FREEDOM OF ASSOCIATION And THE RIGHT TO COLLECTIVE BARGAINING

A Clean Clothes Campaign Primer Focusing on the Global Apparel Industry September 2005

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Preface

This document was written by Anne Lally with guidance from Jeroen Merk and Ineke Zeldenrust. It serves as a compilation of useful information on freedom of association and collective bargaining. As such, much of the information is lifted from other documents – writings of labor scholars, legal instruments, and official decisions. References are made to the sources in footnotes and website addresses are provided wherever possible in order to facilitate further research on this topic.

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I. Introduction

> *The fundamental principle of freedom of association and the right to collective bargaining is a reflection of human dignity. It guarantees the ability of workers and employers to join and act together to defend not only their economic interests but also civil liberties such as the right to life, security, integrity and personal and collective freedom. It guarantees protection against discrimination, interference and harassment. As an integral part of democracy, it is also key to realizing the fundamental rights set in the ILO Declaration.*
>
> *Research and analysis have demonstrated that respect for freedom of association and the right to collective bargaining also plays an important part in sound economic development. It has a positive effect on economic development by ensuring that the benefits of growth are shared, and promoting productivity, adjustment measures and industrial peace. In a globalised economy, freedom of association and the right to collective bargaining in particular provide a connecting mechanism between social goals and the demands of the marketplace. Consequently, the real debate can not and should not be on* whether *to respect these principles and rights, but on how best to respect and make use of them.*
>
> Introduction to "Organizing for Social Justice," the 2004 Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work.

Freedom of association and the right to organize can be summarized as the right of workers and employers to establish and to join organizations of their own choosing without any prior authorization or government interference. Combined with the inter-related **right to bargain collectively**, it also means that trade unions and their members are free from anti-union discrimination, and that voluntary negotiation between employer organizations and worker organizations is to be protected and promoted. The **right to strike** is also widely recognized as an "intrinsic corollary" of freedom of association, meaning it cannot be seen in isolation from industrial relations as a whole.[1]

As explained in the quote above, these rights and principles form the cornerstone of effective labor relations systems. As such, they are enshrined in various ILO conventions, declarations, and recommendations – from the ILO's Constitution of 1919 through the ILO's Declaration of Fundamental Principles and Rights of 1998. International and regional human rights instruments also refer to these inherent human rights. Indeed, the international community's relatively consistent treatment of these rights over the past century highlights their universal acceptance internationally. As one labor expert put it, freedom of association is a kind of customary rule in common law, standing outside or above the scope of any conventions or even of membership in one or another of the international organizations.[2]

[1] Based on language from the ILO's *General Survey,* 1994, para. 179, as cited in Lee Swepston's "Human rights law and freedom of association: Development through ILO supervision," *International Labour Review,* Vol. 137 (1998), No. 2.

[2] Based on quote by Paul Ramadier, ten-year Chairman of the Committee on Freedom of Association, which appears in Geraldo von Potovsky's "Freedom of association: The impact of Convention No. 87 and ILO action," *International Labour Review*, Vol. 137 (1998), No. 2.

As discussed below, however, national governments are responsible for ensuring that workers can exercise their freedom of association. And, while most countries' national legislations nod to the principle of freedom of association and the right to organize and bargain collectively, there are many instances where national legislation does not allow everyone to exercise these rights freely. In even more cases, national laws protecting these rights are simply not enforced.

In order to support the efforts of workers and their advocates as they work to tackle this reality, this "primer" provides background on various aspects of freedom of association and collective bargaining, particularly in the context of multi-stakeholder initiatives that deal with supply chain codes of conduct. In the following sections, the paper highlights that freedom of association and collective bargaining are universal human rights. It details the international instruments where these standards are codified and how they are dealt with – both through International Labour Organization supervisory mechanisms and national legislation. It then offers readers brief explanations of key subjects relating to organizing and collective bargaining and deals with different code initiatives and their treatment of these rights. In final sections, it raises some key points for further consideration and cites various sources that can be accessed for more information on this topic.

Wherever possible, links to the original text are provided for further investigation. In some cases, terms are **bolded** for added emphasis.

