometimes draw on the Anker methodology, I here set out his categories and indicators:

Employment Opportunities

- Labor force participation rate
- Employment-population ratio
- Unemployment rate
- Youth unemployment rate
- Time-related underemployment rate
- Share of wage employment in non-agricultural employment

Further Development

- Employee-specific unemployment rate
- Youth unemployment to total population ratio

Unacceptable Work

- Children not in school by employment status
- Children in wage employment or self-employment

Further Development

- Children in hazardous work
- Children in worst forms of child labor
- Forced labor

Adequate Earnings and Productive Work

- Inadequate pay rate (percentage below one-half median earnings or absolute minimum, whichever is greater)
- Average earnings in selected occupations
- Excessive hours of work
- Time-related underemployment rate
- Employees with recent job training

Decent Hours

- Excessive hours of work (percentage of employed persons actually or usually working more than hours threshold, by status in employment)
- Time-related underemployment rate (percentage of employed population actually or usually working less than hours threshold, but available and wanting to work additional hours)

Further Development

- Atypical or asocial work hours

Stability and Security of Work

- Tenure less than one year
- Temporary work

Further Development

- Perceptions of future job security
- Measures of intermittency of employment

Balancing Work and Family Life

- Employment rate for women with children under compulsory school age
- Excessive hours of work

Further Development

- Duration of employment protection for mothers and fathers
- Duration and level of monetary benefits for maternity and paternity
- Flexibility of work to accommodate family needs
- Childcare affordability and availability
- Ageing workforce issues

Fair Treatment in Employment

- Occupational segregation by sex (percentage of non-agricultural employment in male-dominated and in female-dominated occupations, and index of dissimilarity)
- Female share of employment in managerial and high-level administrative occupations (ratio to female share of non-agricultural employment)

- Female share of non-agricultural wage employment
- Female/male wage or earnings ratio, selected occupations
- Female/male ratios or differences for other suggested indicators (under other headings)

Further Development

- Other major forms of discrimination based on religion, ethnicity, migrant status, national origin, etc.
- Harassment
- Autonomy

Safe Work

- Fatal occupational injury rate (per 100,000 employees)
- Labor inspection (inspectors per 100,00 employees and per 100,000 covered employees)
- Occupational injury insurance coverage (percentage of employees covered by insurance)
- Excessive hours of work (see above)

Further Development

- Health insurance coverage
- Occupational stress and injury rates

Social Protection

- Public social security expenditure (percentage of GDP)
- Public expenditure on needs-based cash income support (percentage of GDP)
- Beneficiaries of cash income support (percentage of poor)
- Share of population over 65 years benefiting from a pension
- Share of economically active population contributing to a pension fund
- Average monthly pension (percentage of median/minimum earnings)
- Occupational injury insurance coverage

Further Development

- Health insurance coverage

Social dialogue and workplace relations

- Union density rate
- Collective wage bargaining coverage rate
- Strikes and lockouts (per 1,000 employees)

Further Development

- Employer-employee relations and grievance settlement procedures
- Participation in workplace decision-making
- Percentage of women among union members and union officers
- Union member participation in union elections and decision-making
- Union participation in public policy-making
- Information sheets (and possibly indicators) on restrictions on freedom of association and the right to bargain collectively

Economic and Social Context of Decent Work

- Output per employed person (purchasing power parity)
- Growth of output per employed person (total and manufacturing)
- Inflation (consumer prices)
- Education of adult population (adult literacy rate, and adult secondary school graduate rate)
- Composition of employment by economic sector (agriculture, industry, services)
- Income inequality (ratio of top 10 percent to bottom 10 percent for income or consumption)
- Poverty (percentage of population subsisting on less than US\$1 or less than US\$2 per day)
- Informal economy employment (percentage of non-agricultural or urban employment)

Anker et al. acknowledge that some will find their indicator list too skimpy or too numerous. As to more specific problems: Anker et al. state that their two indicators of excessive hours are available from “virtually all labor force surveys.” However, “international comparability is a serious problem,” owing to (a) the inconsistency between measurements of “actual hours” and measurements of “usual hours,” and (b) the limited data distinguishing voluntary and involuntary part-time work. (Anker, et al, 2003, p.158).

As for their indicators on family/work issues and discrimination, they note problems

in interpreting the indicator of the employment rate for women with school-age children. A high rate could reflect positive programs for flexible time arrangements, childcare, maternity pay, etc., but could also reflect negative economic circumstances that compel women to work even when acceptable childcare is unavailable. In addition, although not mentioned by the authors, several terms in their indicators are ambiguous. What constitutes a “female-dominated” occupation? How should the analyst arrive at a single indicator value for occupational segregation, in light of the numerosity of relevant occupations? What should guide the analyst’s choice of “selected occupations” for determining female/male earnings ratios? Is it acceptable to provide indicators for gender discrimination, but not for discrimination based on race, ethnicity, migrant status, national origin, and religion?

As for workplace safety, Anker et al.’s indicators are meant as proxies for, among other things, “state effort to enforce safe working conditions,” (Anker et al, 2003, p. 164). However, they elide the difficult conceptual question of measuring effort by outcome metrics in light of the many variables that also likely affect outcomes. In addition, they are forthright about their unsatisfactory set of workplace health and safety Indicators: “The list of indicators...leaves out many areas of safe work for reasons of practicality and current data availability, notably on such important issues as entitlements to sick leave, incidence of occupational diseases, a broad range of physical and mental problems associated with work (e.g. stress), entitlements to breaks, availability of adequate toilet facilities, and exposure to various hazards. By contrast, data are available – albeit of suspect quality – for occupational injuries.” (Anker et al., 2003, pp. 164-165). However, if “entitlement” is

taken in the conventional legal sense, then it is not difficult to determine whether national law provides entitlements to sick leave and to work breaks. Of course, there would remain the important question whether there is data about actual compliance with those entitlements.

As to the three indicators for freedom of association and collective bargaining, Anker et al. concede that they were chosen “[l]argely on the basis of data availability and feasibility....” (Anker et al., 2003, p. 167). They state that the ILO has long collected data on strikes, and that new ILO data collection systems are “under way” for union density and collective bargaining coverage. They also recognize the need for indicators on interference with rights of association and collective bargaining (that is, other than their two crude outcome Indicators). They suggest gathering information from the ILO Committee of Experts reports, ILO Committee on Freedom of Association reports, and reports pursuant to the ILO Declaration of 1998, as well as information from “constituents, media, or others.” (Anker, et al., 2003, p. 167).

Anker et al.’s Indicators of “context” are intended to show whether economic conditions allow for sustainable decent work, whether decent work has affected economic performance, and economic elements that are constitutive of certain substantive Indicators. However, they provide no guidance about which of these purposes is served by any particular context Indicator. In particular, they do not present the context indicators as variables that warrant “adjustments” upward or downward in any sub-index or overall index. This points to a final lacuna (for our purposes) in their methodology. It does not address the question of weighting and aggregation.

Bescond and his co-authors select and refine seven of Anker et al.'s thirty indicators, as measures of what they call "decent work deficits": (1) low hourly pay (less than half of the median, or absolute poverty level, whichever is greater, as in Anker et al.'s methodology), (2) excessive "usual" hours (more than 48 per week for involuntary reasons), (3) unemployed as percentage of those working or seeking work, (4) children not at school, (5) youth unemployment, (6) the male-female disparity in labor force participation, and (7) lack of pensions for the elderly. Each indicator is also disaggregated by sex.

Bescond et al. argue that their conceptual framework has the advantage that the seven indicators "are essentially additive." Their point seems to be that, since each indicator is a percentage, the indicators can simply be arithmetically summed (and averaged) to arrive at a composite index. They propose the trimmed average method – that is, excluding ("trimming") the two extreme indicator values for each country; then averaging the remaining indicator values. Their methodology applies this calculation to any country with data for at least four indicators, so long as one of those four is either low hourly pay or excessive hours of work.

Bescond and his co-authors recognize some difficulties with their methodology. First, the indicators mostly cover wage employment and therefore overlook the bulk of workers in developing countries, who work at home or in self-employment. Second, their methodology is designed to rely on data from national labor force surveys; but that constraint limits the scope of indicators and countries. Third, the data are based on inconsistent definitions across countries.

There are further problems. While Bescond et al. do an excellent job of parsing the problems with available data and the validity of specific statistical measures, they do not fully probe the conceptual underpinnings of their method. Limiting the composite indicator to a simple arithmetic average of between two and five indicators is obviously problematic. First, important matters are ignored altogether. Freedom of association, collective bargaining, and occupational safety and health are entirely excluded. Second, there is no reason to think that percentage rates for qualitatively different social problems are conceptually equivalent in weight.

Bonnet and her colleagues (Bonnet, et al., 2003) develop a family of three decent work indicators – at the national (macro), enterprise (meso), and individual (micro) levels. They first identify seven categories of “security” within each of the three levels, and array their indicators within each category. The seven categories are: labor market security, employment security, job security, skill reproduction security, income security and representation security.

Bonnet et al. develop three types of indicators, somewhat though not entirely along the lines of the NAS-ILAB indicators: input indicators (legal norms), process indicators (enforcement machinery), and outcome indicators (actual worker protection). (In fact, their indicators are frequently placed in the wrong categories; for example, the statutory level of disability benefits is labeled a process indicator rather than an input indicator.) They normalize each indicator using the following equation (also used by the UNDP in its Human Development Index):

normalized value X =

$$(\text{actual value} - \text{minimum value}) / (\text{maximum value} - \text{minimum value})$$

where the actual value is the country's indicator score and the maximum and minimum values are the highest and lowest scores among all other countries. A decent work indicator ranging from 0 to 1 is generated by averaging all of the normalized indicators and normalizing the average value. The methodology produces, for each country, normalized sub-sub-indices for each of the three types of indicators (input, process, and outcome) within each of the seven categories of security. The three sub-sub-indices are then weighted and aggregated, producing seven sub-indices. The authors use two alternative weighting schemes. In the first scheme, each of the three types of sub-sub-indices is weighted equally. In their second, preferred scheme, the sub-sub-index for outcome indicators is double-weighted. The decent work index is then created by adding and normalizing the seven sub-indices.

For reasons of space limitation, I will only recount Bonnet et al.'s specific indicators that directly capture the rights and standards in the current research. I will enumerate their macro indicators, but not their enterprise- and individual-level indicators. I rearrange the relevant indicators to fit our categories rather than Bonnet et al.'s seven categories:

Freedom of Association and Collective Bargaining

- ratification of relevant ILO Conventions
- domestic law places no restriction on sectoral or national union formation (since latter provide stronger collective representation than enterprise unions) [domestic law is given twice the weight of ILO ratifications]
- existence of national tripartite board on labor policy
- legislative permission of worker representation by non-governmental entities
- proportion of workforce covered by collective bargaining [given double weight, because actual coverage is key]

- union density
- change in unionization in last decade
- proportion of wage and salaried workers in total employment (as measure of scope of major sector that is unionizable)
- civil liberties index of Freedom House
- change in Freedom House index in previous decade

Non-Discrimination and Equality

- ratification of relevant ILO Conventions
- ratio of male to female unemployment rates
- ratio of female to male employment rates
- wage employment share, by sex, of all those in income-earning activities
- average annual growth in GDP in the previous decade (as a proxy for economic opportunity)
- a domestic law prohibiting employment discrimination against women
- a domestic law providing paid maternity leave
- a domestic law banning discrimination against workers with disabilities
- overall literacy rate
- ratio of female to male literacy rates
- ratio of percentage of females completing post-secondary education to percentage of total population doing so
- ratio of female to male median years of schooling
- duration of statutory paid maternity leave
- level of maternity benefits as percentage of average earnings
- ratio of percentage of professional women in total female employment to percentage of professional men in total male employment
- does law allow transferability of parental leave between mothers and fathers

Workplace Safety and Health

- ratification of relevant ILO Conventions
- domestic law on safety and health
- domestic law protecting disabled workers
- domestic law providing paid maternity leave
- level of government spending on workers compensation and labor-management as percentage of GDP
- existence of bipartite or tripartite boards or committees for safety and health
- level of statutory disability benefits as percentage of previous average earnings
- annual fatal injuries divided by total employment

- annual non-fatal injuries divided by total employment
- share of economically active population with guaranteed compensation for sick leave and injury

Hours

- ratification of relevant ILO Conventions
- average reported usual working time per week
- average annual paid leave (vacation days) adjusted for share of workers in formal wage employment

Wages and incomes

- ratification of relevant ILO Conventions
- existence of minimum wage law
- existence of unemployment benefits scheme
- existence of state pension scheme
- national poverty rate
- GDP per capita (expressed in purchasing power parity basis)
- Gini coefficient measuring income distribution
- percentage of unemployed receiving unemployment benefits
- wage share in total value added/GDP
- external debt relative to GDP (as measure of income insecurity)

In formulating and applying these indicators, Bonnet et al. draw on databases of the ILO's InFocus Program on Socio-Economic Security (SES). For their macro level analysis, they rely on three databases: SES Primary Database, collected via a national questionnaire; SES Secondary Database, comprising information from many international and regional sources, such as the ILO Bureau of Statistics, World Bank, OECD, IMG, and Eurostat; and SES Social Security Database, based principally on the catalogue of legislation collected by the International Social Security Association.

After calculating their macro decent work sub-indices and overall index, countries are ranked in four groups. "Pacesetters" are those with high scores on the index and on the sub-indices for inputs, processes, and outcomes. "Pragmatists" are those with

satisfactory outcome scores but lower scores for process and inputs. “Satisficers” have relatively high scores on input and/or process but intermediate to low scores on outcomes. “Much-to-be-done” countries have low scores on all three.

One notable conclusion of the Bonnet Indicator scheme is that nearly two-thirds of countries have “unsatisfactory” scores on freedom of association and collective bargaining (which they label “voice security”), and one-quarter of those fall in the “much to be done” category. (Bonnet et al., 2003, p. 228). The latter include (based on data from the 1990s) Bangladesh, Ethiopia, Guinea-Bissau, Mauritania, Honduras, and Thailand. These countries “would need to make a major effort to build institutions and develop instruments if their workers were to overcome voice insecurity.” Another conclusion is that, while their indices correlate with affluence and industrialization, countries with high levels of inequality also tend to score poorly in the overall index.

Although Bonnet et al. present and defend at some length the conceptual framework in which their individual indicators are arrayed, they do not conduct a sensitivity analysis for their strategy of constructing a composite index based on sub-indices (themselves based on summation of varying numbers of normalized indicators some of which express the same underlying concept). This seems especially problematic, in light of the blurred categorizations (noted above) that comprise the sub-indices.

b. The Kucera Methodology

In 2004 (following publication of the NAS-ILAB matrix), the Policy Integration Department (PID) of the ILO held a seminar in which experts inside and outside the ILO

presented papers on qualitative indicators of international labor standards. Seminar papers were subsequently published in the PID Working Paper series and elsewhere. One Working Paper, by David Kucera, constructed a metric for labor union rights through the coding of violations recorded by ILO supervisory bodies. (Kucera, 2004). Kucera subsequently published the indicator methodology in an anthology entitled *Qualitative Indicators of Labor Standards: Comparative Methods and Applications* (Kucera, 2007b), and his metric was analyzed and criticized by other researchers. (E.g., Tietelbaum, 2009).

It is worth focusing on the Kucera indicator methodological, not just for its intrinsic lessons for the current project, but also in light of the International Labor Office's recent pronouncement, in response to the urging of a Tripartite Meeting of Experts (see below), that the Office would consider developing quantitative indicators for core rights that build on the Kucera and Anker methodologies.⁶

Kucera codes country compliance through a textual analysis of violations of rights of association and collective bargaining reported in three sources: the Country Reports on Human Rights Practices of the United States Department of Labor; the Annual Survey of Violations of Trade Union Rights published by the International Confederation of Free Trade Unions (now the International Trade Union Confederation); and the Reports of the Committee on Freedom of Association of the ILO. Kucera constructs 37 categories of rights violations, weights the categories based on his judgment of the significance of each category, and aggregates the weighted categories into a composite index. He further

⁶ As already noted, as of this writing, the Office has not produced such quantitative indicators. Instead, in January 2011, Kucera produced a new Working Paper formulating a tabular methodology for compiling information already gathered by the ILO supervisory mechanisms. The headings of the table are called "evaluation criteria." The evaluation criteria are not quantified or aggregated.

divides the index into six sub-categories: the right to establish and join worker organizations; the right to bargain; the right to strike; the right to engage in other union activities; restrictions on rights in export processing zones; and civil liberties. Kucera presents a “raw” score based on a simple summation of the dichotomous coding of each indicator (“1” for evidence of violation – that is, for one or more violation – and “0” for no evidence of violation). Finally, the raw score is scaled from 0 to 10. For the weighted index, Kucera evaluates the severity of the violation and assigns weights of 1, 1.25, 1.5, 1.75, or 2, before summing the weighted indicators into a composite index.

Kucera’s 37 indicators are as follows:

Freedom of association/collective bargaining-related civil liberties

1. Murder or disappearance of union members or organizers
2. Other violence against union members or organizers
3. Arrest, detention, imprisonment or forced exile for union membership or activities
4. Interference with union rights of assembly, demonstration, free opinion, free expression
5. Seizure or destruction of union premises or property

Right to establish and join unions and worker organizations

6. General prohibitions
7. General absence resulting from socio-economic breakdown
8. Previous authorization requirements
9. Employment conditional on non-membership in union
10. Dismissal or suspension for union membership or activities
11. Interference of employers (attempts to dominate unions)
12. Dissolution or suspension of union by administrative authority
13. Only workers’ committees and labor councils permitted
14. Only state-sponsored or other single unions permitted
15. Exclusion of tradeable/industrial sectors from union membership
16. Exclusion of other sectors or workers from union membership
17. Other specific *de facto* problems or acts of prohibition
18. Right to establish and join federations or confederations of unions

19. Previous authorization requirements regarding evaluation criteria 18

Other union activities

- 20. Right to elect representatives in full freedom
- 21. Right to establish constitutions and rules
- 22. General prohibition of union/federation participation in political activities
- 23. Union control of finances

Right to bargain collectively

- 24. General prohibitions
- 25. Prior approval by authorities of collective agreements
- 26. Compulsory binding arbitration
- 27. Intervention of authorities
- 28. Scope of collective bargaining restricted by non-state employers
- 29. Exclusion of tradeable/industrial sectors from right to collectively bargaining
- 30. Exclusion of other sectors or workers from right to collectively bargain
- 31. Other specific *de facto* problems of acts of prohibition

Right to strike

- 32. General prohibitions
- 33. Previous authorization required by authorities
- 34. Exclusion of tradeable/industrial sectors from right to strike
- 35. Exclusion of other sectors or workers from right to strike
- 36. Other specific *de facto* problems or acts of prohibition

Export Processing Zones

- 37. Restricted rights in EPZs

Emmanuel Teitelbaum (2009) evaluates and criticizes Kucera's methodology.

Teitelbaum uses Item Response Theory (IRT), which "perform[s] similar functions for dichotomous and ordinal variables that factor analysis performs for continuous variables."

(Teitelbaum, 2009, p. 7). He concludes, affirmatively, that most of Kucera's 37 indicators in fact measure a single underlying concept, the propensity to violate labor rights.

However, five important indicators do not correlate with the underlying concept: a general

prohibition on unions; a general prohibition on collective bargaining; a general prohibition on strikes; the permission exclusively of enterprise-level workers councils as distinct from genuine unions; and the absence of unions due to socio-economic breakdown.

Teitelbaum concludes that Kucera's methodology may not be applicable to all countries and may be especially inappropriate for countries that lack a strong labor movement, are at low levels of development, or experience state failure – the reason being that violations of union rights may not arise in such countries. Countries at low levels of development rank high in Kucera's model because their industrial sectors and hence union density are small. In addition, Kucera's model perversely yields positive ranking for countries with weak labor movements caused by repressive government policies. Hence, the model may find little restriction of labor rights in countries with severe human rights violations and low levels of democracy. For example, Bosnia, Kyrgyzstan, and Mozambique ranked high in Kucera's index. For similar reasons, the relationships among Kucera's sub-categories are not well-conceptualized; some individual indicators do not measure the underlying concept; and some indicators are redundant (e.g., the government will not "need" to violate specific union rights if the government entirely represses the labor movement). These conceptual problems are aggravated by Kucera's basic method of relying strictly on "revealed" violations published in the three reports that constitute his database.

Teitelbaum's analysis shows the importance of formulating indicators that distinguish among the causes of weak labor movements – in order to achieve "conceptual equivalence." He explicitly addresses the problems that countries with high levels of union

density may be “penalized” relative to countries whose labor movements are too weak to assert worker rights. And he explicitly addresses the problem that the weakness in labor movements may be due (1) to government repression of civil rights, which might not be captured in “revealed labor violations” because the government’s successful campaign of civil-rights intimidation causes low union density and requires no additional specific labor violations, or alternatively, (2) to exogenous variables such as low levels of industrial development or to civil strife. (Teitelbaum, 2009, pp. 13-14). Teitelbaum therefore generates three modified indices using three different measures of labor mobilization: union density, strike frequency, and strike volume. The results seem more satisfying than Kucera’s. Democratic countries with stronger labor movements rank higher in Teitelbaum’s overall indices of labor rights compliance, even while Teitelbaum’s indices correlate well with Kucera’s indices.

There are, however, additional significant limitations to both Kucera’s indicators and to Teitelbaum’s modification of those indicators. First, as a matter of conceptual validity, Teitelbaum takes the murder of trade union leaders as his fixed measure of the underlying concept (propensity to violate rights of association and collective bargaining). While murder of union leaders is doubtless a strong measure of labor rights violations, it may not be present in sufficiently large numbers or across sufficiently numerous countries to serve the function assigned to it by Teitelbaum – the function, that is, of determining construct validity. To put it differently, that indicator may yield many false negatives as well as true positives.

Second, and even more important for our purposes, the list of 37 indicators

predominantly comprises *de jure* rules of law and outcome indicators. The *de jure* rules, for example, include: a requirement of government authorization of unions prior to organizing; the right to establish federations of unions; the right to establish union constitutions and rules; compulsory binding arbitration; and so on. The outcome indicators, for example, include the murder of trade unionists, seizure of union property, administrative dissolution of unions, employer attempts to dominate unions, and so on.

There are no indicators that would fall into the category of “enforcement efforts,” “enforcement machinery,” or “effective enforcement” – the second of three major categories in the NAS-ILAB methodology. Hence, there are no measures of the structure, procedure, and resources of labor courts, labor inspectorates, labor prosecutorates, and other components of the government apparatus that enforces labor rights.

Kucera’s justification of this lacuna highlights the divergence between the purposes of his indicator methodology and the purposes of the NAS-ILAB methodology. He recognizes that in his methodology “[w]hen a violation of trade union rights occurs but is remedied, it is nonetheless still coded as a violation.” (Kucera, 2007, p. 171). He argues, essentially, that legal remedies can never wholly compensate workers for violations. Even if this is so, however, the stronger the remediation of legal remedies, the greater not only the benefit to workers but also the deterrent effect against future violations. He also argues that even remedied violations cause social instability which, in turn, causes reductions in the dependent variables that interest him most, namely trade and foreign direct investment. The same counter-argument applies to that argument as to his first argument. Finally, he argues that his three information sources were anecdotal and often

did not indicate whether violations were remedied. This highlights the fact that Kucera's analysis is not systemic. That is, he relies on *ad hoc* reports of case-by-case violations, regardless of the number of violations, regardless of the selection bias in the three sources on which he relies, and regardless of the quality and degree of the government's institutional, systemic effort to remedy violations *ex post* and deter them *ex ante*.

Third, Kucera does not distinguish clearly between violations by employers and violations by government officials. This may or may not be consistent with his ultimate purpose of measuring (through econometric analysis) the effect of actual denial of rights on trade and foreign direct investment. But it decouples his indicators from the ultimate question in our project, which is compliance by our trading partners' governments with core labor rights and acceptable conditions of work. It is true that violations or non-violations by employers may be important indicators of the adequacy of government enforcement efforts, either because high rates of employer non-compliance indicate a relatively large social problem that calls for a higher degree of government enforcement efforts or because high rates of employer non-compliance indicate the failure of government enforcement efforts to deter employer violations. But Kucera's methodology does not attempt to specify the descriptive or normative relationship between indicators of employer non-compliance and Indicators of government violations or government enforcement efforts.

More generally, his indicators do not clearly articulate the triangular nature of labor rights. That is, in many areas of human rights, the exclusive question is whether the government is repressing rights. For example, in the field of criminal rights: does the

government provide due process in criminal trials? In the area of labor rights, though, the question is twofold: First, is the government directly repressing rights (by, for example, using riot police to break a strike or by imposing government-controlled unions)? Second, is the government failing to protect workers against employer violations of rights (by, for example, failing to provide adequate legal redress when employers fire workers for engaging in union activity)? If a given indicator asks only whether the employer is violating worker rights (by, for example, firing workers for engaging in union activity), the indicator does not speak directly to the question whether the government machinery is providing adequate *ex post* remedies to the worker (by, for example, providing fair and expeditious hearings to workers, and ordering reinstatement and back pay to a worker found to have been fired for engaging in union activity) or adequate *ex ante* deterrence of the employer violation in question (by, for example, holding the threat of punitive damages over employers' heads).

The point is this: Indicators should clearly specify whether the violation in question is by the government or by an employer; and if the violation is by an employer, the indicator methodology should make clear whether that violation is (a) an indicator of the degree of the social problem that calls for some proportionate, effective government response, (b) an outcome indicator of the failure or success of government efforts to deter employer non-compliance *ex ante*, or (c) a case-specific failure of government inspectorates, prosecutories, or labor tribunals to provide *ex post* redress to workers who are victims of the employer violation.

Fourth, Kucera's and Teitelbaum's individual indicators are, like the NAS-ILAB

indicators, excessively vague, ambiguous, and double-barreled. One could have little confidence that different analysts using the Kucera/Teitelbaum instrument would reach similar results. As just mentioned, in many indicators it is unclear whether the “violations” are those committed by the government, those committed by employers, or both. Here are some examples of other ambiguous and double-barreled indicators:

“Interference with union rights of assembly, demonstration, free opinion, free expression.” [double-barreled; ambiguous, since these are extremely abstract rights; does not specify what degree of interference is violative]

“Other specific problems or prohibitions with respect to union organizing.” [ambiguous; open-ended, and therefore intrinsically double-barreled]

“Other specific problems or prohibitions with respect to collective bargaining.” [ambiguous; open-ended, and therefore intrinsically double-barreled]

“Intervention of authorities in collective bargaining process.” [open-ended and ambiguous, since almost all countries have rules governing collective bargaining, and many such rules are valid under international standards, such as enforcement of employer’s obligation to bargain in good faith]

Kucera does provide explanatory “coding rules” for each indicator, but these provide inadequate guidance for analysts to assess what degree and type of violation is sufficient to code for non-compliance.

Fifth, the indicators are binary, assigning “1” to cases of any violations, regardless of the number of violations. Kucera is aware of this problem: “The method is reproducible because it is rigid....Consider the problem of dismissal for union activities. This method treats one dismissal the same as a thousand....” Moreover, he concedes that the “sources are, in many respects, anecdotal in nature and it is not clear how telling and representative these anecdotes are. It is not difficult to imagine, for instance, that there might have been

in nearly every country in the world at least one dismissal of an employee for union-related activities in the 1993 to 1997 period, while such violations are only reported for a smaller share of countries in our three sources.” (Kucera, 2007, pp. 163, 165). There surely was at least one firing for union activity in all or nearly all countries during that period.

Sixth, in Kucera’s methodology, many of the indicators overlap. As a result, a single employer violation reported, say, by the ITUC will in many instances trigger a finding of non-compliance with more than one indicator. This problem – reflecting in part the ambiguity of many Indicators – raises difficult questions about the soundness of the weighting of particular indicators (since the weight of an indicator is effectively amplified when the same evidence triggers a second indicator) and the conceptual validity of the relationship between specific indicators and the composite index.

Despite these problems Kucera’s methodology, as revised by Teitelbaum, is laudable for taking on the question of ineffective enforcement, unlike some methodologies that look only to *de jure* norms or to highly simplified measures of adequate enforcement. For example, Block uses a single indicator of ineffective enforcement – namely, a party’s right to appeal an agency decision to court. (Block, 2007). One might think *a priori* that such a right strengthens workplace protections, by giving workers a second bite at the apple and therefore additional leverage against the employer in settlement negotiations. But Block surmises the opposite: that the right of appeal is likely to cause delay and that courts are likely to be more pro-employer than administrative agencies. But whether his surmise is right or wrong, this single indicator is highly contingent. That is, some legal systems afford a right of judicial appeal from all agency decisions (not just in the labor

field) as a matter of general administrative law or on fundamental principles of the rule of law. This contingent element of any given legal system may bear little relation to the panoply of labor-specific institutions, budgets, staff, and case processing.

Kucera's methodology could be said to pursue an intermediate strategy in terms of replicable coding of indicators of effective enforcement. Based on a reading of the reports of the State Department, ITUC, and Committee on Freedom of Association, the analyst must make a judgment about the severity of violations pertaining to an indicator. By contrast, the methodology proposed by Cuyvers and Van Den Bulcke requires the analyst to actually count the number of violations reported by the State Department and the ITUC. (Cuyvers and Van Den Bulcke, 2007). While this methodology is strictly reproducible, it promises little by way of measuring the underlying concept. That is, the number of cases (of, say, anti-union dismissals) reported in those documents is sheer happenstance. If the strategy is to determine the actual number of violations, then the place to start is the country's judicial and administrative records. Such records are likely to provide a larger and more accurate sample, at least as to governments that are not highly repressive; and as to the repressive governments, the *number* of violations (how *many* individual unionists discharged?) reported by the ITUC and State Department are so arbitrary as to mean little from country to country.

At the other end of the spectrum is the methodology of Viederman and Klett. (Viederman and Klett, 2007). Their approach, used by the non-governmental monitor called Verité, might be labeled the kitchen sink method or perhaps more aptly the cuisinart strategy. They rely on an open-ended range of evidence for any given country – data from

any source, reports from public and private bodies, interviews with officials, managers, workers, etc. They then make a subjective assessment (blending the assorted evidence in the cuisinart) of compliance with a range of indicators. As they acknowledge, their assessment is not rigorously reproducible. The cuisinart method, notwithstanding my facetious label, should not in fact be dismissed out of hand. Specialists in labor law who spend time immersed in a country's legal system may produce a fairly reliable and consistent judgment at least about some matters, such as whether in the vast majority of meritorious cases labor tribunals provide expeditious, independent and adequate remedies to workers who are discharged for anti-union motives. Even employer-side and employee-side labor attorneys may converge in such consistent judgments, when speaking candidly to analysts. In such contexts, there is often an indisputable quality to manifest facts.

In any event, Kucera's methodology stands as the leading effort to measure compliance with freedom of association and collective bargaining rights – in light of the Tripartite Experts' endorsement of the methodology, and in light of social scientists' use of the methodology. The *American Political Science Review*, as recently as November 2009, published an article by Greenhill et al., using Kucera's methodology in modeling the trade-based diffusion of labor rights. (Greenhill, et al., 2009). For another use of Kucera's methodology by political scientists, see Mosley, et al. (2007).

c. Zarka-Matres and Guichard-Kelly OSH Indicators

While Kucera's work was confined to freedom of association and collective bargaining, the PID published a Working Paper in 2005 by Zarka-Matres and Guichard-

Kelly that elaborated the Decent Work indicators (“criteria”) for two other standards: occupational safety and health, and migrant labor. (Zarka-Martres, et al., 2005). Their research was also published in 2007 in the anthology on *Qualitative Indicators of Labor Standards*. (Zarkes-Matres, et al., 2007). Their OSH indicators were based on survey responses by governments, labor unions, and business organizations. The survey itself was based principally on the ILO Conventions and Recommendations pertaining to workplace health and safety. Zarkes-Martres and Guichard-Kelly reduced the survey responses to 13 Indicators on national law and practice, each indicator linked to specified provisions of Conventions and Recommendations. They concluded from the survey that the ILO Conventions and Recommendations in fact cover “the most essential aspects of OSH.” (Zarka-Martres, et al., 2005, p. 4). Each of the 13 indicators is broken down into several sub-indicators. There are 86 sub-indicators in total.

To illustrate the level of specificity and comprehensiveness of the OSH indicators, here are categories 2 and 3, along with the sub-indicators under each of those categories:

Indicator 2: Coverage of National OSH Legislation:

1. National OSH legislation covers all branches of economic activity
2. National OSH legislation covers all categories of workers
3. Existence of specific provisions for other [specific] branches of activity or occupational hazards.
4. Existence of exclusions from the application of OSH provisions in whole or in part of branches of economic activity, or of specific categories of workers.
5. National OSH legislation includes provisions applicable to the following branches of economic activity:
 - a. Construction
 - b. Commerce and offices
 - c. Agriculture
 - d. Mines

- e. Major hazard installations
- 6. National OSH legislation includes provisions concerning the following occupational hazards:
 - a. Air pollution
 - b. Noise
 - c. Vibration
 - d. Ionizing radiations
 - e. Chemicals
 - f. Carcinogenic substances and agents
 - g. Asbestos
 - h. Benzene and products of benzene
 - i. Lead
 - j. Machinery
 - k. Manual lifting.

Indicator 3: Existence of National Preventive and Protective OSH Measures

Existence of technical OSH rules and measures including in relation to:

- l. The identification and determination of occupational hazards
- m. The prohibition, limitation or other means of control of exposure
- n. The assessment of risks and levels of exposure
- o. Prohibition or limitation of use of hazardous processes, machinery and equipment and hazardous chemical, physical and biological agents
- p. The specification of exposure limits and related criteria including periodic revision and updating of exposure limits
- q. The surveillance and monitoring of the working environment
- r. The replacement of hazardous chemicals and processes by less hazardous ones
- s. The notification of hazardous work and the related authorization and control requirements
- t. The classification and labeling of hazardous chemicals and the provision of related data sheets
- u. The provision and use of personal protective equipment
- v. Safe methods for the handling, collection, recycling, and disposal of hazardous waste
- w. Working times arrangements (such as hours of work and rest periods, etc.)
- x. Adaptation of work installations, machinery, equipment and processes to the physical and mental capacities of the workers, taking ergonomic factors into account
- y. Design, construction, layout and maintenance of workplaces and installations

- z. Design, construction, layout, use, maintenance, testing and inspection of machinery, tools and equipment
- aa. The provision of adequate welfare facilities (such as drinking water and sanitary eating and changing facilities).

(Zarka-Martres, et al., 2005, Appendix 5).

These decent work OSH indicators are more specific and comprehensive than the decent-work freedom of association indicators discussed above. Even so, it is apparent that the OSH indicators are often incomplete, ambiguous, or double-barreled. For example, “the existence of technical OSH rules and measures...in relation to the identification and determination of occupational hazards” does not specify how comprehensive such rules and measures should be, how up-to-date (i.e., how frequently revised) the rules and measures should be, or with what degree of rigor the hazards should be identified. These are open-ended questions regarding the *process* that the competent OSH agencies should implement. The OSH indicators pertaining to the *substantive* rigor of OSH standards are even more poorly specified. Although these deficiencies are mitigated to some degree by a grid system, which points analysts to the specific ILO Conventions and Recommendations underlying each indicator, each analyst must interpret the relevant Convention or Recommendation, which itself typically contains multi-pronged, ambiguous language.

Finally, the ILO researchers strongly reject any attempt to rank countries or quantify their performance:

[U]sing the country profiles based on normative indicators as a ranking system could defeat the purpose; that is the promotion and progressive implementation of the standards. Finally given the complex nature of the standards, if the normative indicators are meant to analyze the legal situation in a country with respect to the

objectives outlined in the standards, then the result can only be qualitative and not quantitative.

(Zarka-Martres, et al., 2005, p. 13).

The OSH indicator methodology therefore lacks a weighting system, does not present substantial conceptual justification for the categories and sub-categories of indicators (other than pointing to relevant Conventions and Recommendations), and does not attempt to validate the body of indicators by reference to aggregate concepts or purposes.

d. Decent Work Pilot Program

While researchers undertook these efforts at developing Indicators, the ILO engaged in several practical initiatives to test and develop decent work policies and indicators, beginning in 2000 with the Decent Work Pilot Program (DWPP). (ILO, 2006). Eight countries participated in the Pilot Program: Bahrain, Bangladesh, Denmark, Ghana, Kazakhstan, Morocco, Panama and the Philippines. The predominant purpose of the Pilot Programs was to integrate ILO efforts into a coherent agenda based on the four prongs of decent work. The Pilot Programs were therefore more in the nature of policy initiatives than of indicator application and development. Nonetheless, indicators were used in various ways in the Pilot Programs of Bangladesh, Ghana, Argentina, Morocco, and the Philippines (ILO, 2006, pp. 77-80), with some lessons for the current research.

The Pilot Programs initially applied the original set of decent work indicators constructed in 2002 by the ILO Statistical Development and Analysis Group (SDA) – 29

indicators measuring 10 criteria, plus 8 additional indicators for socio-economic context.

(see Anker, et al., 2002). The body of indicators was used for national profiles of Bangladesh and Ghana. The ILO found that data availability *per se* was not problematic, but that other severe problems infected data sources:

The main problem was the diversity of sources, ranging from recurrent national surveys or census to *ad-hoc* and one-off sample surveys of limited coverage. Data is [sic] therefore often of limited quality, not sufficiently disaggregated (for example) by gender, not comparable, cannot be used for cross-tabulations and is not very timely.

(ILO, 2006, p. 78). Interestingly, problems in the application of indicators elicited proposals for alternative or supplementary indicators “to better capture specific country features” (ILO, 2006, p. 78), including aspects of the informal sector which accounted for a large share of the national workforce. The interaction between the ILO and national statistical offices and other national actors prompted national initiatives to improve data collection, including in some instances labor force surveys based on ILO definitions.

The most comprehensive application of decent work indicators was undertaken by the Philippines, which formally adopted the decent work agenda as a national goal. The Philippines reduced the original SDA indicators to six criteria encompassing 18 indicators. Tripartite national deliberations set optimum or maximum values for each indicator. The optimum or maximum was set at 100. Indicator values were then expressed as a percentage of 100, and were weighted. The two employment criteria (work opportunities and freedom of choice) made up half the total, and the other 4 criteria (productive work, equity in work, security in work, and representation at work) were each weighted 12.5 percent of the total. The indicators were then aggregated into a single Philippine Labor

Index (PLI).

The ILO was critical of the Philippines' effort to create a single index. First, the aggregate index showed a minor overall improvement in decent work, but this masked the significant worsening of one criteria (employment), the significant improvement in one other (representation), and the minor improvement in a third (security). More broadly, the ILO was harshly critical of efforts to compare or rank countries through an aggregate index. "Differences in definitions, data collection methods and the context in which the indicators have to be interpreted render comparisons between countries all but useless." (ILO, 2006, at p. 80). On the other hand, the ILO advocated the use of indicators to show trends over time for individual countries. Even there, however, the ILO abjured the use of indicators to evaluate specific governmental policies and institutions. "There are strong confounding factors, including national and international economic cycles, fiscal constraints and external shocks, which can mask or reverse the effect of policies and programs implemented to promote decent work." (ILO, 2006, at p. 80.) The ILO was more positive about Morocco's use of performance indicators at the sectoral level (textiles and garments). Morocco used six sets of performance indicators, including indicators for occupational safety and health, working conditions, social conflict, job training, production, and employment. The effect of exogenous variables, such as growth, investment, productivity, and exports, were modeled.

e. Discussion Paper for Tripartite Meeting

In the next major initiative on decent work indicators the ILO Governing Body, in its

March 2008 session, established a Tripartite Meeting of Experts to explore alternative strategies for measuring the various dimensions of decent work. The International Labor Office then prepared a *Discussion Paper for the Tripartite Meeting of Experts on the Measurement of Decent Work*, for a meeting in Geneva in September 2008. (ILO, 2008). That meeting was followed by several projects of ILO bodies and officers. The Chairperson of the Tripartite Meeting issued a *Report* of the deliberations of the meeting, and the Office issued a Revised Proposal for decent work indicators. In addition, the Office prepared a report of the Tripartite Meeting to the 18th International Conference of Labor Statisticians (ICLS) which convened in November – December 2008. The ICLS then established a Working Group on the Measurement of Decent Work, chaired by the United Kingdom. On the basis of a resolution by the Working Group, the ICLS recommended that the Office prepare decent-work country profiles for several pilot countries, including low-, middle-, and high-wage countries; define and carry out developmental work on quantitative decent work indicators based on international statistical standards; and report on these efforts to the 19th ICLS. Austria, Brazil, Malaysia, Tanzania, and Ukraine agreed to work with the Office on pilot country profiles.

Two country profiles have thus far been published (Austria and Brazil, the latter available only in Portuguese). In addition, the ILO Director-General submitted his *Fifth Supplementary Report: Measuring Decent Work* to the Governing Body in November, 2009. According to the November 2009 *Report*, the Office was developing a framework of indicators for freedom of association and collective bargaining, building on the work by Kucera discussed and criticized above. “The framework contains more than 100 separate

categories for possible violations of employer's and worker's rights, both in law and in practice." (ILO 2009, p. 3). For coding this framework, the source documents include comments by the Committee of Experts on the Application of Conventions and Recommendations, the Conference Committee on the Application of Standards, and the Committee on Freedom of Association. For each country two points in time were coded – 2000 and 2008. This pilot phase was under internal review as this literature review was drafted.

It is interesting that according to the 2009 *Report* the coding scheme for the framework on freedom of association relies, as a *formal* matter, exclusively on comments by three ILO supervisory bodies. These supervisory mechanisms typically provide spotty coverage of the law and enforcement efforts of ILO member states. Perhaps for this reason, the 2009 Report indicates that in preparing the country profiles, a much wider database has been or will be consulted – including statistics maintained by national statistical offices, ministries of labor, social security and workplace safety bureaus, as well as national legislation, legal databases, and documents produced by the ILO supervisory bodies. The Office also convened tripartite workshops from country to country to discuss and validate draft chapters of the country profiles. The Director-General's 2009 *Report* stated:

The close involvement of constituents in the pilot countries proved to be an essential element for the success of the decent work country profiles. It allowed the Office to draw on the ILO's strength as a tripartite organization and to utilize the expertise and experience of ministries of labor and employers' and workers' organizations. Likewise, the close collaboration with national statistical offices and other institutions was crucial to ensure that the analysis was based on reliable and high-quality statistics.... [C]onstituents endorsed an open discussion of

shortcomings in their countries and appreciated a critical review of progress towards decent work.

(ILO, 2009, p. 6). This quotation points to the challenges faced by analysts charged with applying indicators, if analysts do not work directly with national statistical offices, labor organizations, and other in-country sources.

According to the Office, the collection of statistical Indicators was “feasible.” (ILO, 2009, p. 7). “It proved helpful that the indicators largely drew on established statistical concepts.” (ILO, 2009, p. 7). However, even with the collaboration of national statistical offices and other in-country actors, data was unavailable for one-quarter of indicators, though in some cases the Office filled the gap with “closely related indicators.” (ILO, 2009, p. 7).

The 2009 *Report* concluded that only minor adjustments to the overall structure of decent work indicators were called for – in some cases, to align legal terminology with ILO Conventions, and in others to formulate indicators that are more conceptually intuitive (such as making the gender wage gap a main Indicator for equal gender opportunity, in place of an indicator of occupational segregation by sex). The *Report* also concluded – based on the view of country constituents, ICLS delegates, and the Tripartite Meeting of Experts – that the decent work indicators did not adequately capture discrimination on the basis of disability and migrant status. Most notably, as mentioned above, the 2009 *Report* states that the new indicators for freedom of association, collective bargaining, and non-discrimination are building, or should be built, upon the methodologies of Kucera and Anker. Until we see the application of the new quantitative indicators in pilot studies, we

are unable to assess the degree to which they have addressed the various problems in those methodologies noted above. Meanwhile, the January 2011 Working Paper (mentioned above and discussed in detail below) leaves the strong impression that the ILO may not in fact publish quantitative indicators, let alone a composite index methodology.

As of this date, then, the ILO's most thorough, up to date, and publicly available discussion of decent work indicators is the above-mentioned 2008 *Discussion Paper for the Tripartite Meeting of Experts on the Measurement of Decent Work* ("2008 Discussion Paper").⁷ The 2008 *Discussion Paper* rejects the strategy of creating a composite index that ranks countries, on the ground that such indices "fail to provide appropriate context and often require the use of restrictive assumptions in order to build a comparative database." (ILO, 2008, p. 3). Nonetheless, the *Discussion Paper* does concede that ILO constituents and others "appreciate comparative information," and that in so far as possible "country information should therefore be presented in a format and using methodologies that facilitate comparisons." (ILO, 2008, p. 3).

The *Discussion Paper* argues for a combination of numerical statistical indicators and qualitative indicators of legal frameworks and effective application of law. (ILO, 2008, p. 11). The *Paper* assumes that questions of freedom of association and collective bargaining ("social dialogue") and the application of international labor standards more generally do not lend themselves to quantitative measurement. The *Paper* maintains, however, that qualitative indicators of social dialogue and international standards can yield

⁷ The work of the Tripartite Meeting is placed in the larger context of the range of ILO statistical efforts in the *General Report of the 18th International Conference of Labor Statisticians* published in late 2008. (ILO, 2008b.)

“objective measures.” (ILO, 2008, p. 3). In contrast, questions of wages and hours can be captured in quantitative statistics.

The *Discussion Paper* advocates the formulation of a “common set of main indicators” to capture the four pillars of decent work, *plus* indicators that capture “country-specific circumstances and priorities.” Tripartite national dialogues would then “examine” – and presumably condense or modify – the list of indicators. “The objective would be to establish a template of international relevance that, nevertheless, is capable of adaptation to reflect national circumstances.” (ILO, 2008, p. 4). But again, since “it is unreasonable to expect aggregation of qualitative and quantitative indicators,” the ILO would assess improvements over time based on country profiles that include but are not limited to “a standard list of indicators.” The country profiles would provide readers with links to further information, including ILO and national databases providing legal and statistical information. The *Discussion Paper* envisions the dynamic evolution over time of the list of Indicators.

Because of the importance of the question to the current research, it is worth setting out the *Discussion Paper*’s critique of composite indices:

1. An index aims at aggregating information into a single index number; measuring decent work describes detailed information on all aspects of decent work.
2. An index requires assigning a weight to different aspects of decent work; measuring decent work does not require such a judgment.
3. An index lends itself to the ranking of countries and the comparison between countries; measuring decent work focuses on individual countries and the progress they have made over time.
4. An index is blind to country-specific circumstances; measuring decent work takes them into account.
5. An index would need to convert information on rights at work into a number;

measuring decent work can provide detailed information on rights at work and the legal framework for decent work.

The *Discussion Paper* concludes: “While this list could be expanded upon, it should suffice to demonstrate that the measurement of decent work poses requirements that are fundamentally different from the development of an index.” (ILO, 2008, p. 17).

Let’s consider each of the five arguments in turn. The first and fifth arguments are *non sequiturs*. That is, the fact that indicators are numerous, detailed, and comprehensive does not rule out weighting and aggregating those Indicators. The second argument is a tautology. That is, the *question* we are asking is *whether* we should provide weights to Indicators. If decent work does not use a weighting system, then of course it need not attach weights to Indicators.

The third argument is again a *non sequitur*. An indicator system might well measure progress of individual countries over time and at the same time compare the performance of different countries. Indeed, measuring the progress of a single country over time entails a *comparison* of two states of the world – (1) indicators applied to Country X at time 1, and (2) indicators applied to Country X at time 2. Some metric is necessary to evaluate whether and by how much (2) exceeds or falls short of (1), a comparison that is no different *in principle* than a comparison of (a) indicators applied to Country X at time 1, and (b) indicators applied to Country Y at time 1. It is true that a greater number of significant variables will likely diverge in the second comparison than in the first comparison. (That is, many “contextual” variables may remain constant in the first comparison.) But in both comparisons the analysis is multivariate.

The fourth argument merits more serious reflection. Is a composite index blind to country-specific circumstances? In some abstract sense, a composite index that is based on a common set of indicators applied to all countries will capture only the variables that are impounded in the indicators. But this is not problematic in the sense that the *Discussion Paper* argues. If the body of common indicators *comprehensively and relatively specifically* covers all significant elements of labor rights enforcement, then the contextual variations across countries can be measured by the indicators. For example, an indicator might ask “Do prosecutors rigorously investigate alleged murderers of trade unionists in each instance when prosecutors obtain non-trivial evidence against the alleged murderer?” An analyst applying this indicator to, say, Colombia may take cognizance of the contextual fact that under that country’s Peace and Justice process prosecutors, after accepting guilty pleas from paramilitary defendants, do not pursue evidence that others aided and abetted the convicted defendant. True, this specific contextual circumstance will not exist in other countries, and is for that very reason “country-specific.” But the indicator is not “blind” to the country-specific fact.

This example highlights the common, indeed ubiquitous, nature of jurisprudence: Each legal rule or standard (here, each Indicator) is necessarily written at a certain level of abstraction or generality (although we may presume that the more detailed the better, putting aside for the moment problems of data availability), and must be applied to evidence or data that is less abstract and more particular than the rule, standard, or indicator itself. Nonetheless, the system of rules or indicators may still comprehensively cover all foreseeable variations in the facts on the ground. Each time the general rule is

applied, the application generates a more specific, detailed “sub-rule” – another twig, so to speak, on the branch of a decision tree. The continuous application of the body of rules or indicators over time fleshes out the meaning of each rule or indicator, giving guidance to future analysts about *which* contextual variations are in fact relevant to the concept (the principle or value) that animates or underlies the indicator. So, for example, after applying the indicator just quoted to Colombia, we may formulate a new sub-rule that is *either* specific to Colombia *or* that is highly contextual but nonetheless applicable to other countries. An example of the former: “When alleged murderers of trade unionists plead guilty in the Peace and Justice process, do prosecutors rigorously investigate non-trivial evidence that others aided and abetted the convicted murderer?” An example of the latter: “When alleged murderers of trade unionists plead guilty, do prosecutors rigorously investigate non-trivial evidence that others aided and abetted the convicted murderer?” Either of these sub-indicators does a good job of capturing country-specific circumstances in Colombia. A composite index based on such indicators is not “blind” to country-specific circumstances. By the same token, a decent work country profile will only “see” such a country-specific circumstance if the decent work Indicators are sufficiently refined to open the analyst’s eyes to the circumstance.

There is a converse process that occurs concurrently in the course of applying indicators to country-specific facts: In the course of fleshing out more specific sub-indicators, the analyst might well decide that the various contextual applications of the more general indicator demonstrates that that general indicator should be revised. The more specific instantiations of the indicator show that the principles or values animating

the indicator will be better served (across the many contexts in which the rule is applied) if the contours of the indicator are shifted. We might say that the body of “common” indicators (applied to all countries) “learns” from the contextual applications of the indicators. The *Discussion Paper* calls, in effect, for shutting down this learning process. It says we should not compare the “performance” of common indicators (that is, the meaning of the indicator when applied to varying factual situations) across varying country-contexts. For example, ILAB analysts might find, based on country-by-country assessments, that the fundamental problem is not that prosecutors fail to pursue evidence against alleged murderers of trade unionists, but that higher officials (such as the Minister of Justice or Prime Minister) block prosecutors from pursuing such evidence. Hence, the original indicator might be revised to read: “Do competent government officials (including prosecutors and their superiors) ensure the rigorous investigation of alleged murderers of trade unionists in each instance when the government obtains non-trivial evidence against the alleged murderer?” And the relevant sub-indicator might read: “When alleged murderers of trade unionists plead guilty, do competent government officials (including prosecutors and their superiors) ensure that prosecutors or other government investigators rigorously investigate non-trivial evidence that others aided and abetted the convicted murderer?”

These are issues of specification, prioritization, and aggregation. What of the specific decent work indicators themselves? Do they contain lessons for constructing and refining ILAB Indicators? I have already discussed the 2007 iteration of freedom of association and collective bargaining indicators formulated by Kucera, and the 2005

indicators on occupational safety and health proposed by Zarka-Matres and Guichard-Kelly on behalf of the ILO's PID. The *Discussion Paper* essentially collates the decent work indicators from several different sources:

- The original 29 indicators presented in the General Report of the 17th ICLS in 2003. (ILO, 2003).
- The list of indicators in the Guidebook of the ILO's Regional Office for Asia and the Pacific. (ILO, 2008c).
- The proposed set of indicators presented by the ILO's Regional Office for Latin American and the Caribbean for use within the region.
- The indicators compiled by the ILO's Regional Office for Europe for the Eighth European Regional Meeting of January 2009.
- Suggestions for indicators by an intersectoral task force led by the ILO's Bureau of Statistics.
- The United Nations indicators for new targets under the Millennium Development Goals.
- Statistical indicators for the Quality of Employment Framework constructed jointly by the United Nations Economic Commission for Europe, Eurostat, and the ILO (see below).

Appendix Table 1 of the *Discussion Paper* compares the various lists of indicators contained in the bulleted points above. Appendix Table 2 then collates the indicators, giving a list of all indicators previously proposed in those sources – approximately 75 indicators in total. The *Discussion Paper* calls for a “significant reduction” in the number of indicators “to arrive at a parsimonious set of indicators.” (ILO, 2008, p. 22). Appendix Table 2 therefore recommends that the Tripartite Meeting of Experts consider the following categorization of indicators:

1. Main indicators
2. Additional indicators (to be used by regional and country analysts as they deem appropriate and where data are available)
3. Context indicators (showing economic and social context for decent work)
4. Candidates for future inclusion (for variables as to which data are expected to become available)
5. Complex legal indicators (for inclusion in textual form rather than as a quantitative indicator)
6. Candidates for exclusion from a core list of decent work indicators

(ILO, 2008, p. 22).

The *Discussion Paper* presents a possible three-tier methodology flowing from this analysis. The first tier of indicators comprises “an extremely parsimonious” list of indicators – only five, in fact – currently used by the United Nations to assess the employment-related MDG targets. The second tier adds 13 more indicators to yield 18 “main indicators” for measuring decent work: 5 indicators for employment opportunities; 3 for social security; 3 for social dialogue and workers’ representation; 2 for adequate earnings; 2 for equal opportunity and treatment; 1 for work that should be abolished; 1 for hours; and 1 for workplace safety. The third tier identifies 16 “additional indicators” for country or regional analysis where use of the indicators “appears informative.” (ILO, 2008, p. 23). The *Discussion Paper* therefore did not over-rule the ILO’s Regional Office for Asia and the Pacific, which was already using many of the additional indicators.

f. Deliberations During the Tripartite Meeting

The deliberations during the Tripartite Meeting itself are summarized in the *Chairperson's Report*. (ILO, 2008d). At the Meeting, representatives of the Office presented the *Discussion Paper* to a group of twenty experts: five each nominated by Governments, the Employers group, and the Workers group, and five independent experts. After the experts discussed the *Discussion Paper*, the Office representatives responded.