II. International Instruments Concerning Freedom of Association, the Right to Organize, and the Right to Collective Bargaining

This section provides an overview of the international instruments dealing with the principle of freedom of association and the right to organize and bargain collectively. These international instruments include relevant United Nations (UN) human rights instruments, various International Labour Organization (ILO) instruments, and regional human rights instruments.

It is important to note here that the **rights of workers to form unions and bargain collectively are human rights**. For this reason, many refer to them as "workers' human rights" or "human rights in the workplace." As exhibited below, these rights are included in the UN Human Rights Declaration and both the UN Civil and Political Rights Covenant and the Economic, Social and Cultural Rights Covenant. Indeed, forming or joining the trade union of an individual's choice is both an exercise of one's political and civil rights and one's economic rights. The rights of *organizations* of workers and employers flow from, and are essential to the implementation of, these *individual* human rights. If individuals have the right to join organizations, it follows that the organizations they join must be protected by law to remain genuinely independent and representative. This means that worker and employer organizations must have rights – such as the right to a legal personality, the right to own property, and the right to issue publications.

As the agency in the UN system that is dedicated to labor issues, the ILO addresses both the rights of individual workers and the organizations they join. Therefore there are numerous ILO Conventions that address freedom of association and the right to organize and bargain collectively. ILO Conventions 87 and 98 are the most-commonly cited among these and are regarded as the authoritative international instruments defining these rights. The specificity of these instruments should not be misinterpreted as detaching these rights from the larger human rights framework, however. **Without the full implementation of the other human rights enumerated in the UN instruments – particularly civil liberties – trade union rights cannot be exercised.**

This is a point that has been reiterated by the ILO over the past several decades. On various occasions the International Labour Conference, the ILO Governing Body, and other ILO bodies have recognized that workers cannot really exercise their right to form or join their own trade unions in countries where other civil and political rights are denied. Trade unions cannot exercise their rights in countries where individuals are not free from arbitrary arrest and detention, do not have freedom of opinion or expression, or cannot assemble freely. [3] The link between trade union rights and other civil and political rights is

[3] To see a complete list of civil liberties that are recognized as being inextricably linked to trade union rights, access excerpts from the 1970 resolution concerning trade union rights and their relation to civil liberties, General Survey, Report III, Part 4B, Session 81,
http://training.itcilo.org/ils/foa/library/general_surveys_en/259416.htm
The ILO's 1994 Freedom of Association and Collective Bargaining training module, "Trade Union Rights and Civil Liberties," can provide additional information and is accessed at:
http://training.itcilo.org/ils/foa/library/general_surveys_en/25942.htm.

important to bear in mind in the context of codes of conduct for the supply chain. Many of the situations of exploitation and abuse of workers that gave rise to the demand for codes of conduct were the result of the failure of governments to protect workers and their human rights. This often involves more than the failure to develop or apply adequate regulation. Authoritarian governments, for instance, repress trade unions in the course of denying other civil and political rights.

Inversely, freedom of association "enables" other rights. Workers exercising their right to join or form trade unions and bargain collectively have played a crucial role in realizing respect for other human rights. Proof of this correlation can be found in the many countries where trade unions have played a key role in toppling undemocratic regimes. Likewise, in established democracies, the ILO observes that "freedom of association and the practice of collective bargaining provide checks and balances that are central to the larger democratic process."[4] Most evidently, freedom of association enables other rights at the level of the workplace. In workplaces with a functioning trade union, collective bargaining machinery, and effective dispute and complaints mechanism, workers are able to monitor workplace conditions and protect their own rights. Indeed, where freedom of association and collective bargaining exist, it is rare to find child labor, forced labor, excessive working hours, or wages below the legal minimum.

Taken in sum, the inseparability of freedom of association from the larger human rights system is clear. The following section therefore covers a wide range of international human rights instruments that deal with freedom of association and the right to organize and bargain collectively.

1. Relevant UN Human Rights Instruments

UN covenants and conventions are multilateral international treaties and are binding on those states that ratify them. While UN declarations are not legally binding, the UN Declaration of Human Rights enjoys a special position among UN instruments. It served as the foundation for the UN human rights Covenants and its provisions are often referred to by international lawyers as representing customary international law. Both UN human rights Covenants cite workers' right to form and join trade unions; however the Economic, Social and Cultural Rights Covenant deals with freedom of association in greater detail, including a provision on the right to strike. It is worth noting that both UN human rights Covenants[5] refer to the ILO's Convention 87 (see next section).