Several points about the discussion are notable. First, while the employer experts strongly agreed with the Office's view that indicators should not be weighted and aggregated, this point was disputed by government experts, independent experts, and worker experts. Some independent experts noted that other organizations had formulated bodies of indicators that were aggregated into both composite sub-indices and a single composite index, such as the Human Development Index and indices of the World Economic Forum and the U.S. Bureau of Labor Statistics. The *Chairperson's Report* concluded solomonically that indicators should be used for cross-country "comparisons" but not for "ranking countries through an index." (ILO, 2008d, p. 5). Second, the camp of worker and independent experts also argued that fundamental principles and rights at work were central to the measurement exercise and that "the Office paper has been shy to make a sufficiently strong argument" on that point. That is, the consistent position of the Office was that quantitative statistical indicators should be "complemented" by qualitative information about "rights at work and the legal framework." But some experts argued that legal elements could and should be quantified, that indicators respecting legal rights and framework should not be excessively parsimonious, and that such indicators should enable analysts to take account of country-specific circumstances. As evidence that

indicators of this sort were feasible, these experts pointed to the indicators on freedom of association and collective bargaining formulated by Kucera and Anker, discussed above. The Office representatives responded that “it would be warranted” to construct indicators of compliance with the four core labor rights “according to standard evaluation criteria.” However, the Office representatives concluded that “[f]or each of the [fundamental rights] the Office needed to develop clear and sufficiently detailed evaluation criteria to define compliance.” (ILO, 2008d, p. 18).

Evidently, the ILO had not yet developed clear and specific criteria for identifying compliance or non-compliance with the core ILO Conventions. The Office representatives stated, however, that “it was possible” to create such indicators, because the relevant information was embedded in the reports of the ILO supervisory organs and other previous work by the Office, although this information was “not generally easily accessible” and an “important effort would be needed to produce compliance indicators.” (ILO, 2008d, p. 19). It is worth noting, however, that the 2007 work of Kucera (cited by the experts) explicitly excluded the ILO’s Report of the Committee of Experts on the ground that it provided information about freedom of association and collective bargaining only for those countries that had ratified the relevant ILO Conventions. (Kucera, 2007, p. 150 n. 1). Kucera’s indicators, as discussed above, were instead based on reports of the ICFTU, the U.S. State Department, and the ILO Committee on Freedom of Association. By contrast, in constructing proposed OSH indicators, Zarka-Martres and Guichard-Kelly included comments (observations and direct requests) by the Committee of Experts. Those comments, however, were included as qualitative textual material in the relevant cells of a

grid; they were not coded for quantitative measurement, as in Kucera's indicators for freedom of association and collective bargaining.

In any event the Kucera Indicators, if taken as metrics for a country's systemic compliance with freedom of association and collective bargaining rights, suffer from the shortcomings detailed above. Indeed, Kucera made quite clear that his methodology "was constructed for one purpose only: for use in econometric models of such economic outcomes as wages, foreign direct investment and international trade.... [I]t was never thought that the indicator would be suitable for any application for which each country must stand on its own such as for socially responsible investing or monitoring progress in individual countries. The intent in constructing the indicator was, rather, to provide a usable if noisy sense of cross-country variation." (Kucera, 2007, p. 145).

g. Revised Proposed Indicators

Based on the Tripartite Meeting discussions, the International Labor Office published a *Revised Office Proposal For the Measurement of Decent Work Based on Guidance Received at the Tripartite Meeting of Experts on the Measurement of Decent Work* ("Revised Proposed Indicators"). (ILO, n.d.). The Revised Proposed Indicators are the most recent, formally published decent work Indicators. Under the categories of both non-discrimination and social dialogue, the Revised Proposed Indicators themselves include the following Indicator: "Indicator for Fundamental Principles and Rights at Work to be developed by the Office." This placeholder is identified as a "main indicator" for freedom of association and collective bargaining (social dialogue) and as an "additional

indicator” (rather than main Indicator) for non-discrimination (equal opportunity and treatment in employment).

The Revised Proposed Indicators include indicators that are relevant to each of the rights and standards that are the subject of the current research project. The Revised Proposed Indicators continue the categorization scheme of the Discussion Paper for statistical indicators: main indicators (“M”); additional indicators (“A”); candidates for future inclusion based on developmental work by the Office (“F”); and indicators of social and economic context (“C”). The Revised Proposed Indicators also note – with the parenthetical (S) – that certain indicators should be presented both in total and in breakdowns for men and women. In addition, alongside the statistical indicators, the Revised Proposed Indicators provide a cell for “information on rights at work and the legal framework for decent work.” The relevant information to be entered into each cell is marked “L.” The Revised Proposed Indicators describe the information on rights and legal framework (which is to be entered in the relevant cell) as follows: “Description of relevant national legislation in relation to the substantive elements of the Decent Work Agenda; where relevant, information on the benefit level; evidence of implementation effectiveness and the coverage of workings in law and practice; complaints and representations received by the ILO; observations by the ILO supervisory system and cases of progress; information on the ratification of relevant ILO Conventions.” In other words, the Revised Proposed Indicators make clear that matters pertaining to rights, legal framework, and legal practice are to be described in a discursive, open-ended fashion, rather than in standardized form that can easily generate cross-country or inter-temporal metrics.

Here are the relevant Revised Proposed quantitative indicators and qualitative categories of legal information, using the categorization scheme provided above (M, A, F, C, S, and L). The bracketed notations are the Office's, except when identified as this author's ("MB"):

Social dialogue, workers' and employers' representation

[MB: relevant to freedom of association and rights of collective bargaining]

- M – Union density (S)
- M – Enterprises belonging to employer organization [rate]
- M – Collective bargaining coverage rate (S)
- M – Indicator for Fundamental Principles and Rights at Work (Freedom of Association and Collective Bargaining) to be developed by the Office

- A – Strikes and lockouts/rates of days not worked [interpretation issues]

- L – Freedom of association and right to organize
- L – Collective bargaining right
- L – Tripartite consultations

Equal opportunity and treatment in employment

[MB: relevant to non-discrimination and equality]

- M – Occupational segregation by sex
- M – Female share of employment in ISCO-88 groups 11 and 12

- A – Gender wage gap
- A – Indicator for Fundamental Principles and Rights at Work (Elimination of discrimination in respect of employment and occupation) to be developed by Office
- A – Measure for discrimination by race/ethnicity/of indigenous people/of (recent) migrant workers/of rural workers where relevant and available at the national level

- F – Measure of dispersion for sectoral/occupational distribution of (recent) migrant workers
- F – Measure for employment of persons with disabilities

- L – Anti-Discrimination law based on sex of worker

L – Anti-Discrimination law based on race, ethnicity, religion or national origin

Adequate earnings and productive work

[MB: relevant to acceptable conditions of work: wages]

M – Working poor (S)

M – Low pay (below 2/3 of median hourly earnings) (S)

A – Average hourly earnings in selected occupations (S)

A – Average real wages (S)

A – Minimum wage as % of median wage

A – Manufacturing wage index

A – Employees with recent job training (past year / past 4 weeks) (S)

L – Statutory minimum wage

Decent hours

[MB: relevant to acceptable conditions of work: hours]

M – Excessive hours (more than 48 hours per week, ‘usual’ hours) (S)

A – Usual hours worked (standardized hour bands) (S)

A – Annual hours worked per employed person (S)

A – Time-related underemployment rate (S)

F – Paid annual leave

L – Maximum hours of work

L – Paid annual leave

Safe work environment

[MB: relevant to acceptable conditions of work: occupational health and safety]

M – Occupational injury rate, fatal

A – Occupational injury rate, non-fatal

A – Time lost due to occupational injuries

A – Labor inspection (inspections per 10,000 employed persons)

L – Occupational safety and health insurance

L – Labor inspection

The Revised Proposed Indicators also include a list of indicators for “economic and social context for decent work.” It is worth listing these as well, since the current project may consider some of these variables for “adjustment” of indicators based, for example, on level of economic development.

- C – Children not in school (% by age) (S)
- C – Estimated % of working-age population who are HIV positive
- C – Labor productivity (GDP per employed person, level and growth rate)
- C – Income inequality (percentile ratio P90/P10, income or consumption)
- C – Inflation rate (CPI)
- C – Employment by branch of economic activity
- C – Education of adult population (adult literacy rate, adult secondary-school graduation rate) (S)
- C – Labor share in GDP
- C (additional) – Real GDP per capita in \$PPP (level and growth)
- C (additional) – Female share of employment by industry (ISIC tabulation category)
- C (additional) – Wage/earnings inequality (percentile ratio P90/P10)

- L – Developmental work to be done by the Office to reflect environment for sustainable enterprises, including Indicators for (1) education, training, and life-long learning, (ii) entrepreneurial culture, (iii) enabling legal and regulatory framework, (iv) fair competition, and (v) rule of law and secure property rights.
- L – Developmental work to be done by the Office to reflect other institutional arrangements, such as scope of labor law and scope of labor ministry and other relevant ministries.

Again, it is difficult to fully evaluate these Revised Proposed Indicators in light of the fact that the Office has not yet specified the relationship between these indicators and any future body of quantitative indicators that the Office may produce for measurement of compliance with the core rights. Nonetheless, the main indicators for the three categories of acceptable conditions (wages, hours, safety and health) are outcome indicators, in

keeping with the initial purpose of measuring the “decency” of actual working conditions rather than measuring enforcement of rights *per se*. Those outcome indicators are lean: two for adequacy of earnings (working poor, and wages below 2/3 of average); one for decent hours (“usual” hours of more than 48 per week); and one for safe work environment (rate of fatal occupational injuries). Most relevant for acceptable conditions respecting *minimum* wages – which is the specific standard in question in the current research project – is the “additional indicator” of minimum wage as a percentage of median wage. The main indicators for worker representation and equality are also outcome indicators: three for worker representation (union density, density of enterprises in employer organizations, and coverage of bargaining), and two for equality (sex segregation by occupation, and rates of female employment in higher level jobs) although five other main indicators require breakdown by gender.

h. Pilot Country Profiles for Austria and Brazil

As noted above, two decent-work country profiles (for Austria and Brazil) were conducted following the construction of the Revised Proposed Indicators. The Austrian profile was vetted in a tripartite workshop among stakeholders in September 2009, and the final profile was published in late 2009. (ILO, 2009d). The Brazilian profile was discussed in a tripartite workshop conducted in August 2009 (ILO, 2009b) and the final profile was published in late 2009. (ILO, 2009c).

Although the Austrian and Brazilian country profiles were published quite recently and were explicitly framed as follow-ups to the 2008 Tripartite Meeting, it is not clear

whether the indicators used in those profiles reflect the Office's development – as reported in the ILO Director-General's *Fifth Supplementary Report* of November 2009 (ILO, 2009) – of any forthcoming quantitative indicators for freedom of association and collective bargaining. Probably not. The Director-General's Report referred to a body of some 100 indicators. The Austrian and Brazilian country profiles apply the Revised Proposed Indicators of 2008, albeit with the addition of a small number of other indicators. These additional indicators may simply reflect *ad hoc* supplements devised by national stakeholders and analysts, as encouraged by earlier Office pronouncements.

In any event, the additional indicators in the Austrian *Report* on the question of equal opportunity and treatment are: gender pay gap, employment to population ratio for older workers (broken down by gender), employment to population ratio for migrant workers (broken down by gender), and employment to population ratio of general workforce ages 15-64 (broken down by gender). The additional indicator for adequate earnings is: mean gross hourly wage. The additional indicators for decent hours are: hours exceeding 48 per usual week (broken down for self-employed and employees); average hours worked per usual week (broken down by gender); and part-time workers as percentage of employment population (broken down by gender). The additional indicators for safe work environment are: occupational injury rate (non-fatal) per 100,000 workers; occupational diseases (fatal) per 100,000 workers; and occupational diseases (non-fatal) per 100,000 workers. There are no additional indicators for social dialogue (i.e., freedom of association and collective bargaining).

On adequate earnings and discrimination, the Brazilian *Report* adds the following

indicators: percentage of workers earning less than PPP-US\$ 1.25/day; percentage of workers earning less than PPP-US\$ 2.00/day; percentage of workers earning below 2/3 of median hourly earnings (broken down by male/female, white/black, and urban/rural); unpaid workers as percentage of employed workers (broken down by male/female, white/black, and urban/rural); and trend in real minimum monthly wages. On adequate hours, the additional indicators are: percentage of workers working more than 44 hours (broken down by male/female, white/black, and urban/rural); percentage of workers working more than 48 hours (broken down by male/female, white/black, and urban/rural); average hours worked for all workers (broken down by male/female, white/black, and urban/rural); average weekly hours spent in domestic labor (broken down by male/female, white/black, and urban/rural); average weekly hours spent in wage labor (broken down male/female); and percentage of workers with commuting time more than 30 minutes, more than 60 minutes, and more than 120 minutes (broken down as above). On safe work environment, the additional indicators are: number of “auditors” (auditors) and “labor inspectors” (fiscais de trabalho) per 10,000 workers; total non-fatal accidents (broken down by typical labor accidents, traffic accidents, and occupational disease); number of workers permanently disabled; incidence rate per 100,000 contract workers; and mortality rate per 100,000 contract workers. For discrimination, the additional indicators are: percentage of managers by male/female and black/white; percentage of production workers by male/female and black/white; percentage average monthly income gap between women and men, and between blacks and whites. And for freedom of association and collective bargaining, the Brazilian indicators include union density (broken down by

male/female, white/black, and urban/rural), but delete the “main indicators” of enterprises belonging to employer organizations and collective bargaining coverage.

The indicators set out in the *Guidebook on Decent Work Indicators for Asia and the Pacific* diverge substantially from those in the Revised Proposed Indicators. The former include only 21 indicators, some of which are not found in the latter. (ILO, 2008c, p. 5). For example, the *Guidebook* lists “strikes and lockouts: rates of days not worked” as an indicator of social dialogue, while the Revised Proposed Indicators list that only as an “additional indicator” not as a “main indicator” in light of the “interpretive issues” associated with it. The *Guidebook* also includes “annual hours worked per person” and “number and wages of casual/daily workers” as indicators of decent hours and adequate wages; these concepts are not captured in the Revised Proposed Indicators. Another indicator listed in the *Guidebook* but not in the Revised Proposed Indicators is “complaints/cases brought to labor courts or ILO” – an indicator of enforcement activity of a kind ignored by the Revised Proposed Indicators.

i. ILO Table of 168 Evaluation Criteria (January 2011)

In 2010, ILO staff mooted the question whether to formulate quantitative indicators of compliance with freedom of association and rights against discrimination. In the end, the Office did not publish such indicators. The ILO did publish the Working Paper authored by Sari and Kucera. (ILO, 2011). As noted above, the Working Paper formulated “evaluation criteria” for freedom of association and rights to bargain collectively. The purpose of the exercise was to collate the compliance information generated by the ILO

supervisory machinery. The aim was not to formulate quantitative indicators for diagnosis or evaluation of country performance; and, so, Sari and Kucera did not formulate a methodology for weighting or aggregating the evaluative criteria. Set out below is the Table of 168 “Evaluation Criteria.” (ILO, 2011).

**TABLE 1. ILO Working Paper List of Evaluation Criteria
(January 2011)**

	Trade Unions	Year
	la. Fundamental civil liberties, de jure	
1	Arrest, detention, imprisonment, charging and fining of trade unionists	
2	Infringements of trade unionists' basic freedoms	
3	Infringements of trade union's right to protection of their premises and property	
4	Excessive prohibitions/restrictions on trade union rights in the event of state of emergency	
5	Lack of guarantee of due process of law re la	
	lb. Fundamental civil liberties, de facto	
6	Murder or disappearance of trade unionists	
7	Committed against trade union leaders re 6	
8	Lack of guarantee of due process of law and/or impunity re 6	
9	Severity (widespread and/or systematic) re 6	
10	Other violent actions against trade unionists	
11	Committed against trade union leaders re 10	
12	Lack of guarantee of due process of law and/or impunity re 10	
13	Severity (widespread and/or systematic) re 10	
14	Arrest, detention, imprisonment, charging and fining of trade unionists	
15	Committed against trade union leaders re 14	
16	Lack of guarantee of due process of law and/or impunity re 14	
17	Severity (widespread and/or systematic) re 14	
18	Infringements of trade unionists' basic freedoms	
19	Committed against trade union leaders re 18	
20	Lack of guarantee of due process of law and/or impunity re 18	
21	Severity (widespread and/or systematic) re 18	
22	Attacks against trade union premises and property	
23	Committed against trade union leaders re 22	
24	Lack of guarantee of due process of law and/or impunity re 22	
25	Severity (widespread and/or systematic) re 22	
26	Excessive prohibitions/restrictions on trade union rights in the event of state of emergency	
27	Lack of guarantee of due process of law and/or impunity re 26	
28	Severity (widespread and/or systematic) re 26	

	Ila. Right of workers to establish and join organizations, de jure	
29	General prohibition on the right of workers to establish and join organizations	
30	Exclusion/restriction of workers from the right to establish and join organizations	
31	Previous authorization requirements	
32	Restrictions on the freedom of choice of trade union structure and composition	
33	Imposed trade union unity and/or favouritism/discrimination among workers' organizations	
34	Dissolution/suspension of legally functioning organizations by public authorities and/or legislation	
35	Prejudice or discrimination with regard to employment because of trade union membership/ legitimate activities	
36	Lack of adequate legal guarantees against anti-union discriminatory measures re 35	
37	Discriminatory dismissal/suspension because of trade union membership/legitimate activities	
38	Lack of adequate legal guarantees against anti-union discriminatory measures re 37	
39	Acts of interference of employers and/or public authorities	
40	Lack of adequate legal guarantees against acts of interference	
41	Infringement of the right to establish and join federations/confederations/international organizations	
42	Other de jure acts of prohibitions, infringements and interference re Ila	
43	Lack of guarantee of due process of law re Ila	
	Ilb. Right of workers to establish and join organizations, de facto	
44	Obstacles towards the development of independent workers' organizations in practice	
45	Exclusion/restriction of workers from the right to establish and join organizations	
46	Previous authorization requirements	
47	Restrictions on the freedom of choice of trade union structure and composition	
48	Imposed trade union unity and/or favouritism/discrimination among workers' organizations	
49	Dissolution/suspension of legally functioning organizations by public authorities and/or legislation	
50	Prejudice or discrimination with regard to employment because of trade union membership/legitimate activities	
51	Committed against trade union leaders re 50	
52	Lack of guarantee of due process of law re 50	
53	Discriminatory dismissal/suspension because of trade union membership/legitimate activities	
54	Committed against trade union leaders re 53	
55	Lack of guarantee of due process of law re 53	
56	Acts of interference of employers and/or public authorities	
57	Lack of adequate guarantees against acts of interference	
58	Infringement of the right to establish and join federations/confederations/international organizations	
59	Other de facto acts of prohibitions, infringements and interference re Ilb	
60	Lack of guarantee of due process of law re Ilb	
	IIla. Other union activities, de jure	
61	Infringements on the right to freely draw up constitutions and rules	
62	Infringements on the right to freely elect representatives	
63	Infringements on the right to freely organize and control internal and financial administration	
64	Infringements on the right to freely organize activities/programmes	
65	Other de jure acts of prohibitions, infringements and interference re IIIa	
66	Lack of guarantee of due process of law re IIIa	
	IIIb. Other union activities, de facto	
67	Infringements on the right to freely draw up constitutions and rules	
68	Infringements on the right to freely elect representatives	
69	Infringements on the right to freely organize and control internal and financial administration	
70	Infringements on the right to freely organize activities/programmes	
71	Other de facto acts of prohibitions, infringements and interference re IIIb	
72	Lack of guarantee of due process of law re IIIb	

	IVa. Right to collective bargaining, de jure	
73	General prohibition on the right to collective bargaining	
74	Exclusion/restriction of workers from the right to collective bargaining	
75	Exclusion/restriction of subjects covered by collective bargaining	
76	Compulsory arbitration accorded to collective bargaining	
77	Infringements on the determination/recognition of trade unions entitled to collective bargaining	
78	Acts of interference in collective bargaining and/or insufficient promotion of collective bargaining	
79	Acts of interference according to collective agreements	
80	Infringements of the consultation with workers' organizations	
81	Other de jure acts of prohibitions, infringements and interference re IVa	
82	Lack of guarantee of due process of law re IVa	
	IVb. Right to collective bargaining, de facto	
83	Obstacles towards collective bargaining in practice	
84	Exclusion/restriction of workers from the right to collective bargaining	
85	Exclusion/restriction of subjects covered by collective bargaining	
86	Compulsory arbitration accorded to collective bargaining	
87	Infringements on the determination/recognition of trade unions entitled to collective bargaining	
88	Acts of interference in collective bargaining and/or insufficient promotion of collective bargaining	
89	Acts of interference according to collective agreements	
90	Infringements of the consultation with workers' organizations	
91	Other de facto acts of prohibitions, infringements and interference re IVb	
92	Lack of guarantee of due process of law re IVb	
	Va. Right to strike, de jure	
93	General prohibition on the right to strike	
94	Exclusion/restriction of workers from the right to strike	
95	Exclusion/restriction based on the objective of the strike	
96	Exclusion/restriction based on the type of the strike	
97	Lack of compensatory guarantees accorded to lawful restrictions on the right to strike	
98	Infringements on the determination of minimum services	
	Vb. Right to strike, de facto	
105	Obstacles to strike actions in practice	
106	Exclusion/restriction of workers from the right to strike	
107	Exclusion/restriction based on the objective of the strike	
108	Exclusion/restriction based on the type of the strike	
109	Lack of compensatory guarantees accorded to lawful restrictions on the right to strike	
110	Infringements on the determination of minimum services	
111	Compulsory arbitration accorded to strikes	
112	Infringements of the prerequisites lawfully required for exercising the right to strike	
113	Acts of interference during the course of strike action	
114	Imposing excessive sanctions in case of legitimate and peaceful strikes	
115	Committed against trade union leaders re 114	
116	Other de facto acts of prohibitions, infringements and interference re Vb	
117	Lack of guarantee of due process of law re Vb	
	Employers' Organizations	Year
	VIa. Fundamental civil liberties, de jure	
118	Arrest, detention, imprisonment, charging and fining of members of employers' organizations	
119	Infringements of employers' organizations' basic freedoms and/or of their right to protection of their premises and property	
120	Excessive prohibitions/restrictions on employers' organizations' rights in the event of state of emergency	
121	Lack of guarantee of due process of law re VIa	

	Vlb. Fundamental civil liberties, de facto	
122	Murder or disappearance of members of employers' organizations	
123	Committed against leaders of the organization re 122	
124	Lack of guarantee of due process of law and/or impunity re 122	
125	Severity (widespread and/or systematic) re 122	
126	Other violent action and/or arrest, detention, imprisonment, charging and fining of members of the employers' organizations	
127	Committed against leaders of the organization re 126	
128	Lack of guarantee of due process of law and/or impunity re 126	
129	Severity (widespread and/or systematic) re 126	
130	Infringements of employers' organizations' basic freedoms and/or attacks against their premises and property	
131	Committed against leaders of the organization re 130	
132	Lack of guarantee of due process of law and/or impunity re 130	
133	Severity (widespread and/or systematic) re 130	
134	Excessive prohibitions/restrictions on employers' organizations' rights in the event of state of emergency	
135	Lack of guarantee of due process of law and/or impunity re 134	
136	Severity (widespread and/or systematic) re 134	
	Vlla. Right of employers to establish and join organizations, de jure	
137	Prohibition, restrictions on/exclusion from the right of employers to establish and join organizations	
138	Restrictions on the right of employers to establish and join to organizations of their own choosing	
139	Dissolution/suspension of legally functioning organizations by public authorities and/or legislation	
140	Acts of interference of workers' organizations and/or public authorities	
141	Lack of adequate legal guarantees against acts of interference	
142	Infringement of the right to establish and join federations/confederations/international organizations	
143	Lack of guarantee of due process of law re VIIa	
148	Lack of adequate guarantees against acts of interference	
149	Infringement of the right to establish and join federations/confederations/international organizations	
150	Lack of guarantee of due process of law re VIIb	
	VIIIa. Other activities of employers organizations, de jure	
151	Infringements on the right to freely draw up constitutions, rules and to organize their administration, activities, programmes	
152	Lack of guarantee of due process of law re VIIIa	
	VIIIb. Other activities of employers organizations, de facto	
153	Infringements on the right to freely draw up constitutions, rules and to organize their administration, activities, programmes	
154	Lack of guarantee of due process of law re VIIIb	
	IXa. Right to collective bargaining, de jure	
155	Prohibition, restrictions on/exclusion from the right to collective bargaining	
156	Exclusion/restriction of subjects covered by collective bargaining	
157	Compulsory arbitration accorded to collective bargaining	
158	Infringements on the determination/recognition of employers' organizations entitled to collective bargaining	
159	Acts of interference in collective bargaining and collective agreement	
160	Infringements of the consultation with employers' organizations	
161	Lack of guarantee of due process of law re IXa	
	IXb. Right to collective bargaining, de facto	
162	Prohibition, restrictions on/exclusion from the right to collective bargaining	
163	Exclusion/restriction of subjects covered by collective bargaining	
164	Compulsory arbitration accorded to collective bargaining	
165	Infringements on the determination/recognition of employers' organizations entitled to collective bargaining	
166	Acts of interference in collective bargaining and collective agreement	
167	Infringements of the consultation with employers' organizations	
168	Lack of guarantee of due process of law re IXb	

Although these evaluation criteria are not constructed as quantitative indicators, might they nonetheless serve that purpose? As can readily be seen, many of the 168 evaluation criteria are ambiguous and double-barreled and, to be adequately operationalized as quantitative indicators, would require detailed quantitative definitions and weighting. For example, evaluation criterion 5 states: “lack of guarantee of due process of law [(1)] re...arrest, detention, imprisonment, charging, and firing of trade unionists; [(2) re] infringements of trade unionists’ basic freedoms; [(3) re] infringement of trade union’ right to protection of their premises and property; [or (4) re] excessive prohibitions/restrictions on trade union rights in the event of state of emergency.” The coding rules state that the criterion can be violated either by a violation of due process alone, or by a violation of due process in connection with one of the four sets of enumerated rights. In the latter case, both evaluation criterion 5 and the “basis non-compliance” criterion (that is, criteria 1, 2, 3, or 4) would be coded as violations.

Note that the list of 168 evaluation criteria includes catchall criteria such as criterion 59: “Other de facto acts of prohibitions, infringements, and interference re IIb [“Right of workers to establish or join organizations, de facto”]. Since such criteria are open-ended, they are intrinsically ambiguous.

Sari and Kucera present “definition boxes” providing lists of what might be called sub-criteria setting out more specific rules than those contained in the text of the 168 evaluation criteria. Each evaluation criteria is thus an umbrella rule. Violations of the sub-criteria – as evidenced by authoritative conclusions of the supervisory mechanisms – are

coded as violations of the overarching evaluation criteria.

This is a useful format; the refined methodology proposed in the paper accompanying this *Literature Review* constructs a somewhat similar hierarchy of Indicators and Sub-Indicators. However, Sari and Kucera do not provide weights to the sub-criteria, and the aggregation of the sub-criteria do not yield a score for a quantitative evaluation criterion. The significance of each evaluation criterion is thus indeterminate, in light of the fact that violations of several sub-criteria might yield the same qualitative coding of an evaluation criterion as does a violation of a single sub-criterion. Indeed, the sub-criteria are explicitly illustrative and therefore do not set out comprehensive definitions of the evaluative criteria. The definition of each evaluation criterion is therefore open-ended and intrinsically ambiguous. Equally important, many of the sub-criteria are themselves ambiguous, double-barreled, and inconsistent. In other words, the relatively abstract and ambiguous evaluation criteria do not in fact have determinate, comprehensive definitions that could serve as precise qualitative or quantitative indicators.

The following “definition boxes” for evaluation criteria 50 through 60 are illustrative of these problems:

50. Prejudice or discrimination with regard to employment because of trade union membership/legitimate activities (de facto)

Article 1 of Convention No. 98;
Paras. 769-781, 782-788, 799-803, 654-657, 658, 660, 675 in Digest of decisions and principles;
Paras. 199-212 in General Survey 1994.

- Refers to discriminatory measures in practice on grounds of trade union membership or legitimate trade union activities both at the time of hiring/recruitment and in the course of employment (Digest, Para. 781.);

- Includes direct and/or indirect discrimination in hiring (Digest, Paras. 782-784.);
- Includes practice of blacklisting (Digest, Para. 803.);
- Includes direct and/or indirect discriminatory measures during employment, in particular non-renewal of contract, excluding union members from receiving bonuses, transfers, downgrading, restrictions of any kind (e.g. remuneration, social benefits, vocational training) (Digest, Paras. 781., 785-788.);
- Includes direct and/or indirect discriminatory measures for participating in legitimate and peaceful strikes.

51. Committed against trade union leaders re 50 (de facto)

[Article 3 of Convention No. 98;](#)
[Paras. 799-803 in Digest of decisions and principles.](#)

- Includes cases when the incident is committed against trade union leaders (e.g. for having presented a list of dispute grievances);
- Includes incidents committed either during the period of office or for a certain time thereafter.

52. Lack of guarantee of due process of law re 50 (de facto)

[Article 3 of Convention No. 98;](#)
[Paras. 813-836 in Digest of decisions and principles;](#)
[Paras. 214-224 in General Survey 1994.](#)

- Includes infringements in practice of the right to fair and rapid trial (e.g. non-informing about charges, delays in procedure, lack of adequate time and/or facilities to prepare defence, etc.);
- Includes infringements in practice of measures that guarantee an effective protection of trade unionists (e.g. procedures which should be prompt, impartial and considered as such by the parties concerned (Digest, Para. 817.));
- Includes lack of access in practice to means of redress which are expeditious, inexpensive and fully impartial (Digest, Para. 820.);
- Includes lack of sufficiently dissuasive sanctions against acts of anti-union discriminative measures.

53. Discriminatory dismissal/suspension because of trade union membership/legitimate activities (de facto)

Article 1 of Convention No. 98;
Paras. 769-781, 789-798, 799-802, 804-812, 658-666, 674 in Digest of decisions and principles;
Paras. 199-210, 213 in General Survey 1994.

- Refers to discriminatory dismissal or suspension in practice on grounds of trade union membership or legitimate trade union activities;

- Includes massive/large-scale dismissals for reasons of trade union membership and/or legitimate trade union activities;
- Includes dismissal for economic reasons if they are used as an indirect means of subjecting trade union leaders/members to acts of anti-union discrimination where the discriminatory motive and impact is proven/acknowledged (General Survey, Para. 213.);
- Includes compulsory retirement as a consequence of trade union membership or legitimate trade union activities;
- Includes direct and/or indirect discriminatory dismissal or suspension for participating in legitimate and peaceful strikes.

54. Committed against trade union leaders re 53 (de facto)

Article 3 of Convention No. 98;
Paras. 799-812. in Digest of decisions and principles.

- Includes cases when the incident is committed against trade union leaders (e.g. for having presented a list of dispute grievances);
- Includes incidents committed either during the period of office or for a certain time thereafter.

55. Lack of guarantee of due process of law re 53 (de facto)

Article 3 of Convention No. 98;
Paras. 813-853 in Digest of decisions and principles;
Paras. 214-224 in General Survey 1994.

- Includes infringements in practice of the right to fair and rapid trial (e.g. non-informing about charges, delays in procedure, lack of adequate time and/or facilities to prepare defence, etc.);
- Includes infringements in practice of measures that guarantee an effective protection of trade unionists (e.g. procedures which should be prompt, impartial and considered as such by the parties concerned (Digest, Para. 817.));
- Includes lack of access in practice to means of redress which are expeditious, inexpensive and fully impartial (Digest, Para. 820.);
- Includes lack of sufficiently dissuasive sanctions against acts of anti-union discriminative measures, lack of reinstatement of workers who had been dismissed without justification or in case reinstatement is not practicable, lack of adequate and full compensation without delay.

56. Acts of interference of employers and/or public authorities (de facto)

Article 2 of Convention No. 98;
Paras. 855-859, 863-868 in Digest of decisions and principles;
Paras. 225-234 in General Survey 1994.

- Includes acts to place trade unions under the domination or control of employers, employers' organizations or public authorities (e.g. by supporting workers' organizations by financial or other means, such as premises or facilities);
- Includes the establishment or attempted establishment of parallel unions and/or solidarist or other associations; the existence of two executive committees within a trade union, one of which was allegedly manipulated by the employer; dismissal of trade union officers prejudicing the existing trade union and promoting the establishment of another trade union (Digest, Para. 869-879.; General Survey, Para. 231.);
- Includes anti-union propaganda; and anti-union tactics in the form of bribes offered to union members to encourage their withdrawal from the union and the presentation of statements of resignation to the workers, as well as the alleged efforts made to create puppet unions (Digest, Para. 858.);
- Includes the use of threats of dismissal or transfer, downgrading, restrictions in remuneration; using means of pressure in favour of or against any trade union organization;
- Includes cases of government interferences when the government has one of its members as a leader of a trade union which represents several categories of workers employed by the States (Digest, Para. 867.);
- Includes discrimination between workers' organization, *except if it leads to trade union monopoly in which case it should be coded under evaluation criterion no. 48*;
- Includes disclosure of information on trade union membership and activities; infringement on the inviolability of correspondence and telephonic conversation; establishment of a register containing data on trade union members (Digest, Paras. 157-177.).

57. Lack of adequate guarantees against acts of interference (de facto)

Article 2 of Convention No. 98;
Paras. 860-862, 865 in Digest of decisions and principles;
Paras. 225-234 in General Survey 1994.

- Includes infringements in practice of provisions ensuring the adequate protection of workers' organizations against acts of interference;
- Includes infringements in practice of the right to fair and rapid trial, the lack of independent and impartial judiciary and/or lack of sufficiently dissuasive sanctions.

58. Infringement of the right to establish and join federations/confederations/international organizations (de facto)

Article 6-7 of Convention No. 87;
Paras. 710-768 in Digest of decisions and principles;
Paras. 189-198 in General Survey 1994.

- Includes obstacles towards the establishment of federations and confederations (Paras. 710-729.);
- Includes obstacles towards the affiliation of workers' organizations, federations, confederation with international organizations of workers (Paras. 732-768.);
- Includes exclusion/restriction of workers' organizations from the right to establish and join federations and confederations or to affiliate with international organizations of workers (Para. 717.);
- Includes previous authorization requirements in practice to establish federations and confederations or to affiliate with international organizations of workers.
- *Note:* All other infringements of rights relating to federations/confederations/international organizations should be coded under the specific evaluation criterion the infringement links to.

59. Other de facto acts of prohibitions, infringements and interference re IIb (de facto)

- Includes other de facto prohibitions, infringements and interferences not included above under evaluation criteria nos. 44-58 that violate (either in a direct or an indirect way or by intimidating, discouraging workers) workers' right to establish and join organizations.

60. Lack of guarantee of due process of law re IIb (de facto)

- Includes infringements in practice of the right to fair and rapid trial (e.g. non-informing about charges, delays in procedure, lack of adequate time and/or facilities to prepare defence, etc.);
- Includes lack of independent and impartial judiciary;
- Includes absence of judgement, impunity or lack of dissuasive sanctions.
- *Note:* Includes de facto lack of guarantee of due process of law with regard to de facto right of workers to establish and join organizations, as listed under evaluation criteria nos. 44-59.

Note, for example, the ambiguities, inconsistencies, and redundancies in the definitional sub-criteria for evaluation criterion no. 50. Three of those sub-criteria refer to “direct and/or indirect discrimination” without defining and distinguishing “direct discrimination” and “indirect discrimination.” The latter two concepts have various alternative meanings within different domestic, regional, and international legal systems. An employer’s discriminatory refusal to hire trade unionists would be captured by each of the first three sub-criteria, although those three sub-criteria use different terminology. Further, it appears that the third sub-criterion (blacklisting) is fully subsumed within the second sub-criterion (direct and/or indirect discrimination in hiring), and that both of those sub-criteria are subsumed within the first sub-criterion (discrimination in hiring/recruitment).

Note similar problems in the definition of due process in evaluation criterion no. 55. Each of the first three definitional sub-criteria repeats the requirement of a speedy trial, but using inconsistent terminology – “rapid,” “delays,” “prompt,” and “expeditious”. None of those vague concepts is defined. The fourth sub-criterion defines adequate remedies for unlawful discharge as *either* reinstatement or full compensation; but in all major legal systems the *minimal* remedy for unlawful discharge is *both* reinstatement and make-whole compensation, and most legal systems impose additional remedies of liquidated damages, punitive damages, or civil penalties. The fourth sub-criterion also refers to “sufficiently dissuasive sanctions” – a concept that could serve as a quantitative (or qualitative) indicator only if more rigorously specified. Moreover, those sub-criteria (defining “due

process”) are partially repeated by the sub-criteria for evaluative criterion no. 57 (lack of adequate guarantees against interference). It is unclear why “guarantees” should include some elements of “due process” but not others, and why differing terminology should be used to define the common elements for the concepts of “guarantees” and “due process.”

The definitions exhibit other defects, if we consider them as potential indicators. For example, the definition for evaluative criterion no. 56 includes “alleged efforts made to create puppet unions.” But surely, allegations do not count as violations. Some of the sub-criteria are linguistically and grammatically confusing. For example, one sub-criterion defining evaluative criterion no. 56 (acts of interference) states: “Includes cases of government interferences when the government has one of its members as a leader of a trade union which represents several categories of workers employed by the States.”

A deeper conceptual problem, for purposes of operationalizing the concept of “internationally recognized worker rights” in U.S. trade legislation and treaties, is the ILO’s conflation of violations by employers and violations by governments. In U.S. legislation and treaties, legal obligations fall on governments, not on employers. The relationship between “input indicators” (measuring government enforcement efforts) and “output indicators” (measuring actual employer compliance) requires extended conceptual analysis. That analysis is undertaken in the research paper accompanying this *Literature Review*.

These problems may not be critical for the ILO’s purposes. The ILO’s definitions need not be precise, consistent, comprehensive, and determinate, since they are simply illustrative guides for purpose of collating information in tabular form. That is, they need

not be operationalized as valid qualitative or quantitative indicators that serve strictly evaluative or diagnostic purposes (notwithstanding the label “evaluative criteria”).

The tabular evaluation criteria are also highly limited by the ILO’s evidentiary constraints. Only final comments, observations, and recommendations by supervisory mechanisms count as evidence for coding the evaluative criteria. The limitations of the supervisory mechanisms – limitations of evidence-gathering, of selection bias in the cases and reports reviewed by the supervisory machinery, and the political reluctance to develop a “common law” of rules fleshing out the politically sensitive Conventions – place severe evidentiary constraints on analyst who might otherwise code indicators based on a much wider, richer range of information sources, some of which may be contextually specific to particular countries.

2. ILO-IFC Better Work Indicators

The ILO and IFC have collaborated in establishing and implementing the Better Work Program, with the purpose of improving labor standards in global supply chains. The Program, launched in 2006, was inspired by the ILO’s Better Factories project in Cambodia. The Cambodia program, in turn, was an adjunct to the U.S.-Cambodia textiles agreement, pursuant to which the ILO monitored Cambodian factories. (Polaski, 2004). Based on Cambodia’s compliance with international and domestic labor standards, the United States rewarded the Cambodian garment industry with large increments of export quota.

Thus far, the Better Work Program has been implemented in Cambodia, Jordan,

Vietnam, and Haiti. In “Stage Two” of the program (2009 - 2012), the ILO-IFC plans to expand into Indonesia, China, Bangladesh, Pakistan, India, Nicaragua, and Morocco. (ILO-IFC, 2009). To date, the Program applies to the garment sector but, again, the ILO-IFC hope to broaden to additional sectors. The Better Works Program combines a global team with country-level programs, with the aim of improving factory productivity while ensuring compliance with core labor standards. The Program solicits the participation of stakeholders at both the global and local levels. The global team coordinates program activities, manages a database of enterprise compliance, and seeks to ensure quality of the country programs.

One of the key components of the Better Work Program is the drafting and dissemination of “Good Practices” – thus far, for the apparel industry. (ILO-IFC, n.d.). The list of Good Practices is, in effect, a body of indicators for labor standard compliance in the apparel sector.⁸

There are 32 categories of indicators, including: fire fighting, fire safety, emergency planning, good lighting, machine maintenance, machine safety, materials handling, personal protective equipment for sewing, personal protective equipment for dyeing, spot cleaning operations, stairway safety, store room safety, providing support to working mothers, provision of pure drinking water, proper sanitation facilities, organization of notice boards, and so on.

The specific indicators within those 32 categories are quite detailed and, in many

⁸ In addition to labor standard compliance, the Good Practices include indicators of efficient, high-quality managerial practices.

instances, adapted pragmatically to the garment sector. There are a total of 170 indicators -- between 3 and 8 indicators in each of the 32 categories. In addition to the indicators, in each of the 32 categories there are several bullet points providing guidance on “how to” implement the indicators. In some instances the “how to” bullets are, in effect, additional indicators.

These indicators produced by the ILO and IFC may be the most detailed and comprehensive body of indicators formulated and published by authoritative public international bodies. What do such indicators look like? By way of illustrating the specificity and comprehensiveness of the 170 indicators, here are the items (“good practices” and “how to” lists) in just two categories:

Providing Support for Working Mothers

Good Practices

- Provide the legally mandated maternity leave or 14 weeks, the international good practice benchmark (See ILO Convention 183).
- Allow employees returning from maternity leave to do only light work during the first 2 months back at work.
- Ensure that all pregnant workers have full job security.
- Provide paid breastfeeding breaks each day and offer flexible working hours to breastfeeding women during the first year of the child’s life.
- Establish and operate breastfeeding facilities and a child-care room at the workplace.
- Encourage co-workers and management to have an accepting and supportive attitude towards breastfeeding.

How

- Provide space for mothers to breastfeed their children on-site: use a vacant room which is silent and private.
- Keep the environment of the nursing room clean and safe.
- Agree with the employee on a clear schedule of breaks in advance.
- Never allow children on the factory floor.

Spot Cleaning Area

Good Practices

- Use a special room in a separate location for the spot cleaning area.
- Use water and detergent for spot cleaning instead of chemicals whenever possible.
- Make sure that workers read and understand Material Safety Data Sheet (MSDS) so that they learn about the dangers of the chemicals being used.
- If workers cannot read, ensure that workers understand the dangers of chemicals.
- Ensure that the spot cleaning room has clean air at all times by fitting fans and installing fume captors where the fumes are located.
- Ensure sufficient fume caption per minute.
- Install exhaust ventilation fans in the spot cleaning area to make sure that clean air flows toward the workers and chemical fumes flow away from workers.
- Caution: The air must not flow toward the worker's face or they will breathe in the chemical.
- After taking all possible measures to improve the working environment, provide workers with proper personal protective equipment such as mask, overalls, gloves and safety goggles.
- Caution: Dust masks are not suitable as they trap the chemical over the worker's face.

How

- Display this Guide and MSDS on the walls of the spot cleaning room.
- Purchase personal protective equipment such as gloves and overalls in local markets.
- Purchase safety goggles and filter respirator masks (for gases and solvents) in commercial markets.
- Find out if any of the chemical products used can be replaced by water and detergent.
- Train workers on proper safety procedures and make sure they know about the hazards associated with the materials they are using.

Some other non-exhaustive examples of Better Work indicators in the area of workplace safety and health, again showing their specificity and comprehensiveness:

- The factory should have an industrial vacuum cleaner to remove dust from

factory machinery.

- The factory should regularly clean or replace the vacuum filter in sewing machines.
- The factory should post maintenance schedules directly on each sewing machine.
- The factory should form firefighting teams.
- The factory should provide training to firefighting teams at least every six months.
- The factory should provide arm bands to designated firefighters.
- The factory should install backup water and electricity supplies in case the electrical system and water mains are damaged by fire.
- The factory should place workstations so that workers do not directly face windows (to avoid glare).
- The factory should use blinds or shades on windows.
- The factory should attach an elastic spring to irons to lighten the burden for ironing workers.
- The factory should provide a foot platform so that shorter workers can iron at an ergonomically comfortable height.
- The factory should install and regularly maintain needle guards on sewing machines.
- The factory should provide metal mesh gloves to workers using cutting equipment and provide left-handed gloves for left-handed workers.
- The factory should provide training to workers on safety in using personal protective equipment, machine guards, and safe use and disposal of chemicals.
- The factory should provide two toilets for every 40 male workers and for every 30 women, and one sink for every 30 workers.
- The factory should ensure that there are no unreasonable limitations on toilet breaks.
- The factory should ensure that ramp walkways have an incline of less than 15 degrees.
- The factory should have a bulletin board with a section for worker and union announcements; and so on. (ILO-IFC, n.d.).

These indicators, therefore, illustrate one approach to indicator construction. They are highly detailed and sector-specific. They are numerous and fairly comprehensive. They hold employers to stringent standards. They draw on international Conventions and international best practices. They are, as emphasized above, issued by authoritative public international organizations.

The ILO-IFC indicators do, however, have some crucial limitations. First, of course they are sector-specific. Second, although they are fairly comprehensive *within* each of the 32 categories, some very important categories are not included. Indeed, the ILO-IFC indicators do not touch on 3 out of the 5 categories that are the subject of the current research. The indicators cover occupational safety and health and certain aspects of gender equality but do not cover freedom of association and collective bargaining; wages; hours; and many aspects of non-discrimination and equality.

Third, the “good practices” and “how to” items are not self-consciously designed as indicators of compliance with rights. They are instead designed to provide factory managers with managerial tools to achieve good practices. Hence, even though taken individually they state succinct standards, they are not as a body well-conceptualized to comprehensively measure compliance with the complex, multidimensional rights that concern us. Also as a consequence, the guidelines are not prioritized or weighted for aggregation into a composite indicator of compliance, and they are not validated as measures of sub-components of a composite indicator.

3. ILO Cambodia Indicators

The ILO’s Better Factories Cambodia program was established for purposes, among other things, of monitoring and measuring compliance by Cambodian factories with ILO core rights and Cambodia’s domestic labor law. As noted above, under the terms of a now-expired bilateral agreement between the United States and Cambodian governments, the United States granted an annual bonus in the quota of garment exports from

Cambodia to the United States based on compliance by Cambodian factories, as reported by the ILO. (Polaski, 2004). The Better Factories Cambodia program continued beyond the 2005 expiration of the U.S.-Cambodia agreement and in some respects serves as a model for the ILO's multi-country Better Work Program discussed above.

The monitoring component of Better Factories Cambodia is based on a body of over 500 indicators of compliance with ILO core rights and Cambodian law. The indicators were endorsed by the Cambodian government, employers, and unions. The indicators are applied to data gathered by a team of monitors who make unannounced factory visits, interview managers, workers, shop stewards and union leaders and examine relevant documents including payroll, leave records, and others. The detailed information on each monitoring visit is provided to factories and (for a fee) to buyers and vendors. The public has access to semi-annual *Synthesis Reports on Working Conditions in Cambodia's Garment Sector*. The program has thus far published twenty-three *Synthesis Reports*, the most recent of these in October 2009, covering some 260 factories. (ILO, 2009I).

The *Synthesis Reports* do not provide data on all 500 indicators. The latest *Synthesis Report*, for example, reports on 54 indicators. These include 15 specific working conditions (such as payment of minimum wage, provision of paid sick leave, and installation of needle guards on sewing machines) and 9 findings that are a mixture of broad and specific indicators on core rights (such as "discrimination," "freedom of association," "number of strikes," and "unionization rates"). In addition, the *Report* lists the "top ten non-compliance issues." These are highly specific, giving a sense of the detailed nature of the 500 indicators: for example, "provide adjustable chairs with backrests for

workers who are sitting down,” “ensure that workplace is well lit,” “ensure that overtime does not exceed 2 hours per day,” “pay workers who work regularly the attendance bonus of \$5 per month and any other mandatory wages supplements, especially probationary workers,” and “set up a dare care center at or near the workplace, or pay child care costs of women employees.” Next, the *Report* lists the 10 “areas of most improvement”, such as “provide shop stewards with an office, “consider all workers who are employed for longer than two years total to be employed under an unspecified duration contract,” and “pay workers severance pay equal to at least 5 percent of the total wages paid under the contract when workers’ fixed-term contracts expire or are terminated.” Finally, the *Synthesis Report* enumerates the 10 “areas of least improvement or negative change,” including “get permission from the Labor Inspector before workers work overtime,” “install proper guards on all dangerous moving parts of machines and power transmission equipment,” and “keep safety data sheets for chemicals used at the workplace.”

The Better Factories Cambodia program developed an information management system (IMS) that computerizes the collection and analysis of data on individual Cambodian garment factories. Monitors input data on tablet computers during each monitoring visit. The IMS system is now transitioning to the new information technology (called STAR) that will apply to the entire Better Work program, discussed above. STAR will refine data collection and analysis. STAR will, among other improvements, show the number of workers affected by factory violations, which the ILO refers to as one example of a “severity index.” (ILO, 2009I, p. 1).

4. ILO Statistical Databases

ILO statistical databases are relevant to our project in at least three ways. First, they are an important source of information. Second, they provide internationally vetted definitions of particular variables that may, with appropriate adaptation, serve as individual indicators for our purposes. Third, as mentioned above in Section III and discussed in greater below in Section IX, some authoritative international legal instruments stipulate that government obligations to comply with certain substantive labor rights require the government to use ILO statistical indicators for self-monitoring.

ILO statistical databases and analysis are currently undertaken by many units within the Geneva headquarters, regional offices, and sub-regional offices. As a result, there are gaps, redundancies, and inconsistencies among the various ILO databases. Searches for particular data sets can be a challenge. Perhaps for that reason, the ILO recently engaged external auditors to recommend rationalization of ILO statistical collection and analysis. The auditors recommended that the ILO Bureau of Statistics be vested with responsibility to coordinate those endeavors, and recommended many other substantive and procedural reforms, some of which are noted below. (ILO, 2007b, pp. 2-3).

This section of the Literature Review summarizes the ILO's databases devoted primarily to quantitative statistics on labor market and workplace conditions. These are of primary relevance for our outcome indicators, as distinguished from indicators of legal norms and enforcement institutions. (ILO databases that are more relevant to the latter indicators are discussed below in Section VIII.) This section provides an overview of relevant databases, but for the most part (for reasons of space and time) does not probe

the definitions, collection protocols, or data analysis of specific variables within each database. That exercise will be undertaken as necessary during the drafting of the research paper proper.

a. ILO Periodic Databases: Yearbook on Labor Statistics and Key Indicators of the Labor Market (KILM)

The Guidebook on Decent Work Indicators for Asia and the Pacific does a good job of contrasting the decent work indicators with the information provided by the ILO *Yearbook of Labor Statistics* and the *Key Indicators of the Labor Market* (KILM) database. The *Yearbook* (available online at the ILO's LABORSTA) is the ILO's principal source of international statistics, collecting data generated by national statistical offices. The *KILM* draws on other sources to supplement national statistical databases with regional, international, and other sources in an effort to produce a database that is more accurate, complete, and consistent across time and country. There are 20 *KILM* indicators, with time series data for some 200 countries. The *KILM* contain some important indicators that are absent from the *Guidebook's* decent work indicators, including indicators on part-time work, the working poor, and breakdown of wages and hours by sector and occupation. The *KILM* lacks indicators on social dialogue and workplace safety.

The external audit of 2007 recommended that the *Yearbook* and *KILM* be rationalized to avoid overlap and improve relevance.

LABORSTA is a database that enables searches by country, variable, and time

series. The broad subject categories are: Total and economically active population; employment; unemployment; hours of work; wages; labor cost; consumer price indices; occupational injuries; strikes and lockouts; household income and expenditure; and international labor migration.

Like the decent work indicators, therefore, the LABORSTA database is primarily targeted at outcomes. It is therefore likely to be of greater (though not exclusive) use for measuring acceptable conditions of work than for freedom of association and collective bargaining. While for many countries LABORSTA provides gender breakdowns for employment by occupation, it does not provide gender breakdowns in wages and earnings.

The *Guidebook* identifies the statistical series of the *KILM* and *Yearbook* that are comparable across countries and consistent over time. I will not here repeat that analysis, but will draw on it in the research itself, when considering the critical question of informational constraints on assessment methodology.

b. ILO Database of National Labor Force Surveys.

The ILO website contains a database of Labor Force Surveys (standard household surveys of labor statistics), providing links to national statistical agencies and descriptions of source methodology.

c. ILO Special Statistical Studies: Multiple Country Compilation and STAT-DIALOGUE Project

In 2005, the Statistical Development and Analysis Unit of the ILO's Policy Integration Department published a Working Paper entitled *Statistical Indicators Relating to Social Dialogue: A Compilation of Multiple Country Databases* (hereafter "Compilation"). (Chataignier, 2005). The title may be a bit misleading. The *Compilation* includes data sources *about* multiple countries, but the data are not necessarily taken from national sources. The sources range from official national statistical publications, such as yearbooks and statistical abstracts, to databases of the ILO, OECD, World Bank, EU, European Industrial Relations Observatory (EIRO) centers in each country, U.S. Bureau of Labor Statistics, labor unions and confederations, special questionnaires to country experts and others, social science studies, and other sources.

The categories of statistical measures for which databases are catalogued are:

A. Trade unions and membership

- A.1. Number of trade unions
- A.2. Number of trade union members
- A.3. Trade union density

B. Collective Bargaining

- B.1. Collective bargaining coverage rate
- B.2. Collective bargaining level
- B.3. Collective bargaining coordination

C. Strikes and lockouts

- C.1. Number of strikes or lockouts per year
- C.2. Number of working days lost per year
- C.3. Number of workers involved in strikes or lockouts per year

D. Indices relating to social dialogue

- D.1. Freedom of association and collective bargaining (FACB)

- index)
- D.2. Voice representation security index
- D.3. Industrial (collective) relations law index

E. Index of opinion on social dialogue

E.1. Cooperation in labor-employer relations indicators

For each of the above measures, the *Compilation* catalogues several alternative databases, the source of each database, country coverage, period covered, and a brief description of the measure itself.⁹ For example, Category A.2 describes seven different databases on the number of labor union members. Some of the statistical “indicators” in the *Compilation* are conceptually straightforward, discrete variables, such as number of labor unions or collective bargaining coverage rate, however tricky it may be to operationalize the concept and gather reliable data once operationalized. Other “indicators” are actually indices constructed from multiple indicators. For example, Category D.2 references the methodology of Bonnet et al., discussed above, and Category D.1 references the methodology of Kucera, also discussed above. The *Compilation* is a highly useful reference. Unfortunately, the period of coverage of most of the databases (so far as we know, from this 2005 *Compilation*) ends at 2003 or earlier. However, we can infer which of the databases are ongoing and which are not.

Also in 2005, two other units of the ILO Policy Integration Department – the Bureau of Labor Statistics (STAT) and the Social Dialogue, Labor Law, and Labor Administration Department (DIALOGUE) – teamed up to analyze and refine the statistical measures for

⁹ The *Compilation* provides references to the databases; the databases themselves are not included.

two “social dialogue indicators” – namely, trade union membership and collective bargaining coverage. (Lawrence and Ishikawa, 2005). Whereas the *Compilation* merely gathered and described existing databases, the STAT-DIALOGUE project undertook detailed description of the ILO data collection methodology, alternative definitions and methods for measuring trade union density and collective bargaining coverage, and country profiles of those statistics – for 36 countries on trade union membership and 34 countries on collective bargaining coverage. Based on two rounds of national-level questionnaires in 2003-2004, STAT-DIALOGUE profiled the domestic administrative institutions and statistical methods used to collect data on the two social dialogue indicators.

The STAT-DIALOGUE project was a significant step toward two goals that stand in tension: creating consistent definitions and data-collection methods, on the one hand, and adapting those definitions and methods to qualitatively different legal and labor relations systems. The current research will examine whether that project, and others since, generate qualitatively differentiated clusters of labor relations systems for purposes of “adjusting” indicators. For example, the STAT-DIALOGUE report concludes, among other things, that “[n]ot all sources of, or reasons for, the discrepancies between countries [in defining and collecting statistics] can necessarily be eliminated, nor would this be necessarily desirable. The particularity of industrial relations practices embedded in different social traditions makes it essential to consider the statistics carefully.... Statistical measurement should address technical issues such as the identification of union or bargaining agents by type of system....” (Lawrence and Ishikawa, 2005, p. 34-35). The

identity of bargaining agents within qualitatively different “types” of labor relations is, in fact, more than a technical matter.

d. Statistical Databases on Outcomes, Arrayed by Standards

The following description of ILO statistical information is arranged by specific rights and standards of interest for the current research. There is overlap between this sub-section and the above sub-sections providing an overview of ILO statistical databases. There is also overlap among the statistical sources for the various rights and standards. Nonetheless, it seems useful to arrange information about sources in this manner.

i. ILO Statistics – Freedom of Association

The ILO’s LABORSTA database includes annual data on strikes and lockouts, number of workers involved, days not worked, and rates of days not worked by economic activity. Some relevant data as to Caribbean countries is found in the ILO’s CARIBLEX database. The external audit recommended, without giving reasons, that the ILO no longer publish by any means (i.e., by hard copy or electronically) data on industrial disputes. (ILO, 2007b, p. 2).

ii. ILO Statistics – Discrimination and Equality

The ILO’s SEGREGAT database provides employment data for detailed occupational groups by gender. The ILO’s database of national labor force surveys provides a portal to national household surveys. The ILO’s Global Employment Trends for

Women (March 2009) contains some country data (Australia, Canada, France, Pakistan, Poland, Netherlands), but mostly global and regional data. (ILO, 2009k). Some relevant data as to Caribbean countries are found in the ILO's CARIBLEX database. A 2004 ILO Working Paper provides a compendium of national methodologies on labor market and working conditions of disabled persons. (ILO, 2004b).

iii. ILO Statistics – Minimum Wages

The NATLEX database includes abstracts of national labor legislation maintained by the International Labor Standards Department. The ILO's database of national labor force surveys provides a portal to national household surveys. The ILO's KILM and LABORSTA databases also contain data on annual and monthly wages by sectors of manufacturing, and wages in 159 occupations (the ILO's "October Inquiry") – although a quick search reveals "no data available" for many countries.

iv. ILO Statistics – Maximum Hours

The "Conditions of Work and Employment Program" of the ILO's TRAVAIL database includes working time laws and regulations in over 100 countries. The ILO's database of national labor force surveys provides a portal to national household surveys. The ILO's KILM and LABORSTA databases also contain data on annual and monthly hours by sectors of manufacturing, hours in 159 occupations (ILO October Inquiry), and distribution of the employed population by hours of work – although a quick search reveals "no data available" for many developing countries.

v. ILO Statistics – Occupational Safety and Health

The ILO's LABORSTA database contains data on occupational injuries, including annual number of injuries, lost workdays, and rates of occupational injuries. The ILO's website contains the CISDOC database on Occupational Safety and Health. It holds some 50,000 documents including national laws and regulations, journal articles and reports, book citations, chemical safety data sheets, and other items. The database is searchable by keywords. Some relevant data as to Caribbean countries is found in the ILO's CARIBLEX database.

V. Labor Regulation Indicators Produced by Academic Researchers

Prominent scholars of comparative labor law, comparative corporate law, and comparative politics have, in the last six years, constructed indicators of labor regulation, compiled cross-country and longitudinal datasets, and analyzed the relationship of the resulting indices to various other economic, political, and legal variables. As an initial matter, it is striking that these academic efforts make no reference to the ILO's decent work indicators, make only sporadic and generalized reference to ILO Conventions, let alone to the detailed rules and standards set out in those Conventions, and rarely draw on the "jurisprudence" of ILO supervisory bodies. The academic projects also engage minimally with the various employment indicators of the EU, the U.N., and the Inter-American Commission. (Conversely, ILO, U.N., and EU indicator methodologies are generally uninfluenced by the comparative scholars' work, with the notable exception of the European Commission's 2008 indices, discussed in Section VII(4) below.)

Instead, the academic indicators are based on the researchers' independent conceptualization of the most important variables in labor market and workplace regulation; and, once constructed, the indicators are applied to datasets on national labor laws, regulations, judicial decisions, and collectively bargained norms – not to international labor rights.

As in most research projects the relative "importance" of each variable (and therefore its inclusion in or exclusion from the body of indicators) is implicitly or explicitly

motivated by the hypothesis the researchers wish to test.

1. Botero et al.'s Indicators of Labor Regulation

The recent efforts by comparative labor law scholars to formulate labor indicators center around the so-called “legal origins” debate. The contested hypothesis is this: The degree of protection afforded to workers by a country’s labor laws (and therefore the degree of legal constraint imposed upon employers) is a product, in part, of the fundamental type of legal system that characterizes each country. More specifically, one group of scholars (“Botero, et al.”) maintains that advanced countries with longstanding “civil law” systems have stronger and more rigid worker protections than do countries with longstanding “common law” systems. (Botero et al., 2004). They also argue that the category of legal system (civil vs. common law) accounts for (causes) the degree and type of labor regulation. In addition, the civil law and common law “mother countries” transplanted their legal systems to their colonies. These “legal origins” therefore have the corresponding causal consequences for each developing country’s post-colonial labor regulations. Indicators of labor regulation were designed by these scholars, then, to capture the degree to which labor regulations constrain a country’s employers and, by implication, constrain the adaptability and efficiency of the country’s business enterprises.¹⁰

The analysis of Botero et al. was a “template” for parts of the World Bank’s *Doing*

¹⁰ These scholars have also created indicators of shareholder protection, to sustain analogous hypotheses about the rigidity and inefficiency of the corporate law rules of civil law countries.

Business Reports which, until this year, included labor indicators weighted in favor of labor market flexibility. (Deakin, et al., 2007) Many of Botero et al.'s key indicators and datasets have been used by other scholars, as a basis for testing claims about the relationship among trade, capital flows, labor regulation, and labor conditions. (See, e.g., Flanagan, 2006, pp. 195-196)

A second group of scholars (the "Cambridge researchers") disputes the hypothesis that common law systems are categorically less worker protective and more adaptable than civil law systems. These scholars also dispute the premise that worker-protective labor laws, whatever their origin, hamper business investment, economic efficiency, and economic growth and development. To support their claims, the Cambridge researchers have created their own indicators of labor regulation, based in part on a critique of Botero et al.'s indicator methodology.

Much is at stake in this debate, from the point of view of our own project. If the degree of worker protection is a matter of path-dependent "legal origins," determined by colonial history, this may have implications for the kind of "adjustment" variables we might wish to incorporate in our body of indicators. Should we categorize countries by their civil or common law traditions, and draw evaluative comparisons only within each category? Should we evaluate the country's record of enforcement "effort" and "improvement" differently for countries whose legal origins make it systemically more difficult to provide enhanced worker protection? As to matters where international labor law is silent or ambiguous, should we apply different norms to civil and common law countries, based on the respective "consensus" or "best practice" norms within each of those two categories?

If, on the other hand, the Cambridge group has convincingly discredited the categorization between civil and common law systems, are there alternative schemes for categorizing labor law systems for purposes of drawing comparisons among similarly situated countries and for fashioning indicators that are well-adapted to each country's labor-relations and labor-law institutions? Or, in demonstrating that "legal traditions" do not account for the evolution of labor regulation, does the Cambridge research point us toward contextual variables that do not take the form of broad "categories" of labor law systems – contextual variables such as contingent political events or religio-cultural traditions?¹¹ (Literature pertaining to these conceptual questions is reviewed more fully in Section XI(2) below.)

Although Botero et al.'s primary distinction is the dichotomy between civil law and common law countries, they also they put forward a more refined categorization among five legal traditions: British common law, transplanted to the United States, the other Commonwealth countries, and other British colonies in South and East Asia, East Africa, and the Caribbean; French civil law, transplanted to Spain, Portugal, Italy, Belgium, the Netherlands, and those various countries' colonies in Latin America, Asia, and North and West Africa; the German civil code, transplanted to Japan, Korea, and Taiwan; socialist law imposed throughout the U.S.S.R.; and an "indigenous" Nordic legal tradition in Denmark, Finland, Norway, and Sweden.

Overall, based on a dataset for 85 countries and an analysis of some 40 labor

¹¹ Some academics criticized by Botero et al. argue that it is not the civil law tradition of labor-protective countries but rather their social-democratic political configuration that matters. (See Roe, 2000; Pagano and Volpin, 2001).

indicators (set out below), they conclude that civil law countries impose stricter regulations on individual employment contracts (such as overtime pay and constraints on dismissal) and somewhat greater protection for collective bargaining. As for social security, the picture is more nuanced: German civil law countries do not provide greater benefits than common law countries, but countries with French or Nordic civil law tradition do.

Botero et al.'s nine alternative regressions find only "mixed support" for the claim that political power of labor and the left in a given country explains the degree of overall worker protection. "Legal origins wins out and accounts for the bulk of the R squared. In six out of nine regressions, the proxies for politics lose their consistent influence on the regulation of labor. In contrast, the difference between common law and French legal origin countries is always statistically significant.... German and Scandinavian legal origin countries continue to be more protective than common law countries.... We conclude that the effects of legal origin on the regulation of labor are larger and different from those of politics." (Botero et al., 2004, pp. 1370-1371).

Botero et al. construct indicators in three categories: employment, collective relations, and social security. Most of their indicators are formal legal variables, not matters of enforcement or application of formal legal standards. The researchers purport to incorporate the "actual" effects of law, by framing some indicators in terms of the real economic costs imposed by legal rules. For example, one of their indicators is the monetary cost for employers in a given country to increase the annual normal hours worked by their employees from the minimum value in Botero et al.'s dataset (Denmark's 1,758) to the maximum value (Kenya's 2,418). This, however, does not really address the

problem. To make their monetary calculation, Botero et al. simply assume that the maximum hours and overtime wage mandates incorporated in formal law are actually enforced. Moreover, they adopt the arbitrary assumption that if the formal law does not allow such an increase in hours, each employer doubles its workforce and pays each worker for 1,758 hours per year (i.e., doubling the employer's wage bill). Similarly, their indicator for the cost of firing 20 percent of the workforce adopts the arbitrary assumption that half of those discharges are without cause. It makes the further arbitrary assumption that if the legal system requires judicial or administration authorization for firings without cause, the court or administrator denies such authorization for all such discharges. It makes a third arbitrary assumption that the employer proceeds with the illegal discharges, and a fourth arbitrary assumption that the employer pays a monetary penalty of one year's pay for each illegally fired worker. In short, the "actual" effects of the law – the monetary costs measured by the indicator – are based on factual *assumptions*, not actual facts, about the actual enforcement of the law and the actual compliance behavior of the employer. These assumptions are questionable, in light of documented facts or anecdotal but consistent factual "priors" respecting labor-law enforcement in developing countries and in the informal sector of advanced countries. (See, e.g. Bernhardt, et al., 2009). Botero et al.'s explanatory Appendix is not currently accessible online; perhaps it provides explanation and evidence for these assumptions.

The Botero, et al. indicators for two categories – "collective labor relations" and "employment laws" – are set forth below. Indicators for the third category, "social security laws," are not shown, because not immediately relevant to the issues in the current

research.

Collective Relations Laws Index = Average of (1) Labor Union Power and (2) Collective Disputes

1. *Labor Union Power*

Measures the statutory protection and power of unions as the average of the following seven dummy variables which equal one:

- (1) if employees have the right to organize,
- (2) if employees have the right to collective bargaining,
- (3) if employees have the legal duty to bargain with unions,
- (4) if collective contracts are extended to third parties,
- (5) if the law allows closed shops,
- (6) if workers, or unions, or both have a right to appoint members to the Board of Directors, and
- (7) if workers' councils are mandated by law.

2. *Collective Disputes*

Measures the protection of workers during collective disputes as the average of the following eight dummy variable which equal one:

- (1) if employer lockouts are illegal,
- (2) if workers have a right to industrial action,
- (3) if wildcat, political, and sympathy/solidarity/secondary strikes are legal,
- (4) if there is no mandatory waiting period or notification requirement before strikes can occur,
- (5) if striking is legal even if there is a collective agreement in force,
- (6) if laws do not mandate conciliation procedures before a strike,
- (7) if third-party arbitration during a labor dispute is mandated by law, and
- (8) if it illegal to fire or replace striking workers.

Employment Laws Index = Average of (1) Alternative Employment Contracts, (2) Cost of Increasing Hours Worked, (3) Cost of Firing Workers, and (4) Dismissal Procedures

1. *Alternative Employment Contracts*

Measures the existence and cost of alternatives to the standard employment contracts, computed as the average of

- (1) a dummy variable equal to one if the part-time workers enjoy the mandatory benefits of full-time workers,
- (2) a dummy variable equal to one if terminating part-time workers is at least as costly as terminating full-time workers,
- (3) a dummy variable equal to one if fixed-term contracts are only allowed for fixed-term tasks, and
- (4) the normalized maximum duration of fixed-term contracts.

2. Cost of Increasing Hours Worked

Measures the cost of increasing the number of hours worked. We start by calculating the maximum hours or 'normal' hours of work per year in each country (excluding overtime, vacations, holidays, etc.). Normal hours range from 1,785 in Denmark to 2,418 in Kenya. Then we assume that firms need to increase the hours worked by their employees from 1,785 to 2,418 hours during one year. A firm first increases the number of hours worked until it reaches the country's maximum normal hours of work, and then uses overtime. If existing employees are not allowed to increase hours worked to 2,418 a year, perhaps because overtime is capped, we assume that the firm doubles its workforce and each worker is paid 1,785 hours, doubling the wage bill of the firm. The cost of increasing hours worked is computed as the ratio of the final wage bill to the initial one.

3. Cost of Firing Workers

Measures the cost of firing 20 percent of the firm's workers (10 percent are fired for redundancy and 10 percent without cause). The cost of firing a worker is calculated as the sum of the notice period, severance pay, and any mandatory penalties established by law or mandatory agreements for a worker with three years of tenure with the firm. If dismissal is illegal, we set the cost of firing the worker equal to the annual wage. The new wage bill incorporates the normal wage of the remaining workers and the cost of firing workers. The cost of firing workers is computed as the ratio of the new wage bill to the old one.

4. Dismissal Procedures

Measures worker protection granted by law or mandatory collective agreements against dismissal. It is the average of the following seven dummy variables which equal one:

- (1) if the employer must notify a third party before dismissing more than one worker,
- (2) if the employer needs the approval of a third party prior to dismissing more than one worker,
- (3) if the employer must notify a third party before dismissing one redundant worker,

- (4) if the employer needs approval of a third party to dismiss one redundant worker,
- (5) if the employer must provide relocation or retraining alternatives for redundant employees prior to dismissal,
- (6) if there are priority rules applying to dismissal or layoffs, and
- (7) if there are priority rules applying to reemployment.

Botero et al. also construct a dataset of six “political variables” for each of the 85 countries, which they see as contending explanations for a country’s degree of worker protection. That is, their regressions test the relative explanatory significance of the political variables compared with the “legal origins” variables. The political variables are: (1) chief executive and largest party in congress have left or center political orientation, (2) union density, (3) autocracy, (4) proportional representation in divided government, and (5) democracy. Their six outcome variables (for measuring the effect of strong worker protections) are (1) size of the unofficial economy, (2) employment in the unofficial economy, (3) male/female participation rate in the labor force, (4) unemployment rate, (5) unemployed males/females 20-24 years old/active males/females 20-24 years old, and (6) wages of machine operators/wages of clerks and craft and related trades workers.

There are conceptual and linguistic problems with many of these indicators, apart from the problem (already noted) that the indicators address only formal law or rest on arbitrary factual assumptions and do not measure actual enforcement or application of law. Some indicators are grossly overbroad. Just one example is: “if the employees have the right to collective bargaining.” That indicator subsumes many specific sub-rules. It is therefore ambiguous and, as a conceptual matter, poorly grounded: The existence of *which* sub-rules suffices to code positively for “the right to collective bargaining”? Individual analysts therefore have effective discretion in defining the right and in weighting

its various components.

Some indicators are not well designed to capture the underlying concept. For example, the requirement that an employer provide notice before dismissing a worker seems a minor constraint on the employer's freedom of dismissal, hardly equivalent to the requirement that the employer "relocat[e] or retrain[]" workers prior to dismissal, which is given equal weight to the notice requirement. That conceptual problem is compounded, since the requirement of notice for firing one or more redundant workers codes positive for two separate indicators ("if the employer must notify a third party before dismissing more than one workers;" and "if the employer must notify a third party before dismissing one redundant worker").

In addition, some of the Botero et al. indicators are double-barreled. For example: "if wildcat, political, and sympathy/solidarity/secondary strikes are legal."

In addition to the conceptual problems with the indicators noted above, there may be problems of transparency in Botero et al.'s application of the indicators – that is, in constructing the dataset or values assigned to the indicators. They state, "unless otherwise indicated, the sources for the variables are the laws of each country" (Botero, et al., 2004, Table I), but do not specify the particular statutes, regulations, judicial decisions, or collective agreements from which they obtain the values in their dataset. This is particularly problematic when values are taken from the terms of "mandatory collective agreements." Which agreements, covering what percentage of workers in which sectors or workplaces? They also state that they supplement "the laws of each country" with secondary sources from 1977 and 1988, even though their dataset is meant to reflect the

cross-section values for the year 1997. Again, perhaps the specific sources for the 85 countries in the dataset are in the Appendix which is not currently accessible online. Other scholars have criticized Botero et al. for failures in transparency and mistakes in coding; but without viewing the Appendix, I cannot verify or reject those criticisms.

There are some positive lessons from Botero et al.'s research. Their use of "if/then" indicators may be worth pursuing, such as their indicator asking, "what would be the monetary cost to firms if they laid off 20 percent of the workforce?" Could we develop relevant indicators that take an analogous form? For example, could we ask how much additional staff or budget would be necessary for a country to achieve a certain rate of labor inspection per 100,000 workplaces? The additional resources necessary to achieve some well-specified rate of inspection could then be compared to the country's overall governmental budget or GDP. While there are obvious issues of data availability for this type of indicator, it may be productive as a conceptual matter to explore this strategy.

Botero et al.'s research is also useful as an example of regression analysis that seeks to "adjust" legal regulation for such matters as "legal traditions" (placing legal systems in five different categories), comparative colonial origins of labor law systems, and political structures and alignments.

Notwithstanding that the Botero et al. indicators are flawed and that more sophisticated conceptualization and empirical testing (see the next subsection) invalidate Botero et al.'s conclusions about the correlation of strong legal regulation and weaker

economic performance, several economists continue to use his indicators and dataset.¹²

Using the Botero et al. dataset, Caballero et al. conclude that a country with effective rule of law that moves from the 20th to the 80th percentile in job security will reduce annual productivity growth by one percent – although there is no such effect for countries with weak rule of law (i.e., most developing countries). (Caballero et al., 2004). Van Stel et al. use Boltero et al.'s indicators for rigidity of employment and hours to find that rates of entrepreneurship are higher in countries with weaker labor regulation. (Van Stel et al., 2007). Feldman uses the Economic Freedom of the World Index, which incorporates Boltero et al.'s labor indicators, to conclude that Indonesia would reduce its unemployment rate by 2.1 percentage points if its business regulations were as flexible as Finland's. (Feldman, 2008). Finally, Freund and Bolaky use Boltero et al.'s dataset to conclude that countries with stronger labor regulation lose growth and employment benefits that would otherwise result from trade liberalization. (Freund and Bolaky, 2008).

2. Comparative Labor Law Indicators of the Cambridge University Project on “Law, Finance, and Development.”

The Center for Business Research at Cambridge University is undertaking a multi-year project on the evolution of legal rules in three fields: worker protection, shareholder protection, and creditor protection. (See Ahlering and Deakin, 2007; Armour, Deakin, Lele, and Siems, 2009; Deakin, 2009; Deakin, Lele, and Siems, 2007; Deakin and Reberieux, 2009; Deakin and Sarkar, 2008.) The strategy of the Cambridge project is to develop

¹² World Bank economists have made much use of Botero et al.'s database and analysis.

quantitative indicators of legal rules in those three fields, to generate longitudinal series of data and indices for several countries, and to analyze the data for variations in the evolution of legal rules over time. The researchers are scholars in comparative labor, corporate, and finance law. The project is driven by a question that has some relevance for, but is not entirely coterminous with, the questions animating the current project. That project's ultimate goal, like Botero et al.'s, is to explore whether the evolution of legal regulation of the business enterprise (including the evolution of labor law) is systematically different as between civil law countries and common law countries, with particular focus on whether the systems vary in their capacity to adapt to changing economic circumstances and to dampen rent-seeking political behavior.

In light of this research question, the Cambridge researchers have chosen to begin their data collection and analysis for the United States, United Kingdom, Germany, France, and India for the period 1970-2005. (The project is currently collecting data for 25 countries.) These five countries are of particular interest, according to the researchers, "because they include three common law and two civilian countries; the three 'mother countries' for the [United Kingdom] common law and the French and German civil laws; one economically significant developing country which is also the world's largest democracy; and the country which is the world's largest economy." (Armour, 2009, p. 16). India, for example, presents an important case for their research goal, since the British common law was transplanted to India during the colonial period, and yet subsequently India adopted stringent statutory worker protections in the manner of paradigmatic civil law countries.

The Cambridge project dubs its method of indicator construction “leximetrics” or “numerical comparative law.” (Seims, 2005; Lele and Siems, 2007). The labor regulation index covers five categories: employee representation, industrial action, working time, dismissal, and alternative forms of labor contracting (self-employment, part-time work, fixed-term contracting, and agency work). (Deakin, Lele, and Siems, 2007). There are 40 indicators. Each is coded from 0 to 1. Some are binary, and others gradated (see below). The indicators within each of the five categories are then summed to generate five sub-indices and summed again to generate the overall index. No publication presents sensitivity testing or other validation of the methodology. The researchers argue against weighting of indicators on the ground it would be too challenging to decide “how much weight to be given each variable in each country – which invariably would have involved subjective elements.” They defend this approach, however, on the ground that their indicators “take[] into account the existence of functional equivalents across jurisdictions.” (Lele and Siems, 2007). Nonetheless, their indicators are in some instances binary and in some instances non-binary. The gradation of values assigned to different “functionally equivalent” rules seems, in practice, to constitute a form of weighting. Moreover, for those categories in which indicators are more numerous, the weight of each indicator is implicitly devalued relative to indicators in categories with fewer indicators. Stated differently, the number of indicators in each category is a means of attaching relative weights to each category. Such implicit weighting requires conceptual justification.

The Cambridge researchers attempt to construct a methodology that responds to some, but not all, of several of their own objections to labor regulation indexing. These

methodological objections include:

[T]he relative importance of a given legal variable will differ from country to country, depending on the different roles it plays in each system. This...is a particular problem in the labor law context where there is considerable diversity across systems in the mechanisms used to protect labor interests (such as collective bargaining versus codetermination; unfair dismissal law versus legal support for strike action over dismissals; and so on...)....

[O]ther problems...include the tendency for many apparently mandatory labor law rules not to be applied in certain industries or regions of national economies, a particular issue [for] developing countries with large informal or unorganized sectors, but one which is by no means confined to the developing world; the difficulties in using binary variables to capture gradations in the effects of legal rules across countries; the growing use of default rules and other 'reflexive' norms which may be varied by either individual or collective agreements, giving rise to particular difficulties in attaching values to certain variables; and the importance of non-legal sources of norms, such as collective agreements, which may have *de facto* binding effect, but which may be difficult to identify from a search based on legal sources alone.

To some degree, all the objections just made are inherent in the coding project; they can be addressed, to some degree...but never completely resolved. In order for any coding to be done at all, it has to be accepted that the resulting index will, at best, be an incomplete proxy for the real effects of labor law and related rule systems (such as collective agreements) in a given country. If the range of potential legal variables is huge, then so is the range of social and economic variables which may influence the application and enforcement of law in practice, and which may render the effect of law in practice very different from the way the formal rule intended it to be. The issue, with regard to any index, is not whether it is a completely realistic account of the workings of the law, since almost by definition, this cannot be achieved. The issue, rather, is how close to reality the index is, compared to alternatives.

(Deakin, Lele, Siems, 2007, pp. 10-11).

Notwithstanding this critique of indicators of formal law, the Cambridge indicators measure formal law and do not attempt to measure enforcement or actual application of law in labor markets or workplaces – that is, the actual degree of “worker protection.” In that respect, they follow the methodology of Botero et al., discussed above. However, they

seek to improve upon Botero et al. in several respects. First, their indicators are longitudinal, not just cross-sectional – an essential characteristic, if their index is to track the evolution of worker protection in different countries and different categories of countries. This characteristic would also be essential for the current research, insofar as we wish to track improvements in worker protection over time, for purposes of directly determining whether countries are “taking steps” to comply, as set out in legislative language, and for purposes of determining whether a country is meeting benchmarks of increasing compliance after an initial finding of non-compliance.

Second, the Cambridge indicators code not just for formal or positive law (in the sense of constitutional provisions, legislation, regulations, and judicial decisions), but also for self-regulatory mechanisms that are functionally equivalent to binding law, in the sense that the mechanisms impose binding norms. The most salient mechanisms of this kind are collective agreements. This is an important point for our project. That is, an indicator of collective bargaining coverage is not just relevant to the question of “freedom of association and collective bargaining.” The scope and content of collective bargaining agreements are also relevant to non-discrimination, wages, hours, and occupational safety and health, to the extent these issues are addressed in collective agreements. Collective bargaining agreements are also relevant to the question of effective enforcement, both because enforcement of rights and standards is as a general matter stronger in unionized workplaces where workers feel less inhibited about asserting their rights and because arbitration and other non-judicial enforcement mechanisms are typically created by collective agreements. The various ILO indicators appear to take collective agreement

coverage as a measure only of employee representation and not as a source of other rights and standards and as a measure of effective enforcement of all rights and standards.

The Cambridge indicators also improve over those of Botero et al. by coding for the different forms of legal rules – that is, whether the rules are mandatory and binding or are instead so-called default rules that can be modified by the parties. Finally, the Cambridge database transparently sets out the specific legal sources for each value in their dataset.

The Cambridge indicators are set out below. I leave the indicators in their five general categories, rather than re-arrange them to fit the categories of the current research (freedom of association, non-discrimination, acceptable conditions, effective enforcement, and so on). It will be apparent that some of the Cambridge indicators are relevant to our project even though categorized under headings that differ from our categories. I also provide the actual application of the indicators by Cambridge analysts for their final category (“Industrial Actions”) as applied to the United States. This gives an example of the degree of transparency, and specificity of legal analysis, in the Cambridge methodology.

Cambridge Longitudinal Labor Regulation Indicators

A. Alternative employment contracts -- Measures the cost of using alternatives to the “standard” employment contract, computed as an average of the variables 1-8

- 1. The law, as opposed to the contracting parties, determines the legal status of the worker*

Equals 0 if the parties are free to stipulate that the worker’s status is one of self-employment as opposed to that of employee.

Equals 0.5 if the law allows the issue of status to be determined by the nature of the contract made by the parties (as in the case of English common law's "mutuality of obligation" test).

Equals 1 if the law mandates employee status on the parties when certain specified criteria are met (depending on the form of payment, duration of hiring, etc.).

Further gradations between 0 and 1 reflect changes in the strength of the law.

2. Part-time workers have the right to equal treatment with full-time workers

Equals 1 if the legal system recognizes a right to equal treatment for part-time workers (as, for example, in the case of the European Union's directive on part-time work 97/81/EC).

Equals 0.5 if the legal system recognizes a more limited right to equal treatment for part-time workers (e.g. through a law against sexual discrimination or through a more general right of workers not to be treated arbitrarily at work).

Equals 0 if neither of the above.

Further gradations between 0 and 1 reflect changes in the strength of the law.

3. The cost of dismissing part-time workers is equal, in proportionate terms, to the cost of dismissing full-time workers

Equals 1 if, as a matter of law, part-time workers enjoy rights proportionate to those of full-time workers with respect to protection against dismissal (notice periods, severance pay and unjust dismissal protection).

Equals 0 otherwise.

Gradation between 0 and 1 reflects changes in the strength of the law.

4. Fixed-term contracts are allowed only for work of limited duration

Equals 1 if the law imposes a substantive constraint on the conclusion of a fixed-term contract, for example, by allowing temporary hirings only for jobs

which are temporary by nature, training, seasonal work, replacement of workers on maternity or sick leave, or other specified reasons.

Equals 0 otherwise.

Gradation between 0 and 1 reflects changes in the strength of the law.

5. Fixed-term workers have the right to equal treatment with permanent workers

Equals 1 if the legal system recognizes a right to equal treatment for fixed-term workers (as, for example, in the case of European Union Directive 99/70/EC).

Equals 0.5 if the legal system recognizes a more limited right to equal treatment for fixed-term workers (e.g. through a more general right of workers not to be treated arbitrarily in employment).

Equals 0 if neither of the above.

Further gradations between 0 and 1 reflect changes in the strength of the law.

6. Maximum duration of fixed-term contracts

Measures the maximum cumulative duration of fixed-term contracts permitted by law before the employment is deemed to be permanent.

The score is normalized from 0 to 1, with higher values indicating a shorter permitted duration.

The score equals 1 if the maximum duration allowed is one year, and 0 if it is 10 years or more or if there is no legal limit.

7. Agency work is prohibited or strictly controlled

Equals 1 if the legal system prohibits the use of agency labor.

Equals 0.5 if it places substantive constraints on its use (only allowed under certain conditions, such as the employer's demonstrable need to meet fluctuations in labor demand).

Equals 0 if neither of the above.

Further gradations between 0 and 1 reflect changes in the strength of the law.

8. Agency workers have the right to equal treatment with permanent workers of the user undertaking

Equals 1 if the legal system recognizes a right to equal treatment of agency workers and permanent workers of the user undertaking, in respect of terms and conditions of employment in general.

Equals 0.5 or another intermediate score if the legal system recognizes a more limited right to equal treatment for agency workers (in respect of anti-discrimination law).

Equals 0 if neither of the above.

Further gradations between 0 and 1 reflect changes in the strength of the law.

B. Regulation of working time - Measures the regulation of working time, computed as an average of variables 9-15

9. Annual leave entitlements

Measures the normal length of paid annual leave guaranteed by law or collective agreement.

The same score is given for laws and for collective agreements which are de facto binding on most of the workforce (as in the case of systems which have extension legislation for collective agreements).

The score is normalized on a 0-1 scale, with a leave entitlement of 30 days equivalent to a score of 1.

10. Public holiday entitlements

Measures the normal number of paid public holidays guaranteed by law or collective agreement.

The same score is given for laws and for collective agreements which are de facto binding on most of the workforce (as in the case of systems which have extension legislation for collective agreements).

The score is normalized on a 0-1 scale, with an entitlement of 18 days equivalent to a score of 1.

11. Overtime premia

Measures the normal premium for overtime work set by law or by collective agreements which are generally applicable.

The same score is given for laws and for collective agreements which are de facto binding on most of the workforce (as in the case of systems which have extension legislation for collective agreements).

The score equals 1 if the normal premium is double time, 0.5 if it is time and half, and 0 if there is no premium.

12. Weekend working

Measures the normal premium for weekend work set by law or by collective agreements which are generally applicable.

The same score is given for laws and for collective agreements which are de facto binding on most of the workforce (as in the case of systems which have extension legislation for collective agreements).

The score equals 1 if the normal premium is double time, 0.5 if it is time and a half, and 0 if there is no premium. It also equals 1 if weekend working is strictly controlled or prohibited.

13. Limits to overtime working

Measures the maximum weekly number of overtime hours permitted by law or by collective agreements which are generally applicable.

The score equals 1 if there is a maximum duration to weekly working hours, inclusive of overtime, for normal employment; 0.5 if there is a limit but it may be averaged out over a reference period longer than a week; and 0 if there is no limit at all.

14. Duration of the normal working week

Measures the maximum duration of the normal working week, exclusive of overtime.

The score is normalized on a 0-1 scale, with a limit of 35 hours or less scoring 1, and a limit of 50 hours or more (or no limit) scoring 0. The same score is given for laws and for collective agreements which are de facto binding on most of the workforce (as in the case of systems which have extension legislation for collective agreements).

15. Maximum daily working time

Measures the maximum number of permitted working hours in a day, taking account of rules governing rest breaks and maximum daily working time limits.

The score is normalized on a 0-1 scale, with a limit of 8 hours or less scoring 1, and a limit of 18 hours or more scoring 0.

C. Regulation of dismissal - Measures the regulation of dismissal, calculated as the average of variables 16-24

16. Legally mandated notice period (for all dismissals)

Measures in weeks the length of notice that has to be given to a worker with 3 years' employment.

The scores are normalized so that 0 weeks = 0, and 12 weeks = 1.

17. Legally mandated redundancy compensation

Measures the amount of redundancy compensation payable to a worker made redundant after 3 years of employment, measured in weeks of pay.

The scores are normalized so that 0 weeks = 0, and 12 weeks = 1.

18. Minimum qualifying period of service for a normal case of unjust dismissal

Measures the period of service required for a worker to qualify for general protection against unjust dismissal.

The scores are normalized so that 3 years or more = 0, 0 months = 1.

19. Law imposes procedural constraints on dismissal

Equals 1 if a dismissal is necessarily unjust if the employer fails to follow procedural requirements prior to dismissal.

Equals 0.67 if failure to follow procedural requirements normally leads to a finding of unjust dismissal.

Equals 0.33 if failure to follow procedural requirement is but one of the factors taken into account in unjust dismissal cases.

Equals 0 if there are no procedural requirements for dismissal.

Further gradations between 0 and 1 reflect changes in the strength of the law.

20. Law imposes substantive constraints on dismissal

Equals 1 if dismissal is only permissible for serious misconduct or fault of the employee.

Equals 0.67 if dismissal is lawful for a wider range of legitimate reasons (misconduct, lack of capability, redundancy, etc.).

Equals 0.33 if dismissal is permissible if it is “just” or “fair”, as defined by case law.

Equals 0 if employment is at will (i.e. no cause of dismissal is normally permissible).

Further gradations between 0 and 1 reflect changes in the strength of the law.

21. Reinstatement is normal remedy for unfair dismissal

Equals 1 if reinstatement is the normal remedy for unjust dismissal and is regularly enforced.

Equals 0.67 if reinstatement and compensation are, de jure and de facto, alternative remedies.

Equals 0.33 if compensation is the normal remedy.

Equals 0 if no remedy is available as of right.

Further gradations between 0 and 1 reflect changes in the strength of the law.

22. Notification of dismissal

Equals 1 if, by law or binding collective agreement, the employer has to obtain the permission of a state body or third party prior to an individual dismissal.

Equals 0.67 if a state body or third party has to be notified prior to the dismissal.

Equals 0.33 if the employer has to give the worker written reasons for the dismissal.

Equals 0 if an oral statement of dismissal to the worker suffices.

Further gradations between 0 and 1 reflect changes in the strength of the law.

23. Redundancy selection

Equals 1 if, by law or binding collective agreement, the employer must follow priority rules based on seniority, marital status, number of dependants, etc., prior to dismissing an employee for redundancy.

Equals 0 otherwise.

Gradations between 0 and 1 reflect changes in the strength of the law.

24. Priority in re-employment

Equals 1 if, by law or binding collective agreement, the employer must follow priority rules relating to the re-employment of former workers.

Equals 0 otherwise.

Gradations between 0 and 1 reflect changes in the strength of the law.

D. Employee representation - Measures the strength of employee representation, calculated as the average of variables 25-31

25. Right to unionization

Measures the protection of the right to form trade unions in the country's

constitution (loosely interpreted in the case of systems such as the United Kingdom's, which do not have a codified constitution).

Equals 1 if a right to form trade unions is expressly granted by the constitution.

Equals 0.67 if trade unions are described in the constitution as a matter of public policy or public interest.

Equals 0.33 if trade unions are otherwise mentioned in the constitution, or if there is a reference to freedom of association which encompasses trade unions.

Equals 0 otherwise.

Further gradations between 0 and 1 reflect changes in the strength of the law.

26. Right to collective bargaining

Measures the protection of the right to collective bargaining or the right to enter into collective agreements in the country's constitution (loosely interpreted in the case of systems such as the United Kingdom's, which do not have a codified constitution).

Equals 1 if a right to collective bargaining is expressly granted by the constitution.

Equals 0.67 if collective bargaining is described as a matter of public policy or public interest (or mentioned within the chapter on rights).

Equals 0.33 if collective bargaining is otherwise mentioned in the constitution.

Equals 0 otherwise.

Further gradations between 0 and 1 reflect changes in the strength of the law.

27. Duty to bargain

Equals 1 if employers have the legal duty to bargain and/or to reach an agreement with unions, works councils or other organizations of workers.

Equals 0 if employers may lawfully refuse to bargain with workers.

Gradations between 0 and 1 reflect changes in the strength of the law.

28. Extension of collective agreements

Equals 1 if the law extends collective agreements to third parties at the national or sectoral level. Extensions may be automatic, subject to governmental approval, or subject to a conciliation or arbitration procedure.

Equals 0 if collective agreements may not be extended to non-signatory workers or unions, or if collective agreements may be extended only at the plant level. Mandatory administrative extensions of collective agreements are coded as equivalent to mandatory extensions by law.

Gradations between 0 and 1 reflect changes in the strength of the law.

29. Closed shops

Equals 1 if the law permits both pre-entry and post-entry closed shops.

Equals 0.50 if pre-entry closed shops are prohibited or rendered ineffective but post-entry closed shops are permitted (subject in some cases to exceptions, e.g. for pre-existing employees).

Equals 0 if neither pre-entry or post-entry closed shops are permitted to operate.

Further gradations between 0 and 1 reflect changes in the strength of the law.

30. Co-determination for board membership

Equals 1 if the law gives unions and/or workers the right to nominate board-level directors in companies of a certain size.

Equals 0 otherwise.

Gradations between 0 and 1 reflect changes in the strength of the law.

31. Co-determination and information/ consultation of workers

Equals 1 if works councils or enterprise committees have legal powers of co-decision-making.

Equals 0.67 if works councils or enterprise committees must be constituted by law, under certain conditions, but do not have the power of co-decision-making.

Equals 0.5 if works councils or enterprise committees may be required by law, unless the employer can point to alternative or pre-existing alternative arrangements.

Equals 0.33 if the law provides for information and consultation of workers or worker representatives on certain matters but where there is no obligation to maintain a works council or enterprise committee as a standing body.

Equals 0 otherwise.

Further gradations between 0 and 1 reflect changes in the strength of the law.

**E. Industrial action - Measures the strength of protections for industrial action, measured as the average of variables 32-40.
[N.B.: Coding for the United States by Deakin, et al.]**

32. Unofficial industrial action

Equals 1 if strikes are not unlawful merely by reason of being unofficial or 'wildcat' strikes.

Equals 0 otherwise.

Scope for further gradations between 0 and 1 to reflect changes in the strength of the law.

[Coded for the United States:] 0 Unofficial strikes are generally considered unprotected (*Confectionery & Tobacco Drivers Local 805 v. NLRB*, 312 F2d 108, 52 LRRM 2163 (CA 2, 1963)) although there is a view that the legality of a strike depends not solely upon majority approval but also whether the object of the strike is to protect the union's demands and policies. *NLRB v. R.C. Can Co.*, 328 F2d 974, 55 LRRM 2642 (CA 5, 1964)).

33. Political industrial action

Equals 1 if strikes over political (i.e. non work-related) issues are permitted.

Equals 0 otherwise.

Scope for gradations between 0 and 1 to reflect changes in the strength of the law.

[Coding for the United States:] 0 - Political strikes are generally considered unprotected; e.g. although not wholly on point the decision in *International Longshoremen's Ass'n, AFL-CIO v. Allied Intern., Inc.*, 452 US 212, 110 LRRM 2001 (1982) indicates that such strikes are illegal if the foreseeable consequences of the union's conduct is to embroil neutrals in the dispute and commerce is affected under the Act.

34. Secondary industrial action

Equals 1 if there are no constraints on secondary or sympathy strike action.

Equals 0.5 if secondary or sympathy action is permitted under certain conditions.

Equals 0 otherwise.

Scope for further gradations between 0 and 1 to reflect changes in the strength of the law.

[Coding for the United States:] 0 - Secondary strikes were outlawed by the 1947 Taft-Hartley amendments to the NLRA which resulted in the addition of section 8(b)(4)(A); this prohibition was further strengthened by the 1959 amendments.

35. Lockouts

Equals 1 if lockouts are not permitted.

Equals 0 if they are.

Scope for further gradations between 0 and 1 to reflect changes in the strength of the law.

[Coding for the United States:] 0 - The Supreme Court in *American*

Shipbuilding Company v. NLRB (1965) held that in certain circumstances lockouts by employers are lawful under the NLRA.

36. Right to industrial action

Measures the protection of the right to industrial action (i.e. strike, go-slow or work-to-rule) in the country's constitution or equivalent.

Equals 1 if a right to industrial action is expressly granted by the constitution.

Equals 0.67 if strikes are described as a matter of public policy or public interest.

Equals 0.33 if strikes are otherwise mentioned in the constitution.

Equals zero otherwise.

Scope for further gradations between 0 and 1 to reflect changes in the strength of the law.

[Coding for the United States:] 0 - The US constitution does not recognize the right to strike.

37. Waiting period prior to industrial action

Equals 1 if by law there is no mandatory waiting period or notification requirement before strikes can occur.

Equals 0 if there is such a requirement.

Scope for gradations between 0 and 1 to reflect changes in the strength of the law.

[Coding for the United States:] 0 - The NLRA (Section 8(d)) makes provision for a 'cooling off' period to be applied under certain circumstances.

38. Peace obligation

Equals 1 if a strike is not unlawful merely because there is a collective agreement in force.

Equals 0 if such a strike is unlawful.

Scope for gradations between 0 and 1 to reflect changes in the strength of the law.

[Coding for the United States:] 0.5 - If either party seeks to modify or terminate an existing collective bargaining agreement it must give 60 days notice to the other Party and continue to work during this period without resort to strike or lockout.

39. Compulsory conciliation or arbitration

Equals 1 if laws do not mandate conciliation procedures or other alternative-dispute-resolution mechanisms (other than binding arbitration) before the strike.

Equals 0 if such procedures are mandated.

Scope for further gradations between 0 and 1 to reflect changes in the strength of the law.

[Coding for the United States:] 0.5 - During the modification or termination of a collective bargaining agreement the parties must notify the Federal Mediation and Conciliation Services and the appropriate state mediation agency within 30 days after giving notice of the existence of a dispute (NLRA Section 8(d)).

40. Replacement of striking workers

Equals 1 if the law prohibits employers to fire striking workers or to hire replacement labor to maintain the plant in operation during a non-violent and non-political strike.

Equals 0 if they are not so prohibited.

Scope for further gradations between 0 and 1 to reflect changes in the strength of the law.

[Coding for United States:] 0 - Although the right to strike is protected under s. 13 of the NLRA, which speaks of the right to strike not being impaired by anything in the NLRA, since the 1938 decision in *NLRB v. Mackay Radio & Telegraph Company* the Supreme Court has allowed

employers to permanently replace striking employees with strike-breakers (although this is restricted to employees who strike for economic reasons and not for reasons of unfair labor practices where the job of that employee is being performed by a new permanent member of staff).

Several aspects of these indicators are noteworthy. First, even though drafted by excellent legal scholars, several of the indicators are double-barreled and ambiguous. For example, Indicator 27 asks whether “employers have the legal duty to bargain and/or to reach an agreement with unions, works councils or other organizations of workers.” Second, the indicators put great weight on whether collective rights are constitutionally protected. This seems conceptually unwarranted. In many if not most legal systems, legislative protections of rights have the same force as constitutional protections, in terms of actual worker protection. Indeed, constitutional protections frequently have only precatory (aspirational) value, and must be operationalized by legislation; the existence of constitutional language about labor rights may not be the decisive legal fact. Third, the indicators are Continental-Euro-centric, in the sense that the model of co-determination (dual-channel or three-channel representation) is taken as the ideal baseline. This may or may not be warranted, but it is noteworthy that a regional norm is being elevated to the global level.

The substantive conclusions of the Cambridge analysis provide some points that are useful for the current research, even though their research question differs from ours. They find that the evolution of rules protecting shareholders and creditors do not correlate with the type of legal system (civil versus common law). They find, however, that worker

protections are stronger in the civil law countries (France and Germany) than in the countries of common law origin (the U.K., the U.S., and India), although over time India approaches the level of protection of the civil law countries. While this seems to confirm the “legal origin” hypothesis and provide us with a potential indicator based on type of legal system, the more detailed analysis by the Cambridge researchers shows nuances that undermine the legal origin hypothesis. During the time period of their data set, Germany, the U.S., and India showed little change, while the U.K. and France changed in opposite directions (deregulation followed by limited re-regulation in the U.K., and the reverse in France). But these trends are traceable primarily to exogenous political factors (Thatcherism followed by Labor Party rule in the U.K.; the Auroux laws of the Socialists followed by incremental weakening of labor protections in periods of conservative ascendancy in France.)

The picture is even more complex when the overall index is disaggregated into the five major categories of indicators (five sub-indices). France is strong in all categories, and the U.S. is weak. Germany is a pacesetter in worker representation, stemming in part from its codetermination laws. Germany’s major weakening of labor protection occurred in the field of social security, an issue not picked up in the Cambridge indicators. The U.K.’s common law rules on mutual trust and confidence in the employment relationship contrasts with the U.S.’s rule (also common law) of at-will employment. And, the U.K.’s working time protections oscillated from strong (via legal protocols for extension of collective bargaining agreements) to weak (Thatcher’s dismantling of sectoral agreements) to partial renewal (owing to the EU Directive on Working Time).

What lessons can we draw from these results? First, the categorization between civil law and common law countries has limited traction. This may be an important result, for one might be tempted to categorize developing countries based on the legal systems imposed by their respective colonizing power. The Cambridge analysis, especially of India, shows that colonial legal origin is not critical, at least not along the dimension of civil law versus common law systems. Of course, they analyze only a small sample, so the jury will be out until their dataset of 25 countries is complete and subject to analysis. Second, exogenous factors – especially highly country-specific political events – may be critical, at least for some indicators. Collective bargaining in the U.K is a big example. Third, even stochastic political factors are mediated in contingent ways from country to country, affecting different indicators. For example, the Hartz labor market reforms in Germany affected social security rules more than other forms of worker protection while, as just noted, a conservative political shift in the U.K. showed itself in indicators of employee representation and collective bargaining. The lessons for us may be twofold: relatively refined categorization of “types” of labor relations systems, and close attention to political context, may be warranted. If such contextual variables cannot be captured in the initial set of indicators, our indicator methodology might embody a process that enables analysts over time to flesh out the initial indicators with country-specific sub-indicators and country-specific data sources.

3. Storm, Nickell, Ochel, et al. Indicators of Coordinated Bargaining

The Botero et al. thesis has also been subject to empirical and conceptual criticism

by comparative political scientists (e.g., Boyer, 2004), economists, (Davoine, et al., 2008b), and by EU and OECD researchers, discussed below in Section VII. (European Commission, 2008, p. 159). The general finding of these researchers is that labor market deregulation is not a prerequisite to successful growth in GDP, labor productivity, and innovation.

A 2009 longitudinal, cross-section study of 20 OECD countries for the period 1984-2004 concludes that more highly regulated, “coordinated” labor relations regimes are associated with higher rates of long-term growth in labor productivity. (Storm and Naastepad, 2009). For their dependent variables, Storm and Naastepad use ten variables. In addition to indicators of union density and collective bargaining coverage, Storm and Naastepad use two indicators of potential interest to us: (1) the percentage of the labor force in administrative and managerial occupations, taken as a measure of the intensity of managerial monitoring and therefore a negative indicator of the degree of autonomy for workers “in organizing and coordinating their work activities;” and (2) an index of the degree of coordination in wage bargaining, measured by centralization of bargaining, intra-firm cooperation between labor and management, and employer associations that actively overcome free-rider problems among employers. The latter index is taken from Nickell, et al. (2005), which in turn draws on Belot and Van Ours (2000) and Ochel (2000).

4. Caraway Labor Indicators for East Asia

A group of comparative political scientists centered at Brown University is currently

conducting regional surveys of labor regulation – encompassing Asia, Latin America, the Middle East, and Eastern Europe/Former Soviet Union. Thus far, one of the researchers, Teri Caraway, has published her initial results – for the Asian region. (Caraway, 2009). I hope soon to obtain the works-in-progress for the other regions.

Caraway constructs four separate indices: (1) *de jure* employment protection (DJEP), (2) *de facto* employment protection (DFEP), (3) *de jure* collective rights (DJCR), and (4) *de facto* collective rights (DFCR). The DJEP is a composite of the World Bank's cost of firing index and the World Bank's Rigidity of Employment Index (REI), which is itself a composite of three indices measuring the difficulty of hiring, rigidity of hours, and difficulty of firing. To produce that composite, Caraway first divides the firing costs for each country by the natural log of the firing costs for Zimbabwe, which has the world's highest firing costs. This generates an estimate of firing costs in relation to other countries. That figure is then scaled from 0 and 100, and averaged with the REI, which is also scaled to 100.

The DFEP is a construct based on the DJEP and the World Bank's index for rule of law (ROL). Caraway assigns a weight of .33 to formal law and .67 to the interaction between ROL and formal law. The result is that, for a given ROL value, countries with more protective employment laws are penalized relatively more than countries with less protective employment laws. This seems perverse: A country with weak substantive law receives a "reward" in the form of a lower penalty for not enforcing its law.

The DJCR is based on 17 indicators pertaining to ILO Conventions Nos. 78 and 79. Caraway states that "[w]e could have added many more indicators in order to be more

comprehensive, but our aim was to develop a relatively simple index that arrayed countries accurately.” (Caraway, 2009, p. 179). These are the 17 indicators and their respective weights:

Indicator	Weight
<i>Freedom of association</i>	
1. General prohibitions against union formation and activity	15.0
2. Administrative or legal hurdles to union formation	1.5
3. Limits on kinds of unions or worker organizations	1.5
4. Closed shop or other prohibitions against union pluralism	1.5
5. Exclusion of sectors or workers from union membership	2.0
6. State interference in internal union affairs	1.5
7. General prohibition of union or federation participation in political activities	1.5
8. Non-ratification of ILO Convention 87	0.5
<i>Right to bargain collectively</i>	
9. General prohibitions	10.0
10. Restriction on scope and/or level of collective bargaining	1.5
11. Other administrative or legal hurdles to collective bargaining	1.0
12. Exclusion of unionized sectors from right to bargain collectively	2.0
13. Non-ratification of ILO Convention 98	0.5
<i>Right to strike</i>	
14. General prohibitions	10.0
15. Binding arbitration	1.5
16. Administrative or legal hurdles to right to strike	1.5
17. Exclusion of unionized sectors from right to strike	2.0

(Caraway, 2009). Caraway explains that a country which imposes a general prohibition (indicators 1, 9, or 14) will receive the maximum score for the category (15 for freedom of association, 10 for collective bargaining, or 10 for the right to strike, respectively) and the remaining indicators in that category will not be scored. The sum of the sub-indicators

within each of those three categories does not equal the score for that category's general prohibition, on the ground that the sub-indicators "do not exhaust the list of things that are necessary for workers to enjoy full rights in this area, but we do think they are the most important." (Caraway, 2009, p. 179).

To code the indicators, Caraway "consulted labor law texts, supplemented by readings of the secondary literature, to determine scores." (Caraway, 2009, p. 179). The sources for each score are not transparent. Some of Caraway's textual discussion cites secondary material that is a decade or more old. (See, e.g., Cooney, et al., 2002, based on a 1999 workshop). Her Appendix states that "[c]oding guidelines are available upon request." (Caraway, 2009, p. 179). The coding guidelines will be critical, since all the indicators are ambiguous and several are double-barreled. For example, the indicator "exclusion of sectors or workers from union membership" is ambiguous, since almost all countries exclude some categories of workers, and the ILO permits such exclusions (e.g., for managerial workers, confidential workers, military workers, police, and others). The indicator "[a]dministrative or legal hurdles to union formation" is ambiguous, since "hurdle" is a term with no legal definition, and the ILO permits countries to apply many general laws regulating associational activity to unions. The indicator "[r]estriction on scope and/or level of collective bargaining" is double-barreled as well as ambiguous, since in labor law the word "scope" can apply to the range of subject matters subject to mandatory negotiation, the range of subject matters subject to permissive negotiation, or the boundary of the bargaining unit. The indicator "[c]losed shop or other prohibition against union pluralism" is double-barreled and confuses union security arrangements (which range from closed shop

through union shop, agency shop, and open shop) with union pluralism (which turns on whether the government restricts multiple unions from organizing in the same sector or enterprise). In short, the rigor and accuracy of this indicator methodology depends very much on the coding guidelines and the source material. In order to achieve rigor and precision, the coding guidelines themselves must effectively contain more detailed, precise sub-indicators.

Finally, the DFCR is a composite of the DJCR and indices for general law enforcement, political climate, and observed violations. The index for general law enforcement is again the World Bank's ROL governance index. The index for political climate is the Freedom House index for political rights. Caraway provides an equation for integrating the DJCR and ROL (which again penalizes countries with strong laws and weak enforcement relative to countries with weak laws and weak enforcement) but does not provide equations for integrating that result with the observed violations and the Freedom House index.