The following are excerpts of relevant articles in these UN instruments. To access the relevant articles in their entirety, please refer to the original texts.

[4] ILO: *Organizing for Social Justice: the Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work.* Geneva: International Labour Office (2004), p 8.
[5] Article 22 (3) of the ICCPR and Article 8(3) of the ICESCR ensure against prejudicing the guarantees provided in Convention 87.

- **United Nations Universal Declaration of Human Rights, 1948.**
  http://www.un.org/Overview/rights.html

  - Article 20: "(1) Everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association."
  - Article 23 (4): "Everyone has the right to form and to join trade unions for the protection of his interests."

- **United Nations International Covenant on Civil and Political Rights, 1966.**
  http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

  - Article 22 (1): "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."

- **United Nations International Covenant on Economic, Social and Cultural Rights, 1966.**
  http://www.unhchr.ch/html/menu3/b/a_cescr.htm

  - Article 8 (1) contains the key principles, stating (emphasis added):

    The States Parties to the present Covenant undertake to ensure:

    (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right 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;

    (b) The **right of trade unions to establish national federations** or confederations and the right of the latter to form or join international trade-union organizations;

    (c) The right of **trade unions to function freely** subject 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;

    (d) The **right to strike**, provided that it is exercised in conformity with the laws of the particular country.

2. Relevant International Labour Organization (ILO) Instruments[6]

What follows is an overview of relevant articles of ILO instruments that pertain to freedom of association and the right to organize and bargain collectively. These are not provided in their entirety, however, so please use the links provided for a more comprehensive look at key articles.

A. ILO Constitution and Declarations

By joining the ILO, member States agree to abide by the *ILO's Constitution*, which is a binding international instrument. Declarations, on the other hand, are non-binding. Nonetheless they represent the collective voice of all participants in the International Labour Conference and are therefore significant.

The *Declaration on Fundamental Principles and Rights at Work* is especially important in this regard. In accordance with the Declaration, even if an ILO member State has not ratified the relevant ILO conventions (in this case 87 and 98), the State's acceptance of the ILO Constitution upon joining obligates it to promote workers' freedom of association and right to collective bargaining. Nonetheless, the Declaration does not obligate a member government to carry out the detailed legal provisions of the conventions, leaving space for discussion about what the Declaration actually requires of member States in concrete terms. The Declaration's follow-up reporting mechanism has offered some guidance in this regard, and is referenced in this document.

The *Tripartite Declaration of Principles Concerning Multinational Enterprises (MNEs) and Social Policy* of 1977 has a different character from the Declaration on Fundamental Principles and Rights at Work. While it is nonbinding, it is one of the first international documents focusing on the central role that MNEs play in labor rights implementation and it is frequently referred to in international discussions about rights and corporations.

- **Preamble of the Constitution of the ILO, 1919** - http://www.ilo.org/ilolex/english/constq.htm

  - Declares "recognition of the principle of freedom of association" to be a means of improving conditions of labour and of establishing peace;
  - The Declaration of Philadelphia (annexed to the Preamble) states: "freedom of expression and of association are essential to sustained progress"

[6] This collection excludes those ILO conventions and recommendations that deal with sectors or industries that fall outside of the CCC's purview. For example, the Public Service Labour Relations Convention (C151) and Recommendation (R159) of 1978 are not covered here. Please access the ILO's website to learn more about these instruments.

❖ **ILO Declaration on Fundamental Principles and Rights at Work, June 1998**
http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE

- In paragraph 2, the International Labour Conference "Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

  (a) freedom of association and the effective recognition of the right to collective bargaining;"

  Subsections (b)-(d) cover the three other fundamental labor rights, i.e. elimination of forced labor, child labor, and discrimination in the workplace.