The index for observed violations is a composite of the following weighted indicators:

Indicator	Weight
1. Murder of trade unionists	2.0
2. Harassment, intimidation, detention, arrest, or forced exile of trade unionists	2.0
3. Unfair labor practices	2.0
4. <i>De facto</i> union monopoly	1.5
5. Violations of rights to union formation and/or collective bargaining in export processing zones	2.0

(Caraway, 2009, p. 180). Observed violations are scored 0 for no violation and 1 for

violation. The scoring of multiple violations in each category is not entirely clear. The sources for identifying violations are the ILO Committee on Freedom of Association, the U.S. State Department Annual Human Rights Reports, and the ITUC Annual Reports. The limitations of relying exclusively on these reports are discussed above. Again, the categories of “violations” are not well-specified. For example, in its conventional legal definition, “unfair labor practices” includes the other violations. And, regardless of its definition, “unfair labor practices” is an extremely broad category; we can expect innumerable annual violations in every country regardless of the number that, by happenstance, is reported in the three sources above. Integrating the World Bank’s rule of law index and the Freedom House political rights index is also problematic, both because the indices themselves are flawed and because the two indices are conceptually inconsistent in various respects.

5. Mosley and Uno’s Labor Regulation Indicators and Correlates

In a 2007 journal article, Mosley and Uno test the hypotheses that foreign direct investment increases the host country’s compliance with labor rights and trade opening decreases compliance. They propose three causal pathways between FDI and collective labor rights: multinational corporations may urge host governments to improve the rule of law; foreign direct investors bring best practices in worker rights, perhaps under pressure by activist groups; and foreign investors may care more about the quality of work than about labor costs. Mosley and Uno hypothesize that trade has the opposite effect, in light

of buyers' and sub-contractors' interest in lowering production costs and supply prices.

Hence, Mosley and Uno undertake a multivariate analysis of the impact of FDI and trade on labor rights, using the following independent variables:

Independent Variables	Operationalization	Expected Effect on Lab Rts
<i>Economic Globalization</i>		
FDI flows	FDI inflows divided by GDP	+
FDI stocks	FDI stock divided by GDP	+
International Trade	Imports plus exports divided by GDP	-
<i>Other External Factors</i>		
External debt	External debt divided by GDP	-
<i>Competition Variables</i>		
Regional Practices	Average labor rights score for all countries in the region, by year	+
Economic Peers' Practices	Average labor rights score for all other nations in the same income decile	+
<i>Internal Variables</i>		
Income	Income per capita (natural log)	+
Economic Growth	Annual change in income per capita	+
Population	Total population (natural log)	+/-
Democracy	Polity IV index	+
Civil Conflict	Uppsala index of civil war	-
Presence of NGOs	Number of NGOs in a country-year (natural log)	+/-
Potential Labor Power	Skilled or unskilled workers x 1/surplus labor	+

Mosley and Uno construct a dataset of collective labor rights (the dependent variable) for 90 developing countries from 1985 to 2002, using Kucera's template of 37 indicators, discussed above. The information sources are the U.S. State Department

Annual Reports on Human Rights, the reports of the ILO Committee on Freedom of Association and the ILO Committee of Experts on the Application of Conventions and Recommendations, and the ICFTU Annual Surveys. Each indicator is scored 1 for a given country if there are one or more violations in the given year. The score (0 or 1) is multiplied by the weight assigned to the indicator by Kucera. The values are then summed to arrive at the index of labor rights compliance. Mosley and Uno say that their index (based on Kucera's methodology) is a "dramatic improvement over existing indicators," notwithstanding that the method "does not distinguish between single and multiple violations within the same category." (Mosley and Uno, 2007, p. 930).

Based on their cross-sectional time-series models, Mosley and Uno conclude that inflow of capital is a positive correlate of compliance with labor rights, and that international trade is negatively correlated with compliance. They also find that a country's compliance is strongly correlated with regional compliance – even more strongly than with democracy or civil strife. The country's compliance is also positively correlated with compliance by its economic peers, but that variable is not statistically significant. Their results are "robust to the inclusion of regional dummy variables, which might capture regional economic cycles, culture, or religion." (Mosley and Uno, 2007, p. 940).

They find that labor rights compliance is negatively correlated with income, "contradict[ing] theories that predict improvements in rights as a result of economic development." (Mosley and Uno, 2007, p. 939). They conjecture that this is due to the higher union density in advanced economies and consequent greater opportunity for violations and greater demand for collective labor rights. It is likely due as well to the

selection bias in their information sources.

Their finding that labor rights performance is strongly correlated with regional labor rights compliance but not significantly correlated with the compliance record of economic peers is intriguing. It raises the difficult conceptual question whether intra-regional comparisons in compliance are more or less valid than inter-regional comparison. If Country X does poorly relative to countries in the same region but not relative to countries globally, should Country X be “penalized” based on its comparison with a group of jack-rabbits or rewarded based on its comparison with the larger group of turtles. That is, do we demand more or less of a country that has already achieved more (compared to a global baseline) by virtue of intra-regional competition and diffusion?

In a more recent paper, Mosley and two co-authors divide Kucera’s indicators into *de jure* and *de facto* categories. They find that the former is correlated with the labor rights record of the country’s trading partner but that the later is not, raising the possibility that countries enact laws to appease other governments or multinational corporate buyers but do not actually enforce those laws. (Greenhill, et al., 2009). This finding suggests that greater conceptual weight be given to enforcement than to law on the books, which is potentially cosmetic.

6. The Harvard Global Labor Survey of 2004

As noted above, the indicators of Botero et al. are measures of formal law, not of actual compliance and workplace conditions. The limitations of such indicators were confirmed by Chor and Freeman. (Chor and Freeman, 2005). Chor and Freeman did not

test the Cambridge indicators which, although more sophisticated and transparent than Botero et al.'s, also measure formal legal regulation.

In 2004, under the auspices of the Labor and Worklife Program at Harvard Law School, Chor and Freeman undertook a *Global Labor Survey* (GLS) of actual labor conditions and actual compliance with labor standards around the world. They then tested other indices for correlation with the GLS results. They found that while Botero et al.'s "collective labor relations" sub-index had a significant correlation with the "labor disputes" module (covering the same set of issues) of their GLS, "it was in general uncorrelated with most of the other GLS variables." (Chor and Freeman, 2005, p. 21). In addition, correlation between the GLS and Botero et al.'s indices was "much smaller" than the correlation between GLS and the *Global Competitiveness Report* (GCR), which like the GLS is based on surveys of actual conditions (notwithstanding that GLS surveyed "pro-labor" respondents and GCR surveyed "pro-employer" respondents). There was also insignificant correlation between the GLS component on collective bargaining coverage and Botero et al.'s indicator on "right to collective bargaining." Chor and Freeman attribute these results to the fact that Botero et al.'s indicators measure formal law, which diverges from actual workplace practices.

The Harvard GLS is also interesting from the point of view of data collection and data accuracy. The GLS was an internet-based survey of practitioners and experts with first-hand knowledge of actual workplace practices and compliance. The survey yielded 1,600 completed surveys from 77 countries. The yield was dramatically lower for developing countries than for advanced economies. The researchers limited their analysis

to 33 countries for which there were four or more respondents. They concluded that even a small sample for a given country was reliable, in light of the low variance they found among responses for each country and the wide variance between countries. They adjusted the responses based on the pro-labor and political leanings of the respondent, although they found that political leanings had relatively little impact on substantive responses.

The GLS survey used the same question design used in the GCR survey of business executives. Each question asked respondents for an assessment on a scale from 1 to 7. For example, one question stated “Protection of the right to form a union in your country is x”, where x = 1 is “weak or non-existent” and x = 7 is “equal to the world’s most stringent.”

They grouped responses under seven headings: (1) general economic situation, (2) role of World Bank and IMF, (3) labor market conditions, (4) freedom of association and collective bargaining, (5) labor disputes, (6) employment regulation and working conditions, and (7) employee benefits. The GLS also reported estimated percentages of workers in the informal sector, in unions, and covered by collective agreements.

In light of the significant and high correlation of the GLS results with other datasets, Chor and Freeman concluded that it is possible “to gather detailed, valid information on labor practices from labor experts and practitioners in different countries at low cost through the Internet.” (Chor and Freeman, 2005, p. 6.) They attributed the low response rate from developing countries to the limitations of their own email contact lists, the limited number of languages into which the questionnaire was translated, and to more limited

internet access in developing countries. The latter problem may have lessened substantially in the last seven years.

The main substantive finding of the GLS was that greater worker protections, including union density, collective bargaining coverage, and higher benefits, were associated with higher GDP, lower inequality, and slightly higher unemployment rates, but were not related to growth rates.

The GLS questionnaire is recounted here, with the exclusion of questions about the respondent's background and political leanings:

Module 1: The General Economic Situation

- 1.01 In 2004, your economy has so far
 - 1 = Been in a recession
 - 7 = Been strong
- 1.02 The level of unemployment in your country is currently
 - 1 = High and a major social and economic problem
 - 7 = Low and not a major social or economic problem
- 1.03 The rate of poverty in your country is currently
 - 1 = High and a major social and economic problem
 - 7 = Low and not a major social or economic problem
- 1.04 The difference in the quality of healthcare available to rich and poor people in your country is
 - 1 = Large
 - 7 = Small
- 1.05 The difference in the educational opportunities available to children from rich and poor families in your country is
 - 1 = Large
 - 7 = Small
- 1.06 The quality of public schools in your country is
 - 1 = Very bad
 - 7 = Equal to the best in the world

Module 2: The Labor Market

- 2.01 Hiring decisions in the PRIVATE sector of your country are based mainly on
1 = Personal connections
7 = Workers' skills, education or experience
- 2.02 Hiring decisions in the PUBLIC or GOVERNMENT sector of your country are based mainly on
1 = Personal connections
7 = Workers' skills, education or experience
- 2.03 The minimum wage in your country is
1 = Evaded by firms
7 = Effectively enforced by the state or labor organizations
- 2.04 Workers' pay levels in your country are
1 = Flexible and can be easily changed or re-negotiated
7 = Rigid and cannot be easily changed or re-negotiated
- 2.05 Pay in your country is
1 = Strongly related to worker productivity
7 = Not related to worker productivity
- 2.06 How often do workers in your country fail to receive the full amount of the REGULAR wages that they are supposed to be paid?
1 = Such problems are a regular occurrence
7 = Such problems are a rare occurrence
- 2.07 How often do workers in your country fail to receive the full amount of the OVERTIME wages that they are supposed to be paid?
1 = Such problems are a regular occurrence
7 = Such problems are a rare occurrence
- 2.08 The effect that globalization and trade have had on unskilled workers in your country has been
1 = Generally negative
7 = Generally positive
- 2.09 To what extent is the government in your country seeking to privatize traditional public sector jobs?
1 = Not privatizing much
7 = Aggressively privatizing

For questions 2.10, 2.11 and 2.12, the INFORMAL sector refers to workers who fall beyond the effective jurisdiction of labor and tax laws, either because they are self-employed or work for unofficial/unregistered businesses.

- 2.10 To your best knowledge, what percentage of workers in your country work in the INFORMAL sector? (PLEASE MARK ONE BOX ONLY)
- 0-20%
 - 21-40%
 - 41-60%
 - 61-80%

81-100%

2.11 The rights of workers in the INFORMAL sector

1 = Receive little attention from the state or labor organizations

7 = Are effectively protected by the state or labor organizations

2.12 Wages in the FORMAL sector of your country are

1 = Set by individual companies that operate under market forces

7 = Set by a centralized bargaining process or by government statute

2.13 Child labor or the employment of minors is

1 = A common and widespread practice

7 = Effectively prohibited

2.14 Discrimination on the basis of gender in the workplace is

1 = A common and widespread practice

7 = Effectively prohibited

2.15 Discrimination on the basis of race or ethnicity in the workplace is

1 = A common and widespread practice

7 = Effectively prohibited

Module 3: Freedom of Association & Collective Bargaining

3.01 To your best knowledge, what percentage of workers in your country are officially members of a labor union? (PLEASE MARK ONE BOX ONLY)

0-20%

21-40%

41-60%

61-80%

81-100%

3.02 Labor unions in your country are

1 = Under the control of the state or political parties

7 = Independent organizations

3.03 Protection of the right to form a union in your country is

1 = Weak or non-existent

7 = Equal to the world's most stringent

3.04 Arrests or attacks on labor leaders because of their union activity are

1 = Frequent

7 = Rare or non-existent

3.05 In a unionized firm, are new employees allowed to choose whether they want to join a labor union?

1 = Yes, employees have full personal choice

7 = No, union membership is effectively mandatory in workplaces where a union is present

3.06 The involvement of labor unions in politics in your country is

1 = Minimal or non-existent

7 = Frequent and substantial

- 3.07 Labor unions in your country are generally
1 = Ineffective in protecting and advancing the interests of workers
7 = Effective in protecting and advancing the interests of workers
- 3.08 To your best knowledge, what percentage of the labor force is covered by a collective bargaining agreement? (PLEASE MARK ONE BOX ONLY)
0-20%
21-40%
41-60%
61-80%
81-100%
- 3.09 Unions conduct negotiations with employers
1 = Under government influence or pressure
7 = Freely and independently of the government
- 3.10 In the process of determining wages in your country, labor unions
1 = Are usually bypassed by employers
7 = Are very influential and powerful
- 3.11 The extension of collective bargaining contracts to non-union firms is
1 = Not legislated
7 = Required and enforced by regulations
- 3.12 Workers' participation in the management of companies (through such bodies as workers' councils) is
1 = Determined by employers
7 = Effectively enforced by the state or labor organizations
- 3.13 In practice, workers' opinions and suggestions on the management of companies
1 = Are usually bypassed by employers
7 = Are very powerful in influencing management decisions

Module 4: Labor Disputes

- 4.01 Labor-employer relations in your country are generally
1 = Cooperative
7 = Confrontational
- 4.02 The population of your country at large generally
1 = Does not support or care about labor unions
7 = Supports labor unions on the issues they raise
- 4.03 In your country, the threat of strikes is
1 = Ineffective in increasing the bargaining power of labor unions and workers
7 = Very effective in increasing the bargaining power of labor unions and workers
- 4.04 In the event of a strike, non-union workers
1 = Rarely or never join in the strike
7 = Often support union workers by participating in the strike

- 4.05 In your country, wildcat strikes (strikes that are not authorized by a formal labor union) are
1 = Rare or non-existent
7 = A common occurrence
- 4.06 In your country, political strikes (strikes for political reasons or in protest of government policies) are
1 = Rare or non-existent
7 = A common occurrence
- 4.07 Procedures requiring a waiting period or notification prior to conducting a strike are
1 = Required and enforced by regulations
7 = Non-existent or typically ignored by workers or labor unions
- 4.08 In the event of a strike, how often do employers resort to hiring replacement workers?
1 = Frequently
7 = Rarely
- 4.09 In the event of a labor dispute, how often do employers resort to lockouts to place pressure on workers?
1 = Frequently
7 = Rarely
- 4.10 When workers fail to receive the full amount of their wages, how likely are they to obtain full repayment through courts or other administrative agencies?
1 = Very unlikely to receive their full pay
7 = Very likely that a full resolution will be reached
- 4.11 The role of third-party mediation (such as labor arbitration courts) in resolving labor disputes is
1 = Non-existent or very limited
7 = Effective in resolving most disputes
- 4.12 Tripartite forums (involving labor, employers and the government) to help resolve labor disputes are
1 = Non-existent or rarely used
7 = Often used to resolve disputes

Module 5: Employment Regulations & Working Conditions

- 5.01 The terms of contracts for hiring workers on a full-time basis are determined by
1 = Employers
7 = Regulations or collective bargaining
- 5.02 The extension of the benefits enjoyed by full-time workers to part-time workers is determined by
1 = Employers
7 = Regulations or collective bargaining
- 5.03 Hiring of workers on fixed-term contracts (employment for only a fixed period of time) is
1 = A common practice

7 = Rare or non-existent

5.04 Maximum hours of work in a regular workweek are determined by

1 = Employers

7 = Regulations or collective bargaining

5.05 The premium paid for overtime hours of work is determined by

1 = Employers

7 = Regulations or collective bargaining

5.06 The number of days of paid vacation in a year for workers in FORMAL sector firms is determined by

1 = Employers

7 = Regulations or collective bargaining

5.07 Paid time off for national or local holidays is determined by

1 = Employers

7 = Regulations or collective bargaining

5.08 In practice, regulations on work hours and workplace conditions are

1 = Ignored by employers

7 = Generally enforced

5.09 The labor standards and working conditions that foreign firms maintain in your country are

1 = Worse than those in domestic or state-owned firms

7 = Better than those in domestic or state-owned firms

5.10 Firing of workers in the FORMAL sector of your country is determined by

1 = Employers

7 = The state or labor organizations

5.11 Workers who believe they have been unfairly laid off

1 = Have no effective means to try to get their jobs back

7 = Can effectively try to get their jobs back through administrative or legal channels

5.12 Do employers regularly notify a third party (such as a government agency or labor union) prior to a collective layoff of workers?

1 = No, they never notify a third party

7 = Yes, they always notify a third party

5.13 Do employers implement "seniority rules" when laying off workers, so that the newest hires are laid off first and senior workers laid off last?

1 = No, such decisions are entirely up to employers

7 = Yes, such seniority rules are always followed

5.14 Severance payment terms for dismissing full-time workers are determined by

1 = Employers

7 = Regulations or collective bargaining

5.15 Minimum health and safety standards in the formal sector are determined by

1 = Employers

7 = Regulations or collective bargaining

Module 6: Employee Benefits

- 6.01 The current level of state-determined benefits or pension for old-age, retirement, disability and death in your country is
1 = Insufficient to cover the needs of workers
7 = Sufficient to cover the needs of workers
- 6.02 In funding future social insurance pensions or retirement benefits, your country
1 = Faces a potential “pensions crisis”
7 = Has adequate funds to finance such future payments
- 6.03 Private pensions programs are
1 = Rarely used or non-existent
7 = Widely used
- 6.04 In your country, sickness and health benefits for workers are
1 = Determined in practice by employers
7 = Legally required and funded by tax revenues
- 6.05 The current level of sickness and health benefits in your country is
1 = Insufficient to cover the needs of workers
7 = Sufficient to cover the needs of workers
- 6.06 In your country, unemployment benefits/unemployment insurance payments provided by employers for workers are determined by
1 = Employers
7 = Regulations or collective bargaining
- 6.07 The current level of unemployment benefits/unemployment insurance payments in your country is
1 = Insufficient to cover the needs of workers
7 = Sufficient to cover the needs of workers
- 6.08 Overall, the current level of social welfare benefits in your country is
1 = Lower than what your country’s budgetary situation can afford
7 = More than what your country’s budgetary situation can afford

VI. United Nations Labor Indicators

1. UNECE-ILO-Eurostat Quality of Employment Indicators

A joint initiative of the United Nations Economic Commission for Europe (UNECE), the ILO, and Eurostat is currently attempting to create an indicator-based, unified International Quality of Employment Framework. The project was initiated by the Bureau of the UNECE Conference of European Statisticians, a United Nations agency that coordinates statistical activity among European statistical bodies.

These three groups held a series of joint seminars, beginning in 2000 and most recently convening in October, 2009. The seminars converged on the idea that three existing indices for assessing quality of work are sufficiently similar to warrant an effort to create a common international system for measuring that concept. The three existing frameworks are: (1) the ILO's decent work indicators; (2) the European Commission Statistical Office of the European Communities (Eurostat) Quality of Work Indicators, which are used as metrics for the European Employment Strategy propelled by the Lisbon agreement; and (3) the Job and Employment Quality measures used in the European Working Conditions Survey, developed by the Dublin-based European Foundation for the Improvement of Living and Working Conditions, which also serve as metrics for the European Employment Strategy. (UNECE, et al., 2007, p. 5).

A joint Task Force proposed a Conceptual Framework in 2007. The Task Force found that the four pillars of ILO Decent Work (employment and income opportunities; social protection; social dialogue; and other fundamental rights) and the four pillars of the

EU Quality of Work framework (decent wages; skills and training; working conditions; and gender equality) are “closely interrelated, to the point of their quasi-complete conversion.” (UNECE, et al., 2007, p. 13.) The Task Force concluded that “the *Quality of Employment* paradigm can be used as a universal framework covering the qualitative dimensions of work and labor included in *Decent Work and Quality of Work*.” (UNECE, et al., 2007, p. 14.) The Task Force therefore proposed that “Quality of Employment” be used synonymously with “Decent Work” and “Quality of Work.” Even more ambitiously, based on its review of the statistical sources, the Task Force also concluded that “the Quality of Employment framework is equally relevant and applicable to high-, middle-, and low-income countries which makes it possible to use it as an *international quality of work framework*.” (UNECE, et al. 2007, p. 14).

The Task Force Proposal includes three useful Appendices. Appendix A sets out the EU Quality of Work indicators, a longer “description” of each one, and the statistical sources for each. Appendix B did the same for the “core ILO statistical indicators of decent work,” adopting for this purpose the indicators in Anker, et al. (Anker, et al., 2002). Appendix C put the two lists side by side with each other, as well as with the European Foundation Job and Employment Quality Indicators.

The Task Force’s strategy was to first propose a “complete,” “generic” list of statistical indicators to measure progress toward Decent Work or Quality of Work. (UNECE, et al., 2007, p. 14). The Task Force effectively treated these as *candidates* for a final list of usable indicators. The 53 candidate indicators, falling into 11 categories, are as follows:

I. Employment Opportunities

1. Labor force participation rate
2. Employment-population ratio
3. Male-female labor force participation gap
4. Unemployment rate
5. Unemployment by level of education
6. Inactivity rate
7. Youth unemployment rate
8. Youth inactivity rate
9. Share of self-employed workers in total employment
10. Share of wage employment in non-agricultural employment

II. Unacceptable Work

11. Children not in school by employment status (by age)
12. Children in wage employment or self-employment (percent by age)

III. Adequate Earning, Skills development and Productive Work

13. Inadequate pay rate (percent of employed below $\frac{1}{2}$ of median hourly earnings)
 - 13a. Low hourly pay of employees
 - 13b. Wages of casual/daily workers
14. Average earning in selected occupations
15. Share of working poor in the employed population
16. Manufacturing wage indices
17. Employees with recent job training (last 12 months)
18. Share of employed persons in high-skilled occupations
19. Percentage of working age population participating in education and training

IV. Asocial/unacceptable Hours of work

20. Excessive hours of work (share of persons working 49 hrs and more per week)
 - 20a. Hours actually worked
 - 20b. Annual hours worked per person
21. Time-related underemployment rate

V. Stability and Security of Work

22. Percentage of employees with job tenure of less than one year
23. Percentage of employees with temporary jobs
24. Percentage of casual/daily workers

VI. Balancing Work and Family Life

25. Ratio of the employment rate for women with children under compulsory school age to the employment rate of all women aged 20-49
26. Absolute difference in employment rates without presence of any children with the presence of a child aged 0-6, by sex

VII. Fair Treatment in Employment

27. Occupational segregation on the basis of gender
28. Female share of employment
29. Ratio of the female share of employment in managerial and administrative occupations to the female share of non-agricultural employment
30. Ratio of women's hourly earnings index to men's for paid employees at work 15 hours and more

VIII. Safe Work

31. Fatal injury rate per 100,000 employees
32. Evolution of the incident rate (number of accidents per 100,000 persons in employment)
33. Labor inspection (inspectors per 100,000 employees)
34. Occupational injury insurance coverage
35. Hazardous occupations (rate)
36. Percentage of workers who feel their health or safety is at risk

IX. Social Protection

37. Public social security expenditure
38. Social security coverage (for wage and salary earners)
39. Public expenditure on need-based cash income support
40. Beneficiaries of cash income support
41. Old age without pension (share of not economically active population 65 years old and over without pension)
42. Share of economically active population contributing to a pension fund
43. Average monthly pension

44. Share of employees who receive paid annual leave

X. Social Dialogue and Workplace Relations

45. Union density rate
46. Collective wage bargaining coverage rate
47. Number of enterprises belonging to employer organizations
48. Strikes and lockouts (per 1,000 employees)
49. Rate of days not worked due to strikes and lockouts (per 1,000 employees)

XI. Socio-Economic Context

50. Informal sector employment
51. Working poor
52. Growth in labor productivity, measured as change in the levels of GDP of the employed population per hours worked (in percent)
53. Income per employed person (PPP)

The Task Force then reviewed practical empirical efforts to use the three existing frameworks mentioned above, as well as several others: the Canadian Labor Force Survey, the United States Current Population Survey, and the State-by-State Work Environment Index of the Political Economy Research Institute of the University of Massachusetts. On the basis of that review, the Task Force proposed two “core lists” of indicators, one longer (core list “A”) and one shorter (core list “B”). Those core indicators – the longer definitions of which are to be drawn from the ILO Decent Work and EU Quality of Work indicators – are as follows:

A. Core statistical indicators for measuring the Quality of Employment: longer list

I. Rights at work

1. Child labor
 - 1a. Economically active children aged 10-14

- 1b. Child school non-enrolment rate 5-14 years
- 2. Women in the workplace
 - 2a. Female share of employment
 - 2b. Gap between female and male labor force participation rates

II. Employment

- 3. Labor force participation rate
- 4. Employment-to-population ratio
- 5. Poverty and informality
 - 5a. Poverty and the working poor
 - 5b. Informal employment
- 6. Wages
 - 6a. Percentage of casual/daily workers
 - 6b. Wages of casual/daily workers
 - 6c. Manufacturing wage indices
 - 6d. Inadequate pay rate (percent of employed below $\frac{1}{2}$ of median hourly earnings)
- 7. Unemployment
 - 7a. Total unemployment rate
 - 7b. Unemployment rate by level of education
- 8. Youth unemployment
- 9. Youth inactivity rate
- 10. Time-related underemployment
- 11. Employment by status in employment and branch of economic activity
- 12. Labor productivity
- 13. Real per capita earnings (from national accounts)

III. Social protection

- 14. Social security coverage (for wage and salary earners)
- 15. Public social security expenditure (as percent of GDP)
- 16. Rates of occupational injuries (fatal/non-fatal)
- 17. Labor inspectors (per 100,000 employees)
- 18. Hours of work
 - 18a. Hours actually worked
 - 18b. Annual hours worked per person
 - 18c. Excessive hours of work (share of persons working 49 hrs and more per week)

IV. Social dialogue

19. Trade union membership
20. Number of enterprises belonging to employer organizations
21. Collective bargaining coverage rate
22. Strikes and lockouts: rates of days not worked

B. Core statistical indicators for measuring the Quality of Employment: short list

1. Employment-population ratio
2. Male-female labor force participation gap
3. Unemployment rate
4. Youth share of unemployment
5. Low hourly pay of employees
6. Working poor
7. Excessive hours of work
8. Hazardous occupations
9. Informal employment
10. Temporary employment
11. Lack of representation at work
12. Labor inspection
13. Children not at school
14. Old age without pension

The Task Force advocated the use of Labor Force Surveys as data sources for these indicators and the extension of those Surveys or use of modular additions to the Surveys where necessary to comprehend the full range of Quality of Employment Indicators. The Task Force drew comfort from the fact that the ILO had concluded that some 80 percent of decent work indicators could be produced by extension of or modular additions to the Labor Force Surveys.

Following the 2007 Seminar at which the above proposed indicators were discussed, a second Task Force (“Second Task Force”) was established and charged with refining the proposed indicators, creating additional indicators including “those for which

data may not be currently available,” and testing the validity of the new list of indicators against criteria to be determined by the Second Task Force. (UNECE, et al., 2009, p. 2).

The Second Task Force included representatives of Canada, Finland, Hungary, Israel, Italy, Mexico, Moldova, Poland, Ukraine, Eurostat, the European Foundation, and Women in Informal Employment: Globalizing and Organizing (WEIGO).

The Second Task Force set out five main principles to guide the development of the indicators: comprehensiveness; a presumption that not all indicators will be relevant for measurement in all countries; a transparent logical framework; feasible data collection by National Statistical Offices, if necessary by expanding their data gathering; and use wherever possible of internationally accepted definitions and computational methodologies.

After reviewing the Decent Work and Quality of Work indicators, the Second Task Force settled on the following table of Proposed indicators (“[f]ully accepted by the Task Force for review”) and “Other possible indicator.” Like the first Task Force, the Second Task Force argued that the indicators are applicable to both advanced and developing countries. The Second Task Force devoted two or three paragraphs of text explaining the importance of each cluster of indicators. This can be viewed as justification of the conceptual importance of the categorical “pillars” and the specific indicators within each pillar.

Note the particular strategy taken by the Second Task Force on non-discrimination. Rather than creating dedicated indicators for that subject, the Second Task Force opts for analyzing non-discrimination as a transversal indicator – that is, for disaggregating all

other relevant indicators by gender, ethnicity, disability, immigration status, and indigenous origins. This methodology seems desirable so far as it goes. But such disaggregation alone is unlikely to fully serve its conceptual function. That is, there are many legal elements of the concept of non-discrimination that cannot be captured by breaking down

UNECE Second Task Force – Proposed Indicators for Employment Quality

Dimension	Proposed indicators (Fully accepted by Task Force for review)	Other possible indicators
I. Safety and ethics of employment		
(a) Safety at work	<ul style="list-style-type: none"> ▪ Fatal occupational injury rate (Workplace fatalities per 100,000 employees) ▪ Non-fatal occupational injury rate (Workplace accidents per 100,000 employees) ▪ Share of employees working in "hazardous" conditions 	<ul style="list-style-type: none"> ▪ Occupational injury insurance coverage ▪ Labour inspection (inspectors per 100,000 employees) ▪ Hazardous occupations (rate) ▪ Occupational disease contraction per 100,000 employees ▪ Workplace expenditure on safety improvements as a share of total workplace labour costs ▪ Share of employed people who feel significant levels of stress on the job.
(b) Child labour and forced labour	<p><i>Child labour and worst forms of child labour</i></p> <ul style="list-style-type: none"> • Employment of persons who are below the minimum age specified for the kind of work performed. • Employment of persons below 18 years in designated hazardous industries and occupations. • Employment of persons below 18 years for hours exceeding a specified threshold 	<ul style="list-style-type: none"> ▪ Children working: average weekly hours by age and sex ▪ Children not in school by employment status (by age) ▪ Children in wage employment or self-employment (percent by age) ▪ Children aged 5-17 by sex, type of activity and residence ▪ Percentage of children involved in household chores, by sex and age ▪ Distribution of working children aged 5-17 by industry and age group ▪ Distribution of working children aged 5-17 by industry and sex ▪ Distribution of working children aged 5-17 by status in employment and sex
		<p><i>Forced labour</i></p> <ul style="list-style-type: none"> ▪ Indicators of deceptive recruitment ▪ Indicators of coercive recruitment ▪ Indicators of recruitment by abuse of vulnerability
(c) Fair treatment in employment	<p>FOR THE MEASUREMENT OF FAIR TREATMENT, STATISTICS SHOULD BE PRODUCED ACROSS ALL DIMENSIONS, FOR AS MANY INDICATORS OF QUALITY OF EMPLOYMENT AS POSSIBLE, FOR THE FOLLOWING GROUPS WHICH MAY BE RELEVANT FOR INDIVIDUAL COUNTRIES:</p> <ul style="list-style-type: none"> - Women - Ethnic minorities - Immigrants - Indigenous population - Persons with disabilities 	

2. Income and benefits from employment		
(a) Income from employment	<ul style="list-style-type: none"> ▪ Average weekly earnings of employees ▪ Low pay (Share of employed with below 2/3 of median hourly earnings) 	<ul style="list-style-type: none"> ▪ Share of employees paid at below minimum wage ▪ Distribution of wages by quintile
(b) Non-wage pecuniary benefits	<ul style="list-style-type: none"> ▪ Share of employees using paid annual leave in the previous year ▪ Average number of days paid annual leave used in the previous year ▪ Share of employees using sick leave 	<ul style="list-style-type: none"> ▪ Share of employees with supplemental medical insurance plan

3. Working hours and balancing work and non-working life		
(a) Working hours	<ul style="list-style-type: none"> ▪ Average annual (actual) hours worked per person ▪ Share of employed persons working 49 hrs and more per week (involuntarily? unpaid overtime, non-managerial only) ▪ Share of employed persons working less than 30 hours per week involuntarily 	<ul style="list-style-type: none"> ▪ Share of employees working overtime (paid or unpaid) ▪ Share of employed working more than one job ▪ Average weekly (actual) hours) ▪ Distribution of hours by quintile
(b) Working time arrangements	<ul style="list-style-type: none"> ▪ Percentage of employed people who usually work at night/evening ▪ Percentage of employed people who usually work on weekend or bank holiday ▪ Share of employees with flexible work schedules 	
(c) Balancing work and non-working life	<ul style="list-style-type: none"> ▪ Ratio of employment rate for women with children under compulsory school age to the employment rate of all women aged 20-49 ▪ Share of people receiving maternity/paternity/family leave benefits 	<ul style="list-style-type: none"> ▪ Ratio of the employment rate for single women with children under compulsory school age to the employment rate of married women aged 20-49 ▪ Average hours worked per household ▪ Share of employed people who feel "time stressed"

4. Security of employment and social protection		
(a) Security of employment	<ul style="list-style-type: none"> ▪ Percentage of employees 25 years of age and older with temporary jobs ▪ Percentage of employees 25 years of age and older with job tenure (< 1 yr, 1-3 yrs, 3-5 yrs, >= 5yrs) 	<ul style="list-style-type: none"> ▪ Transition from temporary jobs into other labour status. ▪ Unemployment rate of those whose last job was temporary ▪ Percentage of employed who are unincorporated self-employed
(b) Social protection	<ul style="list-style-type: none"> ▪ Share of employees covered by unemployment insurance ▪ Public social security expenditure as share of GDP ▪ Share of economically active population contributing to a pension fund 	<ul style="list-style-type: none"> ▪ Average weekly unemployment insurance payment as a share of average weekly wage

5. Social dialogue and workplace relationships		
	<ul style="list-style-type: none"> ▪ Share of employees covered by collective wage bargaining ▪ Average number of days not worked due to strikes and lockouts 	<ul style="list-style-type: none"> ▪ Unit working hours lost due to strikes and look outs ▪ Decentralisation/centralisation index of bargaining ▪ Collective bargaining on working conditions ▪ Share of employees not covered by strike law

6. Skills development and life-long learning		
	<ul style="list-style-type: none"> ▪ Share of employed persons in high skilled occupations ▪ Share of employees who received job training within the last 12 months ▪ Share of employed who have more education than is normally required in their occupation ▪ Share of employed who have less education than is normally required in their occupation 	<ul style="list-style-type: none"> ▪ Share of employed persons by Level of Education (including subgroups) ▪ Kind of job training (job-related, done on one's own initiative)

7. Workplace relationships and intrinsic nature of work		
(a) Workplace relationships		<ul style="list-style-type: none"> ▪ Share of employees who feel they have a strong or very strong relationship with their co-workers ▪ Share of employees who feel they have a strong or very strong relationship with their supervisor ▪ Share of employees who feel they have been a victim of discrimination at work ▪ Share of employees who feel they have been harassed at work
(b) Intrinsic nature of work		<ul style="list-style-type: none"> ▪ Share of employees who feel they do "useful" work ▪ Share of employees who receive regular feedback from their supervisor ▪ Share of employees who feel they are able to apply their own ideas in work ▪ Share of employees who feel satisfied with their work

other indicators. For example, the particular legal definitions of discrimination are critical. Should indicators capture both “disparate treatment” and “disparate impact” concepts of discrimination? The answer is almost certainly yes, since ILO and UN bodies and most national legal systems adopt both definitions. But once disparate impact theory is acknowledged, the indicators must provide specific definitions of the degree of statistical

variation among groups defined by gender, ethnicity, immigration status, etc., as well as specific definitions of the permissible justifications for such variation.

The Second Task Force (1) commissioned a study to “test the completeness/redundancy and validity” of the proposed indicators above, and (2) initiated nine country profiles using the proposed indicators. These were the subjects of a joint UNECE/Eurostat/ILO meeting in October, 2009.

The validation study was undertaken by the Italian National Institute of Statistics (ISTAT). (ISTAT, 2009) (“Validation Study”). The *Validation Study* began by comparing the proposed Quality of Employment indicators and the Decent Work indicators, noting that they share five conceptual dimensions – safety, income, hours (including the balance of work and family), employment security, and social dialogue. The Quality of Employment indicators have two additional conceptual buckets, dealing with “modern day aspirations” – training and lifelong learning, and work relationships. The Decent Work indicators have one additional dimension, dealing with “contextual variables” – employment opportunities.

Beginning with the 30 Quality of Employment indicators, the *Validation Study* reviewed data available from the following sources: Eurostat, ILO, UNECE, the World Bank, and the European Foundation. Indicators were placed in five categories based on availability of data: (1) data available from electronic database, (2) data available with elaboration from electronic database, (3) specific elaboration needed, not from electronic database, (4) data not available, but similar data is available, and (5) data not available. For European countries, 8 out of 30 indicators were in the final category – that is, data not available.

The *Validation Study* argued that, in fact, each indicator was “generic,” in the sense that it could be operationalized in several ways, producing several different variables. This could be understood in two different ways: Either several different sub-indicators are necessary to capture the concept underlying the proposed indicator, or each proposed indicator could be fully specified in any of several different ways.

In any event, the ISTAT analysts formulated a total of 66 quantitative indicators, the “great majority” of which derived from the Second Task Force proposals and the ILO’s Decent Work specifications. In addition to the 66 quantitative indicators, the *Validation Study* formulated 24 “legislative” indicators. These came from the ILO’s database on Conditions of Work and Employment Laws and the World Bank’s *Doing Business Report*.

Next, the 66 quantitative indicators were winnowed down to 22, after eliminating those for which adequate data were unavailable (adequacy measured by relevance, availability, ease of computation, comparability, and data robustness). ISTAT applied Principal Components Analysis to the 22 selected quantitative indicators for 22 countries, and Multiple Correspondence Analysis to the legislative variables. The countries were all European, mostly advanced, but others developing or transitional, such as Estonia Lithuania, Latvia, Slovakia, and Slovenia.

The *Validation Study* identified and eliminated the indicators that produced the greatest variance (on the ground that highly correlated indicators were redundant). The logic of the *Validation Study* on this important point is worth quoting: “Since all the proposed variables were of equal relevance to the study, we adopted as [a] discriminating factor the indicators’ power to highlight differences among countries.” (ISTAT, 2009, p. 10).

From the standpoint of our research, this critical step may be conceptually problematic. Our concern for compliance with vital legal obligations may not be satisfied by elimination of relevant (vital) indicators, simply because they correlate with other (vital) indicators. That is, we are not concerned *solely* with generating a valid composite indicator (say, for freedom of association) or even valid composite sub-indices (say, compliance of labor courts with the rule of law) but rather are also concerned with measuring an array of specific rights-grounded obligations (for example, workers' access to the court, transparency of court proceedings, independence of judges, speed and effectiveness of remedies, effective prosecution of perpetrators of violence against labor unionists, and so on). Even if the value of the composite indicator may be decisive for some purposes (for example, prioritizing countries for deeper assessment or research), the value of specific indicators may be decisive for other purposes (for example, determining compliance in complaint-driven, case-based investigations; determining whether to impose trade penalties on U.S. trading partners; or formulating benchmarks of increasing compliance). Eliminating indicators that do not produce the greatest variance among countries may serve the former goal but not the latter. Less hypothetically, the *Validation Study* in fact eliminated all indicators pertaining to working time.

To see the analytic sequence of the *Validation Study* in this respect, two tables are reproduced below. (ISTAT, 2009, tables 20, 21). The first sets out the 24 legislative indicators. The second shows the shorter list – eliminating work hours and other indicators – produced by the methodology just described. I focus on the legislative indicators for reasons of space, but also since the legal framework may be of greatest relevance to our

project.

Validation Study – Frequency of Legislative Indicators

ILO Monthly minimum wages

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid 100-499 USD	7	31.8	31.8	31.8
500-1000 USD	4	18.2	18.2	50.0
over than 1000 USD	11	50.0	50.0	100.0
Total	22	100.0	100.0	

ILO Minimum wage-fixing mechanism

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid Gov consulting social partners	2	9.1	9.1	9.1
Gov following specialized body recommendation	9	40.9	40.9	50.0
Specialized body	4	18.2	18.2	68.2
Collective bargaining	7	31.8	31.8	100.0
Total	22	100.0	100.0	

ILO Minimum wage-fixing levels

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid National	12	54.5	54.5	54.5
National by sector and/or occupation	3	13.6	13.6	68.2
Regional by sector and/or occupation	2	9.1	9.1	77.3
By sector and/or occupation	5	22.7	22.7	100.0
Total	22	100.0	100.0	

ILO Normal weekly hours limits

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid No universal national limit	3	13.6	13.6	13.6
35-39 hours	3	13.6	13.6	27.3
40 hours*	16	72.7	72.7	100.0
48 hours	3	13.6	13.6	13.6
Total	3	13.6	13.6	27.3
Total	22	100.0		

* Greece value was missing; the modal case was imputed

ILO Maximum weekly hours

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid 40 hours	1	4.5	4.5	4.5
41-47 hours	4	18.2	18.2	22.7
48 hours*	16	72.7	72.7	95.5
49-59 hours	1	4.5	4.5	100.0
Total	22	100.0	100.0	

* Greece value was missing; the modal case was imputed

ILO Overtime limits

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No universal national limit	1	4.5	4.5	4.5
	Overtime limits included in maximum weekly hours limits	4	18.2	18.2	22.7
	Overtime limits <=150 hours per year	4	18.2	18.2	40.9
	151<Overtime limits<300*	10	45.5	45.5	86.4
	Overtime limits> 300 hours per year	3	13.6	13.6	100.0
Total		22	100.0		

* Greece value was missing; the modal case was imputed

ILO Minimum annual leave

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	20-23 days	16	72.7	72.7	72.7
	24-25 days	5	22.7	22.7	95.5
	more than 25 days	1	4.5	4.5	100.0
Total		22	100.0		

ILO Length of maternity leave

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	14 weeks	1	4.5	4.5	4.5
	15 to 17 weeks	10	45.5	45.5	50.0
	18 weeks or more	11	50.0	50.0	100.0
Total		22	100.0	100.0	

ILO Maternity leave benefits

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Less than two-thirds pay for a minimum of 14 weeks	2	9.1	9.1	9.1
	At least two-thirds but less than 100% for 14 weeks	6	27.3	27.3	36.4
	Full pay for 14 weeks or more	14	63.6	63.6	100.0
Total		22	100.0	100.0	

ILO Source of maternity leave benefits

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Social insurance or other public funds	19	86.4	86.4	86.4
	Mixed system	3	13.6	13.6	100.0
Total		22	100.0	100.0	

DB Are fixed-term contracts prohibited for permanent tasks?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	11	50.0	50.0	50.0
	No	11	50.0	50.0	100.0
Total		22	100.0	100.0	

DB maximum duration of fixed-term contracts

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid 12-24 months	6	27.3	27.3	27.3
25-60 months	7	31.8	31.8	59.1
over 60 months	2	9.1	9.1	68.2
no limit	7	31.8	31.8	100.0
Total	22	100.0	100.0	

DB possibility to extend to 50 hours to respond to a seasonal increase in production

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid 50 hours_Yes	20	90.9	90.9	90.9
50 hours_No	2	9.1	9.1	100.0
Total	22	100.0	100.0	

DB maximum number of working days per week

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid Five days	3	13.6	13.6	13.6
Six days	19	86.4	86.4	100.0
Total	22	100.0	100.0	

DB restrictions on night work

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid Night work restrictions	19	86.4	86.4	86.4
Night work no limits	3	13.6	13.6	100.0
Total	22	100.0	100.0	

DB restrictions on weekly holiday work

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid Weekly holiday restrictions	20	90.9	90.9	90.9
Weekly holiday no limits	2	9.1	9.1	100.0
Total	22	100.0	100.0	

DB legally authorized termination of workers due to redundancy

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid Yes	22	100.0	100.0	100.0

DB Does the employer need the approval of a third party to terminate one redundant worker?

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid Yes	1	4.5	4.5	4.5
No	21	95.5	95.5	100.0
Total	22	100.0	100.0	

DB Must the employer notify a third party before terminating a group of 25 redundant workers?

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid Yes	22	100.0	100.0	100.0

DB Does the employer need the approval of a third party to terminate a group of 25 redundant workers?

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid Yes	4	18.2	18.2	18.2
No	18	81.8	81.8	100.0
Total	22	100.0	100.0	

DB Is there a retraining or reassignment obligation before an employer can make a worker redundant?

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid Reassignment obligations	15	68.2	68.2	68.2
No reassignment obligations	7	31.8	31.8	100.0
Total	22	100.0	100.0	

DB Are there priority rules applying to redundancies?

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid Priority for redundancies	14	63.6	63.6	63.6
No priority for redundancies	8	36.4	36.4	100.0
Total	22	100.0	100.0	

DB Are there priority rules applying to re-employment?

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid Priority for re-employment	11	50.0	50.0	50.0
No priority for re-employment	11	50.0	50.0	100.0
Total	22	100.0	100.0	

DB Must the employer notify a third party before terminating one redundant worker?

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid Third part notify	10	45.5	45.5	45.5
No notify	12	54.5	54.5	100.0
Total	22	100.0	100.0	

Validation Report – Variables Used for Multiple Correspondence Analysis

ILO	Monthly minimum wages (<i>less than 1000 \$ /over than 1000 \$</i>) Minimum wage-fixing mechanism (<i>Government consulting social partners o collective bargaining / Government without consulting social partners</i>) Minimum wage-fixing levels (<i>national fixing-wage / others fixing-wage</i>) Minimum annual leave (<i>10-23 days / more than 23 days</i>) Length of maternity leave (<i>18 weeks or more /14 to 17 weeks</i>)
DB	Are fixed-term contracts prohibited for permanent tasks? (<i>yes / no</i>) Maximum duration of fixed-term contracts (<i>12-24 months / 25-60 months / over 60 months</i>) Is there a retraining or reassignment obligation before an employer can make a worker redundant? (<i>yes / no</i>) Are there priority rules applying to redundancies? (<i>yes / no</i>) Are there priority rules applying to re-employment? (<i>yes / no</i>) Must the employer notify a third party before terminating one redundant worker? (<i>yes / no</i>)

Applying Multiple Correspondence to these indicators, the *Validation Study* finds that two factors explain 48 percent of the general variance. The first of these is “level of social negotiation” – countries that fix minimum wages through collective bargaining or social partners tend also to have high minimum wages, longer annual leave, longer maternity leave, greater use of fixed-term contracts, and so on. The second factor is “labor protection system” – especially regulation of layoffs and fixed-term contracts.

The *Validation Study* concludes, among other things:

[T]he analysis shows the relevance of legislative [that is, legal-regulatory] indicators to give a more complex overview of the quality of employment. However, a deep knowledge of the legislative context would be desirable in order to assure...effective data comparability and to interpret the findings correctly.... The problem is the lack of an operational definition, i.e. a translation of labor regulations into indicators and variables which are comparable across countries.

(ISTAT, 2009, p. 42, 44).

The *Study* notes that the ILO is already working on this problem, sending us back,

in effect, to the Proposed Revised Indicators and the non-evaluative January 2011 evaluation criteria. In any event, the *Validation Study* suggests that properly conceptualized indicators of legal regulations are conceptually centered around the structural components of labor relations systems – a point to which we return in Section XI(2).

Prior to the October, 2009 Seminar, nine countries carried out pilot country profiles using the body of indicators proposed by the Second Task Force: Canada, Finland, France, Germany, Israel, Italy, Mexico, Moldova, and Ukraine. (Federal Statistical Office, Germany, 2009; State of Israel, 2009; National Institute of Statistics and Geography, Mexico, 2009; Italian National Institute of Statistics, 2009b; Statistics Finland, 2009; State Statistics Committee of Ukraine, 2009; France, 2009; Statistics Canada, 2009; Republic of Moldova, 2009). A preliminary overview of the *Validation Study* had been presented at a Task Force Seminar in May, 2009 – though the nine countries relied principally on the Second Task Force proposals. Individual countries added new indicators and deleted others, typically driven by data availability but in some cases by conceptual concerns. In many instances, the country profiles relied on the European Quality of Work indicators, ILO Decent Work Indicators, or other international or national definitions to operationalize the Task Force proposals. For example, the German country profile noted that the Second Task Force Report of July 2009 “contain[s] very limited guidance as regards the definition and operationalization of the indicators.” (Federal Statistical Office Germany, 2009, p. 4 n.2). The German profile therefore calculated indicators “based upon the data availability [as determined by] national practices as well as existing practices in the

European Statistical System (EES).” (Federal Statistical Office Germany, 2009, p. 4 n.2).

For the same reasons, the various country profiles were structured as indicator-by-indicator discussions of the available data that could plausibly operationalize each indicator. No effort was made to normalize and weight the indicators to calculate composite sub-indices for each of the seven dimensions or a single composite index for the overall concept of equality of employment. And therefore no attempt to compare and rank countries was undertaken. Nonetheless, the discussions in each country profile of ways to operationalize each indicator and of data sources for that purpose are useful for our project.¹³ Recall, however, that the UNECE project did not formulate indicators of legal norms before the 2009 *Validation Study*. The *Study* was therefore not used for the country profiles, which instead relied on the outcome-based indicators proposed by the Second Task Force.

Some of the main criticism of the Second Task Force indicators by participating countries include: the failure of indicators to capture relevant information about the self-employed (Israel, Italy, Germany) or workers in the informal sector (Mexico, because of gaps in national data collection); the indicators on freedom of association and collective bargaining did not map well onto national industrial relations systems (Italy, with both national and enterprise bargaining, and Germany, with highly institutionalized, consensual labor relations and low strike rates); data on number of sick days and holiday days taken are difficult to obtain, unlike data on days to which employees are entitled (Italy,

¹³ Summarizing those discussions for the 53 total indicators, or even for the shorter lists of core indicators, would take excessive space in this Literature Review, but the profiles may provide helpful references for our specific indicators.

Germany); non-discrimination should be measured not only as a transversal indicator but also through free-standing indicators (Germany); many indicators are ambiguous in their definition and normative implications, such as number of strike days, which could reflect either pathological labor relations or workers' strong collective voice (Mexico).

2. UN Reports on Indicator Methodologies for Rights Monitoring

In 2006 and 2008, the United Nations High Commissioner for Human Rights issued *Reports* on the formulation of “indicators for promoting and monitoring the implementation of human rights.” (UNHCHR, 2006; 2008). The *Reports* developed a conceptual framework for the general exercise of formulating human rights indicators, and set out illustrative indicators for several categories of political and economic rights, including “indicators on the right to work.”

The 2008 *Report* maintained that “for the framework to be conceptually meaningful, it is necessary to anchor the indicators...in the normative content” of the right in question. (UNHCHR, 2008, p. 5). Hence, the starting point is the text of the relevant treaty and the comments of the relevant UN committees.¹⁴ The main objective is to measure the “effort” made by the government “in meeting their obligations.” Hence, according to the *Report*, “it is equally important to get a measure of the ‘intent/commitment’ of the [government], as well as the consolidation of its efforts, as reflected in appropriate ‘results’ indicators.” (UNHCHR, 2008, p. 5).

¹⁴ See Sections IX(1) and IX(2) below, for an overview of relevant treaties and committees and the literature pertaining to them.

The *Report* concluded that for most human rights, it is possible to identify a limited number (approximately four) of “characteristic attributes” that capture the “essence of the normative content” of the right in question. (UNHCHR, 2008, p. 5). The *Report* then adopted a triadic framework based on structural, process, and outcome indicators for each of the attributes. The framework also seeks to capture cross-cutting norms that apply to the implementation of most rights, such as non-discrimination in the application of the right, and participatory, transparent, and accountable enforcement of the right.

The 2006 and 2008 *Reports* fashioned two categories of data: (1) “socio-economic and other administrative statistics,” and (2) “events-based data” on human rights violations – roughly corresponding to what we have labeled systemic and complaints-based non-compliance. The 2008 *Report* notes that events-based data – reported by NGOs and official human rights institutions – are likely to under-report the full number of violations.

The 2008 *Report* states that the foremost consideration in choosing a body of indicators is “its relevance and effectiveness” in achieving the objectives for which the indicators are to be used. Thus:

In the context of the work undertaken by the treaty bodies in monitoring the implementation of human rights, quantitative indicators should ideally be: relevant, valid and reliable; simple, timely and few in number; based on objective information and data-generating mechanisms; suitable for temporal and spatial comparison and following relevant international statistical standards; and amenable to disaggregation in terms of sex, age, and other vulnerable or marginalized population segments. ...In the context of this framework, these methodological considerations in the selection of indicators are being addressed through the preparation of a meta-data sheet that is being prepared for each indicator included in the illustrative list.

(UNCHR, 2008, pp. 9-10).

On the difficult tension between maintaining the universality of rights and adapting them to local context, the *Report* attempts to take a middle ground:

The contextual relevance of indicators is a key consideration in the acceptability and use of indicators among potential users. Countries and regions within countries differ in terms of their level of development and realization of human rights. These differences are reflected in the nature of institutions, the policies and the priorities of the State. Therefore, it may not be possible to have a set of universal indicators to assess the realization of human rights. Having said that, it is also true that certain human rights indicators, for example those capturing realization of some civil and political rights, may well be relevant across all countries and their regions, whereas others that capture realization of economic or social rights, such as the rights to health or adequate housing, may have to be customized to be of relevance in different countries. But even in the latter case, it would be relevant to monitor the minimum core content of the rights universally. Thus, in designing a set of human rights indicators, like any other set of indicators, there is a need to strike a balance between universally relevant indicators and contextually specific indicators, as both kinds of indicators are needed.

(UNHCHR, 2008, p. 10).

The *Report's* threefold categorization of indicators – structural, process, and outcome – does not precisely map onto the three NAS-ILAB categories of legal framework, government performance, and overall outcomes. “Structural” indicators subsume both legal instruments and institutional mechanisms that promote and protect the right. “Process” indicators “relate State policy instruments with milestones that cumulate into outcome indicators.... By defining the process indicators in terms of a concrete ‘cause-and-effect relationship,’ the accountability of the State to its obligations can be better assessed.” (UNHCHR, 2008, p. 12). The *Report* is candid about the ambiguity of the concept of a process indicator:

There is some similarity in process and outcome indicators which comes from the fact that any process can either be measured in terms of the inputs going into a process or alternately in terms of the immediate outputs or outcomes that the

process generates. Thus, a process indicator on the coverage of immunization among children can be measured in terms of the public resources or expenditure going into the immunization program (which is the input variant) or in terms of the proportion of children covered under the program (which is an outcome or impact variant). In terms of the definition outlined in this note, both these indicators are process indicators. They contribute to lowering child mortality....

(UNHCHR, 2008, p. 12 n. 12). The table of “right to work” indicators below illustrates the distinction between, as well as the blurring among, the three categories of indicators in the UNCHR framework.