❖ **Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body in November 1977**
http://www.ilo.org/public/english/standards/norm/sources/mne.htm

The 1970s were a decade in which the impact of corporations on developing countries was given increased attention. During this period, many called for the regulation of multinational enterprises and work was begun on a "UN Code of Conduct for Multinational Enterprises". It was in this context that the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy ("the ILO MNE Declaration") and the OECD Guidelines for Multinational Enterprises ("the OECD Guidelines" – discussed in the following section) were developed. The ILO MNE Declaration is the most authoritative statement regarding the relationship of international business to social development. It is important because the ILO MNE Declaration recognizes that, although ILO standards are intended to be applied by governments, many of the principles in these standards can be applied by businesses as well. The ILO MNE Declaration consists of 59 paragraphs organized into four sections. Below is a summary of the paragraphs most relevant to freedom of association:

- *Paragraph 43*: MNEs should support representative employers' organizations.
- *Paragraph 45*: Host-country governments should not limit workers' freedom of association or the right to organize and bargain collectively as an incentive for MNE investment.
- *Paragraph 50*: MNEs should provide workers' representatives with facilities to assist in the development of effective collective agreements.
- *Paragraph 52*: MNEs should not threaten to transfer the whole or part of an operating unit in order to influence negotiations or hinder organizing efforts.
- *Paragraph 57*: Workers, individually or jointly, should have the right to submit grievances without suffering prejudice, and to have the grievance examined. This is particularly important when MNEs operate in countries that do not allow for freedom of association and the right to organize and collective bargaining.

B. ILO Conventions Dealing with Freedom of Association

As defined by the ILO, an "ILO Convention is an international labour standard developed through the ILO tripartite system. ILO Conventions are comparable to multilateral international treaties - they are open to ratification by member States and, once ratified, create specific binding obligations. A member State that has ratified a Convention is expected to apply its provisions by legislation or other appropriate means as indicated in the text of the Convention. The government of the member States is required to report regularly on the application of ratified Conventions and complaints about alleged non-compliance may be made by the governments of other ratifying States or by employers' or workers' organisations."[7] Readers are encouraged to access the full texts of these important instruments, which are summarized below.

- **C87: Freedom of Association and Protection of the Right to Organize Convention, 1948**
  http://www.ilo.org/ilolex/english/subjlst.htm
  Number of Ratifications: 144 [8]

  As noted above, this is one of the two major ILO conventions relating to freedom of association. It addresses both individuals' and organizations' rights to organize and protects them from interference by the government. A brief summary of key articles:

  - **Workers and employers**, without distinction whatsoever, have the right to establish and join organizations of their own choosing without previous authorization (Article 2).
  - **Workers' and employers' organizations** have the right:
    - To draw up their own constitutions and rules, elect their representatives, and formulate their programs (Article 3).
    - To be protected against dissolution or suspension by administrative authority (Article 4).
    - To join in confederations and affiliate with international organizations (Article 5).

  Article 9 of this Convention clarifies that national legislation shall determine the extent to which this Convention applies to the armed forces and the police. This is echoed in other international instruments with regard to freedom of association. In Article 11, member States commit to "**undertake all necessary and appropriate measures** to ensure that workers and employers may exercise freely the right to organize." According to ILO experts, this Convention applies to all workers, regardless of their immigration status.

[7] From the ILO's Handbook for Joint Safety and Health Committees in the English-speaking Caribbean, accessed at http://www.ilo.org/public/english/region/ampro/portofspain/infsources/osh_handbook/backgr.htm
[8] While the ratification record for Conventions 87 and 98 may be impressive in numerical terms, the numbers eclipse the fact that about half the world's workers and employers are not covered, with the largest non-ratifying countries including Brazil, China, India, Mexico, and the United States.

❖ **C98: Right to Organise and Collective Bargaining Convention, 1949**
http://www.ilo.org/ilolex/english/subjlst.htm
Number of Ratifications: 154 [9]

This is the other major ILO convention dealing with freedom of association. It focuses on the relationship between workers' and employers' organizations and protects workers and their organizations from interference by employers. It also promotes voluntary negotiations. A brief summary of key articles:

- **Workers** have the right to adequate protection against anti-union discrimination, and against refusal of employment or dismissal due to union membership or participation (Article 1).
- **Workers' and employers' organizations** have the right to adequate protection against interference by each other, particularly employer efforts to financially or otherwise dominate workers' organizations (Article 2).
- Machinery shall be established to ensure respect for the right to organize (Article 3) and promoted for voluntary negotiations between employers and workers (Article 4).

Similar to Convention 87 above, the application of this convention for armed forces and police depends on national legislation (Article 5). This convention also does not deal with the position of public servants (Article 6).

❖ **C135: Workers' Representatives Convention, 1971**
http://www.ilo.org/ilolex/english/subjlst.htm
Number of Ratifications: 77

This convention defines "worker representatives"[10] and clarifies the protections afforded to them. In sum:

- Worker representatives are protected against any prejudicial treatment in the workplace (Article 1).
- Worker representatives are afforded the facilities to enable them to carry out their functions, taking into consideration the local context and the needs and capacities of the undertaking, i.e. factory, farm or other enterprise (Article 2).
- When elected worker representatives and trade union representatives exist in the same undertaking, it calls for measures to ensure that elected representatives do not undermine the position of the trade unions. It encourages cooperation between representatives (Article 5).

See the discussion about worker representatives in section IV for more about this convention.

[9] While the ratification record for Conventions 87 and 98 may be impressive in numerical terms, it eclipses the fact that about half the world's workers and employers are not covered, with the largest non-ratifying countries including Brazil, China, India, Mexico, and the United States.

[10] According to Article 3, the term **workers representatives** means persons who are recognized as such under national law or practice, whether they are – (a) trade union representatives, namely representatives designated or elected by trade unions or members of such unions; or (b) elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognized as the exclusive prerogative of trade unions in the country concerned.

- **C154: Collective Bargaining Convention, 1981**
  http://www.ilo.org/ilolex/english/subjlst.htm
  Number of Ratifications: 37

  This convention defines "collective bargaining"[11] and clarifies that it applies to all branches of economic activity. It requires governments to promote the practice for all employers and all groups of workers (i.e. trade unions or other workers' representatives, as defined by law). It also obligates governments to develop rules of procedure for bargaining, and bodies and procedures for the settlement of labor disputes. It highlights that measures to promote collective bargaining should not hamper the "freedom of collective bargaining" (Articles 1-8). See the discussion in section IV below for more information about this convention.

C. ILO Recommendations Dealing with Freedom of Association

Unlike ILO conventions, ILO recommendations are not ratified by States and are therefore nonbinding. This should not undermine their importance, however. Recommendations are agreed to at the ILO's General Conference and offer guidance to governments, employers, and trade unions with regard to the implementation of ILO Standards. They are the product of tripartite negotiations, and often clarify the ILO's official position on how key principles should be applied. Member States have procedural obligations to submit the texts to their legislative bodies and to report on the application of the recommendations at the request of the ILO's Governing Body.

The ILO recommendations that can inform discussions on freedom of association and collective bargaining in the apparel and textile sector are listed below. Key points from these texts are referred to in following sections.

- **R91: Collective Agreements Recommendation, 1951**
  http://www.ilo.org/ilolex/english/subjlst.htm

- **R92: Voluntary Conciliation and Arbitration Recommendation, 1951**
  http://www.ilo.org/ilolex/english/subjlst.htm

- **R94: Co-operation at the Level of the Undertaking Recommendation, 1952**
  http://www.ilo.org/ilolex/english/subjlst.htm

- **R113:Consultation (Industrial and National Levels) Recommendation, 1960**
  http://www.ilo.org/ilolex/english/subjlst.htm

- **R130: Examination of Grievances Recommendation, 1967**
  http://www.ilo.org/ilolex/english/subjlst.htm

[11] Article 2 states "...the term **collective bargaining** extends to all negotiations which take place between an employer, a group of employers or one or more employers' organizations, on the one hand, and one or more workers' organizations, on the other, for – (a) determining working conditions and terms of employment; and/or (b) regulating relations between employers and workers; and/or (c) regulating relations between employers or their organizations and a workers' organization or workers' organizations."

- **R143: Workers' Representatives Recommendation, 1971**
  http://www.ilo.org/ilolex/english/subjlst.htm

- **R163: Collective Bargaining Recommendation, 1981**
  http://www.ilo.org/ilolex/english/subjlst.htm

- **R129 Communications within the Undertaking Recommendation, 1967**
  http://www.ilo.org/ilolex/english/subjlst.htm

3. Other Relevant Instruments

As discussed above, those countries that ratify any of the following regional human rights treaties are bound to enforce them. In the case of Europe and the Americas, this may also involve subscribing to the decisions of the relevant human rights court. By contrast, the OECD Guidelines discussed below are voluntary and do not qualify as an international treaty.