List of illustrative indicators on the right to work (UDHR, Art. 23) (* MDG related indicators)

	Access to decent and productive work	Just and safe working conditions	Training, skill upgradation and professional development	Protection from forced labour and unemployment	
Structural	<ul style="list-style-type: none"> International human rights and ILO treaties relevant to the right to work ratified by the State Date of entry into force and coverage of the right to work in the Constitution or other forms of superior law Date of entry into force and coverage of domestic laws for implementing the right to work including regulations to ensure equal opportunities for all and eliminate employment-related discriminations as well as (temporary) special measures for target groups (e.g. women, children, indigenous, migrants) Number of registered and/or active non-governmental organisations (per 100,000 persons), including trade unions, involved in the promotion and protection of the right to work 				
	<ul style="list-style-type: none"> Time frame and coverage of a national policy for full and productive employment Date of entry into force and coverage of regulations and procedures to ensure safe and healthy working conditions, including an environment free of sexual harassment, and establishing an independent monitoring body Maximum number of working hours per week stipulated by law Minimum age for employment by occupation type Duration of maternity, paternity and parental leave and leave entitlements on medical grounds and proportion of wage paid in covered period 	<ul style="list-style-type: none"> Time frame and coverage of national policy on vocational education and skill upgradation Proportion of administrative agencies with specialised public agencies to assist individuals in finding employment 	<ul style="list-style-type: none"> Time frame and coverage of awareness raising programmes on labour standards Time frame and coverage of policy for the elimination of forced labour, including child labour, migrant worker and of domestic work 		
Process	<ul style="list-style-type: none"> Proportion of complaints on the right to work, including just and safe working conditions, investigated and adjudicated by the national human rights institution, human rights ombudsperson or other mechanisms (e.g. ILO procedures, trade unions) and the proportion of these responded to effectively by the government 				
	<ul style="list-style-type: none"> Proportion of target population receiving effective support for their (re-) entry into the labour market Annual employment growth (job creation rates), by education level Average time spent on unpaid domestic family care work as well as in unpaid work of family business by women, men and children Proportion of requests by parent or guardian for certified child care arrangements reviewed and met in the reporting period Proportion of workers who moved from precarious to stable contracts during the reporting period 	<ul style="list-style-type: none"> Proportion and frequency of enterprises inspected for conformity with labour standards and proportion of inspections resulting in administrative action or prosecution Proportion of inspected enterprises conform with labour standards Proportion of employed persons, including domestic workers, whose salary level is covered under legislation (e.g. minimum wage) and/or wage setting procedures involving social partners (unions) 	<ul style="list-style-type: none"> Proportion of labour force undergoing some training during their employment Proportion of unemployed persons involved in skill upgradation and other training programmes, including publicly financed jobs Improvement in secondary and tertiary enrolment ratios in the reporting period 	<ul style="list-style-type: none"> Proportion of informal sector workers shifted to formal sector employment in the reporting period Proportion of economically active children Estimated number of labour force in the informal sector receiving some public support Proportion of targeted unemployed persons covered by unemployment / social security benefits 	
Outcome	<ul style="list-style-type: none"> Employment-to-population ratios*, by sex, target group and education level Proportion of voluntary part-time workers to total part-time employed population Share of women in wage employment in the non-agricultural sector* Proportion of workers in precarious employment (e.g. short, fixed term, casual, seasonal workers etc.) 	<ul style="list-style-type: none"> Incidence of accident at work and occupational diseases Ratio of women to men wages, by sector and by other target groups Proportion of identified positions (e.g. senior officials, managerial positions in public/private service/field) by women and other target groups 	<ul style="list-style-type: none"> Proportion of workers employed after skill upgradation and other training programmes, including publicly finance jobs Long-term unemployment rates (1 year or more of unemployment), by sex, target groups or regions Distribution of labour force by level of education 	<ul style="list-style-type: none"> Unemployment rates, by sex, target groups and level of education (LFS/registered) Incidence of forced labour, including worst forms of child labour and of domestic work Reported cases of violations of the right to work, including forced labour, discrimination, worst forms of child labour and of domestic work and unlawful termination of employment and proportion of victims who received adequate compensation 	
	<ul style="list-style-type: none"> Gini indices and ratio of lowest/highest income quintiles or consumption expenditures (before and after taxes) <p style="text-align: center;"><i>All indicators should be disaggregated by prohibited grounds of discrimination, as applicable and reflected in meta-headers</i></p>				

Note that some of the “process” indicators listed in the Table would fit more aptly under NAS-ILAB’s “legal framework” category – for example, the proportion of the workforce covered by minimum wage legislation. But most of the “process” indicators

would more sensibly fit into the “outcomes” category or fit into a fourth category of “context” indicators – for example, the proportion of economically active children, or the growth in employment.

In sum, the UNHCHR scheme of structural-process-outcome indicators seems unsuited to the task. The ultimate objective, as the 2008 *Report* itself notes, is to measure government commitment and effort to protect and promote rights. It seems not only logical but, more importantly, conceptually and pragmatically justified to *directly* identify indicators of government enforcement effort – such as staffing and funding of labor inspectorates, fair and expeditious procedures for court enforcement, and the like. True, the UNHCHR process indicators above include one double-barreled indicator for labor inspection – an indicator of the proportion, frequency, and complaint-generation of inspections. But, as just noted, most of the process indicators do not measure government enforcement efforts; and in any event, the *Report's* indicator for labor inspection does not capture critical features of labor inspection, which are discussed below in Section XI(3)(f).

The UNHCHR indicators were subject to a “validation” process – not in the sense of statistical validation, but rather in the sense that the Office of the High Commissioner for Human Rights conducted consultations with broad groups of experts and stakeholders. Since the UNHCHR did not attempt to develop a methodology for calculating a composite index, statistical validation may be less vital; yet the UNHCHR’s disaggregation of the right into “attributes” and “indicators” warrants more rigorous validation than a process of stakeholder consultation followed by secretariat determination.

The 2008 *Report* concluded that the validation process confirmed that the new UNHCHR indicator framework is superior to the Millennium Development Goals (MDGs). Participants in the validation process “underlined a certain arbitrariness in the choice of MDG indicators, the insensitivity of the corresponding targets and indicators to capture contextual concerns, the fixation with averages rather than inequality or distribution adjusted indicators and a general lack of attention to strategies and the processes for meeting the targets.” (UNHCHR, 2008, p. 16).¹⁵

¹⁵ As to labor matters, the MDG indicators have incorporated ILO indicators discussed elsewhere in this Literature Review. No further discussion of MDG indicators is necessary or useful.

VII. European Labor Indicators

There are several initiatives in formulating labor indicators at the level of the European bloc. This Section discusses the European efforts to construct quantitative indicators, including in some cases composite labor indicators. Section X below discusses authoritative *legal* interpretations of core labor rights by European bodies.

For the most part, the European indicators focus on quality-of-work-life *outcomes* (labor market or workplace variables), rather than on the legal definitions of rights and standards and government efforts to enforce those rights. Moreover, some of the principal European indicators either (1) have been incorporated into the UNECE/ILO/Eurostat Quality of Employment Framework discussed above, or (2) have directly drawn on ILO standards.

Nonetheless, there are several good reasons for surveying the European indicators and the literature discussing them. First, there are, as a general matter, several good reasons for examining outcome indicators in the labor field, as discussed above in Section III. Second, the European Union (and related European-wide bodies) represent the leading multi-nation-state setting in which disciplined supranational guidelines and indicators have been formulated and routinely applied to domestic labor market outcomes and in some instances to domestic labor regulation. And, third, that multi-state exercise occurs in a data-rich setting, allowing a natural experiment for formulating indicators that approach a conceptual ideal, unconstrained by severe data limitations.

In addition to the specific papers and articles mentioned below, there are some general sources that contain much material on the various European indicators. The website of the Economic Committee of the European Commission contains webpages on “monitoring and indicators” for the European Employment Strategy. The Reconciliation of Work and Welfare in Europe network (RECWOWE) also has a website that publishes many working papers and other material on fashioning labor indicators. The European Trade Union Institute (ETUI) publishes working papers and reports on its own body of indicators and methodology. Recent issues of the ETUI journal, *Transfer: European Review of Labor and Research*, have contained several relevant articles. The same can be said of the ILO’s *International Labor Review*. The Hans Böckler Foundation has issued several reports assessing European indicators and developing new ones. Many books contain chapters on the subject, most recently an anthology entitled *Quality of Work in the European Union - Concept, Data and Debates from a Transnational Perspective*. (Guillén and Dahl, eds., 2009).

1. European Employment Strategy Indicators

Three developments in European labor indicators are closely intertwined and, in some initiatives, convergent: (1) The European Employment Strategy, (2) Decent Work, and (3) Quality of Work.

The European Employment Strategy (EES) was launched in 1997 in the Luxembourg Jobs Summit. Job quality issues were added to the EES agenda – under the banner of “more and better jobs” – by the Lisbon Summit of 2000. Later in that year, at the

Nice Council, job quality was placed in the European Social Agenda. Subsequently – at the Leaken European Council of 2001 and in the Employment Guidelines of 2002 – ten clusters of indicators were formulated. (European Commission, 2002). The clusters included, among others, “gender equality,” “diversity and non-discrimination,” and “health and safety at work.” However, there was a political stalemate over inclusion of indicators for the dimension of “social dialogue and worker involvement.” (Davoine, et al., 2008, p. 165).

In 2007, the European Commission issued a *Strategic Report on the Renewed Lisbon Strategy for Growth and Jobs: Launching the New Cycle: 2008-2010* (European Commission, 2007); and a 2008 decision of the European Council renewed, for the years 2008-2010, the three EES goals of “full employment,” “improving quality and productivity at work,” and “strengthening economic, social and territorial cohesion.” (European Council, 2008). The Council endorsed the following eight Employment Guidelines for the EU member states, and provided more specific policy objectives under each of these headings:

Guideline 17: Implement employment policies aiming at achieving full employment, improving quality and productivity at work, and strengthening social and territorial cohesion

Guideline 18: Promote a lifecycle approach to work

Guideline 19: Ensure inclusive labor markets, enhance work attractiveness, and make work pay for job-seekers, including disadvantaged people, and the inactive

Guideline 20: Improve matching of labor market needs

Guideline 21: Promote flexibility combined with employment security and reduce labor market segmentation, having due regard to the role of social partners

Guideline 22: Ensure employment-friendly labor cost developments and wage-setting mechanisms

Guideline 23: Expand and improve investment in human capital

Guideline 24: Adapt education and training systems in response to new competence requirements

The Employment Committee of the European Commission now promulgates indicators on an annual basis to monitor progress toward the three goals of the Employment Guidelines, and issues a compendium of country-by-country data for each indicator. (European Commission, 2009; 2009b). The indicators are arranged in the eight categories above. In addition to “Monitoring Indicators,” the Employment Guidelines include “Indicators for Analysis.” The Monitoring Indicators are raw data; the Indicators for Analysis perform operations on the Monitoring Indicators – although the distinction between the two categories is not entirely sharp.

The relevant indicators are given below. The current Employment Guideline indicators do not include freedom of association and collective bargaining. They take gender as a transversal indicator but, unlike the Quality of Employment indicators, they include indicators dedicated to non-discrimination as well:

- **19.M5 Labor market gaps for disadvantaged groups:** gaps in the labor market, such as difference between the employment, unemployment and activity rates for a non-disadvantaged group in percentage points and the corresponding rates for the disadvantaged groups (such as non-EU nationals, disabled people, ethnic minorities, immigrants, low-skilled people, lone parents, etc. according to national definitions).

- **18.M2 Gender pay gap:** Difference between men's and women's average gross hourly earnings as a percentage of men's average gross hourly earnings (for paid employment).
- **18.M3 Child care:** Children cared for (by formal arrangements other than by the family) less than 30h a usual week/30h or more a usual week as a proportion of all children of the same age group.
- There are also **several indicators about youth employment and training.**

The "Indicators for Analysis" pertaining to discrimination include:

- **18.A1 Employment gender gap:** The difference in employment rates between men and women in percentage points, by age group (15-24, 25-54, 55-64) and by education level (less than upper secondary, upper secondary and tertiary education, according to ISCED classification).
- **18.A2 Employment gender gap in [full time equivalent]:** The difference in employment rates measured in full-time equivalent between men and women in percentage points.
- **18.A3 Unemployment gender gap:** The difference in unemployment rates between men and women in percentage points.
- **18.A4 Gender segregation:** Gender segregation in occupations/sectors, calculated as the average national share of employment for women and men applied to each occupation/sector; differences are added up to produce a total amount of gender imbalance presented as a proportion of total employments (ISCO classification/NACE classification).
- **18A.5 Employment impact of parenthood:** The difference in percentage points in employment rates (age group 20-49) without the presence of any children and with presence of a child aged 0-6.
- **18A.6 Inactivity and part-time work due to lack of care services for children and other dependants:** Inactivity and part-time work due to lack of care services defined as share of persons (age groups 15-64) who would like to work but are not searching for a job/who work part-time due to their care responsibilities AND lack of suitable care services (% of persons with care responsibilities). Persons with care responsibilities is defined as share of persons who would like to work but are not searching for a job/who work part-time due to their care responsibilities (% of the whole population 15-64).

- **20.A1 Recent immigrants to and within the EU:** Foreign born persons/Persons with another nationality than the country of residence/in the age group 15-64 who have been resident 5 years and less in the reporting country as a proportion of total population in the same age group.
- **20.A2 Employment/Activity of recent immigrants to and within the EU:** Employed persons/Employed and unemployed persons/in the age group 15-64 who have another nationality than the country of residence and who have been resident 5 years and less in the reporting country as a proportion of
 - total recent immigrants in the same age group
 - total employed/active population in the same age group

There is one “Monitoring Indicator” for health and safety:

- **21.M3 Accidents at work:** Index of the number of serious and fatal accidents at work per 100,000 persons in employment (1998=100).

The sole “Indicator for Analysis” for health and safety is:

- **21.A5 Occupational diseases:** [no definition; but source: EODS giving data only at EU-level]

The “Monitoring Indicators” for working time and the informal economy are:

- **21.A1 Undeclared work:** Size of undeclared work in national economy (e.g., as share of GDP or persons employed).
- **21.A2 Working time:**
 1. Average weekly number of hours usually worked per week defined as the sum of hours worked by full-time employees divided by the number of full-time employees.
 2. Average effective annual working time per employed person.
- **21.A3 Overtime work and hours of overtime:**
 1. Employees for whom overtime is given as the main reason for actual hours worked during the reference week being different from the person’s usual hours worked as % of total employees.
 2. Average hours of overtime.
- **21.A4 Access to flexitime:** Total employees who have other working time arrangements than fixed start and end of working day as % of total employees.

The two “Monitoring Indicators” for wages are:

- **19.M6 Tax rate on low wage earners: Low wage trap:** The marginal effective rate on labor income taking account of the combined effect of increased taxes on labor and in-work benefits withdrawal as one increases the work effort (increased working hours or moving to a better job). Calculated as the ratio of change in personal income tax and employee contributions plus change (reductions) in benefits, divided by increases in gross earnings, using the ‘discrete’ income changes from 34-66% of AW. Breakdown by family types: one earner couple with two children and single person.
- **19.M7 Tax rate on low wage earners: Unemployment trap:** The marginal effective tax rate on labor income taking account of the combined effect of increased taxes and benefits withdrawal as one takes up a job. Calculated as one minus the ratio of change in net income (net in work income minus net out of work income) and change in gross income for a single person moving from unemployment to a job with a wage level of 67% of the AW.

The “Indicators for Analysis” for wages are:

- **18.A8 Transition by pay level:** Transitions between non-employment and employment and within employment by pay level (gross monthly earnings) from year n to year $n+1$. Note: Pay levels are deciles 1, 2, 3, and 4-10.
- **19.A8 In-work-poverty risk:** Individuals who are classified as employed (distinguishing between ‘wage and salary employment plus self-employment’ and ‘wage and salary employment’ only) and who are at risk of poverty (whose equivalized disposable income is below 60% of national median equivalized disposable income).

Four points are worth noting about these EES indicators. First, the indicators are inflected by the EU’s relative shift in the last decade away from social protection and toward labor market “flexibility” (under the neologism of “flexicurity”). (See, e.g., Leschke, 2008). As noted, the indicators do not measure workers’ right to organize, collectively bargain, or strike. Nor do the indicators measure minimum wages, although the concept is measured indirectly by the in-work-poverty risk, defined as income less than 60 percent of

the national median – an apparent compromise between the competing metrics of 50 percent and 66 percent. The indicators do, however, closely attend to tax-based disincentives to work. (The French government favored an indicator for wage level, but the United Kingdom and Scandinavian countries opposed it; the original compromise was the wage mobility indicator 18.A8 above. (Davoine, 2008, p. 165).)

Second, the EES methodology makes no attempt to weight and aggregate indicators. There is no overall composite index, nor are there composite sub-indices for each of the (now) eight dimensions or “guidelines.” (The EU’s *Compendium* does, however, compare the several European countries for each indicator.) Any effort to create such sub-indices would have to grapple with the fact that the various dimensions have different numbers of indicators, some of which may be redundant. (Davoine, 2008, p. 182).

Third, some of the indicators are double-barreled or ambiguous or both. This is in keeping with the fact that the indicators are used as diagnostic surveys of each country’s labor market performance. That is, it is sufficient if the indicators guide the analyst to the underlying concept to generate inter-temporally consistent time series for specific countries. Cross-country consistency is not critical, in light of the methodological decision to forego inter-country rankings and composite indices or sub-indices.

Fourth, the indicators are data-intensive and may therefore be practicable only when applied to the data-rich European Union countries or other advanced economies.

2. European Working Conditions Survey

The principal vehicle for “monitoring” the EES indicators is the European Working Conditions Survey conducted every five years by the Dublin-based European Foundation for the Improvement of Living and Working Conditions (“European Foundation”). The European Foundation is an agency established by the European Council to provide data and analysis on labor conditions. According to the European Foundation, the European Working Conditions Survey “is a unique source of comparative information at the European level on essential topics that are not covered by the rest of the European statistical system.” (European Foundation, 2009, p. 51). The latest published survey is the *Fourth European Working Conditions Survey 2005* (“Fourth Survey”) (European Foundation, 2007). The findings of the current (fifth) survey – based on face-to-face interviews with approximately 34,000 workers in 34 European countries – will be reported in late 2010. The survey asks 120 questions. The questions relate to quality of work life issues that are relevant primarily for issues of wages, hours, and occupational safety and health. There are a few questions on non-discrimination but they are highly generalized, such as: “Over the past 12 months, have you or have you not, personally been subjected at work to sexual harassment or discrimination linked to gender?”

Following the *Fourth Survey*, the Foundation drew on the survey data for a series of analytic reports on gender equality, workforce ageing, flexicurity, technology and working conditions, convergence and divergence in working conditions, sectoral profiles, and work organization. (European Foundation, 2007b; 2008; 2008b; 2008c; 2009; 2009b; 2009c).

In these reports, some data analysis is aggregated at the European level, and much is presented at the country level. Comparisons among countries are found in tables and charts, as well as in the discursive textual discussion of the datasets, but there is no country ranking. However, the comparisons are chiefly among the raw data (i.e., specific indicators). The easiest place to find the comparative data, at least for the specific indicators promulgated by the Employment Committee of the European Commission, is in the *2009 Compendium*, which shows annual time series data for each country from 2000 through 2008.

In addition to the *European Working Conditions Surveys*, The European Foundation has also published six *Annual Reviews* giving overviews of the principal developments in legislation and policy pertaining to quality of work and working conditions at the EU level – most recently for 2008-2009. (European Foundation, 2009d). The *Annual Reviews* include comparative charts for the performance of member states for many variables included in the *Fourth Survey*.

In addition to the *European Working Conditions Survey* and the *Annual Reviews*, the European Foundation collects and analyzes other comparative data. One comparative *Report* that may be particularly useful is *Working Conditions and Social Dialogue*. (European Foundation, 2008d). That *Report* is based on a questionnaire answered by national governments of advanced and emerging countries in the European bloc. (European Foundation, 2008e). The raw responses from those countries are provided. The questionnaire itself is qualitative. It contains no indicators that might be candidates for measuring compliance with the rights of collective bargaining. Nonetheless, the *Report*

itself contains a useful survey of research (including quantitative surveys) on the relationship between collective bargaining and working conditions (i.e., outcome metrics), especially measures of occupational safety and health; and the country responses contain information on legal regulation and labor relations systems.

The European Foundation provides no methodology for weighting and aggregating the variables of its primary database on working conditions, the European Working Conditions Survey. The *Fourth Survey* database, however, has been used by other organizations and researchers for their analysis, including for the formulation of composite indicators discussed below. (E.g., European Commission, 2008; OECD, 2008; ETUI, 2009; ETUI, 2008; Leschke, et al., 2008; Tangian, 2008; Fauth and McVerry, 2008; Seifert and Tangian, 2008).

However, the European Foundation's own comparative report *Convergence and Divergence of Working Conditions in Europe: 1990-2005* ("*Convergence and Divergence Report*"), published in 2009, compares groups of countries defined by their labor regimes, albeit without constructing a composite index. (European Foundation, 2009). The strategy is to compare the performance of country groups over time, in terms of variables drawn from the *European Survey of Working Conditions*; to compare the performance of individual countries within each group; and to attempt to determine whether the group and country trends can be explained by changes in the European-level regulatory framework.

The *Convergence and Divergence Report* divides the EU-27 countries into six groups. The groupings are rooted in the comparative political science literature originating with Esping-Anderson's categorization of "three worlds" of European welfare capitalism

(Anglo-Saxon liberal, Continental social democratic, and Southern European conservative), which has been extended over time to include the Nordic model, the post-communist transitional states, and (non-European) Asian models. (Esping-Anderson, 1990; Amable, 2003). The Foundation creates a new, sixth European category for Cyprus and Malta, on the ground that those two countries are distinctive hybrids of Continental and Southern characteristics overlaid by the history of Anglo-Saxon colonial rule. The European Foundation recognizes that “Eastern NMS [New Member States]” is an unsatisfactory grouping of countries moving along very different developmental and institutional paths, but ultimately accepts the category for lack of a well-grounded classification scheme to differentiate them. It also recognizes the challenge of categorizing the hybrid regimes of Austria, Finland, Ireland, the Netherlands, and Portugal, but opts for fitting them into the traditional categories on the pragmatic ground that analyzing groups “seems necessary to give more robustness to the data.” (European Foundation, 2009, p. 12).

<u>Groups</u>	<u>Countries</u>
Scandinavian	Denmark, Finland, Sweden
Continental	Austria, Belgium, France, Germany, Luxembourg, Netherlands
Anglo-Saxon	Ireland, United Kingdom (UK)
Southern	Greece, Italy, Portugal, Spain
Eastern NMS	Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia
Mediterranean NMS	Cyprus, Malta

Although these groups resemble those used by Botero et al. discussed above in

Section V, the European Foundation's analysis is more compelling, since the latter uses a relatively accurate database of outcome variables while the former uses ill-defined indicators of formal legal rules (without meaningful enforcement indicators). In addition, Botero et al. categorize countries by unconvincing "legal traditions," while the European Foundation looks to institutional definitions of political regimes that have reasonably strong grounding in the literature of comparative political science and labor relations.

In addition to grouping countries, the *Convergence and Divergence Report* makes two other "adjustments" to the *Survey* dataset. First, "the items of certain questions with scales" are grouped "to obtain more significant categories." Second, to reduce the number of questions while remaining coherent with the underlying concept of job quality, the research developed indices that aggregate "conceptually related questions" in the *European Working Conditions Surveys*. (European Foundation, 2009, p. 11).

The *Convergence and Divergence Report* measures the "intensity" of trends across time in two simple ways. (The simplicity is designed to make the study accessible to general audiences and policy-makers.) The first method is the absolute difference between the most recent and earliest values. The second is to measure the percentage change in variables (ratio of the absolute difference and the value of the earliest period of reference).

The key results are captured in the following table:

Intensity of changes* and signs** by country group, 1990-2005

Workers...	Scandinavian	Continental	Anglo-Saxon	Southern	Eastern NMS	Mediterranean NMS
declaring to be very satisfied or satisfied with working conditions in main paid job	-5.3% =	-0.1% =	5.1% =	-3.9% =	-0.5% =	3% =
thinking their health or safety is at risk because of work	36.4% --	-17.2% +	-33.1% ++	0.1% =	0.8% =	-6.5% =
declaring to have been absent due to health problems over the past 12 months	91.5% --	-7.8% =	35.8% --	6.4% =	: :	: :
reporting health-related absenteeism exceeding one month	77.1% --	2.9% =	90.4% --	85.5% --	: :	: :
declaring to be exposed more than half of their working time to ambient hazards	6.6% =	14.2% -	-30.1% ++	24.3% --	-2.3% =	-9.8% =
declaring to be exposed more than half of their working time to chemical or toxic hazards	-18.6% +	-15% +	-46.5% ++	-29% ++	-2.9% =	-39.9% ++
declaring to be exposed more than half of their working time to poor ergonomic conditions	28% --	2.6% =	-15.3% +	7.2% =	16.8% -	-2.2% =
declaring that their jobs involve a high pace of work	18.6% -	3.7% =	-18.7% +	19% -	5.6% =	42.9% --
declaring that their pace of work is dependent on factors other than themselves	3.4% =	11.5% -	-2.2% =	2.2% =	3.6% =	0.1% =
declaring that they are unable to choose or change the organisation of their daily work	-8% =	6% =	33.4% --	14.9% -	-0.7% =	33.5% --
in jobs with poor learning opportunities	6.5% =	5.8% =	48.5% --	-2.7% =	-8.2% =	-0.2% =
without training in previous year	1.3% =	3% =	14.2% -	-2.1% =	5.2% =	2.5% =
with non-standard employment contracts	-24% ++	-31.3% ++	52.9% --	-12.8% +	76.5% --	45.9% --
reporting that they are subject to discrimination	28.8% --	-14% +	-29.1% ++	8.2% =	6.5% =	49% --
whose immediate boss is a woman	94% ++	49.5% ++	17.7% +	80.1% ++	3.4% =	190.4% ++
declaring that they have discussed work-related problems either with their boss or employee representative in the last 12 months	12.6% +	-13.4% -	-12.1% -	10.5% +	22.6% ++	1.7% =
declaring to be very well informed about health and safety risks	6.5% =	-4.5% =	32.7% ++	-7.7% =	-10.3% +	10.1% -
declaring to work more than once a week per month on Saturdays, Sundays or at night	2% =	-9.6% =	-12.7% +	-7.5% =	-1.2% =	11% -

Notes: * Intensity is calculated as a simple ratio of the absolute difference and the observed value of the oldest period of reference, expressed as a percentage. The absolute difference is the difference between the last and first period of reference: 1995-2005 for all groups, except NMS: 2001-2005. ** = if intensity is lower than 10%; - or + if intensity is between 10% and 20%; -- or ++ if intensity is higher than 20%.

Source: EWCS

The *Report* reaches several conclusions. First, it unsurprisingly confirms that the new member states have poorer overall labor performance, but that the gap is slowly diminishing. Second, more unexpectedly, it finds relative improvement in the Anglo-Saxon group and backsliding in the Scandinavian group, while the Continental and Southern groups are comparatively stable. Hence, putting aside the new members states, “the convergence process is not towards the best results but more towards the average.” (European Foundation, 2009, p. 49).

Third, the *Report* finds high intra-group variance among the countries. This casts some doubt on the usefulness or validity of the six broad groupings, or at least on the usefulness of static groupings when countries evolve away from the core characteristics of their initial group; although, interestingly, the variance is low within the group of new member states, which seemed *a priori* to be a hodge-podge group. Still, the *Report* emphasizes the increasing economic specialization and transformation of and the still-limited datasets for those countries. The Foundation hopes that deepening data-gathering may permit more refined classifications among the new member states.

3. Paris School of Economics

A study by researchers of the Paris School of Economics finds a different set of country clusters based on statistical analysis. (Davoine et al., 2008). That is, while the European Foundation *starts* with country groupings based on previous comparative-institutional studies and explores longitudinal trends in working conditions across the groups, the Paris researchers begin with four dimensions of job quality, using the EES

indicators and some complementary indicators, and use Principal Components Analysis on the set of European countries to *generate* country clusters.

The Paris researchers reduce the ten original EES dimensions to four “synthetic components” of job quality: socio-economic security (including decent wages and secure transitions); skills and training; working conditions; and gender equality (including the capacity to combine work and family). The researchers add some key indicators that, for political reasons, were excluded from the EES indicators, such as the mean wage and the proportion of the working poor.¹⁶ They also formulate additional, more detailed indicators for workplace safety and health and other working conditions. The researchers also state that they have added an indicator for “social dialogue” to the EES indicators, but their list of indicators does not make clear what that additional indicator is. The list does include an indicator titled “consulted about changes in work organization, etc.,” but that indicator already appeared in the *Fourth Survey*.

The Paris researchers apply Principal Components Analysis, with components representing not sub-indices of the four dimensions *per se*, but rather sub-sets of indicators that are strongly correlated.

Contrary to the presumption by the European Foundation, the Paris researchers conclude that the new member states are divided into categories: (1) Estonia, Latvia, Lithuania, Cyprus, Czech Republic, Hungary, Bulgaria, and Romania, and (2) Poland and Slovakia. They also find that the Anglo-Saxon liberal model drops out, as the U.K joins the northern cluster, and Ireland joins the Continental cluster. “This counter-intuitive result

¹⁶ The latter of these is included in the new EES indicators for 2009, as set out above.

reflects the existence of functional equivalences across different institutions and/or policies that are equally successful in improving job quality.” (Davoine, et al., 2008, p. 176). The position of the U.K in the Northern cluster suggests “there are two pathways to high job quality.” (Davoine, et al., 2008, p. 184).

While that finding is based on a comparative study of job quality and not labor regulation, it is an important caution about comparative analysis of labor law norms and enforcement institutions. That is, our indicators must be sufficiently supple to take account of functionally equivalent means of enforcement, and indeed functional equivalence in the substantive norms themselves (that is, different norms that equally protect the underlying principles of the more general right or standard). By the same token, the Paris researchers note that an alternative analysis might show a “distinctly liberal model” (i.e., less functional equivalence) if legal regulation and other institutional variables are considered. (Davoine, et al., 2008, p. 184).

4. European Commission Indices: Employment in Europe 2008 Report

In 2008, the European Commission for the first time published a composite index methodology, as chapter 4 of its report on *Employment in Europe 2008*. (European Commission, 2008). That chapter is largely based on a 2008 paper entitled *A Taxonomy of European Labor Markets Using Quality Indicators (“Taxonomy”)* by the Paris researchers discussed in the previous sub-section. (Davoine et al., 2008b). In this sub-section, therefore, I review only some additional points of interest, or some newly emphasized points, in these two somewhat more detailed documents.

Employment in Europe and the *Taxonomy* summarize the key weaknesses with the EES indicators. First, the two Reports emphasize anew that EES indicators leave out critical variables such as data on pay levels and the distribution of pay, and on collective rights of all kinds; and some broader dimensions are therefore not fully developed “for lack of political consensus.” (European Commission, 2008, p. 153). Second, the gender equality dimension includes offsetting indicators that might be misleading when aggregated: while there are increases in higher-level female employment, there are concurrent increases in employment in female-dominated low jobs. Third, some indicators are conceptually ambiguous. For example, an increase in fixed-term and part-time employment may be taken as a deterioration in life-long career paths, but might also be viewed as an improvement in flexible working time.

In line with the Paris researchers’ methodology, the European Commission carries out a two-step analysis – starting with Principal Components Analysis, followed by Cluster Analysis. The analysis identifies four clusters: Nordic, Continental, Southern, and New Member States. Using the more limited set of EES indicators themselves, the analysis breaks up New Member States into two clusters, as identified by the Paris researchers above.

Turning to trends in job quality, the European Commission uses two multivariate techniques: Kohonen maps and synthetic indices. In constructing synthetic indicators, the European Commission first standardizes variables; second, excludes variables that have an ambiguous impact on job quality; third, gives the variables equal weight and adds or subtracts them based on their impact on job quality. (European Commission, 2008, p. 162)

n. 37). The results are shown in country and cluster charts, both for a composite indicator for overall job quality and for composite sub-indices for flexibility in employment relations, atypical work, and gender balance.¹⁷ The Commission cautions, “These results should be taken with care, especially those related to synthetic indexes. In fact, results depend on the choice of variables, method of aggregation, and weighing scheme. The reader should bear in mind that the range of job quality components considered is relatively limited due to data availability problems. The choice of equal weights is largely arbitrary, although being transparent, simple and in line with the literature which does not establish any clear ‘hierarchy’ between the different components of job quality.” (European Commission, 2008, p. 164). Our project may be different, in light of the fact that the legal sources do provide a hierarchy of elements defining each labor right and standard, and a hierarchy of procedural elements necessary to implement the rule of law in labor court proceedings. Prioritizing other institutional elements, such as the various desirable features of a labor inspectorate, may be less certain, but the recent social science research discussed below in Section XI gives some guidance.

5. Hans Böckler Foundation Composite Indicators

Andranik Tangian, a researcher at the Institute for Economic and Social Sciences of the Hans Böckler Foundation in Germany, has constructed a composite index for quality of work and composite sub-indices, using the European Foundation’s *European Working*

¹⁷ There are actually two gender sub-indices: one for the employment gap between genders, and another for gender segregation by sector.

Conditions Fourth Survey of 2005.

In a 2009 paper, Tangian calculates three levels of aggregate indicators. (Tangian, 2009). The first level includes 15 indicators, aggregated from the longer list of *Fourth Survey* indicators. The second level aggregates those 15 sub-indices into 3 sub-indices for (1) “resources,” including such matters as training, work time arrangements, career opportunities, and creativity; (2) “strain,” including such matters as safety and health and discrimination; and (3) “employment security and income,” including job stability and remuneration. The third level aggregates the three sub-indices into an overall composite indicator for job quality.

Tangian’s methodology exploits the fact that the *Fourth Survey* dataset contains values for all the indicators for every individual worker who was surveyed. Tangian first calculates the sub-indices for each worker in the survey, then aggregates them to create national indices or group and sector indices. Before aggregation, the answers are scaled in two alternative ways. For absolute values, the variables are normalized by reducing the variable’s minimum and maximum to 0 and 100 percent. For relative evaluation, the values are standardized by reducing the mean and standard deviation to 0 and 100 percent respectively. (Tangian, 2009, p. 555). There are minimal differences between the indices produced by normalization and those produced by standardization.

Some of Tangian’s conclusions are relevant to our research. He finds a disjuncture between actual conditions and legal regulation. For example, in some instances where legal rules provide weak employment protection, employers do not necessarily make use of their powers, so actual job security remains high. Conversely, workers may experience

job insecurity even where national laws seem to provide high worker protection. Tangian concludes that it is not legal regulation but rather labor union strength – measured by union density – that accounts for the different outcomes. However, in his 2009 paper, he seems to reach these conclusions by simple correlation. For example, Greece has high job insecurity despite its strong legal protections; Tangian attributes this to the fact that union density in Greece is only 20 percent. That is, Tangian does not conduct multivariate analysis, but simply ranks countries based on the methodology just described, and reaches conclusions by his qualitative assessment of countries' comparative political and social features.

In his earlier paper, however, Tangian does apply more sophisticated multivariate regression analysis to the construction of composite indicators, and offers additional methodological explanation. (Tangian, 2007). He justifies equal weighting of indicators on the grounds that (1) justifications for unequal weights “are usually difficult to provide;” (2) “in large sums weighting errors [become] less important, and even omitting certain variables makes less practical difference;” (3) unequal weighting “result[s] in a factual inequality of individuals” since individuals with a preference for certain questions will be advantaged if those questions are given higher weights; and (4) “[i]n statistics it is also a tradition to accept equal distribution (weights) by default.” (Tangian, 2007, p. 474-475). None of these justifications is particularly compelling. Indeed, Tangian recognizes that subject matters with a greater number of indicators are, by default, effectively given greater weight.

In the 2007 paper, Tangian tests the differences among countries' rankings on the

overall index for statistical significance, using first pairwise then multiple comparison tests. Although this generates country clustering, Tangian concludes that “in spite of close indicator values, the working conditions in Europe differ significantly.” (Tangian, 2007, p.481). Despite the clustering, Tangian does not attempt to categorize countries by labor relations models, region, or political system. His regression analysis does include a variable for income level, however; and he finds that countries with higher earnings (equal to higher productivity, in his conceptualization) have better working conditions. He also concludes that there is greater cross-country variance in working conditions than in earnings; and he conjectures that this “is likely caused by persistent differences in national norms, in industrial relations, and in different trade unions activity.” (Tangian, 2007, p. 482). It is precisely this conjecture that needs to be more rigorously specified and tested.

6. ETUI Job Quality Index

In 2008, the European Trade Union Institute published a methodology for calculating composite sub-indices and an overall composite index for job quality (Leschke, et al., 2008) and a report that applies the methodology to generate indices for the EU-27 countries. (Leschke, et a., 2008b).

The ETUI job quality index comprises six sub-indices for: wages; non-standard forms of employment; work-life balance and working time; working conditions and job security; access to training and career advancement; and collective interest representation and voice/participation. The overall index is an unweighted average of the six sub-indices. The sub-indices, however, are based on aggregations of weighted indicators. Each of the

sub-indices is grounded in two to four indicators, which in some instances are themselves composite indicators. Each indicator is normalized on a range of 0 to 1. Note that, unlike the other EU indicators discussed above, the ETUI index includes measures of collective representation. That sub-index is based on three indicators: collective agreement coverage; union density; and share of workers reporting they are consulted about changes in work organization (as measured in the European Foundation Surveys). The ETUI performed a sensitivity test for alternative weighting systems. For example, for the collective representation indicator, the ETUI put initial weights of 30/40/30 on consultation/collective agreement coverage/union density. It then applied weights of 25/50/25, giving greater emphasis to collective agreement coverage. The alternative weighting schemes made relatively little difference in country rankings, even for an outlier country such as France (high collective agreement coverage; extremely low union density). This conclusion may give very useful guidance to the definition and weighting of our outcome indicators for collective bargaining.

The ETUI *Report* presents the rankings among individual countries for the sub-indices and the overall index. The countries are then placed in essentially the same categories used by the European Foundation and the European Commission, derived from Amable's and Esping-Anderson's typologies of welfare capitalism. (Amable 2003; Esping-Anderson 1990). Next, the *Report* tests the groupings for relevance, by comparing the average rankings within each cluster against the average of all countries, and by comparing the standard deviations of cluster members around their average with the overall standard deviation of the full set of countries. Based on these two tests, the report

concludes that the five country clusters are relevant: Nordic, Anglo-Saxon, Continental, Southern Europe, and NMS/Eastern. However, the report concludes, unsurprisingly, that the dispersion is greater within the NMS/Eastern cluster, and recognizes the familiar problems of identifying cluster members for the Southern Europe and Continental clusters (e.g., Italy, Cyprus, Malta.)

VIII. Inter-American Commission Indicator Methodology

The structure and function of the Inter-American Commission on Human Rights is described below in Section X(4), which covers the labor jurisprudence of the Inter-American system. This Section briefly explains the Commission's recent development of a methodology for construction of human rights indicators, including the labor rights provisions of OAS instruments.

In 2008, the Commission published *Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights*. (Organization of American States, 2008). The purpose of the *Guidelines* is to provide a tool for governmental reporting on progress in realizing economic and social rights contained in the Inter-American human rights instruments, particularly Article 19 of the San Salvador Protocol; for civil society organizations participating in monitoring; and as "a permanent internal evaluation mechanism for each state party." The *Guidelines* are neither comprehensive nor invariable. That is, governments may add to or change the "to cater to different local and regional contexts. The aim is to make indicators and qualitative signs of progress consistent with different realities in a context of broad participation and rigorous methodological transparency." (OAS, 2008, p. 2). The *Guidelines* also recognize that governments are free to choose "from a broad range" of policy strategies to achieve compliance with rights and satisfy indicators. (OAS, 2008, p. 5). The *Guidelines* state:

Indicators can take different forms – statistical data collected in a census or household surveys, questions put in a questionnaire or an open interview, budgets, public social spending (all disaggregated by sex, race, ethnicity and incorporating

gender-specific indicators) – and may be “operationalized,” depending on the information-gathering technique that each state selects, with rigorous methodological transparency and in accordance with international agreements and standards. It should be made clear that, as with all analytical processes, margins of uncertainty are assumed; that is to say, the relationship between the indicators and what they aim to measure – in this case the observance of a social right recognized in the Protocol – will always be assumed and never known for certain, which is why probability estimates are used. The foregoing means that any monitoring body is limited in its ability to measure the situation of rights in a given state on the basis of indicators alone. Hence, indicators cannot be the only tool for verifying compliance with the Protocol... Without question, the possibility of access to reliable and secure information sources will be critical for ensuring the effectiveness of quantitative indicators and qualitative signs of progress. The indicators and measurement units to be used in each case must realistically take into account the type and quality of information available in each state.

(OAS, 2008, p. 7).

For its methodological framework, the Inter-American Commission takes “as its point of departure” the 2006 *Report* of the United Nations High Commission for Human Rights (subsequently confirmed in the UN Commission’s 2008 *Report*), discussed above in Section VI(2). That is, it adopts the three categories of structural, process, and outcome indicators. However, the Inter-American Commission proceeds to create three new orthogonal categories. The first category is “incorporation of the right” in the legal framework – both in law and policy. The second is “state capabilities,” designed to measure the government’s “political will” to enforce the right. “State capabilities” is defined as follows:

This category describes a technical-instrumental and distributive aspect of government resources within the state apparatus. That is, it entails a review of how and according to what parameters government (and its various branches and departments) deals with different socially problematized issues; in particular, how it establishes its goals and development strategies; and under what parameters the implementation of the rights contained in the Protocol is inscribed therein. It entails reviewing the rules of play within the state apparatus, interagency relations, task

allocation, financial capacity, and the skills of the human resources that must carry out the allotted tasks. To provide an example, a structural indicator of state capacity is the existence of specific government agencies for the protection or implementation of a social right. A structural indicator may also be used to examine competencies and functions. A process indicator on state capacity endeavors to determine the scope and coverage of the programs and services implemented by those agencies. A process indicator on state capacity could also measure changes in the quality and scope of those interventions over a period of time.

(OAS, 2008, p. 14).

The final orthogonal category is “basic financial context and budgetary commitment” – measuring the total funds available for social spending and the proportion devoted to enforcing the right in question.

The Inter-American Commission then creates a third dimension of cross-cutting government obligations, including equality, access to justice, and access to information and participation. For example, the Commission reaches the same conclusion on the government’s obligation to produce data as I discussed in the *Summary and Analysis of Interviews with ILAB Staff*. (Barenberg, 2009):

The obligation of the State to take positive steps to safeguard the exercise of social rights raises important implications to do, for example, with the type of statistical information that it should produce. From this perspective, the generation of information suitably disaggregated to identify these disadvantaged sectors or groups deprived of the enjoyment of rights is not only a means to ensure the effectiveness of a public policy, but a core obligation that the State must perform in order to fulfill its duty to provide special and priority assistance to these sectors. For example, the disaggregation of data by sex, race or ethnicity is an essential tool for highlighting problems of inequality.

The Inter-American Commission also makes a strong case for including indicators for historical disadvantaging of groups, as well as geographic inequalities. While these may seem far afield from matters of employment discrimination, recall that authoritative

interpretations by both the ILO and the UN deem such forms of systemic discrimination as indicators of inequitable employment deprivations; that is, workers who earn less or have fewer employment opportunities by virtue of belonging to historically disadvantaged groups or residing in disadvantaged regions may be considered victims of employment discrimination.

As to the cross-cutting principle of access to justice, the Inter-American Commission identifies four components: “i) The obligation to remove economic obstacles to ensure access to the courts; ii) the components of due process of law in administrative proceedings concerning social rights; iii) the components of due process of law in judicial proceedings concerning social rights; and, iv) the components of the right to effective judicial protection of individual and collective social rights.” (OAS, 2008, para. 69). To flesh these out, the Commission relies on the jurisprudence of the Inter-American system, on conceptions of due process in the Council of Europe, as well as on criteria newly fashioned by the Commission.

On the cross-cutting principle of access to information and participation, the Inter-American Commission relies heavily on a report by the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights Dealing with Article 13 of the Convention. (Inter-American Commission on Human Rights, n.d.).

The Tables below – for equality and access to justice – show how the Commission’s framework is designed, and how it might be applied to particular rights and standards.

Equality and nondiscrimination				
EQUALITY AND NONDISCRIMINATION		STRUCTURAL INDICATORS	PROCESS INDICATORS	OUTCOME INDICATORS
INCORPORATION OF THE RIGHT	INDICATOR	<ul style="list-style-type: none"> - Inclusion of the principle of equality in the constitution. Scope. - Inclusion of the principle of nondiscrimination in the constitution. Scope. - Inclusion of the principle of real equality and/or of opportunities in the constitution. Scope. - Inclusion of the principle of political equality in the constitution. Scope. - Inclusion of the principle of equality in the rights of the family in the constitution. Scope. - Inclusion of the principle of equality in nationality and citizenship. Scope. - Inclusion of the principle of equality in education. Scope. - Ratification by the state of the following international treaties (yes/no). Indicate date: <ul style="list-style-type: none"> a) CEDAW, Optional protocol b) ICESCR, Protocol of San Salvador c) Convention on the rights of the child d) Inter-American Convention against Corruption e) ILO Convention No. 169 f) 1951 Convention Relating to the Status of Refugees and its 1967 Protocol g) 1954 Convention relating to the Status of Stateless Persons h) 1961 Convention on the Reduction of Statelessness i) ILO Convention No. 138 CONCERNING MINIMUM AGE FOR ADMISSION TO EMPLOYMENT j) ILO Convention No.182 Concerning the prohibition and immediate action for the elimination of the worst forms of child labor 	<ul style="list-style-type: none"> - Existence and scope of national plans on equality of opportunities for men and women in ESCR. - Existence and jurisdiction of any or all of the following specific government areas to promote equality and nondiscrimination in the country: <ul style="list-style-type: none"> a) offices for the advancement of women; b) antidiscrimination offices; c) ombudsmen or similar; d) immigration affairs offices; e) offices of indigenous affairs. - Implementation of affirmative action measures for vulnerable populations that include the exercise of social rights. Scope and performance indicators. - Existence of policies or programs on employment integration or regularization for migrants and refugees, and on access to other social rights. Scope and performance indicators. - Existence of policies or programs on employment integration or regularization for agricultural laborers and peasant farmers, and on access to other social rights. Scope and performance indicators. - Existence of affirmative action measures to advance integration in the world of work for persons with disabilities. Scope and performance indicators. - Existence of complaints of discrimination in connection with ESCR received, investigated, and resolved by the constitutional authorities or their equivalent and appropriate agencies. Include statistics if the available. - Number of complaints by members of the public or civil society organizations alleging gender discrimination or other forms of discrimination. 	<ul style="list-style-type: none"> - Activity, employment, and unemployment rate gaps, by age group, ethnicity, nationality, legal status (refugee or stateless person), academic level, and income bracket. - Wage gaps taking into account academic level, ethnicity, occupational qualifications, and occupational category. - Gaps by occupation sector (formal, informal). - Femininity index of poverty and indigence. - Employees social security coverage gaps. - Percentage of persons with disabilities integrated in the labor force, by sex and nationality. - Individual documentary status of refugees, asylum seekers and stateless persons.

		<ul style="list-style-type: none"> kl Inter- American Convention on the elimination of all forms of discrimination against persons with disabilities - Standards recognizing the principle of equality and nondiscrimination in other frameworks and for other sectors of the population. Scope in terms of expansion or restriction of the provisions contained in the ICESCR and the protocol. 	<ul style="list-style-type: none"> - Existence and scope of measures implemented by civil society organizations to petition regulatory provisions in favor of disadvantaged groups. 	
	SIGNS OF PROGRESS	<ul style="list-style-type: none"> - Type and forms of allocation of national priorities, in terms of resources, policies, and areas, in order to ensure equality and nondiscrimination with respect to social rights coverage. 	<ul style="list-style-type: none"> - Evaluations and assessments of affirmative action measures adopted, by type of measure (quota, world of work, people with disabilities). Include main outcomes if available. - Evaluations of living standards and labor/social integration of immigrants. Include main outcomes if available. - Evaluations of living standards and labor/social integration of indigenous people and persons of Afro descendent. Include main outcomes if available. - Evaluations of living standards and labor/social integration of populations displaced by armed conflicts, refugees, asylum seekers, internally displaced persons and stateless persons. Include main outcomes if available. - <u>Assessment of child labor.</u> 	
BASIC FINANCIAL CONTEXT AND BUDGETARY COMMITMENTS	INDICATOR	<ul style="list-style-type: none"> - Budget composition: items and breakdown. - Existence of a budget for gender-related issues. Date of inclusion and items covered. - Existence of disaggregated social spending budgets for indigenous peoples and afro-descendants. - Existence of disaggregated social spending budgets for refugees, and asylum seekers, internally displaced persons, and stateless persons. 	<ul style="list-style-type: none"> - Per capita monthly and annual income, by sex, academic level, and activity status. - Agriculture as a percentage of GDP. - Performance of agricultural GDP and food output. - Public social spending as a percentage of GDP. - Public social spending per capita. Trends. By geographic zone in the country. 	<ul style="list-style-type: none"> - Inequity ratio (ratio between the wealthiest decile and the poorest decile of the population) - GINI inequality coefficient by regions, according to income. - Income gap. - Minimum wage and GDP per capita. - Percentage of non earning adults, by sex.

		<ul style="list-style-type: none"> - Composition of total expenditure as a percentage of revenue. - Recognition of unpaid domestic labor (reproductive labor). Cite legal and administrative instruments. - Allowance to meet the cost of regularization of migrant workers. Amount and areas covered. 	<ul style="list-style-type: none"> - Proportion of total expenditure allocated to specific agencies. - Household expenditure pattern. 	<ul style="list-style-type: none"> - Wage gap between men and women; between migrants and nationals; between indigenous peoples and persons of Afro descent. - Percentage of persons with access to basic services (infrastructure) by geographic zone or region.
	SIGNS OF PROGRESS	<ul style="list-style-type: none"> - Existence of priorities in resource allocation to poor or vulnerable sectors, by depressed geographic region or zone. - Instruments and policies that take the above priorities into account. 		
STATE CAPABILITIES	INDICATOR	<ul style="list-style-type: none"> - Existence of oversight agencies to monitor and evaluate implementation of ESCR. Indicate jurisdiction, responsibilities, coverage and budget. - Existence of effective policy and social services coordination mechanisms between national, provincial and local levels. Scope, responsibilities and assessments. - Existence of a specific anti-corruption monitoring agency. Responsibilities, jurisdiction, budget. - Powers of anti-corruption agencies to receive, process, resolve and/or refer complaints. - Existence of measures and actions in social policies to eradicate patronage. Scope, jurisdiction, responsibilities and outcomes. 	<ul style="list-style-type: none"> - Existence of government assessments of the main problems affecting compliance with the obligations under the protocol. - Number of reports presented by the country to treaty monitoring bodies concerned with the issues of equality, discrimination, and social rights. - Number of shadow reports presented by civil society organizations to treaty monitoring bodies concerned with the issues of equality, discrimination, and social rights. - Number and forms of resolution of measures and interventions by internal auditors to verify observance of social rights. - Number of complaints received and resolved concerning corruption connected with access to social programs and plans. 	
	SIGNS OF PROGRESS		<ul style="list-style-type: none"> - Reviews on implementation and type of measures to combat political patronage in the area of social policy. 	

Access to justice

I. POLICIES ON ACCESS AND REMOVAL OF FINANCIAL AND OTHER OBSTACLES		STRUCTURAL INDICATORS	PROCESS INDICATORS	OUTCOME INDICATORS
INCORPORATION OF THE RIGHT	INDICATOR	<ul style="list-style-type: none"> - Recognition of the right of access to justice in the legal system of the state. Scope. - Enforceability and justiciability of the social rights recognized in the protocol. Scope. - Recognition of indigenous systems of justice. 	<ul style="list-style-type: none"> - Relevant case law of federal and state superior courts on the enforceability of social rights. - Relevant case law of federal and state superior courts on access to justice. - Training programs for judges and lawyers. Thematic and jurisdictional coverage, frequency and requirements. 	
	SIGNS OF PROGRESS			
BASIC FINANCIAL CONTEXT AND BUDGETARY COMMITMENTS	INDICATOR	<ul style="list-style-type: none"> - Estimated litigation cost of a social rights case, including court costs and attorneys' fees. - Estimated litigation cost of a labor case. - Estimated litigation costs of a social security, environmental, consumer, and land dispute case. - Existence of mechanisms for exemption of court costs. Eligibility requirements for this benefit. 	<ul style="list-style-type: none"> - Changes in the national budget allocated to government legal services and programs to ensure access to justice in the area of social rights. - Number of litigants who benefit from the full or partial exemption of court costs in proceedings on social rights. - Total percentage of litigants in proceedings before social courts. 	
	SIGNS OF PROGRESS	<ul style="list-style-type: none"> - Table comparing movements in average salaries between public defenders and prosecutors and judges. 		
STATE CAPABILITIES	INDICATOR	<ul style="list-style-type: none"> - State-organized, comprehensive, free legal services for protection of rights. - Existence and availability of free legal services organized by non-state actors (e.g. Pro bono services) - Nature of the legal services in place: <ul style="list-style-type: none"> • Public service • Government social policy • Welfare services • Other. Specify 	<ul style="list-style-type: none"> - Territorial and population coverage of legal services and programs. - Physical accessibility and population coverage of the state's legal aid program. - Physical accessibility and population coverage of legal aid. - Number of social rights cases processed by the public defender's office since ratification of the protocol. Number of persons represented. 	

	<ul style="list-style-type: none"> - Legal aid in social rights claims. Scope and outcomes. - Plans or policies for removal of financial, material, or cultural obstacles that prevent access to the courts. Jurisdiction and territorial scope. - Government agencies that generate information, assessments, and policies on access to justice. - Public offices that provide mediation or conciliation services to resolve social rights disputes in the country. - Structure and jurisdiction of the justice administration system for social rights (tribunals for labor, social security, land, environmental, and consumer disputes). - Existence of tribunals for agrarian and indigenous land disputes. Jurisdiction. - Special rules of procedure adopted by social courts. Indicate if they provide for any of the following: <ul style="list-style-type: none"> • Prosecution ex officio; • Official experts; • Waiver of costs; • Informality; • Mediation and conciliation. 	<ul style="list-style-type: none"> - Average duration of cases processed by the public defenders office compared to average duration of the type of case in question (pensions, evictions, labor). - Training programs on social rights for legal aid attorneys and public defenders. Type, contents, duration, and mechanisms. - Coverage of translation services in indigenous and ethnic minority languages. - Territorial coverage and physical accessibility of public mediation offices with jurisdiction over social rights. - Existence of coordination mechanisms between federal and subnational governments on access-to-justice policies. Scope and responsibilities. 	
<p>SIGNS OF PROGRESS</p>		<ul style="list-style-type: none"> - Existence of studies on effectiveness of and user satisfaction with legal aid, public defenders, and access-to-justice programs. 	

Although it may seem excessively detailed and complicated, the Commission’s framework is worth mining for indicators as well as underlying concepts. It deploys a “legal realist” strategy that looks to gritty details that determine whether rights are actually vindicated, such as a worker’s capacity to enforce a court or administrative judgment and actually obtain a monetary remedy, and the worker’s receipt of information about rights of appeal from administrative and judicial orders. These are the kinds of questions that are neglected in other indicator systems but that may be decisive in the realization of labor rights.

PART THREE: CONVENTIONAL LEGAL SOURCES AND RESEARCH

IX. ILO Conventions, Recommendations, Jurisprudence, Legal Databases and Reports

Since this project proposes to develop indicators using legal-regulatory analysis, it is of course important to begin with authoritative international legal sources. ILO materials are the key starting point.

The labor provisions of the U.S.-Peru bilateral free trade agreement make specific reference to the rights enumerated in the ILO Declaration of Fundamental Rights and Principles at Work of 1998. (ILO, 1998b). It is true that U.S. trade statutes – section 301 of the Trade Act of 1974, as amended; the Generalized System of Preferences; regional preference programs; and OPIC, among others – refer instead to “internationally recognized worker rights” and to “acceptable conditions of work” without explicit reference to ILO rights and standards. And trade agreements outside the U.S.-Peru template do not reference ILO rights or principles. Nonetheless, even as to these statutes and agreements, ILO jurisprudence provides norms that have broad international acceptance. In the absence of other authoritative international norms, ILO rules may give a firm foundation for many global indicators.

The key instruments are the ILO Constitution, Declaration, and Conventions. ILO Recommendations are not, in principle, binding instruments, but they are an influential

interpretative source as to specific matters not resolved by Conventions. The ILO supervisory mechanisms also generate reports and rulings of various sorts, some of which have great interpretive weight (even if not formally binding) and some of which are compiled in official ILO digests. In addition, the International Legal Office (the secretariat to the ILO's political bodies) publishes research papers and reports that are sources for legal interpretation but again are themselves not formally binding.

The Office and various *ad hoc* committees (such as the recent Tripartite Meeting of Experts on the Measurement of Decent Work (ILO, 2008)) also construct bodies of indicators, which are discussed above in Section IV. These indicators do not have binding effect until such time as they are ratified by the International Labor Conference (the legislative body of the ILO); but even without ratification, they can without a doubt be treated as *weighty* if not *per se* binding international standards, since they issue from the most authoritative organization in the field. It is therefore highly significant that the Office is currently constructing quantitative indicators for the rights of association, collective bargaining, and non-discrimination – although, as noted in Section IV, the internal Office work on the non-discrimination indicators is not yet publicly available, and the internal indicators recently constructed on collective bargaining have many problems.

It is true that the indicators for specific rights or standards would still not bind countries that have not ratified the Conventions that codify the right or standard in question, unless the plenary International Labor Conference identifies the indicators as authoritative interpretations or operationalizations of the 1998 Fundamental Declaration of Principles and Rights at Work or the ILO Constitution itself, which bind all ILO member

states. Nonetheless, our project – to create bodies of indicators pursuant to U.S. legislation and treaties – does not require us to apply indicators only to countries that have ratified relevant ILO treaties. To the contrary, U.S. legislation and treaties call for the formulation of indicators that will apply to *all* trading partners. The authoritative source for all trading partners' *obligations* flows from the U.S. legislation and treaties, not from ILO Conventions. We look to ILO Conventions only for authoritative or weighty interpretations of the substantive *content or interpretation* of those obligations, not for the *legal basis* of the *binding effect* of the obligations.

It also bears reiterating that while ILO materials are the starting point they are not the end point of international standard-setting in the labor field. As discussed below in Section X, other international instruments – namely, U.N. Covenants and Conventions – include international labor rights and standards which are interpreted by relevant U.N. Committees. And, if the specific definitions of ILO and other U.N. rights and standards have ambiguities or gaps in coverage, then regional human rights jurisprudence and the comparative labor law of national systems may also be relevant to identifying consensus norms or best practice norms, either globally or by region, by level of development, or by country clusters defined by qualitative labor relations system. The regional and national literature is canvassed in Sections X and XI below.

1. ILO Conventions and Recommendations

The NAS-ILAB Report did not systematically examine the text of relevant ILO Conventions. In light of the methodology of this project, Appendix A sets out the key

elements of the relevant ILO Conventions.

Appendix A does not simply replicate or “scissors and paste” the text of the Conventions. Instead, it begins the (painstaking) process of breaking the Conventions down into simplified, concise, single-barreled obligations. Still, I want to emphasize that Appendix A only *begins* that process, in more than one sense: First, many of the items in the Appendix are still insufficiently refined to serve as unambiguous indicators for ILAB analysts. Many of the items, while single barreled, can be broken down still further into less abstract, more specific and simplified sub-rules. Second, by comprehensively setting out the elements of the relevant ILO Conventions, I do not mean to suggest that our final body of indicators should include the full list of items in the Appendix or even that some sub-set of that list comprises the core indicators for our project. Rather, as noted above, the key elements in the text of Conventions provide a starting point for our analysis of the relevant jurisprudence pertaining to the rights, standards and enforcement institutions we wish to evaluate. How we convert that jurisprudence into a body of indicators is the task of the research paper proper.

On the other hand, while the detailed itemization in Appendix A may seem like overkill in the context of a Literature Review, it is in fact a vital exercise, for several reasons. First, a comprehensive catalogue of the elements of relevant ILO Conventions contains the most authoritative (even if highly over-inclusive or under-inclusive) enumeration of *potential* indicators of compliance with the rights and standards that are the subject of the current research. Second, the key elements of the Conventions point us to the domains given greatest weight in the hierarchy of international labor norms. Third,

only by comprehensively cataloguing and breaking down the obligations imposed by relevant Conventions can we see, systematically, where the authoritative ILO standards are in fact under-inclusive – that is, we can see the “sub-issues” as to which we must devote special effort to find other authoritative or quasi-authoritative sources of indicators, whether those sources are other international instruments, regional instruments, or comparative national labor standards.

Fourth, careful reading of the Conventions themselves shows that the NAS-ILAB methodology did not recognize that the ILO has grappled with certain questions, other than the definition of rights and standards, that are highly significant for the current research. Two such questions are most notable. First, the Conventions address questions of what institutional structures, procedures, and data-collection are required for effective enforcement of the substantive rights and standards. Thus, the catalogue of key elements in Appendix A not only includes categories for each of the five rights and standards that are the subject of this research – (1) freedom of association and the right to bargain collectively; (2) rights to non-discrimination and equality; (3) minimum wages; (4) hours of work; and (5) occupational safety and health – but also includes categories for Conventions pertaining to (6) enforcement institutions and (7) data collection. The latter issues – enforcement institutions and data collection – are covered by free-standing Conventions as well as by specific provisions in the Conventions on substantive rights and standards. That is, there are separate Conventions on such matters as labor inspectorates and collection of data on wages and hours; but the substantive Conventions defining, for example, freedom of association or remuneration impose additional specific

obligations related to government institutions, procedures, and enforcement machinery, as well as obligations of data collection and reporting, for those specific substantive rights and standards.

The second notable question covered by Conventions, going beyond the definitions of substantive rights and standards, is modes of “adjusting” indicators for different categories of countries. Article 19, paragraph 3 of the ILO Constitution authorizes flexibility clauses based on “climatic conditions,” “imperfect development of industrial organization” and “other special circumstances.” The Conventions at several points speak of such adjustments in various ways: for countries at different levels of development, at different levels of productivity, with qualitatively different labor relations systems, with different “national conditions” or “national practices,” and so on.

The adjustment mechanisms embodied in ILO Conventions take several forms:

- adjustments of degree (e.g. amount of wages; or giving countries the option to choose between less strict and more strict provisions);
- qualitative adjustments (adapting enforcement machinery to “national conditions”);
- limiting the indicators to certain well-specified industries or sectors;
- giving governments the option of limiting the indicators to certain economic or geographic sectors;
- allowing governments to choose from a menu of means to achieve specified ends (so-called “equivalence clauses”);
- allowing governments to choose the means to achieve general principles;
- allowing governments to use various legal or private instruments to implement the Convention’s requirements, such as legislation, regulations, collective bargaining agreements, judicial rulings, and so on;

- allowing governments to apply some sub-set of requirements (in our terms, a sub-set of indicators) rather than all the requirements of the particular Convention;
- framing Conventions in elastic terms, such as requirements that governments take “appropriate” or “sufficient” measures to secure a right;
- allowing governments to implement the terms of the Convention incrementally;
- adjusting indicators in quite specific ways for named countries (an early strategy used by the ILO, but long since discarded).

There are innumerable examples of these adjustment mechanisms in the Conventions that are parsed in Appendix A. Two examples of provisions combining at least five of these flexibility mechanisms are from the *Convention on Workers with Family Responsibilities No. 156 (1981)*:

The provisions of this Convention may be applied by laws or regulations, collective agreements, works rules, arbitration awards, court decisions or a combination of these methods, or in any other manner consistent with national practice which may be appropriate, account being taken of national conditions.

....

The provisions of this Convention may be applied by stages if necessary, account being taken of national conditions: Provided that such measures of implementation as are taken shall apply in any case to all the workers covered by [this Convention].

Another example is the following provision from the Supplementary Convention on the Rights of Migrant Workers:

Any Member which ratifies this Convention may, by a declaration appended to its ratification, exclude either Part I or Part II from its acceptance of the Convention.

While the ILO’s adjustment strategies are not systematized or carefully operationalized –

as shown by the open-ended examples just recited – they provide candidates for more rigorously defined and defended adjustment strategies in the current research.

For an overview of ILO flexibility strategies and examples of Conventions that make use of them, see Valticos and von Potobsky (1995, pp. 57-60) and Politakis (2004).

For discussions of the tension between universality of rights and “flexibility” in application of Conventions, see Wisskerchen (2005) and Wisskerchen and Hess (2001), arguing that the universality of ILO rights has been embraced to a surprising degree, at least formally, by developing countries – at least at the time of legislation – although they may subsequently seek flexible application of ILO Conventions during post-ratification supervisory processes.

The ILO’s promulgation of Recommendations can serve as another kind of flexibility strategy. Recommendations may contain guidelines that supplement a Convention by defining terms and obligations in greater detail or by defining additional (non-binding) obligations that exceed those set out in the Convention. Note that I have included breakdowns of certain Recommendations as well as Conventions in Appendix A. While Recommendations are not legally binding, they may provide second-best candidates for indicators, where Conventions leave gaps or are ambiguous. Still, it is important to emphasize that the political process behind the formulation of Recommendations may call for skepticism about their consistency and clarity.

Recommendations which, until 1970, were issued solely as a supplement to a Convention, cannot be ratified and remain, as their name clearly suggests, non-binding. Every issue [pertaining to the drafting of a Convention] is thrashed out in the competent technical committee of the International Labor Conference, where wording is often a matter of tough, intense negotiation right up to the last minute.

After difficulty in reaching agreement on the content of a Convention, lack of time has sometimes led to all the remaining outstanding points being lumped together, without thorough examination, in an accompanying Recommendation. Consequently, the content of a good many Recommendations is not exactly consistent or meaningful.

(Wisskirchen, 2005, p. 258).

2. ILO Supervisory Body Jurisprudence

Article 37 of the ILO Constitution originally provided that questions about interpretation of the ILO Constitution or Conventions be resolved by the International Court of Justice (ICJ). Such questions have been submitted to the ICJ in only a handful of cases. In 1946, that provision was amended to authorize authoritative interpretations by specially appointed tribunals – but that provision too has lain dormant. On many more occasions the Director-General has published advisory interpretive opinions in the ILO Official Bulletin; and these are given great weight, notwithstanding the Director-General's lack of constitutional authority in this regard. (Valticos, et al., 1995, pp. 67-68).

The ILO's supervisory bodies issue reports, observations, and recommendations. As with the Director-General's advisory opinions, there is no constitutional authority for the committees to issue binding interpretations of Conventions. Nonetheless, even when not adopted by the plenary Conference, a report or recommendation issued by a tripartite or other committee established by or reporting to the Governing Body or Conference constitutes weighty, quasi-“judicial” authority for the meaning of international standards.

The three key entities are the Committee of Experts on the Application of Conventions and Recommendations (“Committee of Experts”), the Conference Committee

on the Application of Standards (“Conference Committee”), and the Committee on Freedom of Association. The Committee of Experts is composed of 20 “eminent jurists” appointed for three-year terms by the Governing Body. (ILO, 2009i). The Committee of Experts’ mandate is to review the periodic reports that member states must submit on their compliance with Conventions. The Committee of Experts issues an annual report, which contains “observations,” which effectively cite particular countries for their problems in complying with particular rights or standards. The Committee of Experts may also make “direct requests” for more information from governments, but these requests are not published.

The annual report of the Committee of Experts is submitted to the Conference Committee, which is a standing committee of the plenary Conference (ILO, 2009j). The Conference Committee selects a few observations from the report of the Committee of Experts, inviting the government in question to respond to the observation, and in some cases recommending that the government take specific remedial steps or that the government invite ILO missions or technical assistance. The most serious problems are indicated in “special paragraphs” of the Conference Committee’s annual report.

The third body is the Committee on Freedom of Association, which is a committee of the Governing Body. It takes complaints on freedom of association, requests facts from the government and complainant, and, if it finds a violation, makes remedial recommendations (issued through the Governing Body) and requests that the government report on its compliance with the recommendation. (ILO, 2006c). The Committee on Freedom of Association has processed some 2,300 cases since its establishment in 1951.

In principle, then, the appropriate jurisprudential strategy is to read all reports of these three Committees and compile all significant rules or “holdings” that pertain to (1) the standards for which this research is constructing indicators, and (2) the obligations of governments to construct institutions, procedures, investigative protocols, and data collection for purposes of enforcement of those standards. In the absence of any other mechanism that provides binding interpretations of ILO Conventions (aside from the almost-never used recourse under Article 37 to the ICJ or special tribunals), such holdings by default constitute the common law of the ILO, filling in the gaps and clearing up the ambiguities of the language of the Conventions themselves.

However, it is a commonplace among lawyers with first-hand experience in “litigating” cases before these ILO Committees that the ILO common law itself leaves considerable gaps and ambiguities. This is due in large part to political constraints that impede the Committees from announcing new, inevitably controversial rules of international labor law as is routinely done by domestic labor courts when fleshing out the meaning of domestic labor legislation and regulations.¹⁸ A good overview and critique of the ILO supervisory process, authored by a lawyer who served on the Conference Committee for 28 years, is found in Wisskirchen (2005).

Despite the limitations of the ILO’s supervisory committees, it is essential to draw on their authoritative rulings, however fragmentary and indecisive. Fortunately, for at least one of our rights – freedom of association and the right to bargain collectively – the ILO

¹⁸ Inevitably controversial, because announcing almost any new rule to fill the gap in the text of ILO Conventions – or clarifying an existing, ambiguous provision in those Conventions – will tilt toward the interests of either employers or workers, whose representatives comprise two of the ILO’s tripartite constituents.

has compiled a relatively comprehensive treatise: the *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (“*Fifth Digest*”). (ILO, 2006b). The most recent (fifth) edition of the *Digest* was published in 2006. Unlike domestic digests of labor cases and domestic treatises on labor law, the *Fifth Digest* is not updated annually. Hence, it is essential to read through all reports of the Committee on Freedom of Association since 2006, to update the *Digest*. The LybSynd database (at the ILO website) of Committee of Freedom of Association Cases makes this possible, even if somewhat laborious.

The *Fifth Digest* is systematically organized by sub-topics. There are three tiers of topics, starting with 18 broad categories. All but two of these are broken down into several second-tier categories. Several of the second-tier categories are broken down into third-tier. This categorization scheme is set out in Appendix B.

Unfortunately, we cannot assume that the third-tier categories are less weighty than the second-tier categories, or that it is conceptually sensible to construct sub-indices corresponding to each of the second-tier and first-tier categories. In some instances, just the contrary may be true. That is, in some instances, the second-tier categories are broken down into third-tier categories precisely because each of the third-tier categories is such a critical element of the both the second-tier and first-tier categories in which the third-tier category is situated. The clearest example of this is the third-tier category “discriminatory dismissal” which falls within the second-tier category “forms of discrimination” which, in turn, falls under the first-tier category “protection against anti-union discrimination.” Protection against anti-union discharge is the single most important

rule in freedom of association and collective bargaining rights – that is, the single most important rule of either international labor law or domestic labor law. On the other hand, we cannot assume that third-tier categories necessarily capture the most vital protections in this way. For example, the third-tier category of “distinction in labor union rights based on occupational category – persons working under community participation programs intended to combat unemployment” may be important, but it does not rise to the level of the core protection of the general workforce against anti-union dismissal.

Another problem with the ILO categorization scheme reflects, perhaps, the political make-up of the ILO. One of its three (tripartite) constituent groups is comprised of representatives of national union federations. Out of the 18 principal (first-tier) categories constructed by the Committee on Freedom of Association, 13 are on the subject of the organizational rights of labor unions *qua* organizations and federations. The remaining 5 cover individual rights (such as freedom from dismissal for anti-union motives). While it is true that labor unionists’ rights as individuals are often intertwined with labor union rights *qua* organizations – for example, an individual’s freedom to form a trade union is dependent on the organization’s protection against government or employer interference – the relative imbalance in organizational and individual rights in the *Fifth Digest* does not reflect the priority of specific worker rights in most national labor law systems and national digests around the world.¹⁹ Hence, in constructing our indicators, the ILO categorization scheme must be treated with caution.

¹⁹ I speak here of “imbalance” only in the sense of the relative number of indicators. I am not here entering into the heated debate over whether the rights of individual workers are predominantly group-based economic rights or individualistic, liberal human rights.

As to our other rights and standards – rights to non-discrimination and equality; minimum wages; hours of work; and occupational safety and health – there is no such official digest or treatise. In principle, then, it is necessary to review all reports of the Committee of Experts and the Conference Committee and “manually” compile the relevant ILO “common law” based on Committee “observations” and “direct requests” (available at the ILO website). The Committee of Experts’ general surveys on specific Conventions and Recommendations also carry weight, though not as much weight as observations and direct requests.

An indispensable text, not available at the time the NAS-ILAB matrix was formulated, is Neville Rubin’s two-volume *Code of International Labor Law: Law, Practice, and Jurisprudence*. (Rubin, 2005). That treatise compiles all ILO Conventions and Recommendations, and provides annotations of the supervisory Committees’ pronouncements about each instrument. While that text does not itself have the authoritative weight of the *Digest* compiled by the Committee on Freedom of Association itself, it does contain a reliably comprehensive collection of the authoritative statements made by that Committee and the Committee of Experts. Unfortunately, it is not routinely updated, so the Committees’ interpretations must be manually updated for the last five-year period.

There are other secondary sources that are helpful, though use of the primary materials is necessary, since none of the secondary sources is entirely comprehensive and up-to-date. The best short overview of ILO jurisprudence on non-discrimination and

equality, although a bit dated, is Thomas (2003).²⁰ However, that article, unlike the *Digest* on freedom of association, does not purport to give a comprehensive compilation of the ILO supervisory bodies' "common law" on non-discrimination. And unlike the *Digest*, Thomas's overview is not a publication by the relevant authoritative body (the Committee of Experts in the case of non-discrimination, analogous to the Freedom of Association Committee, in the case of the *Fifth Digest*). Still, at the time of writing the article, Thomas served as the Section Chief of the ILO's International Labor Standards Department, so her summary of interpretations by the authoritative body (the Committee of Experts) can be taken as the next-best-thing to a treatise by that body. She makes several important interpretive points: First, the ILO Conventions No. 100 and 111 obligate countries to protect against both direct and indirect discrimination. Second, the meaning of "discrimination" in those Conventions "largely corresponds" to its meaning in the U.N. Convention on All Forms of Race Discrimination (CERD) and the U.N. Convention on All Forms of Discrimination Against Women (CEDAW). (The U.N. monitoring and interpretation of these U.S. Conventions is discussed below in Section IX.)

Third, the ILO's non-discrimination norm is very expansive, covering discrimination in access to education (including vocational training); access to self-employed occupation

²⁰ More recent official documents of the ILO, including the Reports following-up on the 1998 Declaration, which carry persuasive but not precedential authority, are discussed below in Section IX(4). Furthermore, as discussed below in Section X, as to some questions of non-discrimination norms, opinions rendered by the U.N. Committees authorized to monitor the various U.N. Covenants and Conventions on non-discrimination provide more jurisprudential grist than do ILO supervisory bodies. Finally, in some important areas, such as non-discrimination/equality, wages, hours, and safety and health, the ILO Conventions are "fleshed out" not only by ILO and U.N. bodies but also by regional and domestic tribunals that internalize and interpret those Conventions.

as well as wage-earning or salaried employment; placement services; promotion and job tenure; remuneration and benefits, including employment-based social security; access to public service; access to workers' organizations and collective bargaining; safety and health, hours, holidays, and all other working conditions; and sexual harassment. This compendium indicates that our indicators respecting discrimination may extend well beyond the workplace proper (e.g., education, employment-based social security, access to self-employment, etc.) The U.N. Covenants, Conventions, and Committees, discussed below, confirm this point and define the scope of relevant social domains even more capaciously.

Fourth, the non-discrimination norms are "immediately applicable." That is, progressive implementation is not permitted. (Thomas, 2003, p. 377 n. 13).

Thomas rejects the idea of constructing quantitative or comparative indicators for compliance with non-discrimination norms. Thomas does, however, support the construction of indicators designed to measure the progress of each country over time, and to compare the "relative performance" of different countries in terms of their longitudinal performance. She proposes approximately thirty indicators for this purpose – although, in fact, the proposed indicators seem to measure absolute levels and not progress over time, in keeping perhaps with the substantive obligation to achieve immediate compliance with Conventions No. 100 and 111. They are not worth setting out and discussing here, since most of them are framed in general, ambiguous, and double-barreled language. Nonetheless, pending the ILO's publication of any new indicators on rights of non-discrimination and equality, Thomas's indicators may have some use for us in

identifying broad fields in which we might develop concise, unambiguous, single-barreled indicators.

3. ILO Databases on National Laws and Regulations

The ILO's NATLEX database contains national labor laws and related human rights legislation. It is maintained by the ILO's International Labor Standards Department. NATLEX contains abstracts of legislation, searchable by subject and keywords. The ILOLEX database contains ILO Conventions and Recommendations, ratification information, and representations, complaints, comments and General Surveys issued by the various ILO supervisory bodies. The Applis database contains Article 22 reports and comments of the Committee of Experts on the Application of Conventions and Recommendations. The Annual Review Database contains country baselines, introductions to the compilation of annual reports, and observations by employer and worker organizations. It also contains the Report Forms for follow-up to the 1998 Declaration on Fundamental Principles and Rights at Work. The CARIBLEX database contains full text legislation for the 13 Dutch-speaking and English-speaking Caribbean countries, on the status and recognition of labor unions and employer federations; non-discrimination and equality; and occupational safety and health. The *Ley Laboral* database covers Latin America and the Caribbean, largely in Spanish but with a translation function. The Corenit database includes information in Spanish on the application of labor standards in the Americas. Labordoc is the database of the ILO Library, including citations and full text access to many items. More specific databases – relevant to particular rights and

standards – are presented in the following subsections.

a. Freedom of Association and Collective Bargaining

The ILO's LibSynd database contains reports and cases of the Committee on Freedom of Association, and comments of the Committee of Experts on the Application of Conventions and Recommendations.

b. Non-Discrimination and Equality

The ILO's equality@work database contains legislation and other materials on equal employment opportunity. The ILO's TRAVAIL database contains a section entitled "Conditions of Work and Employment Program," last updated in 2009, which includes the laws on maternity leave duration and benefits for over 100 countries. The most recent report, based on this database, is *Working Conditions Laws, 2006-2007*, which usefully sets out in tabular form comparative data on minimum wage rates, minimum wage-fixing mechanisms, weekly hourly limits, overtime limits, vacation days, and maternity leave duration and benefits, for 103 countries. (ILO, 2008j).

c. Wages

As just noted, the ILO's TRAVAIL database contains a section entitled "Conditions of Work and Employment Program," last updated in 2009. It includes minimum wage rates and minimum wage-fixing mechanisms and regulations in over 100 countries. These are usefully set out in comparative tables in *Working Conditions Laws, 2006-2007*. (ILO,

2008j).

d. Hours

Again, the TRAVAIL database section on Conditions of Work and Employment Program, last updated in 2009, includes maximum weekly hours, overtime hours, and vacation days for more than 100 countries, and these are helpfully set out in tabular form in *Working Conditions Laws, 2006-2007*. (ILO, 2008j).

e. Occupational Safety and Health

The ILO's CISDOC is a searchable database of laws, regulations, papers, and books pertaining to workplace health and safety.

f. Labor Inspection

The ILO NATLEX database has a subject category "Labor Inspection," with documents searchable by country. Many of the documents are quite dated, however, even for advanced economies. For example, the U.S. regulations for OSHA inspections are more than a quarter century old. Even for country files with somewhat more recent documents (say, Australia's labor inspection regulations with amendments dated 1995), there is no way of knowing whether there have been later amendments, since the database does not indicate whether the database managers have more recently confirmed the continuing effectiveness of the regulations and, if so, when. The current labor inspection regulations must be checked through conventional country-by-country legal

research. Secondary sources, such as labor law treatises and monographs, may be as, if not more, useful starting points than NATLEX. To take just one example, the most recent NATLEX documents for Turkey show labor inspection regulations dated 2000. A 2006 monograph on Turkish labor law and institutions of the *Bulletin of Comparative Labor Relations* gives a more up to date compilation on Turkish labor inspection, even though its contents will still require updating after that date. (Blanpain, et al., 2006).

4. ILO Guidelines, Codes of Practice, and Reports

The absence of authoritative ILO digests or treatises (apart from the *Fifth Digest on Freedom of Association*) makes it especially worthwhile to canvass ILO guidelines, codes of practice, and reports by the Director-General, the Governing Body, and the Office in the core areas of our research. It bears emphasizing that, while the ILO literature is of interest for its intrinsic or scientific value, it may be even more relevant to us as an authoritative international source of indicators and variables. That is, there are many caches of research on labor market trends and statistics, besides ILO reports, and some of those caches – produced, for example, by certain national and regional statistical offices – may be more sophisticated than ILO research. What makes the ILO guidelines and reports especially worthy of attention is that in some instances they define variables or indicators that are authoritatively or quasi-authoritatively tied to the international norms contained in ILO Conventions and supervisory jurisprudence. This Section will briefly note the most recent major reports of this kind.

a. Freedom of Association and Collective Bargaining

The 1998 Declaration mandated a follow-up procedure requiring countries to file periodic reports on their compliance with the Declaration and requiring the Director-General each year to issue a *Global Report* on one of the four core rights. The Director-General's *Global Reports* are based on the governments' periodic reports on ratified Conventions and on the special reports required by the Declaration from countries that have not ratified core conventions.

The Director-General's *Global Reports* in 2000, 2004, and 2008 were on freedom of association. (ILO, 2008g). These *Reports* contain much useful information. First, they provide a statistical overview of the cases brought before the Committee on Freedom of Association disaggregated by region (Africa, Americas, Asian and Pacific, and Europe) and by subject area (denial of civil liberties, restrictive legislation, by-laws and elections, establishment of organizations, right to strike, anti-union discrimination, interference in union administration, and collective bargaining). To be sure, these are large categories, and the selection bias of complaint-driven data is overwhelming. But the data is nonetheless useful precisely because it shows the potential selection bias, giving us a basis to question whether the predominant "common law" concerns addressed by the Committee should guide the prioritization of our indicators. For example, 61 percent of cases are from the Americas, and only 15 percent from the Asia-Pacific. This almost certainly reflects in part the relative strength of unions in the Americas and their weakness or repression in the Asia-Pacific rather than the contrary. Moreover while complaints of civil liberties violations constituted one-third of cases in the period 1995-2000, the

percentage fell by nearly two-thirds, to 13 percent, for 2004-2007. (ILO, 2008g, pp. 9-10). It is hardly credible that there was such a global improvement in civil liberties in that short span.

Second, more reliably, the *Reports* point the reader to problem countries by citing the most salient violations. The *Global Reports'* willingness to name names is uncharacteristic of ILO documents. The *Reports* also point out countries that enacted structural changes in legal regulation, providing valuable information about comparative performance and contextual variation, even if qualitative. Particularly noteworthy is the *Reports'* discussion of regional trends, such as the various positions taken by the Gulf states on trade union pluralism. (ILO, 2008g, p. 11).

Third, the *Reports* provide some highly specific interpretations of ILO Conventions that may be of use to us. For example, the most recent *Report* notes that in some cantons in Switzerland, the remedy for acts of anti-union discrimination is approximately three months of wages on average and is limited to six months of wages, without reinstatement; and these remedies are far below the remedies for acts of gender discrimination. The Director-General faults Switzerland on both counts. This provides specific minima for indicators of adequate remedies. These *Reports* can be mined for further hard indicators of compliance, alongside systematic review of the primary documents of the Committee on Freedom of Association.

Issues of collective bargaining are also addressed in some ILO reports devoted primarily to other subjects. For example, the *Global Wage Reports* discussed below include indicators and cross-country data on collective bargaining coverage, and present

statistical analyses showing that collective bargaining is associated with higher average wages and lower wage inequality. (See, e.g., ILO, 2008e, p. 41).

b. Non-Discrimination and Equality

The most recent *Global Report on non-discrimination Conventions* is the 2007 *Report* entitled *Equality at Work*. (2007b). This *Report* confirms Thomas's proposition that ILO Conventions prohibit both direct and indirect discrimination, both *de jure* and *de facto* discrimination, and both discrete institutional and general societal discrimination.²¹ Even discrimination in, say, housing and transportation, is potentially relevant to measuring discrimination in employment, since the former may impair access to employment opportunities. Indeed, the Director-General states that while some of the indicators in the OECD's Gender, Institutions and Development Data Base (GID) "include and go beyond employment and the workplace, some of them, such as marriage customs, women's freedom of movement and women's property rights, have a direct bearing on women's opportunities and choices in the labor market." (ILO, 2007b, p. 13). Some of the GID indicators may therefore serve as candidates for inclusion in our body of indicators.

The 2007 *Report* also reaffirms that affirmative action programs do not violate equality norms, even programs broader than those permitted under U.S. constitutional law. It also gives useful guidance on statistical measures, mandating careful distinction among concepts such as "country of birth," "ethnic origin," and "race." (ILO, 2007b, p.12). The

²¹ And, of course, as a statement by the Director-General, the Report carries much greater jurisprudential weight than that of Thomas, a subordinate Office official.

Report also usefully summarizes the numbers and regional location of countries that collect and report different categories of data that are central to measuring discrimination.

Like the *Global Reports* on freedom of association, the *Reports* on equality present tables of data on indicators of employment equality by region and, for some indicators, by country. The indicators span discrimination based on gender, race, indigenous peoples, migrant status, religion, disability, age, and sexual orientation. The *Reports'* Appendices provides definitions and data sources for the indicators on which we might draw.

It is noteworthy that, while the *Global Reports on Freedom of Association* refer liberally to the cases processed by the Committee on Freedom of Association, the *Global Reports on Equality at Work* make almost no reference to the observations of the Committee of Experts. This confirms that the latter is not taken as a systematic source of “common law” on the ILO jurisprudence on non-discrimination and equality, a point already highlighted by the absence of an ILO digest or treatise on discrimination. The Director-General instead relies largely on the ILO’s statistical definitions and databases, such as the *Key Indicators of the Labor Market*. (2010b).

There is also an abundance of ILO reports and handbooks on specific bases of discrimination. For example: *The Employment of People with Disabilities: Towards Improved Statistical Information* (ILO, 2007); *Towards a Fair Deal for Migrant Workers in the Global Economy* (ILO, 2004c); and *Global Employment Trends for Women* (ILO, 2009k). These and similar reports should also be mined for well-specified indicators and associated data sources. And, again, relevant indicators and data are found in ILO reports

on other subjects, such as indicators of employment and wage inequality in the *Global Wage Reports* discussed in the next subsection.

c. Wages

There are three especially useful recent ILO reports on minimum wages. The *Global Wage Database Methodological Note* (2009q) systematically lists and defines the various indicators for wages, including both legal norms and outcome measures. For example, the ILO's indicator of legal minimum wages is: "The lowest level of remuneration permitted...which in each country has the force of law and which is enforceable under threat of penal or other appropriate sanction. Minimum wages fixed by collective agreements made binding by public authorities are included in the definition." (ILO, 2009q, p. 7). This definition originates from the ILO's 1992 Report entitled *Minimum Wages: Wage-Fixing Machinery, Application and Supervision*. (ILO, 1992). Note that this indicator includes minimum wages set by collective bargaining only if they are made legally binding by statute. It is unclear from this definition if minimum wage statutes must expressly incorporate by reference the wage terms of collective agreements, or if instead it is sufficient that collective agreements are legally enforceable as contracts.

Cross-country comparisons are complicated by the fact that different countries use varying definitions of wages, varying data sources, varying time periods, varying categories of employees, and varying inequality measures. For example, some countries include benefits, family allowances, sick leave, or vacation time in the concept of wages, and others do not. The variety of definitions is set out in the ILO's 2003 report entitled *The*

Protection of Wages, Standards and Safeguards Relating to the Payment of Labor

Remuneration. (ILO, 2003), as well as the 2009 *Methodological Note*. (ILO, 2009q). Note that these definitional questions are critical both to indicators of the legal regulation of minimum wages and to indicators measuring whether women and men are equally remunerated for work of equal value.

The *Methodological Note*, focusing just on the choice of minimum wage indicators, raises several dimensions of variation in country specifications: Which compensation and benefits are included in the amount (as mentioned above)? Which time unit (hourly, weekly, monthly)? Which wage-fixing mechanism(s)? Which sector or region covered? Which enforcement mechanism and sanctions? What frequency and mechanism of updating?

The *Methodological Note* (and therefore the *Global Wage Reports* themselves) apply the following protocols to define the regulatory minimum wage:

- a. For countries in which there is one national minimum wage (e.g. United States), the national minimum wage is used.
- b. For countries in which a national minimum wage does not exist and there are multiple minimum wages which vary by geographic location in a country, an average of regional minimum wages is calculated. If the full set of geographical minimum wages is not available, this is approximated through an average of major regions (i.e. China).
- c. For countries in which a national minimum wage does not exist and there are multiple minimum wages which vary by industry, the minimum wage for manufacturing is used. In the event that a minimum wage for manufacturing is not available, a similar substitute is used. Unfortunately, “similar substitutes” vary by country (e.g. American Samoa: fish canning, processing, and can manufacturing minimum wage is used).
- d. For countries in which a national minimum wage does not exist and there are

- multiple minimum wages which vary by industry *and* geographic location, the minimum wage for manufacturing in the capital, or largest city, or largest cities is used. If a minimum wage does not exist for manufacturing, a similar substitute is used (e.g. South Africa: minimum wage applies to employees in the wholesale and retail sector for region “A” which is a region which includes Cape Town).
- e. For countries in which a *nonobligatory* national minimum wage exists, and multiple obligatory minimum wages by industry and region exist, the national minimum wage is used (i.e. India).
 - f. For countries in which a national minimum does not exist, but are in place (generally by industry) through collective agreements, minimum wage levels are *excluded* (e.g. Switzerland, Germany).
 - g. Minimum wages are standardized to monthly levels in the ILO Global Wage Database. However, as previously mentioned, some countries set the levels of their minimum wage(s) differently. For example, some minimum wages are hourly, whereas others are daily, weekly, or monthly. In the event that minimum wage figures are available monthly, monthly figures are used. Otherwise, weekly figures are multiplied by 52 weeks and divided by 12 months. Daily figures are multiplied by the number of days normally worked in a given country and then by 52 weeks divided by 12 monthly. Hourly figures are multiplied by the number of hours generally worked in a day. Daily figures are then transformed into weekly using the number of days worked in a week and finally multiplied by 52 weeks divided by 12 months.

(ILO, 2009q, pp. 21-22). The 2009 *Methodological Note* also provides other candidate indicators – for the gender wage gap, low pay rate, inequality, and other wage-related questions – and explains the alternative data sources.

The indicators that are defined and explained in the 2009 *Methodological Note* are then applied in the ILO’s *Global Wage Report 2008/9* (ILO, 2008e) and in the *Global Wage Report: 2009 Update* (ILO, 2009h).²² These two *Reports* provide much useful data, both on law and on outcomes – including the statutory minimum wage for specific countries in

²² The latter, published in late 2009, assesses the impact of the global recession on global wages.

purchasing power parity, annual growth in minimum wage 2001-2007, the minimum wage as a percentage of per capita GDP, average real wage growth, wage share, and various inequality indicators. The compilation on statutory minimum wages is relatively comprehensive, covering some 100 countries accounting for 90 percent of the world's population. (ILO, 2008e, p.34). However, the relative paucity of outcome data for Africa, Asia, and Latin America is striking.

The 2008 and 2009 *Global Wage Reports* also provide useful qualitative background on the global "revival" of minimum wage regulation, both in annual growth of the minimum wage level and in coverage. The *Reports* find that "[r]egional powers such as Brazil, China and South Africa are among the main drivers of this upward trend." (ILO, 2008e, p. 35). This raises the question whether we might demand relatively stronger performance by countries in a region in which the foremost economy is raising standards.

Analogously, we should consider the interaction of indicators such as collective bargaining coverage and equality, in light of the statistical analysis in the *Global Wage Report* showing that the rate of collective bargaining coverage is positively associated both with greater compliance with minimum wages and with wage equality. That is, collective bargaining coverage is an indicator not only of collective bargaining rights, but also of wage payment and non-discrimination. Stated a bit differently, collective bargaining coverage is an indicator going to effective enforcement of labor norms within and outside the domain of collective bargaining rights.

The *Global Wage Reports* also provide helpful discussion of alternative strategies for defining the concept of "acceptable" (or "decent") minimum wage levels. Minimum

wage levels vary widely as a percentage of average wages, but the high frequency around 40 percent of average wages makes that percentage “a useful reference point.” (ILO, 2008e, p. 47.) Adjustments in minimum wages for inflation may also be a meaningful indicator for an “acceptable” system of wage regulation. Minimum wage regulation may be an indicator of gender and ethnic equality when the minimum wage level is set above the prevailing wage in labor market strata that are disproportionately female or minority; an indicator on this point may be warranted.²³ Relatedly, in assessing the “acceptability” of the minimum wage, a relevant indicator in countries with sectoral minima may be whether the minima are relatively lower in sectors with disproportionate numbers of women, minorities, or migrants. On this point, for example, the *Global Wage Report* shows countries that either exclude domestic workers from coverage by minimum wage legislation or provide a lower minimum than in other sectors. (ILO, 2008e, p.53).

Previous to the *Global Wage Report*, ILO researchers published a 2005 monograph on *The Fundamentals of Minimum Wage Fixing*. (Eyraud and Saget, 2005). It contains even more detailed, rigorous definitions of indicators and statistical analysis, though it lacks the relative authority of the *Global Wage Reports*. Even more in-depth analysis is provided in the just-published book entitled *The Minimum Wage Revisited in the Enlarged EU*. (ILO, 2010g). This book is particularly useful in applying definitions and indicators across the range of advanced and laggard economies in the EU’s new member states.

d. Hours

²³ On minimum wage regulation as an anti-discrimination instrument, see also Rodgers and Rubery, 2003.

Three recent ILO reports on work hours are significant. In a 2008 Report entitled the *Measurement of Working Time*, the ILO's International Conference of Labor Statisticians (ICLS) updated the ILO's definitions and measures of working time. Prior to 2008, the ICLS had adopted only one resolution (in 1962) defining working time for purposes of statistical measurement. That resolution defined the concepts of "normal hours of work" and "hours actually worked." The 2008 *Report* discusses in detail the history of definitions for various concepts related to working time, the objectives of working-time statistics, and the inadequacy of current measures. The *Report* makes the case for new definitions of nine working-time concepts: hours actually worked; hours paid for; normal hours of work; contractual hours of work; hours usually worked; overtime hours of work; absence from work; organization of working time; and scheduling of working time. These concepts are placed within a systematic measurement framework that incorporates complete coverage of job, person, activity, and time, and that integrates all concepts related to working time and working-time arrangements. In short, the *Report* attempts to construct the kind of conceptual framework that could undergird a well-formulated, valid set of indicators pertaining to acceptable working hours.

The ICLS adopted a resolution on December 5, 2008 codifying the new definitions. (ILO, 2008I). The *Resolution* also accepts the *Report's* recommendations regarding the optimal methods of data collection via household surveys, establishment surveys, and administrative registers. The 2008 *Report* and *Resolution* are keyed to the more than 30 ILO Conventions addressing working-time issues. Hence, their definitions of concepts and measurement methods are highly relevant to developing indicators that are anchored in

authoritative international labor law. I will not here attempt to set out and analyze the ICLS framework, concepts, definitions, measurement methodologies, and justifications, in light of the technical detail of each. Suffice it to say that the *Report* and *Resolution* provide the most internationally authoritative set of concepts and definitions. (Some additional explanation of the concepts and definitions is found in the April 2008 *Report of the Meeting of Experts on Labor Statistics* (ILO, 2008k) that preceded the final Report and Resolution of December 2008.)

The 2008 *Report* and *Resolution* provide concepts and definitions that might be especially useful in the framing of indicators of acceptable legal regulations (indicators of the “legal framework,” in the language of the NAS-ILAB methodology). For example, if we wish to construct an indicator such as “does domestic law require the payment of an overtime premium for hours worked in excess of 48 per week?”, we can draw on the 2008 *Report’s* and *Resolution’s* definition of “hours worked.”

On the other hand, candidate indicators of enforcement and outcomes are developed in a 2007 book-length study by ILO researchers entitled *Working Time Around the World*. (Lee, et al., 2007). After canvassing various definitions of “excessive working hours,” the book develops an “effective working-hour regulation index” (ERI). The ERI is an average of the normalized values of statutory maximum hours and the “observance rate” (or hours actually worked). In other words, equal weight is given to formal legal protection and to actual outcomes. Hence, Korea and Panama have the same ERI, even though Korea has a lower statutory maximum, because Panama has a higher rate of compliance. (Lee, et al. 2007). This conceptualization has obvious problems, for our

purposes. Why should Panama be rewarded (in comparative terms) for its long actual working hours on the ground that it has a lax statutory mandate? This seems perverse. That is, it may be easy for Panama to achieve a higher rate of actual compliance, since its regulatory requirements are so undemanding. (This is the converse of a difficulty in measuring minimum wage enforcement. Should a country that sets its statutory minimum wage at a level beneath the market-clearing wage be rewarded for having no actual minimum wage violations, compared to a country that has many violations because its statutory minimum wage is much higher?)

This criticism shows the importance of formulating indicators that directly measure actual enforcement efforts, such as the number and quality of labor inspections; strategic planning by inspectorates; the budget and staffing of inspectorates, prosecutorates, and labor courts; the strength of judicial and administrative procedures and remedies; and so on. Measures of formal norms, even when aggregated with actual outcomes, can be misleading.

Based on their empirical analysis, Lee et al. conclude that there is no simple relationship between economic development and income growth, on the one hand, and reduction in working hours, on the other. The pace of reduction varies from country to country, and in some cases working hours increase despite growth in income. (Lee et al., 2007, p. 27). Much depends on political institutions and trade union strength. It is true that there is a statistically significant correlation between income growth and reduction of working hours, but this correlation vanishes for countries that reach higher levels of income. This conclusion cautions against simple “adjustment” of indicators based on a

country's per capita income.

Lee et al. set out six ideal types of working-time regulation, each with its own characteristic working-hour distributions: (1) strong statutory regulation (e.g., France); (2) strong role of collective agreements (Germany, Austria); (3) strong statutory regulation with part-time work (Belgium); (4) weak statutory regulation with part-time work (United Kingdom, Japan); (5) poor enforcement (Korea, United States); and (6) poor enforcement and underemployment (many low-income developing countries). (Lee et al., 2007, p. 35). In other words, in measuring the effectiveness of working-time regulation, distribution patterns may be key and must be carefully defined. Four of Lee et al.'s six categories have double-peaked distributions of working hours, but the difference between effectively enforced regulations and ineffectively enforced regulations turns on the amplitude and degree of separation of the peaks, and on the labor market context.

e. Occupational Safety and Health

The most important and authoritative ILO documents on occupational safety and health are more eclectic than the reports on other rights and standards.

First, the ILO SafeWork program is in the process of producing a new (fifth) online edition of the *ILO Encyclopaedia of Occupational Health and Safety*. In the meantime, the most current edition is the 1998 fourth edition. (ILO, 1998). It has four lengthy volumes: the first on health care, management and policy (including inspection), and protection strategies; the second on types of hazards, safety management, and safety programs; the third on industry-specific safety problems and solutions; and the fourth on guides to

occupations and chemicals. The *Encyclopaedia* includes many explicit references to safety and health Conventions and Recommendations, giving explanations and elaborations that can help us refine the provisions into more detailed, less ambiguous indicators.

Second, in 2009, the Committee of Experts on the Application of Conventions and Recommendations submitted to the International Labor Conference a Report entitled *ILO Standards on Occupational Safety and Health*. (ILO, 2009r). As discussed above, the Committee's pronouncements are not binding, but have substantial weight as a source of ILO common law. The 2009 *Report* focuses on what it designates "the three central ILO instruments in this area," namely the Occupational Safety and Health Convention of 1981 (No. 155), the associated Recommendation of 1981 (No. 164), and the Protocol of 2002 to Convention No. 155. (ILO, 2009r, p. xi). The Committee confirms that the more recent Promotional Framework for Occupational Safety and Health Convention of 2006 (No. 187) complements the earlier 1981 Convention. By not including the 2006 Convention in its survey, however, the Committee confirms that the later Convention is not central to the safety and health domain. Interestingly, the Committee concludes that one of the key "challenges and opportunities" is to "develop[] practical and viable indicators – with due account taken of the ILO decent work indicators – to demonstrate progress in this area." (ILO, 2009r, p. xii).

The Committee *Report* provides definitions and explanations that refine the broader language of the Conventions and Recommendation, both as to substantive safety and health norms, and as to effective inspection, administration, sanctions, and case

procedures. It therefore gives guidance not just for safety and health indicators but for enforcement indicators across the board. The *Report* also contains up-to-date summaries of trends in legislation and administration, including many references to specific countries' recent legal developments in regulating workplace safety and health.

Third, the ILO publishes many *Codes of Practice*, ratified by the Governing Body, that provide practical guidance to governments and private actors on specific components of safety and health. Some *Codes* are industry specific, such as the 2003 *Code* on safety and health in the non-ferrous metals industries. (ILO, 2003c). Others address categories of workplace practices, such as the 2001 *Code* on ambient factors in the workplace. (ILO, 2001). Others deal with matters of public labor administration, such as the 1995 *Code* on recording and notification of occupational diseases and accidents. (ILO, 1995). Others address managerial protocols, such as the 2001 guidelines on occupational safety and health management systems. (2001b). The *Codes* addressing government enforcement are potential sources of indicators on best practices in administration and inspection, notwithstanding that the *Codes*, as products of expert panels, do not have binding effect.

Fourth, the ILO's hazard datasheets on occupations (HDO), and International Chemical Safety Cards (ICSC) contain well-specified indicators and measures, should we choose to develop indicators at the detailed level of specific occupations and chemical hazards, or should we choose to incorporate these tools by reference (that is, should we choose to require governments "to enforce the standards set out in the HDO and ICSC" or some equivalent language).

f. Labor Inspection and Labor Administration

The ILO has published many recent Reports that can help refine indicators for effective labor inspectorates. The relevant Reports fall into three categories.

First are reports on labor inspection in general. These include a 2002 Report entitled *Labor Inspection: A Guide to the Profession* (ILO, 2002); a 2006 training manual *Integrated Labor Inspection Training System* (ILO, 2006f); a 2006 Governing Body Report *Strategies and Practice for Labor Inspection* (ILO, 2006h); and a 2006 *Code of Ethical Behavior for Labor Inspectors* (ILO, 2006g), which served as a foundation for the International Association of Labor Inspection's 2008 *Global Code of Integrity for Labor Inspection*. (IALI, 2008).

The most authoritative document in this first category is a 2006 *Report* authored by the Committee of Experts on the Application of Conventions and Recommendations, analyzing and discussing compliance with the Labor Inspection Convention of 1947 (No. 81), the Protocol of 1995 to the Labor Inspection Convention of 1947, the Labor Inspection Recommendation of 1947 (No. 81), the Labor Inspection (Mining and Transport) Recommendation of 1947 (No. 82), the Labor Inspection (Agriculture) Convention of 1969 (No. 129), and the Labor Inspection (Agriculture) Recommendation of 1969 (No. 133). (ILO, 2006e). Like the CEACR *Report* on occupational health and safety discussed above, the CEACR *Report* on labor inspection contains quasi-authoritative refinements of labor inspection indicators and much useful information about country trends and specific countries' regulation and practices.

Second, there are *Reports* on the particular problems facing labor inspection for

particular standards or workplace concerns. Although dedicated to specific issues, these *Reports* also contain guidance as to effective labor inspection more generally. These include *Reports* on labor inspection for child labor (ILO 2002b), for HIV/AIDs (ILO, 2005c), and for occupational safety and health. (ILO, 2001).

Finally, some ILO *Reports* have chapters or sections devoted to labor inspection or more general labor administration in the course of treating substantive standards. For example, Volume I, Chapter 23 of the *ILO Encyclopaedia of Occupational Health and Safety* (ILO, 2008) includes a guide to a well-functioning labor inspection program, elaborating on the ILO Labor Administration Convention of 1978 (No. 150) and its associated Recommendation (No. 158), as well as Convention on Labor Inspection in Industry and Commerce of 1947 (No. 81) and Convention on Labor Inspection (Agriculture) of 1969 (No. 129).

Apart from these *Reports* on labor inspection and general labor administration, the ILO publishes *Reports* on standards for labor courts, such as the *ILO Codes of Practice and Guidelines for Labor Judges and Magistrates*. (ILO, 2005d). While *Reports* of this kind give a sense of the problems facing courts in developing and emerging economies, they do not provide the kind of comprehensive treatment found in international reports that address the overall question of due process, transparency, and effective remediation.

In addition, the ILO has just published a book on *The Fundamentals of Labor Administration*. (ILO, 2010). I have read the introductory chapter and am in the process of obtaining the rest. The book will cover the entirety of public institutions charged with enforcing labor rights and implementing labor policy, focusing on the ministries of labor but

encompassing their coordination with other ministries that touch on economic and social regulation.

g. Country Reports

The ILO publishes country reports from the standpoint of many different ILO projects, purposes, and departments. The *Decent Work Profiles* discussed above are important reports for our purposes, especially in light of the fact that the country data is keyed to the decent work indicators, many of which are candidates for inclusion in our body of indicators. As noted above, the decent work profiles have come in waves, starting with the Decent Work Pilot Programs in Bahrain, Bangladesh, Denmark, Ghana, Kazakhstan, Morocco, Panama and the Philippines. Since 2008, the Office has turned to new country profiles for Austria, Brazil, Malaysia, Tanzania, and Ukraine. The published profiles for Austria and Brazil apply the Revised Proposed Indicators (and some additional indicators). (ILO, 2009c; ILO, 2009d). The profiles for the remaining countries may also include the just-formulated quantitative indicators for freedom of association and collective bargaining and the soon-to-be-formulated quantitative indicators for non-discrimination and equality.

Apart from the *Decent Work Profiles*, there are many other country reports, too numerous to review here. For example, the ILO's Better Factories Cambodia program has published many useful documents for that country's labor regulation. Its *Guide to the Cambodian Labor Law for the Garment Industry* is a thorough monograph covering all of our subjects except for labor inspection and enforcement, although the Guide dates to

2005 and its coverage of non-discrimination is brief. (ILO, 2005). As detailed above, the Cambodia program has also published a series of twenty-three *Synthesis Reports on Working Conditions in Cambodia's Garment Sector*, the most recent of these in October 2009 (ILO, 2009l), showing 54 indicators selected from the body of over 500 indicators checked by factory monitors. The Cambodia program has also generated subject-specific reports, such as *Cambodia: Women and Work in the Garment Industry* in collaboration with the World Bank, CARE and UNIFEM (ILO, et al., 2006), and *Cambodia Garment Industry Workforce Assessment: Identifying Skill Needs and Source of Supply*. (USAIS, 2006). Most recently, together with the International Institute for Labor Studies, the ILO/IFC published Sandra Polaski's *Harnessing Global Forces to Create Decent Work in Cambodia*. (Polaski, 2009).

The Regional and Sub-Regional offices of the ILO issue useful publications focusing on the countries within their jurisdiction, if not as comprehensive and in-depth as the Cambodia material. These publications sometimes focus on labor regulation and sometimes on labor market outcomes. For example, *Labor and Social Trends in Sri Lanka 2009* (ILO, 2009m) and Decent Work Country Program Sri Lanka 2008-2012 cover both subjects, though far from comprehensively. (ILO, 2008h). The same can be said for *Vietnam Employment Trends Report 2009*. (ILO, 2009n). Documents like these must be carefully mined for consistent, reliable measures, data and sources. The Regional Offices more often publish subject-specific reports keyed to their technical projects, such as *Report of the ILO/Japan Program on Expansion of Employment Opportunities for Women – Cambodia and Vietnam Chapters* (ILO, 2008i) and *Safety and Health at the Workplace –*

Trade Union Experiences in Central and Eastern Europe. (ILO, 2000).

The ILO issues an annual *World of Work Report*, most recently for 2009, together with Regional and Country “briefs,” but the latter provide only selected data. (ILO 2009o). It is likely not worthwhile to mine these briefs, except when ILAB analysts are conducting a focused investigation of a country for which there is highly limited data from other sources.

X. Labor Norms of Other Authoritative International Instruments and Bodies

1. International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is one of the three United Nations instruments that form the core of international human rights law. (United Nations General Assembly, 1966). The other two are the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. (United Nations General Assembly, 1948; 1966b).

The ICESCR was ratified by the U.N. General Assembly in 1966 and entered into force in 1976. The ICESCR contains provisions on labor union rights; non-discrimination; wages; hours; workplace safety and health; and domestic enforcement of these and other standards.

Part IV of the Covenant assigns monitoring responsibilities to the U.N. Economic and Social Council (ECOSOC). In 1985, the ECOSOC monitoring role was delegated to the Committee on Economic, Social and Cultural Rights (CESCR), a body comprised of independent experts.

All states that are party to the Covenant must submit reports to the CESCR every five years, describing the country's implementation of the rights set forth in the Covenant. The CESCR issues "concluding observations" stating concerns and recommendations about the country's compliance.