- **European Convention on Human Rights, 1950.**
  http://www.hri.org/docs/ECHR50.html

  The European Convention on Human Rights was drafted by the Council of Europe, which currently has 45 members. The Human Rights Convention guarantees civil and political human rights and is complemented by the European Social Charter (below), which guarantees social and economic rights.

  - Article 1: "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests."

- **European Social Charter, 1961; revised 1996.**
  http://conventions.coe.int/Treaty/en/Treaties/Word/163.doc

  The European Social Charter was adopted by the Council of Europe in 1961 and revised in 1996. It contains several relatively in-depth provisions for freedom of association and collective bargaining, most notably the first provisions in an international instrument protecting the right to strike (1961). This in turn influenced the content of the UN Economic, Social and Cultural Rights Convention (above), adopted in 1966. Key articles include:

  - Article 5: All workers and employers have the right to freedom of association in national or international organizations for the protection of their economic and social interests.
  - Article 6: All workers and employers have the right to bargain collectively, including the **right to strike**, i.e.," the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."

- Appendix to the Charter: "It is understood that each Contracting Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article 31."

❖ **American Convention on Human Rights (Pact of San Jose), 1969.**
http://www.oas.org/juridico/english/Treaties/b-32.htm

The American Human Rights Convention has been ratified by 25 countries that are members of the Organization of American States (OAS). Individual cases relating to the Convention can be addressed through the Inter-American Commission on Human Rights or the Inter-American Court of Human Rights, which offers binding decisions if the relevant country has accepted the Court's jurisdiction.

- Article 16 (1) states: "Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes."

❖ **Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Jose), 1988.**
http://www.oas.org/juridico/english/Treaties/a-52.html

An "additional protocol" builds upon an instrument that is already in force. In this case, the additional protocol recognizes economic and social rights in addition to the civil and political rights already contained in the American Convention on Human Rights. States that are members of the original convention are given the choice to adopt the protocol.

Noteworthy in this protocol is the inclusion of the right to strike in Article 8(2) b and a unique clause in Article 8 (3), which highlights workers' option to choose *not* to join a union. This clause was designed to make trade union security clauses[12] illegal. A summary of key articles:

- Article 8 (1) a: The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. Union federations also have the right to function freely.
- Article 8 (1) b: The right to strike.
- Article 8 (3): No one may be compelled to belong to a trade union.

[12] Trade union security clauses make union membership, payment of union dues, or recruitment of workers through trade union organizations compulsory. Historically this has been common practice in some Latin American countries.

❖ **OECD Guidelines for Multinational Enterprises, 1976; revised in 2000.**
http://www.oecd.org/document/28/0,2340,en_2649_34889_2397532_1_1_1_1,00.html

As discussed above (see ILO MNE Declaration), the OECD Guidelines were first drafted in the 1970s. Revised in 2000, the OECD Guidelines call on enterprises to respect workers' freedom of association, including:

- Respecting the right of employees to be represented by trade unions and to engage in negotiations.
- Providing facilities and information to employee representatives to develop collective agreements.
- Not threatening to transfer production from a country to influence negotiations unfairly or hinder the right to organize.
- Enabling consultation and negotiation between authorized employee representatives and management for the purposes of collective bargaining or management relations issues.

The 2000 revisions of the OECD Guidelines attempted to bring back into the spotlight the responsibilities of MNEs when doing business internationally. However, they **lack effective mechanisms** to ensure that enterprises abide by the rules. There is no appeal mechanism that can be used by involved parties, such as unions or NGOs, and the language used with regard to labor rights is far vaguer, and therefore weaker, than what is established in ILO documents.

III. Enforcing the Standards

National governments traditionally have been responsible for the application of international standards, and freedom of association is no exception to that rule. This section discusses the application of freedom of association and collective bargaining at the national level, and how the ILO's supervisory mechanisms evaluate countries' performance in this regard. It also discusses ways in which these mechanisms can prove helpful to those who seek to enhance freedom of association.