In December, 2008, the U.N. General Assembly adopted the Optional Protocol to the ICESCR, authorizing individuals or groups to file complaints against signatory governments alleging violations of rights provided by the Covenant. (United Nations General Assembly, 2008). Upon receiving a complaint, the CESCR conveys its “views and recommendations” to the state in question, to which the state is obligated to give “due consideration” and respond within six months. If a complaint conveys “reliable information indicating grave or systematic violations,” the Committee may designate one or more members to conduct an inquiry, including (with the consent of the state in question) an on-site visit. However, the Committee’s ultimate option is again merely to issue recommendations and to include a summary of the case in its annual report.

In addition to issuing “concluding comments” to country reports and conveying “views and recommendations” in response to complaints under the new Optional Protocol, the CESCR from time to time issues “general comments” interpreting provisions in the Covenant. Relevant general comments include:

- Reporting by States Parties (1989, No. 1)
- The Nature of States Parties’ Obligations (1990, No. 3)
- Persons with Disabilities (1994, No. 5)
- The Economic, Social and Cultural Rights of Older Persons (1995, No. 6)
- The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights (1997, No. 8)
- The Domestic Application of the Covenant (1998, No. 9)
- The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights (1999, No. 10)

- The Right to the Highest Attainable Standard of Health (2000, No. 14)
- The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (2005, No. 16)
- The Right to Work (2006, No. 18)
- Non-Discrimination in Economic, Social and Cultural Rights (2009, No. 20)

(United Nations Committee on Economic, Social and Cultural Rights, 1989; 1990; 1994; 1995; 1997; 1998; 2000; 2005; 2006; 2009).

These general comments can be quite detailed, sometimes providing standards that are more clear and comprehensive than ILO jurisprudence, even though the terms of the Covenant itself are less detailed than ILO Conventions.

The relevant terms of the Covenant, broken down into concise single-barreled obligations, are as follows. (Note that many of these candidate indicators would need further refinement for actual use in our project):

- Government shall recognize the right to work.
- Government will take appropriate steps to safeguard the above right.
- Government recognizes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.
- Government shall take appropriate steps to safeguard the above right.
- Government shall take steps to achieve the full realization of the above rights through technical and vocational guidance and training programs.
- Government shall take steps to achieve the full realization of the above rights through policies and techniques to achieve steady economic, social and cultural development.

- Government shall take steps to achieve the full realization of the above rights through policies and techniques to achieve full employment.
- Government shall take steps to achieve the full realization of the above rights through policies and techniques to achieve productive employment.
- Government shall take steps to achieve the full realization of the above rights through policies and techniques that safeguard fundamental political and economic freedoms to the individual.
- Government shall guarantee the right of everyone to just conditions of work.
- Government shall guarantee the right of everyone to favorable conditions of work.
- Government shall, more specifically, guarantee remuneration which provides all workers, at a minimum, with fair wages.
- Government shall, more specifically, guarantee remuneration which provides all workers, at a minimum, with equal remuneration for work of equal value.
- Government shall guarantee such remuneration without distinctions of any kind.
- Government shall guarantee that women's conditions of work are not inferior to those enjoyed by men.
- Government shall guarantee that women and men have equal pay for equal work.
- Government shall guarantee everyone remuneration to afford a decent living for themselves and their families.
- Government shall guarantee safe and healthy working conditions.
- Government shall guarantee equal opportunity for everyone to be promoted in his employment to an appropriate higher level based solely on seniority and competence.
- Government shall guarantee all workers rest.
- Government shall guarantee all workers leisure.
- Government shall guarantee all workers reasonable limitation of working hours.
- Government shall guarantee all workers periodic vacations with pay.
- Government shall guarantee all workers remuneration for public holidays.
- Government shall guarantee the right of everyone to form trade unions.

- Government shall guarantee the right of everyone to join the trade union of his choice, subject only to the rules of the organization concerned.
- Government shall guarantee the right of everyone to promote his economic and social interests through trade union activity.
- Government shall place no restrictions on the exercise of these trade union rights other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.
- Government shall guarantee the right of trade unions to establish national federations.
- Governments shall guarantee the rights of national federations to form or join international trade union organizations.
- Government shall subject trade unions to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.
- Government shall guarantee the right to strike, provided that it is exercised in conformity with the laws of the particular country.
- Government may impose lawful restrictions on the exercise of these trade union rights by members of the armed forces or of the police or of the administration of the State.
- Government shall guarantee the right of everyone to social security, including social insurance.
- Government shall guarantee working mothers during a reasonable period before and after childbirth paid leave or leave with adequate social security benefits.
- Government shall guarantee the right of everyone to an adequate standard of living for himself and his family.
- Government shall guarantee the right of everyone to the continuous improvement of living conditions for himself and his family.
- Government shall guarantee the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
- Government shall take steps necessary for the improvement of all aspects of environmental and industrial hygiene.

Note that these provisions explicitly guarantee the right to strike, unlike ILO jurisprudence in which the right to strike is merely implicit. The Covenant also obligates states to secure rights to fair and decent remuneration, to just conditions of work, to full employment, to promotion based exclusively on seniority and competence, and to continuous improvement in standards of living.

The CESCR's general comments give even more expansive, detailed interpretation of government's obligations, including obligations pertaining to enforcement institutions. Space limitations do not permit an exhaustive recitation of those additional obligations. A few examples must suffice. The general comment on the right to work provides, among other things:

- Government must reduce to the fullest extent possible the number of workers outside the formal sector [in order to achieve legal protection of workers who typically work in the informal sector owing to lack of opportunity in the formal sector].
- Government must ensure domestic workers the same protection as other workers.
- Government must ensure agricultural workers the same protection as other workers.
- Government must protect workers in all aspects of work against discrimination on grounds of race, color, sex, language, religion, political or other opinion, national or social origin, age, migration status, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, or civil, political, social or other status.
- Government's obligation to fulfill the right to work requires governments to adopt appropriate legislative, administrative, budgetary, judicial and other measures to ensure its full realization.
- Government should promote access to employment for young persons.
- Government should particularly promote access to employment for young women.

- Government must ensure that privatization measures do not undermine workers' rights.
- Government must ensure that measures to increase labor market flexibility do not reduce job security.
- Government must ensure that measures to increase labor market flexibility do not reduce social protection of the worker.
- [As a non-discrimination measure for women and other vulnerable workers,] Government must establish a compensation mechanism for loss of employment.
- [As a non-discrimination measure for women and other vulnerable workers,] Government must establish employment services at the national and local levels.
- [As a non-discrimination measure for women and other vulnerable workers,] Government must establish technical and vocational training programs.
- Government must promote these rights in other countries through bilateral and multilateral negotiations.
- Government must not agree to structural adjustment programs that have negative effects on these rights for women, young persons, and other disadvantaged groups.
- Government must use "the maximum of its available resources" to secure these rights.
- Government must allocate "sufficient" resources to secure these rights.
- Government must not "misallocate" public funds in securing these rights.
- Government must not abrogate legislation against forced labor [i.e., "no retrogression"].
- Government must not abrogate legislation against forced labor [i.e., "no retrogression"].
- Government must not abrogate legislation against unlawful dismissal [i.e., "no retrogression"].
- Government retrogression in relation to other worker rights is a presumptive violation of the Covenant.

- However, Government must immediately guarantee non-discrimination, which is neither subject to progressive implementation nor dependent on available resources.
- Government must adopt specific legislation that establishes a plan of action to secure these rights.
- Government must adopt specific legislation that establishes a national mechanism to monitor implementation of the national plan of action.
- Government must adopt indicators and benchmarks by which progress in securing these rights can be measured and periodically reviewed.
- Government must adopt specific legislation that contains numerical targets and a time frame for implementation.
- Government must adopt specific legislation for the involvement of civil society, including experts, the private sector, international organizations, and most importantly worker organizations in monitoring the Government's fulfillment of these rights.
- Government indicators should be based on ILO indicators ["such as the rate of unemployment, underemployment and ratio of formal to informal work," and ILO "indicators...that apply to the preparation of labor statistics..."].
- Government must incorporate the Covenant work rights into national law, empowering courts to adjudicate violations of the Covenant.
- Government must provide effective judicial or other appropriate remedies at the national level to individuals and groups whose right to work is violated.
- Government must provide adequate reparation to victims of such violations, which may include restitution, compensation, satisfaction or a guarantee of non-repetition.

Note that these obligations, as authoritatively defined by the Committee on Economic, Social and Cultural Rights, include obligations that go beyond ILO obligations in degree and in kind. Most notably, they include obligations pertaining to enforcement machinery, including the obligation to formulate national indicators, benchmarks, and quantitative

targets that measure current compliance and progressive achievement of compliance.

Worker organizations and other civil society actors must participate in formulating and implementing such indicators. Certain matters – such as non-discrimination obligations – require immediate rather than progressive compliance. There is an affirmative obligation to use maximum available resources to enforcement. A range of specific judicial remedies is provided. In addition, the Committee stipulates that some matters that initially seem distinct from our labor standards are in fact connected. For example, an obligation to reduce the informal sector is an indicator of non-discrimination, since vulnerable groups tend to fall into the unprotected sector.

A similar analysis could be undertaken with respect to the Committee's general comments on non-discrimination and health and safety. For reasons of space, I will note a few important points pertaining to non-discrimination:

- Government must eliminate *de jure* discrimination.
- Government must eliminate *de facto* discrimination.
- Government must eliminate direct discrimination (differential treatment).
- Government must eliminate indirect discrimination (disparate impact).
- Government must eliminate discrimination within private groups, such as workplaces, families, and housing markets.
- Government must eliminate systemic discrimination (laws, practices, culture in the private and public sectors that deeply entrench discrimination in social behavior and organizations).
- Government can justify differential treatment only if the governmental measure or private practice has a clear and reasonable proportionality with reasonable and objective purposes.

- In judicial proceedings, the government or private actor alleged to have committed discrimination shall have the burden of proof, when relevant evidence lies wholly or partly with the defendant.
- Government must monitor effective implementation of non-discrimination laws.
- Government monitoring must include both input and outcome indicators.
- Government must disaggregate indicators on the basis of the prohibited grounds of discrimination.

These obligations are interesting in several respects. They provide international norms that substantially flesh out the sparse ILO Conventions on discrimination and confirm the ILO Committee of Experts' broadest interpretation of those Conventions. The substantive definition of non-discrimination is extraordinarily broad, encompassing *de jure* and *de facto* discrimination, disparate treatment and disparate impact, formal and substantive discrimination, systemic societal discrimination, and public and private discrimination (including discrimination by private commercial actors such as landlords and employers but also by non-commercial actors such as families that refuse to send girls to school). These categories sweep much more broadly than the obligations imposed on U.S. government actors by the Fifth and Fourteenth Amendments of the U.S. Constitution, which cover only *de jure* discrimination taking the form of disparate treatment. It is true, however, that U.S. legislation goes further than constitutional safeguards, covering disparate impact and discriminatory practices by private commercial actors. Still, even the legislation does not cover non-commercial actors and does not cover systemic societal discrimination. And, neither the U.S. Constitution nor civil rights legislation requires government actors to implement self-monitoring by indicator systems. On the other hand,

the justification permitted by the Committee –reasonably proportionate means serving reasonable, objective purposes – seems on its face to be weaker than the U.S. requirement that the measure be necessary to serve a compelling state interest (U.S. Constitutional jurisprudence) or that the employer practice implements a bona fide occupational qualification (legislation).

It is also noteworthy that the Committee’s general comment no. 3 entitled *The Nature of States Parties Obligations* includes some useful interpretation of the concept of a government “taking steps” to come into compliance – a question that is also directly raised by U.S. trade legislation.

2. Other United Nations Covenants, Conventions, and Committees

As noted above, the Covenant on Economic, Social and Cultural Rights is one of the three core instruments of the international human rights regimes. The other two are the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. There are also several relevant U.N. Conventions on more specific topics: the Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention on the Protection of the Rights of all Migrant Workers and the Members of Their Families (ICRMW); and the Convention on the Rights of Persons With Disabilities (CRPD). (United Nations General Assembly, 1965; 1979; 1990; 2006).

All of these instruments contain provisions on worker rights. With the exception of the Universal Declaration (which is not a treaty), they are monitored by specialized

committees more or less in the fashion of the Committee on Economic, Social and Cultural Rights described above. For example, CEDAW is monitored by a Committee on the Elimination of Discrimination Against Women. The Committee is empowered to issue concluding comments when reviewing periodic country reports, general comments providing extended interpretations of particular provisions of CEDAW, and views and recommendations in response to complaints filed under the terms of an Optional Protocol. The Committee has issued general comments on statistical data; equal remuneration for equal work; unpaid women workers in rural and urban family enterprises; women and health; and women migrant workers; among other subjects. (United Nations Committee on the Elimination of Discrimination Against Women, 1989; 1989b; 1991; 1998; 2008).

Both the general and concluding comments of these Committees provide useful supplements to, and in some instances clarifications of, ILO Conventions and jurisprudence.

There are also “shadow reports” published by NGOs under each of these U.N. instruments. The shadow reports do not, of course, have authoritative weight in interpreting the Conventions, although they are important sources of information about actual compliance by governments.

3. European Regional Instruments for Human and Social Rights

a. European Social Charter

The European Social Charter is a creature of the Council of Europe. It came into force in 1961, fifteen years before the U.N.'s Covenant on Economic, Social and Cultural Rights. The Charter was revised in 1996. (Council of Europe, 1996). The Charter (as revised) contains a lengthy list of worker rights, which are set out in Appendix C to this Literature Review. It overlaps substantially with the U.N. Covenant (for example, explicitly protecting the right to strike, unlike ILO Conventions), but provides greater protections in certain areas (for example, requiring four weeks of annual paid vacation, unlike the U.N. Covenant, which does not specify the duration of vacations) and has more refined provisions that could provide candidate indicators on such questions as non-discrimination on the basis of migrant status, equality in provision of vocational training, and affirmative steps on behalf of disabled workers.

The European Social Charter is monitored by the European Committee of Social Rights (ECSR), composed of fifteen experts chosen by the Committee of Ministers (composed of the foreign ministers of all member states). Member governments file annual reports describing their compliance in law and practice with the Charter (reporting on each of four sections of the Charter in four-year cycles). In response, the ECSR adopts "conclusions" conveying any non-compliance. If the government fails to address the "conclusion," the Committee of Ministers asks the government to come into compliance. Alston makes a convincing argument, based on a case study, that this promotional vehicle for monitoring the Charter is weak. (Alston 2005b).

However, under the terms of an Additional Protocol, which came into force in 1998, labor unions and other non-governmental organizations may file collective complaints

alleging a government violation of the Charter. (Council of Europe, 1998). This track for monitoring compliance has somewhat greater jurisprudential traction. (See, e.g., Churchill and Khaliq 2004; O’Cinneide, 2009). After written submissions and in some instances a hearing, the ECSR renders a “decision” which may include recommendations to correct violations. Since 1998, fifty-eight complaints have been taken up by the ECSR.

In September, 2008, the ECSR published a *Digest of Case Law of the European Committee of Social Rights*. (Council of Europe, 2008). Part I of the *Digest* provides a discursive “interpretation” of each provision of the Charter. Part II sets out, for each Article of the Charter, annotations of relevant “conclusions” and “decisions.”

There is a large secondary literature covering ECSR jurisprudence overall (Swiatkowski, 2007; Akandji-Kombe, 2005) and as to specific rights, such as freedom of association (Kristensen, 2009); occupational safety and health (Lasak, 2009), anti-discrimination law for the disabled (Quinn, 2005); and the right to dignity at work. (Toth, 2008).

b. EU Charter of Fundamental Rights

The EU Charter of Fundamental Rights was enacted with the Lisbon Treaty of 2000. Revised in 2007, it became legally binding on December 1, 2008. Subsequently, the EU created a new portfolio – a new Vice-President of the European Commission – for Justice, Fundamental Rights and Citizenship. The Charter applies to all actions by EU machinery, and to domestic law when it implements EU law. The Charter is intended to entrench all the rights in the European Convention of Human Rights; and the meanings of

the rights in the two documents are intended to be equivalent. The Charter, however, contains additional rights in the fields of economic and social rights “resulting from the common constitutional traditions of the EU member states, the case law of the European Court of Justice and other international instruments.” (Reding, 2010).

However, the EU Charter is not as detailed or expansive as the Charter of the European Council or the U.N. Covenant and therefore will not serve as a significant source of additional candidate indicators, notwithstanding its greater weight in the jurisprudence of EU institutions and, potentially, member states.

c. European Convention on Human Rights

The European Convention of Human Rights, like the European Social Charter, is an instrument of the Council of Europe. It is enforceable by individuals or states through complaints to the European Court of Human Rights. While adjudication by the Court gives the Convention greater jurisprudential weight, only two of its provisions are relevant to us. First, the right of association in Article 11 includes “the right to form and to join trade unions,” subject to restrictions “prescribed by law” and “necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.” (Council of Europe, 1953). The Article does not apply to the armed forces, police, or State administrators. Second, Protocol No. 12 to the Convention, which entered into force in 2005, prohibits discrimination in the enjoyment of any domestic legal right on grounds “such as sex, race, color, language, religion, political or other opinion, national or

social origin, association with a national minority, property, birth or status.” (Council of Europe, 2005).

In 2008, the European Court of Human Rights held in the *Demir* case that the European Convention on Human Rights includes the right to collective bargaining, and in subsequent cases extended that holding to collective action. (European Court of Human Rights, 2008; 2009). The Court cited not only the Convention, the EU Charter of Fundamental Rights, and the European Social Charter, but ILO sources as well. These decisions were issued at the same time as the European Court of Justice announced, in the *Viking* and *Laval* cases, that the European Community Treaty itself recognized the right to strike as a fundamental right even while circumscribing the right in certain specific instances of cross-border solidarity actions. (European Court of Justice, 2007; 2007b). Good overviews of these developments are presented in Fudge (2010b); Ewing and Hendy (2010); and in the *Symposium on The Laval and Viking Cases*. (Blanpain, 2009d). Although these particular decisions do not establish new jurisprudence (beyond settled international law), the increasing convergence between ILO and European legal sources gives greater weight to European precedents and instruments in the construction of our candidate indicators.

4. Inter-American Human Rights System

Three human rights instruments, promulgated by the Organization of American States, provide the foundation for the Inter-American system: the 1948 American Declaration of the Rights and Duties of Man; the 1969 American Convention on Human

Rights; and the Additional Protocol to the Convention (the “San Salvador Protocol”). (Organization of American States, 1948; 1969; 1988). These three instruments include several basic worker rights, including freedom to associate in labor unions, the right to “safety and hygiene at work,” the right to wages that assure “a standard of living suitable for himself and for his family,” the right to a “reasonable limitation of working hours,” and other worker protections. Article 26 of the Convention provides that governments are required to “progressively...achieve the full realization of” such economic and social rights.

Individuals, labor unions, and other organizations may file complaints alleging violations with the Inter-American Commission on Human Rights. After conducting hearings and, in some cases, field missions, the Commission privately issues a report and recommendations to the respondent government. If the government fails to correct the violations, the Commission may make its report public and refer the case to the Inter-American Court of Human Rights. The Court can issue injunctive relief, but has no enforcement powers against a recalcitrant government.

The Commission and Court have processed several cases involving labor rights, including the rights of migrant workers. Decisions must be searched and compiled manually, though there are secondary sources covering some specific subject matters. For example, the category of migrant worker rights is discussed in Lyon and Paoletti’s *New Rights for Migrant Workers and Their Families*. (Lyon and Paoletti, 2005). In a case against the United States, the Court issued an advisory opinion holding that undocumented immigrant worker are entitled to the same rights as other workers. (Inter-American Court of Human Rights, 2003). The Court’s decision rested on the non-

discrimination provisions of the Declaration and Convention, as well as the OAS Charter, the U.N. Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights. (The United States has not responded.) The detailed interpretations of this and other opinions by the Commission and the Court may provide candidate indicators for non-discrimination against immigrant workers, where ILO and U.N. jurisprudence leave gaps or ambiguities.

The Inter-American Commission's ambitious development of a methodology to construct indicators to measure compliance with human rights is discussed above in Section VIII.

5. African Human Rights System

The African Charter on Human and Peoples' Rights entered into force in 1986. Oversight of the Charter was vested in the African Commission on Human and Peoples' Rights. The Commission was authorized to write reports and issue recommendations in response to a complaint by one state against another.

In 1998, the African Union adopted a Protocol, which entered into force in 2005, establishing an African Court on Human and Peoples' Rights. In July 2008, a Summit of Ministers of Justice adopted a so-called "Single Protocol" to merge that court with the Court of Justice of the African Union, upon ratification by fifteen member states. Under the terms of the Protocol, individuals and civil society organizations can file complaints against a government alleging violations of human rights; but the Court will take the case only if

the government has made a declaration accepting the Court's competence under Article 30(f) of the Single Protocol.

The African Charter's provisions on labor rights are thin. Article 15 provides, in full: "Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work." Article 10 provides for freedom of association, "provided [the individual] abides by law." Article 2 provides for non-discrimination in the enjoyment of rights guaranteed in the Charter. By implication, then, discrimination pertaining to the right to work, discrimination pertaining to equitable and satisfactory conditions of work, and discrimination against equal pay, are violations of the Charter. Article 60 of the Charter provides that the Commission "shall draw inspiration" from international law on human rights, including the U.N. Universal Declaration and other instruments of the U.N. and of U.N. specialized agencies, of which the ILO of course is one. In principle, then, authoritative ILO and U.N. jurisprudence is one (though not necessarily decisive) source of precedent for interpreting the Charter.

There is no substantial African Commission and Court jurisprudence on labor matters – although, in the aftermath of the establishment of an African Court, the literature on the general features of the African Human Rights System was abundant. (See, e.g., van der Mei 2005; Pityana, 2004; Gumedze, 2005; Heyns, Strasser, and Padilla, 2003). The best overview of the history, institutions, and jurisprudence of the system is Heyns and Killander's *African Regional Human Rights System*, although their survey predates the Single Protocol. (Heyns and Killander, 2006).

6. National Interpretation of International and Regional Labor Norms

In some important areas, such as non-discrimination/equality, wages, hours, and safety and health, the ILO Conventions may be “fleshed out” not only by ILO, U.N., and regional bodies but also by domestic tribunals that internalize and interpret international instruments. There is increasing, though still relatively limited, interpretation of ILO Conventions by national courts, and the same can be said about the scholarly literature on the phenomenon. The best and most recent overview is Novitz (2009). For two more relatively recent overviews, see Beaudonnet (2005) and Thomas, et al. (2004); but since this is a fast-evolving subject, the 2009 Novitz paper is indispensable. (An even earlier, “classic” but now out-dated treatment of the subject is the anthology edited by Bronstein and Thomas (1995).) The interpretations of national courts have authoritative weight although of course they do not bind national governments other than the government whose courts issue the decision. The EU has made reference to ILO Conventions with increasing frequency. (Landau and Biegbeder, 2008). There is much academic writing about a recent high-visibility decision of the Supreme Court of Canada, drawing in part on ILO law and concluding that collective bargaining rights are included in the Canadian Charter of Rights and Freedom. (E.g., Fudge, 2010; Gravel and Delpech, 2008). One useful source that covers interpretations of ILO standards both by the ILO itself and by the European Union is Landau and Beigbeder’s *From ILO Standards to EU Law: The Case of Equality Between Men and Women at Work*. (Landau and Beigbeder, 2008). A good survey of domestic enforcement of the European Charter and therefore indirectly the ILO and U.N. instruments, is Gori (2005). Of course, for purposes of constructing our body of

indicators, these authoritative regional and domestic interpretations are only compelling to the extent that there is substantial agreement across regions and countries, or to the extent that we choose to “adjust” indicators based on regional or other clustering of countries.

XI. Comparative Labor Law and Comparative Legal Institutions

As already noted, the literature on comparative labor law, legal institutions, and labor relations may be vital to this project. First and most obviously, the exercise of measuring national compliance with international labor law requires, in the first instance, assessing the content of national labor laws and regulations. That is, the fundamental question is: Does national labor regulation match up to international standards? Formulating indicators that are suited to this task will turn in part on the characteristic structure of domestic legal rules and institutions, and on the sources for identifying that structure. That is the province of comparative labor law.

In principle, the ILO's supervisory machinery would carry out this exercise – comprehensively monitoring domestic labor laws and institutions, analyzing their structure, and measuring their compliance with international norms. However, the ILO does not conduct continuous, in-depth monitoring of countries' legal institutions, let alone their actual enforcement efforts. The ILO does not engage in on-site investigation unless invited by the host country. The Cambodia monitoring program is the exception that proves the rule. Meanwhile, “[a] glance at the reports of the [ILO] Committee of Experts on the Application of Conventions and Recommendation [shows] that ratified Conventions are being poorly enforced. Its mostly unfavorable comments have grown substantially over the years.... And it should not be forgotten that, in recent years, the trend has been towards shorter comments on each individual case.” (Wisskerchen, 2005, p. 261). While the ILO often cites the fact that the Committee on Freedom of Association has processed

some 2,500 cases since its formation, this means that on average the Committee decides approximately one case every four years for each member government. That figure contrasts with the thousands or tens of thousands of cases processed each year by domestic tribunals of individual countries. And, most of the Committee decisions do not announce new sub-rules on difficult questions of international labor law, but instead apply an already clearly settled rule (such as “anti-union discharges are prohibited” or “violence against trade unionists is prohibited”) to the facts at hand. The ILO supervisory machinery is not a high-powered, precision machine for generating common law jurisprudence on international labor standards.

It is telling, perhaps, that when the ILO itself gives technical assistance to countries in drafting their domestic labor laws, it looks not only to ILO Conventions and ILO Committee interpretations of those Conventions, but also “recurrently uses comparative law and practice; in particular of countries comparable with the one requiring advice.” (Bronstein, 2005b, p. 155).

Second, as noted above in Section II, where international labor law does not provide specific rules and standards covering particular subject areas within the broader rights and standards of interest to us, or where the international rules are ambiguous, the comparative labor regulation by national governments may be relevant. We might be able to discern a global consensus to fill the gap or resolve the ambiguity. Alternatively, we may be able to identify a best practice in defining and enforcing particular sub-rules. The much greater volume of cases decided at the domestic level means that domestic legal institutions generate more comprehensive and finely textured bodies of rules and sub-rules

than does ILO jurisprudence. Alternatively, if we cannot identify a consensus or best practice at the global level, we may be able to do so at the level of regions or other relevant groupings of countries.

Third, and closely related, Identifying such relevant groupings of countries by close examination of comparative labor law and labor relations may be useful to “adjusting” indicators based on the problems and constraints that are characteristic of different classes of labor law or labor relations regimes. This point is discussed in greater detail in subsection 2 below.

1. Overview of the Literature on Comparative Labor Regulation

There are innumerable treatises, books, journal articles, and papers on the national labor laws and regulations of individual countries and regions.

This Literature Review cannot cover all the relevant comparative material that will be useful for the research paper proper. The relevance of particular writing on comparative labor law may only become apparent as indicators are fashioned out of international sources, revealing specific gaps and ambiguities that might be resolved by recourse to global or regional patterns of national law. Instead, I will review the main categories of literature, identify some exemplary publications, and touch on some of the particularly significant questions and analysis covered by the literature.

In the field of comparative labor law, there are at least eight major types of primary and secondary publications.

1. Primary legal materials. Primary documents include national constitutions,

legislation, regulations, and judicial and administrative case decisions. The relevant compendia of primary materials, and the system of indexing or digesting, vary from country to country. Most countries now have online databases, although they vary widely in comprehensiveness and ease of searching. There are regional databases of domestic labor law, such as *Ley Laboral*, international databases purporting to cover all domestic labor and employment laws such as the ILO's Natlex (discussed above), and regional and international databases specific to particular rights and standards, such as the ILO's International Occupational Safety and Health Information Center (CIS), which lists the occupational safety and health institutions of various countries with links to the institutional websites.

Even when online databases purport to be comprehensive and up-to-date, however, they often are not. For some developing countries, even the best research strategy is still laborious and entails, first, finding the most recent, solid compendium or treatise and, second, manually updating the compendium by reviewing the complete list of new laws and regulations that post-date the compendium. In practice, it is generally most efficient to contact a reliable labor lawyer or labor law professor in the country in question to get on the right track (that is, to identify the authoritative indices of new laws), to confirm that one's search has been comprehensive and accurate, or to obtain the full set of updated laws and regulations directly from the specialist.

2. Understanding a country's overall legal institutions: Materials on country legal systems, sources, and research methods. While researching the labor and employment laws of individual countries or groups of countries, it is often useful, indeed necessary, to

consult rigorous guides to the country's overall legal institutions and to country-specific methods of legal research. This particularly applies to countries in which some or all labor rights and standards are enforced in courts of general jurisdiction (as opposed to specialized labor courts), or where decisions of specialized labor courts or administrative boards are appealable to courts of general jurisdiction. But it applies to all other countries as well, in that it is essential to understand a country's particular "sources of law" – that is, the hierarchy and interaction of laws of various types, such as constitutional law, statutory law, administrative regulations, judicial decisions, administrative decisions, collective bargaining agreements, and others, as well as the relationship between national law and the law of sub-divisions such as states, provinces, and cantons. The relationships among these various legal sources differ from country to country.

There are innumerable websites and materials relevant to this task. For most countries, though not for all developing countries, there are preeminent treatises that survey and explain overall laws and institutions. There are an increasing number of good English-language, country-by-country guides, mostly accessible at websites hosted by leading U.S. law schools. One of the very best of these is the GlobalLex website of the Hauser Global Law School Program of New York University School of Law. It contains country-by-country guides to researching the domestic law of nearly 150 countries, including links to relevant primary and secondary databases. GlobalLex also serves as a comprehensive portal to regional and international databases.

3. Collections of country monographs on labor law. There are collections of monographs that systematically summarize the labor laws and regulation of many

countries, giving citations to the primary legal texts. The leading such collection is the *International Encyclopaedia of Labor Law and Industrial Relations*. (Blanpain, 1977-2010). The *Encyclopaedia* is effectively a collection of country treatises, including for some countries the primary legal texts themselves. Like many other hard-copy legal treatises, it is in loose-leaf form to permit continuous updating. The most recent updating of the *Encyclopaedia* is February, 2010 (supplement no, 361). Not all of the country monographs are continuously updated, however – so the *Encyclopaedia* is at best a first step in country-level legal research.

A second publication of the same sort is *Employment and Labor Law: Jurisdictional Comparisons*, current as of 2007, containing concise summaries of the law for 25 countries, mostly in Europe and North America, but also Argentina, Brazil, Hong Kong, and South Korea. (Gaynor, 2007). A third, more limited collection, is *The Global Workplace* (Blanpain, et al., 2007), which has chapters, albeit less comprehensive than full-scale treatises, on India and China, as well as several advanced economies.

4. *Major journals and bulletins of comparative labor law and labor relations.* As sources of raw information and analysis of labor laws and enforcement institutions, the leading comparative labor law journals are gold mines. The three most prominent are: the *Bulletin of Comparative Labor Relations* (which, despite its title, is typically comprised of comparative labor law chapters and monographs rather than labor relations topics *per se*), the *Comparative Labor Law and Policy Journal*, and the *International Journal of Comparative Labor Law and Industrial Relations*. Frequently, these journals devote special issues to one area of labor law – such as gender equality, occupational safety and

health, and the like, or more specific sub-issues, sometimes defined by economic sector – with several chapters or articles devoted to country cases. They tend to focus on Europe and North America but are increasingly global in scope. For example, the Bulletin published a volume on *Labor Relations in the Asia-Pacific Countries*, which despite its title covered several Latin American as well as Asian countries. (Blanpain, 2004b). In addition, the ILO's *International Labor Review* frequently publishes papers that are more comparative than international in nature.

In addition to these flagship journals and monograph series on comparative labor law, there are many labor law journals based in individual countries which are valuable not only for the specific country information they routinely publish but also for the comparative (multi-country) papers they occasionally publish as well. The *Industrial Law Journal*, published by Oxford University Press and focusing principally on the U.K., is a leading example – but there are counterparts in every advanced country including of course the United States; in most emerging countries; and in many developing countries. Examples include the *Industrial Law Journal* (South Africa), *Analisis Laboral* (Peru), *Labor, Society and Law* (Israel), *Lavoro e Diritto* (Italy), and the *Berkeley Journal of Employment and Labor Law* (United States). Articles on labor law in individual or multiple countries are also published from time to time in the general law reviews; the comparative law journals not dedicated to any one field of law; and the international or transnational law journals. Public policy and human rights organizations, such as Human Rights Watch, also publish important monographs on comparative labor law.

There are, of course, many important journals in the field of industrial relations,

which frequently publish articles on comparative labor regulation, even if not always focusing with precision on labor laws and enforcement institutions. The leading journals based in the United States are *Industrial and Labor Relations Review* and *Industrial Relations: A Journal of Economy and Society*. There are counterpart journals in other countries, too numerous to recite here. The *Labor and Employment Relations Association Series* contains chapters on labor regulation and labor relations within and across countries.

Area studies journals such as the *Journal of East Asian Studies*, *Latin American Politics and Society*, and *African Development Review* also from time to time publish articles on labor regulation, and more frequently on comparative political regimes within regions. The latter topic is often treated in more general journals of comparative politics and economics, such as *Comparative Political Studies*, *Studies in Comparative International Development*, or the *Socio-Economic Review*, as well as in flagship political science journals such as the *American Political Science Review*.

Articles in other social science journals – particularly journals on labor economics and economic development – are particularly relevant for defining variables that may serve as well-specified indicators of outcomes. ILAB analysts will be familiar with these publications, such as the *Journal of Labor Economics*, *Labor Economics*, the *Monthly Labor Review*, the *Journal of Development Economics*, the working paper series of the National Bureau of Economic Research, the *IZA Discussion Paper Series* of the Institute for the Study of Labor in Bonn, Germany, as well as general economic periodicals, such as the *American Economic Review*, *Economic Journal*, *Quarterly Journal of Economics*,

Journal of Political Economy, and *Journal of Comparative Economics*. Again, there are area studies journals in the field, and important non-academic research centers such as the Inter-American Development Bank and the ILAB Economic and Labor Research Division.

Articles from the sources just listed are cited and discussed throughout this Literature Review. As the research paper itself is drafted, I will consult other articles in these and related journals discussing the construction of particular variables/indicators, adjustments for regional and regime types, and weighting and aggregation of indicators.

5. *'Preeminent' country treatises*. For each country, there is typically one or more "preeminent" treatise summarizing the country's labor law and legal institutions, often in great detail. In the best case, updated editions of the treatise are published with some frequency, or the treatise is supplemented annually with so-called "pocket parts" or supplementary volumes, or through digitized updates in the case of an online or electronic treatise. The treatises may be specialized by sub-field of labor regulation. So, for example, in the United States, the leading single volume treatise on the law of union organizing and collective bargaining is *Basic Text on Labor Law: Unionization and Collective Bargaining* (2nd Edition). (Gorman and Finkin, 2004). The most comprehensive multi-volume treatise on the subject is *The Developing Labor Law*, comprising thousands of pages, with annual cumulative supplements. (Higgins, 2006-2009). The counterparts for wage and hour law are *Employment Law* (Rothstein et al., 2010) and *The Fair Labor Standards Act*. (Kearns, 1999-2009).

A sample of exemplary counterpart publications for other countries includes: For South Africa, *South African Labor Law*. (Thompson and Benjamin, 1965-2010). For Argentina, *Manual de Derecho Laboral* (Grisolia, 2009) and *Derecho del Trabajo y de la Seguridad Social*. (Vazquez Vialard, 2008). For Brazil, *Curso de Direito do Trabalho* (Nascimento, 2009); *Comentarios a Consolidacao das Leis do Trabalho* (Carrion, 2009); and *Curso de Direito do Trabalho Aplicado*. (da Silva, (2009). For Chile, *Derecho del Trabajo y de la Seguridad Social*. (Noguer, 2009). For Japan, *Japanese Employment and Labor Law*. (Sugeno, 2002). For Peru, *Despido Arbitrario. Estudio Constitucional, Comparado y Jurisprudencial* (Figueroa Gutarra, 2009) and *Introducción al Derecho del Trabajo*. (Neves Mujica, 2009).

6. *Analytic country overviews*. There are books or articles that, while more analytic than the treatises (which dryly recite the legal rules), provide useful overviews of the legal terrain. Examples of this genre include:

For India, there is a cottage industry of publications flowing from Besley and Burgess's coding of state-by-state amendments to labor regulations. (Besley and Burgess, 2004). Besley and Burgess conclude that the relative strictness of labor regulation accounts on average for two-thirds of the variation in manufacturing growth across states and for large increases in urban poverty. Aghion et al. use the same dataset on cross-state labor laws and interact them with data on regulation of industry licenses. (Aghion, et al., 2008). They find that industries grew more slowly in states with more protective labor laws than those in states with weaker labor regulation.

However, Bhattacharjea closely scrutinizes the Besley and Burgess coding of state-

by-state labor amendments and finds pervasive errors, not least of which are the failure to take account of (1) litigation that held up or modified the actual implementation of the initial amendments; (2) other substantial variations in legal enforcement; and (3) severe conceptual problems in the weighting of legal provisions (for example, giving equal weight to trivial and important amendments). (Bhattacharjea, 2006). Bhattacharjea finds equally serious flaws in Besley and Burgess's statistical testing. In the course of decisively refuting Besley and Burgess's dataset and analysis, Bhattacharjea provides much useful information about the complexities of the India labor law system. The same can be said of the same author's analysis of minimum wage regulation in India. (Bhattacharjea, 2008).

For Israel, Mundlak gives an excellent analysis of the historical development and current state of Israeli labor law in *Fading Corporatism: Israel's Labor Law and Industrial Relations in Transition* (Mundlak, 2007), and in his more compressed article *The Israeli System of Labor Law*. (Mundlak, 2009).

For Indonesia, there is much useful information about domestic labor law in Caraway's *Explaining the Dominance of Legacy Unions in New Democracies: Comparative Insights from Indonesia*, and the same author's *Protective Repression, International Pressure, and Institutional Design: Explaining Labor Reform in Indonesia*. (Caraway, 2008; 2004). Also for Indonesia, Lindsey and Masduki's *Labor Law in Indonesia after Soeharto*. (Lindsey and Masduki, 2002). For the Philippines, Bacugnan and Ofreneo's *Development of Labor Law and Labor Market Policy in the Philippines*. (Bacugnan and Ofreneo, 2002). For Vietnam, Nicholson's *Vietnam's Labor Market: Transition and the Role of Law*. (Nicholson, 2002). For Malaysia, Ahmad's *Law and Labor*

Market Regulation in Malaysia. (Ahmad, 2002). For Taiwan, Wang and Cooney's *Taiwan's Labor Law: The End of State Corporatism?* (Wang and Cooney, 2002). For South Korea, Lee's *Law and Labor-Management Relations in Korea*. (Lee, 2002). For China, Joseph's article *Measuring Progress under China's Labor Law*. (Joseph, 2009), Däubler and Wang's article *The New Chinese Employment Law* (Däubler and Wang, 2009), and Zhu's *Economic Reform and Labor Regulation in China* (Zhu, 2002). Anita Chan's analysis of Chinese labor corporatism provides much information about the regulation of labor unions and collective activity. (Chan, 2008).

For Greece, see Koukiadis's essay *General Characteristics of Greek Labor Law*. (Koukiadis, 2009). For Turkey, Melda Sur's *General Framework and Historical Development of Labor Law in Turkey* (Sur, 2009) and the anthology *Flexibilization and Modernization of the Turkish Labor Market*. (Blanpain, 2006).

For Poland, Sewerynski's *Toward a New Codification of Polish Labor Law*. (Sewerynski, 2004). For Russia, Bronstein's *The New Labor Law of the Russian Federation*. (Bronstein, 2005).

Again, these are merely examples from a body of literature that is wide and deep.

7. *Comparative surveys and analysis*. There are works that are genuinely comparative, in the sense that they describe, compare, and analyze more than one nation's labor law system. Works in this category mostly focus on particular regions, but sometimes are broader in scope. There are innumerable works of this kind comparing the major countries of the European bloc. A very recent survey of European Works Councils sets that topic in the wider context of comparative collective bargaining systems in the EU.

(Blanpain, 2009c). An astute recent essay on comparative European labor law is Silvana Sciarra's *The Evolution of Collective Bargaining: Observations on a Comparison of the Countries of the European Union*. (Sciarra, 2007). Another useful comparative overview of collective bargaining systems in Europe is Keune's *Collective Bargaining Systems in Europe: A Schematic Overview*. (Keune, 2006).

A valuable comparative survey of the countries of Eastern Europe/Former Soviet Union is Casale's *Collective Bargaining and the Law in Central and Eastern Europe: Recent Trends and Issues*. (Casale, 2003). Another comparison of labor relations in the post-communist states is found in Kubicek (2004). For a more current comparison of Russia and Lithuania, see *Trade Unions' Law Evolution in Post-Soviet Countries: The Experience of Lithuania and Russia*. (Lyutov and Petrylaite, 2009). For comparative essays on the Eastern Mediterranean countries, see a 2009 symposium of the *Comparative Labor Law and Policy Journal*. (Koukiadis, 2009; Mundlak, 2009; Sur, 2009; Sural, 2009).

Good comparative surveys of Latin American labor laws, from the pre-1990 period through the early 2000s are Vega Ruiz's *La Reforma Laboral en America Latina: 15 Anos Despues – Un Analisis Comparado* (Vega Ruiz, 2005) and Frers' *Labor in Latin American and European Constitutions*. (Frers, 2004). A dated but still valuable comparative background source on the overall institutional framework of Latin American legal institutions, including labor law institutions, is Golbert and Nun's *Latin American Laws and Institutions*. (Golbert and Nun, 1982).

Among the more current and useful comparative treatments of Latin American law by political scientists – discussed in subsection 2 below, on the question of the usefulness of categorizing regime types within regions – are Murillo and Schrank’s forthcoming paper *Labor Unions in the Policymaking Process in Latin America*; Carnes’ unpublished paper on *Labor Markets, Worker Organization, and Variation in Labor Codes in Latin America* (Carnes, 2009), based on his 2008 PhD dissertation entitled *The Politics of Labor Regulation in Latin America* (Carnes, 2008); Anner’s *Meeting the Challenge of Industrial Restructuring: Labor Reform and Enforcement in Latin America* (Anner, 2008); and Cook’s *The Politics of Labor Reform in Latin America: Between Flexibility and Rights* (Cook 2007). While the primary focus of these books and papers is on analyzing the relation between political institutions and broad changes in labor law, they are also useful for the raw information they contain on labor laws. Anner’s paper is particularly noteworthy for providing data on enforcement activities for Brazil and El Salvador, including Ministry of Labor budgets as a percentage of overall national budgets, salaries of labor inspectors, average and total fines paid by employers, number of labor courts, remedial authority of labor courts, as well as persuasive anecdotal evidence of labor court judges’ pro-employer bias and labor inspectors’ corruption. A 2009 anthology on contemporary popular politics in Latin America gives good background on institutional transformations in collective representation in Argentina, Chile, Peru, and Venezuela. (Collier and Handlin, 2009).

A landmark volume published by the National Bureau of Economic Research (NBER) entitled *Law and Employment: Lessons from Latin America and the Caribbean* contains comparative analysis of labor regulation and its economic effects across Latin

America and the Caribbean, with more focused chapters on Peru, Colombia, Brazil, Argentina, Chile, and Uruguay. (Heckman and Pages, ed., 2004). Although the dependent variables in most of those case studies are various employment measures, the studies include much valuable data on both collective and individual employment regulation, including minimum wages and maximum hours, as well as legal-institutional features; and the employment variables are in some cases disaggregated by gender and other factors relevant to questions of non-discrimination. Two genuinely comparative chapters in that volume are *Measuring the Impact of Minimum Wages: Evidence from Latin America* (Maloney and Mendez, 2004), and *Labor Demand in Latin America and the Caribbean: What Does it Tell Us?* (Hamermesh, 2004). These works spawned many subsequent studies addressing the question whether wage and hour regulation impairs growth in output, employment, wages, productivity, and other variables. The recent literature is surveyed by Djankov and Ramalho in a paper on *Employment Laws in Developing Countries*. (Djankov and Ramalho, 2009).

As discussed above, Caraway constructs indicators for labor regulation for East Asia, and in the process provides information about the individual and collective labor laws of Cambodia, China, Indonesia, Laos, Malaysia, Philippines, Singapore, South Korea, Taiwan, Thailand, and Vietnam. For her information about labor law, Caraway relies heavily on a 2002 anthology by regional labor law scholars, including two essays that compare Indonesia, Malaysia, Philippines, Vietnam, China, Taiwan, and South Korea: *Labor Law and Labor Market Regulation in East Asian States* (Cooney, et al., 2002) and *What is Labor Law Doing in East Asia?* (Cooney and Mitchell, 2002). Sarosh Kuruville,

Christopher Erickson, and their collaborators have published many valuable descriptions and analyses of changing labor relations systems in Asia. (E.g., Erickson, et al., 2003; Kuruvilla and Erickson, 2002). A more recent comparison of Korean and Japanese labor regulation highlights political variables that may be candidates for indicators of effective enforcement. (See *Regulatory Contradictions: The Political Determinants of Labor Market Inequality in Korea and Japan*. (Yun, 2008).) Less current, but very useful for its analytic typology, is Woodiwiss's *Globalization, Human Rights and Labor Law in Pacific Asia* (Woodiwiss, 1998), which compares the Philippines, Hong Kong, Malaysia, Singapore, and Japan. A good sector-level comparison on labor relations in automobile assembly, including China, Korea, Japan, and other countries is found in Blanpain (2008b).

For Australia and the European model, see Forsyth's *The 'Transplantability' Debate Revisited: Can European Social Partnership be Exported to Australia?* (Forsyth, 2007).

For a comparison of the U.K., Australia, and New Zealand, see Pencavel's *The Appropriate Design of Collective Bargaining Systems: Learning from the Experience of Britain, Australia and New Zealand*. (Pencavel, 1999).

For a rare and current comparison of Southern African countries, see Olivier (2009).

8. *Country and multi-country overviews of particular rights, standards, and enforcement institutions.* There is a multitude of books, articles, and papers in this category. As noted above, the leading journals of comparative labor law frequently publish symposia with articles or chapters of this kind. Some of the most useful of these are noted below in subsection 3 on specific rights and standards.

2. Comparative Models of Labor Law, Labor Relations, and Political Regimes

We might choose to categorize countries or “adjust” indicators based on quantitative variables such as GDP per capita or labor productivity. But another critical question for our project is whether, alternatively or additionally, to categorize countries into distinct clusters based on their qualitative political regime, industrial relations system, or labor law models and, if so, which categories are most conceptually relevant. This subsection reviews literature that might help answer that question.

There are, of course, many systems for categorizing regimes in the literature of comparative labor relations, comparative labor sociology, comparative political science, and comparative labor law proper. The question is: which, if any, categorization schemes are relevant to our purposes? There are multiple potential purposes for grouping countries. We might group countries into categories that help us (a) identify the relevant consensus or best practice as to national rules within relevant clusters, in order to formulate indicators where international jurisprudence leaves gaps or ambiguities; (b) identify indicators that make conceptual sense (that is, that “fit”) within their particular legal-institutional context; (c) conduct intra-group comparisons among similarly situated countries to identify individual countries that most effectively enforce labor rights within the structural constraints of their regime type; and (d) conduct inter-group comparisons to identify the regime types that enable the most effective enforcement of labor rights. These purposes are analytically distinct even if closely inter-related.

Not only may different categorization schemes be relevant to these different

purposes, but different schemes may also be relevant to different institutions and rights or even to different individual indicators. For example, there may be distinct categories of labor inspectorates. As discussed below, researchers have recently drawn sharp distinctions between Anglo-American and Franco-Iberian models of labor inspectorates (Piore and Schrank, 2008); while others have used functional categories based on whether inspectorates use adversarial or collaborative methods, or some combination of the two (Pires, 2008); and still others categorize labor inspectorates according to whether they are reactive, programmatic, or strategic, and further refine those categories based on specific types of programmatic or strategic planning. (Weil, 2008; Weil, 2009). We will need to consider which, if any, of these categories should animate our indicators pertaining to labor inspectorates, and whether the indicators should vary across regime types.

On the other hand, entirely different category schemes may be relevant to measuring the degree of representativeness of labor unions or other bargaining agents. Comparative labor law scholars identify several categories of representational systems: for example, exclusive representation, pluralist representation, corporatist representation, neo-corporatist representation, and others. (See, e.g., Summers, 1998; Mundlak, 2007). Here too, it seems worth considering whether we should draw on these categories to fashion indicators of legal regulation of worker representation that are well-adapted to the country's particular system of labor representation or that assess the merits of the system itself.

Further, some comparative researchers categorize *overall* representation of workers along a different dimension, distinguishing among unitarist (non-union), single

channel (unions), dual channel (unions and works councils), and triple channel representation (unions, works councils, and codetermination). (See, e.g., Ross and Bamber, 2009; Addison, et al., 2010; Doellgast, 2009). And these categorizations may have implications beyond the direct measure of overall representation of workers. For example, the presence of works councils may be associated with a significant wage premium and narrowing of male-female wage differences; and the dual-channel combination of unions and works councils may increase those two effects. (Addison, et al., 2010, pp. 263-265; Gartner and Stephan, 2004). These overall representation structures may therefore be candidates for indicators not only of worker representation but of equality and acceptable wages as well. The same might be said for the categorization of labor relations systems based on enterprise, sectoral, regional, and national collective bargaining structures. (See, e.g., Doellgast, 2008; Block and Berg, 2009).

Researchers have proposed yet other qualitative dimensions for identifying regime effects on individual employment protections, such as hours, wages, and occupational safety and health. As discussed above, there is heated debate among comparative legal scholars over whether civil law governments (both in the metropolises and their former colonies) provide systematically greater (and more rigid) individual protections than do governments with common law traditions. (Cf. Botero, et al., 2004, with Deakin, Lele, and Siems, 2007).

If Botero, et al. are correct, then we might expect that governments in common law countries would need to exert greater enforcement effort to overcome path-dependent constraints in the area of individual employment standards. But given the crudeness of

these categories and the continuing contestation over their empirical significance, it seems unlikely they will serve our purposes, at least in the absence of some strategy for disaggregating these broad categories into more specific sub-categories. The same can be said of the large recent literature that uses two or three “varieties of capitalism” – “coordinated market,” “liberal market,” and for some researchers, “emerging economies” – to predict various dimensions of economic performance, including labor market outcomes. (See, e.g., Hall and Soskice, 2001; Batt, et al., 2009).

Botero et al.’s alternative, more refined categorization scheme – French civil law; German civil law; Nordic; Anglo-American common law; and state socialist – seems to move in the right direction, both in terms of the substantive categories and in terms of the methodology of focusing on intra-regional taxonomies.

Similar categories proved useful in the various European labor-indicator methodologies recounted above, either as presumptive ideal types or as statistically derived clusters. (See, e.g. Davoine, 2008; European Foundation, 2009; European Commission, 2008, all discussed above in Section VII.) However, these intra-European categorizations have a critical difference from Botero et al.’s. The latter are explicitly defined in terms of legal tradition and are meant to *displace* regime-categorization based on political systems, while the former rely on ideal types that derive, more or less, from the comparative political analysis of Esping-Anderson (1990), Ebbinghaus (1998), and others. And, we have seen that Botero et al.’s “legal origin” thesis has come under sharp and perhaps lethal empirical attack. The political regime analysis – based on qualitative comparative institutional analysis or on quantitative cluster analysis, or both – has proved

more resilient and illuminating.

Amable's state-of-the-art typology of capitalist political economies is conceptually well-grounded in complementarities among work and labor market institutions, social protection and welfare states, corporate governance, and product-market competition. (Amable, 2003). He finds five types of capitalism: market-based, social democratic, Continental, Mediterranean, and an Asian model.²⁴

But even Amable's categorization – akin to those used by the European Foundation and the European Commission – is inadequate to our task. These categorizations are predominantly meant to apply to advanced European regimes and no serious effort is made to translate them to other parts of the world. (The "Asian" model hardly suffices.) Their applicability even to the new, post-socialist member states of the EU is doubtful, as attested by the European Foundation's empirical work described above. Lane, for example, finds that the post-socialist European countries fall into three categories of institutionally coherent regimes: one that fits the continental model, a second that aligns with low-income, primary-commodities exporting countries exhibiting a hybrid state/market capitalism, and a third marked by high levels of state control and little privatization. (Lane, 2005).

Are there regime typologies, analogous to the categories of West European regimes, that will prove equally useful in distinct regions of emerging and developing economies: South America, Central America, Sub-Saharan Africa, North Africa, the

²⁴ In the Asian model, large corporations collaborate with the state, and labor is protected through retraining and career paths within relatively stable firms.

Middle East, East Asia, Southeast Asia, South Asia, or other appropriate regional categorizations? Or, are there regime typologies that cut across the regional grouping of developing and emerging states?

The non-European region for which the literature of regime types is most rich is Latin America. One crude axis of comparison in the comparative labor law literature counter-poses the “contractualist” model of North America (the United States and Canada) with the “corporatist” model of many Latin American countries. That dichotomy, however, was motivated by a debate between those who saw corporatist labor law as more depoliticizing than contractualist labor law (Gacek, 1994), and those who saw the reverse (Lothian, 1986) or who saw the virtues of some hybrid in which labor unions were unitary but independent of political control. (Lothian, 1995). That is, the dependent variable was degree of political activism by labor movements. While that question bears some relation to our concern about labor union freedoms, the relation is not sufficiently close to be of much interest. In any event, that debate turned on the particularities of only two qualitative case studies: the United States and Brazil.

More recently, comparative political scientists have produced an abundance of regime typologies for Latin America. Some of these typologies are explicitly constructed with a view to explaining variations in existing labor regulation and in inter-temporal trends in regulation. That is, the statistical modeling in these studies probes the economic, political, and institutional variables that cause or constrain changes in labor regulation. The studies may therefore serve some of the purposes identified above: providing guidance on the coding of labor regulations; identifying economic, political, and institutional

variables that might serve as indicators of regulatory compliance; and identifying similar variables that might either “excuse” a government’s weak compliance or “call for” greater enforcement efforts by a government.

In a 2005 paper, Murillo and Schrank seek to explain the surprising fact that most Latin American countries maintained or increased their collective labor protections in the 1980s and 1990s, even in the face of market liberalization, privatization, and deregulation (in non-labor matters). (Murillo and Schrank, 2005). They identify 13 instances of “union-friendly” reform and 5 instances of “union averse” reforms in that period. A legislative reform is coded as “union-friendly” or “union averse” relative to the baseline of the predecessor legal code that was amended by the new law. Murillo and Schrank do not disaggregate the collective labor code to examine changes in particular aspects of collective labor law, but instead evaluate the overall direction (friendly or averse) of legislative reform.²⁵ They focus only on legislative reform and not constitutional or administrative-regulatory change, on the ground that, first, constitutional and regulatory reform “are apparently less common than legislative reforms; second, they follow a different political logic; and third, they pose nearly insurmountable problems of missing data.” (Murillo and Schrank, 2005, p. 972 n. 1). These assumptions might be questioned. It is unclear whether more-easily-promulgated regulations are less numerous than legislative reform, and questionable whether tracking regulatory rules (which are contained

²⁵ Anner’s 2008 paper on *Labor Reform and Enforcement in Latin America* begins with a similar categorization of “union-friendly” vs “union-averse” labor reforms, coded with the same source material, but then breaks down the “core collective labor law reforms” into three indicators: “workers needed to form an enterprise union” (before and after reform); “collective bargaining right to information” (before and after), and “workforce needed to authorize a strike” (before and after). (Anner, 2008, tables 1 and 2).

in public records) is in fact intractable, however time-consuming it may be.

Murillo and Schrank put aside the dichotomy between “liberal market economies” and “coordinated market economies” on the ground that it is applicable only to advanced economies or, in any event, does not capture the key dimensions of Latin American political economies. (See, e.g., Hall and Soskice, 2001). Instead they distinguish between (1) historically “labor-mobilizing” political economies such as Argentina, Brazil, Peru, and Mexico, and (2) historically “exclusionary” (or “labor-repressive,” “elitist,” or “patrimonial”) political systems such as the Dominican Republic, El Salvador, and Paraguay. In a later paper, they refer to an exceptional third category (notably Bolivia and Nicaragua) which underwent “thoroughgoing social (or national) revolutions in the 1950s and 1970s respectively,” but they do not integrate that category into their statistical model. (Murillo and Schrank, 2010, p. 4).

The puzzle, then, is why both regime types strengthened their labor codes in a period of market liberalization in other spheres. Murillo and Schrank hypothesize that strengthening labor laws promised greater *political returns* to the first regime type, which needed to lock in the support of its core constituency (unions), which would otherwise feel disaffected by economic liberalization. At the same time, if the second regime type failed to strengthen labor laws, it faced the threat of increased *material costs* by means of U.S. trade sanctions under GSP.

Murillo and Schrank’s independent variables include “structural variables” (level of economic development and size of economy), “political factors” (alliances between political parties and labor unions, and alliances between organized labor and non-governmental

international labor rights advocates), “institutional variables” (labor-mobilizing versus labor-repressive regime types), and “conjunctural factors” (economic recovery, inflationary pressure, democratization, and trade openness). Notice that in the “democratization” variable, Murillo and Schrank introduce three regime categories – “democratic,” “semi-democratic,” and “authoritarian” – that may be orthogonal to their labor-mobilizing and labor-repressive categories, potentially generating a matrix of six regime types (or nine, if we include their nationalist-revolutionary category).

Murillo and Schrank’s statistical testing confirms the hypotheses set out above, linking labor law reform to the institutional legacies of labor relations and party systems: “On the one hand, unions in traditionally labor-mobilizing systems had both an incentive and the capacity to extract concessions from their traditional legislative allies when they were in power. On the other hand, unions in traditionally labor-repressive environments had both an incentive and the ability to turn to foreign allies who could tie market access to the defense or improvement of labor rights.” (Murillo and Schrank, 2005, p. 993). Although their dependent variable did not code for specific aspects of legislative reform, they note that “[i]n the labor-repressive countries, most of the reforms we have examined negatively sanctioned antiunion activities, improved job protection for union activists, and eased the procedures for union registration. In other words, they moved their industrial relations regimes toward compliance with the emerging international consensus on core labor standards that have increasingly been demanded by domestic labor and its transnational allies. In the labor-mobilizing countries, however, union-friendly reforms were more likely to increase the organizational resources of trade unions to help them cope with the

broader impacts of liberal market reforms.” (Murillo and Schrank, 2005, p. 994).

Among many other relevant insights, Murillo and Schrank’s analysis suggests that we must take care not to misattribute improvements in labor regulation to domestic political commitment and capacity-building, when in fact those improvements were brought about by international effort and resources. We might also expect differential ease in implementing different kinds of improvements in worker protection satisfying different indicators, depending on regime type. This might call for differential weighting schemes across different regime types.

In an unpublished paper based on an unpublished doctoral dissertation, Carnes uses a dataset of 23 labor law provisions across 18 Latin American countries. (Carnes, 2009; Carnes, 2008). He seeks to explain the variation in labor codes based on two “demand-side” factors and two “supply side” factors. The demand-side factors are the skill level in the workforce (proxied by average years of schooling in the workforce) and the organizational strength of labor (proxied by union density). Less-skilled workers have a weaker preference for labor protections, which they see as barriers to entry; while skilled workers seek greater labor protection to secure better working conditions in stable jobs. The supply-side factors are the type of political system (democratic, authoritarian, and semi-democratic) and partisan dynamics (left-party governance vs. right-party governance). Carnes therefore hypothesizes that labor legislation will be more protective where skill levels are higher and labor unions are sufficiently strong or linked with political parties under democratic conditions, since under these conditions labor unions can form political coalitions to maintain or improve worker-protective legislation.

Carnes creates a matrix of four “labor regulation regimes” – or rough ideal types – based on the two demand-side axes: (1) low-skill workforce and unorganized labor movement, (2) high-skill, unorganized, (3) low-skill, organized, and (4) high-skill, organized. Carnes expects regime 1 to be associated with minimal individual or collective regulation, or a “neoliberal” system. He expects regime 2 to be associated with more protective individual regulation but not collective regulation. Regime 3 is expected to yield little individual regulation but strong collective regulation, and Regime 4 to yield strong protection of both kinds.

Carnes’s dependent variables are therefore individual labor regulation, collective labor regulation, and the four combinations of strong/weak individual and collective regulation. Carnes’s independent variables are skill levels, political type, party governance, population (which he takes as a proxy for the reserve of underemployed workers), country income levels, growth, trade openness, and foreign direct investment.

Carnes begins with statistical testing of the individual labor regulation and collective labor regulation variables (but not the four combinations of strong/weak individual and collective regulation). He finds no support for the significance of political system (democracy or autocracy), but finds that individual protection is positively associated with both left-leaning and right-leaning governments. He cites salient cases of strengthening of collective rights under such autocratic regimes as the Argentine Peronist government and the Mexican PRI government. (See also Carnes and Mares, 2007). Left-leaning governance is not associated with stronger collective protections, though leftist governance in the preceding decade shows a greater lag effect of weakening of labor

protections than does prior rule by right-wing governments – which, he conjectures, is attributable to a reactionary backlash upon succession by a right-leaning government.

Since Carnes expects that the power of a stronger labor movement will be expressed through political parties, he adds interaction terms of the union density with democracy and left-party vote share. Democracy and union density now have positive association with individual labor regulation, as does high skill, although the interaction effects of democracy and unionization are negative. He conjectures that democracy enables all groups, not just unions, to realize their preferences. However, the interaction terms between democracy and unionization are statistically insignificant in the model of collective labor regulation. Thus, from modeling and testing the individual regulation and collective regulation dependent variables (but not the four combinations) Carnes concludes that skill level and union density have the expected effects, while political system has minimal effects and partisan variables have the strongest effect in associating left-leaning governments with individual labor regulation. However, left-leaning vote share has a *negative* association with collective labor laws. Finally, testing the dependent variables for the four regime types set out above, Carnes finds support for his hypothesized associations. That is, he concludes that the four regimes are “distinct analytic outcomes that correlate significantly with skill levels and union density.” (Carnes, 2009, p. 38).

If Carnes’s regressions are credited, then fundamental labor market and institutional factors may impose significant constraints on a regime’s capacity to carry out rapid changes in legal regulation along specific dimensions (i.e., reforms in individual regulation vs. collective regulation).

Carnes highlights his finding that partisan politics is not a significant predictor of labor regulation, which conforms with Botero et al.'s finding that political variables are not strongly associated with labor law. He conjectures that parties act opportunistically rather than programmatically, citing the oscillation between pro-regulation and anti-regulation administrations of the Argentine Peronists, the Mexican PRI, the Peruvian APRA, and the “underdeveloped,” elite-driven parties of Brazil. (Carnes, 2009, p. 38).

In a subsequent paper (Carnes, 2009b), Carnes emphasizes even more the point that “comprehensive reorientation” of each country’s labor regulation (the degree of, and balance between, individual and collective regulation) is “extremely rare.” In this paper, he locates the pertinent constraints in path-dependencies – that is, in the historical effects of the labor market variables identified in the earlier paper. The “initial labor law development” is rooted in the early industrial development of each country. The early labor code, based on “the capacity of key sectors to ‘hold up’ the economy or political systems,” is “cemented” in favor of those sectors, setting the “parameters of later labor law reform or modification.” (Carnes, 2009b, p. 5). Carnes defends this argument through extended historical case studies of Argentina, Peru, and Chile, showing that even after the 1980s – the period of economic crisis, dismantling of import-substitution strategies, and removal of government subsidies and protections of those key sectors – the basic contours of labor regulation were highly resistant to change.

Carnes maintains that his database is unique in disaggregating indicators of individual and collective regulation. His coding rules for 23 labor provisions are presented in his 2008 dissertation, which I am currently obtaining. His 2009 paper based on that

dissertation states that his coding is based on a 2005 Spanish-language comparative volume published by the ILO (Vegas Ruiz, 2005), and by his own reading of country sources. The ILO volume contains tables comparing legislation across Latin American countries for the pre-1990 period, the 1990s, and the current period (as of 2005). Until I obtain the dissertation's coding rules, I cannot evaluate Carnes's 23 indicators of labor regulation. It is apparent, however, that his indicators are based on formal legal codes and not on actual enforcement or outcomes.

As for the Asian region, Section V(4) above reviews Caraway's construction of labor indicators for the region. (Caraway, 2009). Recall that she constructs four sets of indicators: *de jure* employment protection, *de jure* collective protection, *de facto* employment protection, and *de facto* collective protection. She first arrays countries in a four-quadrant matrix for *de jure* protections (weak/strong, employment/collective), just as Carnes does for Latin America. She finds that all countries fit into either the top left quadrant (high *de jure* collective protection and low *de jure* employment protection) or the top right quadrant (high *de jure* collective protection and high *de jure* employment protection). However, in the analogous matrix for *de facto* protections, the Asian countries all fall into the lower left quadrant for weak *de facto* enforcement of collective rights and weak *de facto* enforcement of individual employment rights.

Contrary to Carnes's finding for Latin America, Caraway finds for the Asian region that both *de jure* and *de facto* protection of both individual and collective rights are positively correlated with political regime type, based on the threefold categorization of democratic, semi-democratic, and authoritarian. However, even in the democracies, the

gap between laws on the books and compliance in practice is “huge.” (Caraway, 2009, p. 174). She also finds that formerly repressive countries that have democratized – Indonesia, South Korea, Taiwan, and to a lesser extent the Philippines – “are consistently clustered together for both individual and collective rights.” (Caraway, 2009, p. 177). She interprets this as the legacy of protective individual regulation under authoritarian regimes that, once democratized, redraft their collective labor laws while retaining their individual protective regulation. The still-authoritarian regimes – China, Laos, Malaysia, and Singapore – also cluster together. The exceptional cases are Thailand (which falls into the cluster of authoritarian regimes) and Vietnam and Cambodia (which fall into the democratic cluster).

The exceptionalism of Cambodia is likely related to the U.S.-Cambodia bilateral agreement, monitored by the ILO. (Polaski, 2004). The case of Vietnam may be an instance of a semi-authoritarian variant of corporatism – that is, a regime that seeks to avoid labor unrest by affording some degree of autonomy and power to labor unions, which nonetheless remain official organs of the state – in contrast to China’s all-out repressive corporatism. This, in any event, is the argument made by Chan and Wang in their comparison of the labor regimes of China and Vietnam, based on careful interviews of workers and managers of Taiwanese firms operating in both countries. (Chan and Wang, 2004/2005; see also Chan, 2008).

The Chan and Wang analysis is convincing, and suggests that more careful attention to the variants in corporatist labor regimes may be useful, both in Latin America and Asia, and perhaps other regions. There is a large literature on types of labor

corporatism, some of which overlap or cross-cut one another: authoritarian corporatism, semi-authoritarian corporatism, bargained corporatism, bureaucratic corporatism, popular corporatism, societal corporatism, and neocorporatism, among others. (See, e.g., Chan, 2008; Schmitter, 1974; Frenkel, 1993; Legget, 223). These categories are sometimes applied differentially to post-communist and post-colonial regimes of different types, providing even more refined typologies. And, current literature on contemporary transformations in traditional corporatist structures adds further nuance. (E.g., Collier and Handlin, 2009; Cook, 2001). Maria Cook's analysis of labor reform in Latin America is particularly suggestive in this respect. Her historical case studies show the significance of corporatist legacies in Brazil and Argentina, where labor unions are sufficiently entrenched to participate in labor reforms that in some respects worked to their advantage, contrasting sharply with Peru and Chile; while Mexico and Bolivia, in light of their revolutionary legacy, resisted labor reforms altogether despite market liberalization on other fronts. (Cook, 2007). Categorizations along these dimensions are almost certainly relevant to assessing trade union freedom, since they are defined by the various degrees and kinds of state control of unions. They are likely to be relevant to other indicators as well.

Regime typologies in non-corporatist polities are less well analyzed. One attempt, now somewhat dated, is Woodiwiss's *Globalization, Human Rights and Labor Law in Pacific Asia*. (Woodiwiss, 1998). Apart from Singaporean corporatism, which he re-labels "enforceable benevolence," Woodiwiss identifies the "mendicant patriarchalism" of the Philippines, the "patriarchalist individualism" of Hong Kong, and Malaysia's "authoritarian patriarchalism." These refinements may also have value outside the Asian context,

perhaps refining Murillo and Schrank's catchall "labor-repressive patrimonialism" in Latin America.

Thus, while the categorization schemes canvassed above have various limitations – they are more fully specified for some regions than for others; there are no canonical taxonomies within specific regions or across regions; and existing typologies are not constructed with our precise purpose in mind (identifying countries with complementary, coherent labor-law and labor-enforcement institutional features) – it nonetheless appears that certain categories have potential utility for formulating specific indicators or sub-sets of indicators.

In reflecting on the usefulness of such categorizations, it is important to consider the literature that directly addresses the conceptual foundations of comparative labor relations, comparative labor politics, and comparative forms of capitalism. One foundational question is whether regime types are in fact characterized by institutional complementarities that place constraints on reform of particular components of the regime. For our research, the correlative question is whether there are regimes of which we can expect and therefore demand more effective reform and enforcement of worker protections.

Jackson and Deeg provide useful discussions of institutional complementarity and dynamism in alternative types of capitalism. (See Jackson and Deeg 2007, 2008, Deeg, 2007). Deeg writes that "[t]he core idea of complementarity is that the co-existence (within a given system) of two or more institutions mutually enhances the performance contribution of each individual institution." (Deeg, 2007, p. 611). He cites empirical studies

confirming the hypothesis that there is such complementarity among the following national institutions: industrial relations, corporate governance, training/skills, and finance; that such complementarity has performance effects on GDP growth, innovation, productivity, and employment; and that such complementarity can be (and has been) measured by regression and Boolean analysis.

The thesis of institutional complementarities has, however, its detractors. Apart from the unsettling debates over which sets of categories are most useful within particular regions, the utility of categorization by regime type is thrown into question by path-dependent influences on labor regulation or (the opposite phenomenon) politically contingent redirection of labor law. There are innumerable examples of both such influences, some of which are cited above in the summary of Carnes's discussion of partisan opportunism in labor regulation in Latin America. To take just one further example: the "Southern European Social Model" evinces several key features that seem entrenched longitudinally and cross-sectionally, including the model's comparatively high percentage of couples in which the man works full-time outside the home and the woman does not participate in the paid labor market. Greece, Italy, and Spain have the highest such rate in the EU-15. But Portugal, which otherwise fits the model, has an unusually high rate of female wage labor reaching back to the 1960s, "when massive, mostly male emigration, male conscription for the Colonial War (in Angola, Mozambique and Guinea-Bissau, 1961-1974) and industrial investments in sectors intensively employing female labor created a high demand for women workers in both rural and urban areas." (Karamessini, 2008).

Citing analogous examples, Crouch argues that the theory of institutional “types” and institutional “complementarities” underplays observed institutional recombination or incoherence, and the increased potential for innovation in an environment of institutional diversity and destabilization. (Crouch, 2005). One of the most sophisticated (and current) critiques of simplistic comparativism in industrial relations is Richard Hyman’s *How Can We Study Industrial Relations Comparatively?* (Hyman, 2009). As the title suggests, however, Hyman does not reject comparative categorization altogether. He instead emphasizes that the costs and benefits of comparative categorization must be judged by the purposes in using the categories; that parsimonious models are not always superior to more complex ones in serving the relevant purposes; that initially crude categories can be increasingly refined to suit the purposes at hand; that for many purposes functional equivalence between different institutions is more significant than equivalent institutional features; and that large-N variable-based research “is perhaps most valuable not for the modal cases which ‘fit’ a causal argument but for identifying ‘outliers’ in need of more detailed, qualitative investigation.” (Hyman, 2009, p.17) The latter point resonates with our project of specifying “triage” indicators that identify countries to which a body of more detailed, comprehensive indicators should be applied.

The question of complementarities is not just an abstract academic matter. If there are strong institutional complementarities in regimes of labor law and enforcement, then we can expect a successful change in one institution to precipitate changes in complementary institutions. Conversely, if we call on a government to make changes in one institution, we can expect systemic resistance to the extent that the institution is

embedded within a complex of complementary institutions. This may have implications for both the conceptualization and formulation of our indicators. If, for example, we assess a regime in which general legal enforcement, including labor-law enforcement, is primarily conducted through public inspectorates and public prosecutorates, we might expect a metric of private civil enforcement of worker rights to start at a lower absolute level and perhaps to show slower improvement than in a country in which private civil enforcement is already well-embedded in the legal regime. In the former regime, institutions for civil labor enforcement may not be complementary with institutions for public law enforcement – or, at least, this is a type of proposition worth considering.

Examples of path-dependency, contingency, and institutional recombination cited above raise the question whether qualitative regime classifications might most usefully take the form of a classification tree or dendogram. For an example of a dendogram applied to working conditions, see Davoine, 2008, Appendix B. That is, beginning with a set of broad categories that are empirically well-grounded in the existing literature, ILAB analysts over time might segment the categories into progressively more refined sub-categories, using the familiar criterion of maximizing inter-class and minimizing intra-class variance. So, for example, there is strong empirical support for the broad division of Europe into central and northern countries, on the one hand, and southern, on the other, for such matters as gender equality and work/family patterns. In the former category, for example, women's life-cycle participation rate in the labor market follows an M-shaped curve that peaks twice, with the valley at the age of approximately 30. The pattern in the Southern countries, on the other hand, is expressed in a "toppled L-shape" curve, peaking

at the age of labor market entry and then steadily declining. (Losa and Origoni, 2005).

Starting with this classification, however, the ILAB analysts will identify the path-dependent exceptionalism of Portugal's gendered division of labor, just noted, and create a new branch within the Southern European classification. In subsequent iterations applying the indicators, ILAB analysts will not start from scratch but instead will work within the classificatory framework (the classification tree) that guides the analyst to country-by-country baselines and constraints. For example, the analyst will understand that entrenched gender patterns in Greece, Italy, and Spain may call for stronger government efforts in the name of equality (measured by input or performance indicators), but may concurrently excuse weaker labor market results (measured by output indicators). And the analyst will demand and expect the converse from input and output indicators applied to Portugal.

The question, calling for more reflection, is whether the framework of a qualitative classification tree (that is, a dendogram) will add any value to the "decision tree" format proposed in that *Summary*. To formulate the question more precisely: Will relatively broad categories of regime types guide the analyst to patterns of labor rights compliance or non-compliance that would not be more readily observed by simple application of well-specified individual indicators on a country-by-country basis? The broad (but progressively more refined) classification tree might help indicate relevant contextual or historical dimensions – such as, to continue our example, the entrenched culture of "familism" in Southern European countries, with the salient exception of the Portuguese sub-branch explained by the path-dependent legacy of the 1960s labor market

transformations noted above. That is, the Portuguese exception might be *made* salient to the analyst by the sub-branch classification itself. Or, to the contrary, the classification scheme, even when progressively refined, might simply hinder the analyst from moving immediately to the more finely textured data and analysis of gender equality in the several Southern European countries, as accumulated by previous ILAB evaluations of each country.

3. Comparative Literature on Particular Standards and Institutions

Much of the discussion above touches on comparative labor law and labor relations literature addressing not only overall labor regulation but also particular rights and enforcement institutions. The following subsections survey materials pertaining to particular rights and institutions that have not already been reviewed above.

a. Freedom of Association and Collective Bargaining

In 2009, two Symposia of the *Bulletin of Comparative Labor Relations* addressed the comparative law of collective bargaining. The first focused on *The Modernization of Labor Law and Industrial Relations in Comparative Perspective*, including country reports on various dimensions of collective bargaining for South Africa, Tanzania, Namibia, India, Singapore, Hong Kong, Lithuania, Estonia, Hungary, Russia, Chile, Venezuela, Israel, Spain, the United Kingdom, Australia, and France. (Blanpain, 2009). The second, on *Employment Policies and Multilevel Governance*, was more Euro-centric. (Blanpain, 2009b). A recent symposium in the *Comparative Labor Law and Policy Journal* focuses

on a seemingly narrow question – whether domestic law permits employers to give “captive audience” speeches against unionization (as permitted in the United States, for example) – but that question is not only an important candidate indicator; it is also a window into other dimensions of national labor regimes, including those of Brazil, Argentina, Turkey and several advanced economies. (Filho and Lobao, 2008; Alimenti, 2008; Sural, 2008)

In 2007, the *Bulletin* surveyed the law of decentralized and centralized bargaining, with case studies of Korea, Taiwan, Australia, the United States, Japan, Italy, France, Germany, and the U.K. (Blanpain, 2007). In 2005, the *Bulletin* issued a volume on *Collective Bargaining and Wages in Comparative Perspective*, but this was again focused on Europe. (Blanpain, 2005).

In 2004 the *Bulletin* published a symposium containing crisp national reports on the topic of *The Actors of Collective Bargaining* (Blanpain, 2004), for Australia, Austria, Belgium, Canada, France, Germany, Great Britain, Israel, Mexico, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Taiwan, The Netherlands, Turkey, the U.S., and Uruguay. A 2003 volume ranged even more widely, covering collective bargaining and other topics in the Congo, South Africa, China, Korea, Turkey, Belarus, Romania, the Czech and Slovak Republics, Croatia, Serbia, Montenegro, Hungary, Poland, Bulgaria, Latvia, Estonia, Lithuania, Ukraine, Russia, Spain, and Sweden. (Blanpain, 2003).

b. Rights to Non-discrimination and Equality

In 2008, the *Bulletin of Comparative Labor Relations* devoted an issue to *New*

Developments in Employment Discrimination Law. The volume includes chapters on Taiwan (Chiao, 2008); Korea (Lee, 2008); Australia (Smith, 2008); Japan (Sakuraba, 2008); the United Kingdom (Barnard, 2008); the United States (Lieberwitz, 2008); Germany (Waas, 2008); and France (Lokiec, 2008).

A rare (and current) comparative analysis of Middle Eastern and Sub-Saharan law on gender inequality is provided in Baliaoune-Lutz and McGillvray's 2009 paper estimating the impact of gender equality on economic growth. Baliaoune-Lutz and McGillvray, 2009). They use panel data for 10 Arab countries and 31 Sub-Saharan African countries for the period 1974-2001. They find that increases in the ratio of female to male literacy rates has a statistically significant negative effect on growth, and that trade-induced growth is likely associated with greater gender inequalities.

Abramo and Valenzuela examine cross-country variation in women's labor market participation rates in Latin America. (Abramo and Valenzuela, 2005). Their conclusions cut against conventional wisdom, finding that in many countries female participation rates do not correlate with per capita GDP, and that there is no negative correlation between childbearing and participation rates. Instead, they surmise, "the boom in female participation in the labor market is a long-term trend that is attributable, among other factors, to better schooling, urban growth, declining fertility rates and new cultural patterns that favor the autonomy of women. Another important phenomenon is the substantial increase in the number of female-headed households, which is as high as 19 to 31 per cent of the total, depending on the country."

Recall that both the ILO and U.N. definitions of *employment* discrimination extend to

any form of *societal* discrimination that entrenches differential workplace outcomes. In other words, the sorts of variables cited by Balamoune-Lutz and McGillvray and by Abramo and Valenzuela (literacy, culture, schooling, fertility rates) may themselves be indicators of what the ILO and U.N. call “indirect” or “societal” discrimination. In principle, then, the indicator with the greatest weight should be the raw outcome indicator of women’s (unadjusted) employment and wages relative to men’s, since any social factor (control variable) accounting for a differential is likely to be a “cultural” or “institutional” factor that is itself a form of indirect employment discrimination. That being said, however, our task is to measure *government enforcement effort*, which is not itself reducible to these other forms of discrimination, even if they are cognizable grounds for violations, and even if the government is obligated by ILO Conventions and U.N. Covenants and Conventions to take measures to neutralize those other forms of discrimination. That is, government “effort” to correct such cultural and societal discrimination cannot be measured simply by raw outcome indicators.

The complexity of comparative institutional characteristics associated with workforce inequality is demonstrated in a series of very recent studies. A 2009 paper by de Ruyter, et al. examines the informal sectors in Indonesia, Brazil, India, and China. (de Ruyter, 2009). It cites data finding that approximately half of the workforce in Indonesia is in the informal sector, between 40 and 63 percent in Brazil, and as many as 90 percent in India, including the informal agricultural sector. Most micro-entrepreneurs and other employers in the informal sector are men, while most of the lowest paid industrial out-workers and home-workers are women. Although de Ruyter et al. emphasize government

non-enforcement of such non-core matters as minimum wages, weekly time off, holidays, physical security and transportation access for work in the informal sector, they also show that these issues are more acute for women and other vulnerable workers, leading them back to the core rights against discrimination and rights to organize, even if the collective organization takes forms other than traditional formal-sector unionization.

While the de Ruyter et al. paper focuses on inequality in the informal sector, it is one of many papers making the comparative case that general inequality in wages, and non-enforcement of the minimum wage in particular, works to the detriment of women and other vulnerable workers. For one restatement of the comparative evidence, see *The Minimum Wage as a Tool to Combat Discrimination and Promote Equality* (Perspective, 2003), finding across a range of developing countries that minimum wage regulation serves as an anti-discriminatory measure. (Estrin and Mickiewicz, 2009).

However, while de Ruyter et al. suggest that a larger informal sector is detrimental to women's ascension to employer status, a November 2009 study comparing 40 countries finds that female entrepreneurship is promoted by a larger informal *financial* sector and is impeded by a larger formal *public* sector. Care must therefore be taken in using crude institutional indicators (e.g., relative size of the informal sector) as proxies for the equality norm. More refined institutional variables are warranted.

The same might be said for indicators based on comparative studies of labor market segmentation. A 2010 case study from Central Europe analyzes the wage premium for full-time workers over part-time workers, finding that the wage premium for men is fully explained, while the premium for women is not explained by control variables;

and for both genders, terms of employment are better for voluntary part-timers compared to involuntary. (Krillo and Masso, 2010). Again, indicators must take care to distinguish types of part-time work, if we wish to use those indicators as indirect measures of gender inequality.

A rigorous analysis of the U.K. labor market, using the Oaxaca Decomposition method, finds discrimination in the wage term between immigrant and native workers with equivalent human capital. (Anees, 2009). This points to the potential significance of human capital indicators not just as outcome indicators but also in the treatment of input indicators as well. That is, wage terms between majority and minority workers cannot be taken as naïve indicators of equality.

c. Acceptable conditions – Minimum Wages

Anker's *A New Methodology for Estimating Internationally Comparable Poverty Lines and Living Wages* (2005) analyzes alternative measures of acceptable wages, usefully supplementing the river of literature flowing from Heckman and Pages (2004) and the ample ILO material on the same question, both discussed above. Saget's *Fixing Minimum Wage Levels in Developing Countries* is a good overview of both the institutional and substantive dimensions of the problem. (Saget, 2008). As a case study on the subject, Bhattacharjee gives a very useful analysis of wage regulation in India. (2008).

In a study on *Minimum Wages, Labor Market Institutions, and Youth Employment: A Cross-National Analysis*, Neumark and Wascher make sophisticated use of cross-

sectional time-series data, and find that the disemployment effects of minimum wages are greatest in countries with the weakest labor market regulation, while stricter employment protections and active labor market policy offset the effects of higher union coverage and other more restrictive labor standards. (Neumark and Waschler, 2004). Apart from these analytic conclusions, the study contains a useful appendix setting out the “definition of the minimum wage variable” and the “method of setting” minimum wages in 17 countries, and a bibliography of sources on minimum wage regulation, current as of 2004.

A 2009 paper by de Ruyter, et al., examines remuneration, focusing mainly on the informal sectors in Indonesia, Brazil, India, and China. (de Ruyter, 2009). This paper, which also addresses questions of equality, is discussed in the previous subsection. Sagat’s paper, just mentioned, makes the general case that minimum wage machinery is relevant not only to acceptable wages, but also to equality. (Saget, 2008).

d. Acceptable conditions – Hours of Work

Frey’s *Diagnostic Methodology for Measuring Decent Work*, presented at a 2009 ILO Conference, provides a general overview of the subject, together with a valuable case study of enforcement problems in Honduras. (Frey, 2009). On the general subject of acceptable hours, the work of the ILO secretariat seems to dominant the field. (In fact, Frey’s analysis draws heavily on ILO databases and reports.) The most comprehensive treatment of comparative law on hours regulation and actual practice is Lee at al.’s *Working Time Around the World: Trends in Working Hours, Laws and Policies in Comparative Perspective* (Lee, et al., 2007), discussed above in Section IX(4). Lee and

McCann's methodological and conceptual treatment of the subject is found in a 2008 book chapter. (Lee and McCann, 2008). Thorough tabular data on work hours can be found in the *Working Conditions Report* (ILO, 2008j), published by the ILO Conditions of Work and Employment Program. Less current is an anthology entitled *Flexible Work Arrangements: Conceptualizations and International Experiences* (Zeytinoglu, 2002) which provides an overview of overtime laws and other legal regulations bearing on flexible work time, focusing primarily on European countries. At the intersection of maximum hours and occupational safety, Spurgeon's *Working Time: Its Impact on Safety and Health* is a conceptual and global survey, but provides some useful citations to comparative domestic law on both subjects. (Spurgeon, 2003).

e. Acceptable Conditions - Occupational Safety and Health

The United States system of "OSH Federalism" provides a potentially very useful model for assessing country-wide effective enforcement of occupational safety and health norms. Section 18 of the Occupational Safety and Health Act provides that the federal Occupational Safety and Health Administration (OSHA) will relinquish its authority to regulate workplaces in a state that provides sufficient protection of workplace safety and health. The state must first put in place "all the structural elements necessary for an effective occupational safety and health program," including legislation, procedures for standard setting, enforcement, appeal of citations and penalties, and a sufficient number of competent enforcement personnel. (OSHA, 2010, p. 1). In order to gain final approval, the state must afford worker protection that is "at least as effective as the protection provided

by the federal program.” (OSHA, 2010, p. 1). Among other things, the state must “meet 100 percent of the established compliance staffing levels (benchmarks)” and must participate in OSHA’s computerized inspection data system. Federal regulations establish “criteria” and “indices” for assessing state programs. (19 CFR §§ 1902.3, 1902.4). The regulations also authorize the federal OSHA administrator to formulate additional indicators.

In sum, the federal OSHA monitors state-level regulation and applies indicators to ensure that the state “effectively” enforces safety and health norms. This is a precise analogue to our project. For many years, the federal OSHA did not actively audit state regulation. Recently, however, it has begun doing so, starting with a detailed *Review of the Nevada Occupational Safety and Health Program*, published in October, 2009. (OSHA, 2009). The *Review* made more than fifty detailed recommendations to correct areas of ineffective enforcement. These findings and recommendation are much more specific than the “criteria” and “indices” set forth in the federal regulations. They provide candidate indicators for elements of country norms and institutions necessary to effectively enforce workplace safety and health.

OSHA is now conducting audits of the other 24 states with approved state OSH programs. In October, 2009, the Acting Assistant Secretary for OSHA sent interim guidance to OSHA regional administrators “about the monitoring tools available to them and encouraged more in-depth investigation of potential problems.” (OSHA, 2009b). I am currently obtaining the guidance, monitoring tools, and auditing protocols.

The ILO’s *Encyclopaedia of Occupational Health and Safety* provides a

comprehensive starting point on the substantive subject, though unfortunately not on the comparative *law* on health and safety. (ILO, 1998). A current treatment of the subject is Hilgert's *A New Frontier for Industrial Relations: Workplace Health and Safety as a Human Right* (Hilgert, 2009), but unfortunately his essay focuses more on the history of the concepts at the international level and less on comparative national regulation.

Fortunately, the specialized journals in the field – such as the *International Journal of Occupational and Environmental Health*, the *International Journal of Occupational Health and Safety*, the *International Journal of Occupational Safety and Ergonomics*, the *International Journal of Health Services*, and others – contain many articles on comparative or country-specific occupational safety and health law, institutions, enforcement, and practices. To give just a few examples: Delclos et al. provide a global survey of institutional competencies in occupational health (Delclos et al. 2005); Kamuzora gives a synopsis of the deficiencies in occupational health policies in developing countries (Kamuzora, 2006); Naidoo et al. examine programs for occupational health in several Southern Africa countries (Naidoo, et al., 2006); Mock et al. report on a large-sample household survey of occupational injuries in Ghana (Mock, et al., 2005); Bhuiyan and Haq survey workplace safety and health in Bangladesh (Bhuiyan and Haq, 2008); Allen describes the challenges faced by Brazil's labor inspectorate (Allen 2004); Zubieta et al. recount international efforts to address hazardous conditions faced by Mexican miners (Zubieta et al., 2009); Manothum et al. assess participatory strategies to enforce health and safety norms in Thailand (Manothum, et al., 2009); and Chen and Chan give an overview of occupational safety and health in China's state-owned enterprises. (Chen and

Chan, 2010). An earlier Symposium issue of the *International Journal of Occupational and Environmental Health* covered many other aspects of workplace health and safety in China. (Brown and O'Rourke, 2003; O'Rourke and Brown, 2003; Su, 2003; Pringle and Frost, 2003).

The specialized research increasingly examines particular sectors, occupations, diseases, or accidents – but articles of that type occasionally provide useful descriptions of one or more countries' overall occupational safety and health regime. For example, in the course of analyzing Costa Rica's national reporting system for occupational injuries, Buchanan et al. give an overview of that country's occupational safety and health institutions. (Buchanan et al., 2006). An international overview of safety in the construction industry provides country-specific information about more general safety regulation. (Murie, 2007).

f. Labor Inspection and Labor Courts

In its 2006 *Report on Labor Inspection*, a committee of the ILO Governing Body stated, "There is widespread concern that labor inspection services in many countries are not able to carry out their roles and functions. They are often understaffed, underequipped, under-trained, and underpaid." (ILO, 2006d, p. 4).

Nonetheless, in the last half-decade, there has been something of a revival in the study of comparative institutions and methods of labor inspection – and, according to the key researchers, a revival in labor enforcement institutions themselves. (See, e.g., Schrank, 2009; Piore and Schrank, 2008; Weil, 2008; Schrank and Piore, 2007; Pires,

2009; Pires, 2008). They attribute this revival to at least three different real-world and academic developments. First, with the relative waning of the deregulatory project of “neoliberalism,” some governments have devoted new efforts and attention to public strategies for responding to the labor market strains of competitive globalization. These efforts include fortification of labor inspectorates, in terms of both resources and strategic planning. The researchers cite France, Spain, Morocco, Argentina, Brazil, Chile, the Dominican Republic, and other Latin American countries in this respect. (Pires, 2008, p. 199.) Second, labor rights proponents have adopted strategies of pressuring global producers and distributors to monitor their transnational supply chains by means, in some instances, of novel forms of inspection and remediation of suppliers’ working conditions and legal compliance. In some cases, these forms of “private” regulation have inspired public innovation; in other instances, new public initiatives actively seek to enlist the private regulatory consortia and stakeholders as partners in enforcing public norms. And third, students of regulatory theory and institutional design have paid increasing attention to modes of regulation that do not depend solely or even principally on command-and-control styles of punitive or coercive enforcement. These theorists instead identify (and wish to encourage) the emergence of regulatory architectures that combine local, decentralized experimentation and knowledge with centralized mechanisms that provide incentives for local actors to identify and disseminate best practices. Proponents of these models see innovations in labor inspection as one instance of the broader template of regulatory innovation.

The work of Michael Piore and Andrew Schrank is animated chiefly by the first and

third of these developments. They see two broad categories of labor inspection: the Anglo-American model of adversarial, punitive enforcement, and the “Latin” model, in which labor inspectors act as collaborative “consultants” with the firms they inspect. Piore and Schrank define “the Latin world” broadly to include French, Spanish, and Portuguese inspectorates and their colonial transplants throughout Latin America. In his most recent paper, Schrank has labeled this the “Franco-Iberian” model of labor law enforcement. (Schrank, 2009).

Rather than deploy punitive sanctions, the Latin inspectors seek to promote better production methods that enable well-intentioned managers to avoid the trap of squeezing labor as a response to market pressure. And Latin inspectors are *empowered* to distinguish well-intentioned but poorly trained managers from their ill-intentioned competitors, since Latin inspectors are legally authorized to exercise discretion in their response to the particularities of workplaces and sectors. Such discretion is well-suited to their mandate to enforce a wide range of labor laws (wages, hours, health and safety, discrimination, and in some instances collective bargaining rights), unlike the United States’ fragmentation of jurisdictional authority to enforce these various rights (through various federal and state wage and hours divisions, OSHA inspectors, EEOC attorneys, NLRB regional officials, and so on). Since the Latin inspectors cannot possibly enforce all of these rights and standards with equal force, they necessarily prioritize their efforts, working with enterprises to resolve the most significant problems associated with their mode of production and even with the particular phase of the business cycle or other economic variations. For example, there may be tradeoffs between aggressive

enforcement of standards and rates of employment; so inspectors may be less aggressive in times of high unemployment.

More affirmatively, Latin inspectors are often legally required to develop “compliance plans.” They must therefore act as promotional “pedagogues,” developing plans that best suit the individual enterprise. They are “responsive” and “flexible” regulators, rather than mechanical enforcers of rigid, one-size-fits-none rules. The Latin inspectorates therefore point towards a regulatory model of “managed flexibility,” in Piore and Schrank’s phrase. Indeed, they argue that the Latin labor inspectors may be more efficient than the market, in that the inspectors are the economic actors with the greatest knowledge of both the problems facing a wide array of enterprises and the best solutions to those problems. Their institutional role enables them to diffuse those best practices across enterprises and sectors.

Note the irony here: Where Piore and Schrank see the Latin (civil law) system as the locus of flexible, efficient regulation, Botero et al. brand the civil law tradition as just the opposite – rigid, inefficient, and unable to adapt to economic circumstance. (See Section V(1) above.) Piore and Schrank’s analysis therefore offers one mechanism that might explain the Cambridge researchers’ empirical finding that civil law systems do not generate worse economic outcomes than common law systems.

Piore and Schrank recognize the obvious danger with such a flexible model. In vesting so much discretion in front-line bureaucrats, there is great potential for inconsistent treatment, errant decision-making, and out-right corrupt behavior. (They hasten to add, however, “that in Latin America outright corruption is less common or consequential than is

generally believed, largely because in most countries inspectors are not in a position to levy fines or penalties.” (Piore and Schrank, 2008, p. 9).)

Piore and Schrank offer some cautionary words about the construction of quantitative indicators of labor inspectorate effectiveness. Since this issue may be critical to our project, it is worth setting out their analysis in some detail. They first recount the story of a French labor inspector faced with three sets of companies under her jurisdiction: a large manufacturer with contentious relationships with a union; a cluster of small garment factories employing undocumented immigrants and having many legal violations; and a cleaning company with a scattered, non-union workforce. She chose, wisely in Piore and Schrank’s view, to focus on the cleaning company, since the union could protect workers in the first company and any effort to mediate the labor conflict would have taken too much of her limited time; and enforcement of standards in the garment sector would have simply caused the closing of the shops. She could therefore best help the scattered, non-union workers in the cleaning company, which would not go out of business at its fixed locations. Drawing on this example, they write:

In labor inspection, it is even more difficult [than in street-level policing] to identify relevant quantitative indicators. One measure often proposed is the number of violations detected or sanctions imposed, but in our [French] triage example, this would have encourages the inspector to focus on the small garment shops which would most likely have simply closed down and opened for business elsewhere, rather than the immobile – and therefore potentially accommodating – contract cleaner. But measures focusing on the number of shops visited or even the number of their workers would have encouraged the inspector to concentrate on the garment shops as well. Alternative measures focusing on labor/management conflict would have led the inspector to focus on the firms with the best-organized and most militant unions, where the workers were already better able to defend themselves and therefore in less need of the inspector’s support than their counterparts at the contract cleaner.

These examples point to a more general pattern. Quantitative performance standards tend to create perverse incentives. Productivity measures that emphasize the number of inspections carried out give inspectors an incentive to execute a multitude of cursory inspections rather than a smaller number of high-quality inspections. Similarly, productivity measures that emphasize the number of sanctions issued foster an overzealous approach, which might well compromise the interests of both the workers and their employers.

It becomes even more difficult to conceive of relevant quantitative indices when administrative control over lay-offs is added to the picture or, as in Latin America when the inspector may play a critical role – but one that is time-consuming and difficult to quantify – in upgrading the production capabilities and business strategies of the firms in question. How does one measure and evaluate the inspector's ability to: make the proper trade-off between the quantity and quality of the available job opportunities; adjust his/her calculations in the light of a shifting political context (as, for example, the one created by demonstrations in 2006 against the French Government's measures affecting young workers in the labor market); build relationships between employers and publicly subsidized training programs?

(Piore and Schrank, 2008, 12-13).

Note, however, that Piore and Schrank's skepticism is directed at a category of quantitative indicators that is not quite the same as ours. They are concerned about organizational control of the discretion of individual inspectors; they therefore reflect on the kinds of indicators that higher-level officials in the inspectorate might use to uniformly evaluate the performance of *individual* front-line inspectors. Our goal, by contrast, is to fashion quantitative indicators of the performance of the inspectorate as an *institution*. True, some of Piore and Schrank's concerns about quantitative indicators apply as well to our project – for example, the danger of encouraging a greater number of low-quality inspections, or encouraging profligate imposition of sanctions rather than targeting inspections guided by a strategic plan.

But Piore and Schrank propose several ameliorative or prophylactic policies to constrain the discretion of individual inspectors in conformity with strategic planning by inspectorate officials – and *these* policies might themselves be measured by well-specified, quantitative indicators. In any event, it is worth exploring the possibility. They recommend three such policies. First, higher-level managers should gain greater control over the inspectorates' "organizational culture" – including norms that constrain the discretion of frontline inspectors – by appropriate recruitment and continuous training strategies. Piore and Schrank cite the Dominican Republic's strengthening of qualifications, training, and meetings that encourage the kind of *esprit de corps* that is so characteristic of the French inspectorate. (Piore and Schrank, 2008, p. 15). We might be well-advised, then, to fashion indicators pertaining to qualifications and ongoing training of inspectors.

Second, they recommend that inspectorates group cases into relatively homogeneous categories to encourage sub-cultures of consistent treatment of similarly situated firms and workforces. There are many examples of specialization by enterprise field, sector, size, or location in existing inspectorates. The regional offices of the Guatemalan inspectorate, for example, concentrate on the major industries in each region – *maquiladoras*, family farms, plantations, and so on. (Piore and Schrank, 2008, pp. 16-17). The basic distinction is this: Franco-Iberian inspectorates tend to enforce the entire, heterogeneous labor code to homogeneous groups of firms; Anglo-American inspectorates apply particular laws to heterogeneous firms. For the reasons set out above, Piore and Schrank see the former as the more rational model. This analysis suggests that we might

be well advised to fashion indicators of whether inspectorates are structurally designed to assign specialized inspectors to homogeneous or similarly situated enterprises.

Third, they recommend that channels of popular participation, especially access to inspectorates by workers, be opened, to impose an external constraint on inspectors' discretionary powers. "By consciously advertising their existence, making their presence felt in provincial towns as well as capital cities, and actively courting such participation, labor ministries can go a long way toward making labor inspectorates publicly accountable." (Piore and Schrank, 2008, p. 18). This too is a dimension that, conceptually, might be subject to quantitative metrics, however challenging may be the relevant data gathering.

Fourth, they point to the various kinds of healthy or pathological relationships and patterns of communication among the three relevant tiers – political officials, middle managers, and frontline inspectors. This may entail mechanisms to identify and codify the tacit understandings on which inspectors based their decisions, in order to more clearly distinguish "objective," technical judgments from "value-driven" tradeoffs that should be guided by political processes. Many models of appropriate deliberative mechanisms (in this case, bringing together actors from all three tiers for periodic disciplined and transparent comparisons of performance) have been examined in a variety of regulatory fields in the very extensive literature on "responsive regulation" and "experimentalist governance." (See, e.g., de Burca, 2007; Sabel and Zeitlin, 2008). It may be worth exploring whether the various mechanisms have common design features that are subject to quantitative metrics.

Roberto Pires has extended this line of research through cases studies of inspection across various sectors of the Brazilian workforce. His fundamental conclusion is that inspectors are most effective when they do not rely exclusively on either a sanctions-driven model or a pedagogical strategy, but effectively combine the two approaches. (Pires, 2008). While this conceptual argument is not new, Pires's work, including his 2006 MIT doctoral thesis, provides a wealth of detail about the Brazilian Department of Labor Inspection. (Pires, 2009; Pires, 2008; Pires, 2006).

David Weil argues that traditional methods of labor inspection, which presume that workforces are concentrated in large factories, are undermined by four broad changes in the employment relationship: increases in subcontracting and independent contracting, which stretch already limited inspection resources; the long-term decline of unions and of the standard-enforcement activities they can provide; the changing sectoral composition of work, from factory jobs to often decentralized service workplaces which are embedded in a variety of ownership and supply configurations; and technological changes that cause new workplace risks and, at the same time, more fluid work design. (Weil, 2008, pp. 351-352).

Weil identifies four central principles of "strategic enforcement" by labor inspectorates: *prioritization* of sectors and workplaces, from worst to best; focusing on the projection of *deterrent* incentives across workplaces, rather than exclusively on the direct effects on inspected workplaces; emphasizing *continued* compliance, rather than time-limited compliance at the time of inspection; and achieving systemic effects rather than *ad hoc* solutions. Note that Weil's analysis does not celebrate the Franco-Iberian model to quite the degree that Piore and Schrank do. The principles of deterrence and systemic

impact are challenges for the Latin model as they are for the Anglo-American sanctions-based model as well.

Weil's four principles pose obvious problems for complaint-driven models of inspection. (Weil, 2008). He sets out empirical data from the United States proving the point. Complaint-driven OSHA investigations are weakly related to underlying problems, and FLSA investigations are unrelated to industry-level conditions. He therefore recommends strategic approaches to complaint-driven investigations. Inspectorates should be aware of the empirical relationship (or lack of relationship) between the volume of complaints and the distribution of workplaces (across and within industries) evidencing the underlying problem.

Weil's four principles also have implications for strategic enforcement in programmatic investigations (i.e., investigations initiated by the inspectorate). He finds that inspectorates tend to prioritize across industries but not within them. Inspectorates rarely use deterrence as an explicit norm in allocating inspection resources. Inspectorates often undertake subject-specific "sweeps" that are not temporally sustained. And the focus tends to remain on remediation by individual workplaces rather than through systemic measures.

Weil's recommendations for strategic inspection may point toward useful indicators for effective enforcement by labor inspectorates. He recommends that inspectorates: carefully map the location of underlying problems across and within industries; work closely with third-parties such as unions and labor advocates (see also Weil, 2005); respond to complaints in ways that are not reactive but instead seek to achieve regulatory

priorities; use leveraging strategies that target pressure points in supply chains and ownership structures, exemplified by the U.S. Department of Labor's use of its "hot goods" powers (see also Weil and Mallo, 2007); and combine decentralized strategies and knowledge about local conditions with centralized evaluation of resource allocation based on compliance impact studies. In his most recent paper, *Regulating Vulnerable Work: A Sector-Based Approach*, Weil applies these principles to several sectors in which vulnerable workers are concentrated, showing that in many instances there are "centralized" owners, purchasers, clients, brands, or production coordinators who, if properly targeted by inspectors, can indirectly ensure compliance by decentralized affiliates, franchises, suppliers, and sub-contractors. (Weil, 2009). These leveraging techniques are more specific components of well-designed strategic programming. It might be possible to design indicators that view such techniques as evidence of the underlying concept of effective strategic deployment of labor inspection resources.

These relatively sophisticated approaches to the subject may supplement candidate indicators draw from the more conventional treatments of the subject of labor inspection. The latter comprehensively set out the elements of an effective labor administration system, from which we can construct baseline indicators. These include Albracht's *Integrated Labor Inspection Systems* (Albracht, 2005), Von Richtofen's *Labor Inspection: A Guide to the Profession* (Von Richten, 2002), and the just-published *Fundamentals of Labor Administration*. (ILO, 2010). Best practices in labor inspection, at global and regional levels, are also noted in the periodic *Forum* of the International Association of Labor Inspection and in that organization's Conference Reports. (International Association

of Labor Inspection, 2001-2008).

While the comparative research on labor inspectorates is relatively rich, the same cannot be said of the literature on labor courts, labor boards, ombudsmen, and the more general functions of Ministries of Labor. On these issues, it is necessary to rely on country-specific treatises, articles, and books. The country-specific literature on labor courts and agencies in advanced economies is vast. In the United States, for example, the actual functioning of the National Labor Relations Board is a common subject in the leading labor law journals; and the same is true of the literature for other advanced and emerging economies. For developing countries, however, the relevant literature comprises mainly dry recitation of the formal structure and authority of institutions, with little information or analysis of the operation of courts and agencies in practice.

There are two recent exceptions. Kaplan et al. undertake an empirical study of filings in two Mexican federal labor tribunals. (Kaplan, et al., 2007). Their major finding is that workers gain larger awards through settlement than through trial, and collect thirty percent of their claims on average. The paper is as valuable for its fine-textured account of the actual functioning of the labor tribunal system as for its data gathering and analysis. Another empirical country study is Fagernas's construction of an indicator for the "judicial efficiency" of India's labor courts, to examine whether more efficient courts are associated with decreases or increases in size of the informal sector. (Fagernas, 2007). Fagernas's chosen indicator is the ratio of the number of court awards per year to the number of disputes adjudicated in the same year. Fagernas finds no significant relationship between judicial efficiency and the size of informal work in the overall service and industrial sectors,

but a positive association in the organized industrial sector and a lower rate of sub-contracting among unorganized industrial firms. Again, the paper is especially valuable for its overview of the practical functioning of the Indian labor court system.

PART FOUR: NEW REGULATORY PRACTICE AND THEORY

XII. Indicator-Driven Regulation: Practice and Theory

The indicators we wish to create are effectively legal-regulatory norms. In the last two decades, the actual practice of regulation and the theorization of that practice have evolved rapidly. Indicator-driven regulation is an increasingly significant part of that evolution. Metrics are used in evaluating both the process and the outcome of regulation, in such diverse subject domains as education reform, child welfare, environmental regulation, policing, consumer protection, public health, financial regulation, and constitutional law. (E.g., Hood, et al., 2008; Rosga and Satterthwaite, 2009; Noonan, et al., 2009; Karkkainen, 2004, 2002, 2001; Garrett and Liebman, 2004; Sabel and Simon, 2004; UNHCHR, 2008; De Burca and Scott, 2006; Dorf and Sabel, 1998). More to the point, indicator-driven reform has been applied to labor law, to nondiscrimination and diversity in employment, and to occupational safety and health. (Sturm, 2001; Sabel, 2006; Fung, O'Rourke, and Sabel, 2001).

The literature on new forms of regulation highlights that legal norms can take several different forms. (E.g., Noonan, et al., 2009). One of the key conceptual issues in the formulation of indicators is therefore the question of what *type* of norm is best-suited to serve as a measure of the particular matters that concern us, including such matters as the given country's labor laws, enforcement institutions, resources, procedures, remedies, and outcomes. For example, a norm can take the form of a "bright-line rule" which specifies the behavior of the regulated party in detail or which specifies the outcome

measure in detail. Alternatively, a norm can take the form of a “standard” that states a more general policy or principle. The job of the analyst is to apply the policy or principle to the specific factual context at hand. Through successive application of the policy or principle, the analyst may formulate a body of bright-line rules that flesh out the more general standard.²⁶

The question of the norm-types is closely related to the question of designing the *institutions* and *processes* through which ILAB or other analysts will over time apply, refine, test, and potentially revise the initial indicators. As just mentioned, the analyst may self-consciously conceive her role as applying standards in an iterative fashion, through which the analyst gains more and more information about the indicator and constructs more and more detailed sub-rules that define the indicator. The process of evaluation or diagnosis is therefore a process of learning. (Sabel, 1994). In pragmatically learning about the relevant factual contexts – workplace problems, modes of production, managerial systems – the analyst gains a better understanding of what reforms are feasible and within what time frame such reforms can be implemented. The analyst learns as well about what conduct violates the policies and principles embodied in general standards – for example, the specific types of complaint systems and supervisory training that best protect workers against sexual harassment. (Sturm, 2001).

Some of the literature maintains that such models of “learning by monitoring” need not and should not produce an ever-more refined body of fixed rules or indicators. Instead,

²⁶ For an example of this process, see the discussion of norms applicable to prosecution of murderers of trade unionists in Section IV(1)(e) above.

the process should yield a continuously revised or rolling set of indicators, as improvements in workplace conditions are rendered more feasible over time, due to improvements in productivity, organizational innovations, and other soft constraints. In its boldest claim, the literature maintains that the values-based norms themselves can and should change, as social actors and regulators engage in dialogue about what purposes and outcomes should be expected of the regulatory initiative. (Sabel, 1994). That is, ongoing dialogue and collaboration, and ongoing experience of which policy interventions actually work, may transform the actors' conception of their goals and interests.

The latter vision of rolling rules and values may entail a commitment to democratic processes of deliberation among the actors affected by regulatory indicators. That is, since the regulatory process may produce revisions in values-based goals, the process should be subject to the kinds of democratically legitimate protocols that apply to any collective determination of values. Indicators might then be used not only to measure labor law, enforcement institutions, and workplace outcomes, but also to measure the transparency, accountability, and participatory features of the process of applying and revising the indicators.

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