1. Implementation at the National Level[13]

As discussed above, by being a member State of the ILO, a country has an obligation to uphold the fundamental principle of freedom of association and the right to organize and bargain collectively, regardless of whether the country has ratified Conventions 87 and 98. In addition, the 144 countries that ratified Convention 87 and the 154 countries that ratified Convention 98 have treaty obligations to implement these rights. Ratifying these and the other ILO Conventions dealing with freedom of association and collective bargaining obligates them to integrate the standards into legislation and to ensure observance of the law.

With regard to countries' legislative responsibilities, many countries' laws recognize the right to organize and bargain collectively, but place restrictions on these rights. For example, agricultural workers or those in the public sector (in non-emergency positions) might be excluded from freedom of association and collective bargaining. Some countries do not recognize these rights for domestic workers or others in the informal sector. Some ban strikes in "essential" industries so as to support a particular national economic policy. Other ban strikes altogether. Such provisions may indicate a government's failure to comply with its international commitments. As discussed in the following section, the ILO's supervisory and reporting mechanisms can be accessed to address such issues.

Regarding countries' obligation to apply the law, as the ILO and other organizations frequently point out, this requires positive action on the part of the government – not only to *avoid interference* with these rights ("negative rights"), but to *protect* and *promote* these rights ("positive rights"). The duty to protect means that governments must ensure that private individuals or groups cannot violate others' rights to join trade union and bargain collectively. The duty to promote means creating programs to educate workers about their rights. It means developing independent and fair national labor dispute resolution mechanisms and building capacity for government officials with responsibility in for labor matters. A country's level of development and the competing needs faced by a government influence the amount of resources that are devoted to enforcement. Organizations like the ILO offer technical assistance to support countries who seek to

[13] The discussion below on implementation at the national level is a summary of information available on WebMILS, the US Department of Labor website: "Assessment Source: International Labor Organization – Ad Hoc, Complaints-Driven Supervisory System" accessed at http://www.dol.gov/ilab/webmils/compliance/collectivebargaining.html.

uphold these obligations. More information about assessing a country's compliance with its international obligations can be accessed on the US Department of Labor's WEBMILS website, www.dol.gov/ilab/webmils/compliance/collectivebargaining.html

2. ILO Supervisory Mechanisms

The ILO has established a supervisory system to hold countries accountable for meeting their international obligations. With regard to freedom of association, these mechanisms play the two-fold role of providing information about countries' performance and developing international jurisprudence regarding associational rights. Workers' and employers' organizations can also use the mechanisms to communicate situations in which countries' international commitments are not upheld, even with regard to individual cases. Indeed, in numerous cases the ILO's supervisory system has played an important role in protecting individual workers against anti-union discrimination or securing the release of illegally detained trade unionists.

In order to tap into the strengths of the ILO's supervisory system, it is important to understand its different mechanisms. The following overview is based on the ILO publication, *Freedom of Association: A User's Guide*, by David Tajman and Karen Curtis.[14]

A. The ILO's Regular System of Supervision

The ILO's regular system of supervision focuses on countries that have ratified the relevant ILO Conventions. In accordance with the ILO Constitution, countries are required to provide periodic reports on the application of their treaty obligations. With regard to freedom of association, the *Committee of Experts* and the *Conference Committee,* discussed below, are the relevant mechanisms for reporting and dialogue. These two committees are seen as being complementary, with the Committee of Experts providing technical supervision, and the Conference Committee creating the opportunity for "direct dialogue" between governments, employers, and workers, which can even "mobilize international public opinion."[15]

Committee of Experts on the Application of Conventions and Recommendations (often referred to as the "Committee of Experts") – This committee consists of twenty independent experts from around the world who meet annually and:

- Examine governments' reports on the application of freedom of association conventions, where they have been ratified.
- Receive comments from workers' and employers' organizations on the application of those conventions. The committee considers these comments in the examination of government reports.

[14] Tajman, David and Karen Curtis. *Freedom of Association: A User's Guide.* Geneva: International Labour Organization (2002).
[15] ILO. *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries*, Report III (Part 4A), International Labour Conference, 81st Session, 1994, p.12. As cited in Geraldo von Potovsky's "Freedom of association: The impact of Convention No. 87 and ILO action."

- Request that States take particular actions to comply with their freedom of association obligations wherever they fail to do so.
- Examine reports from countries that have not ratified the freedom of association conventions with regard to 1) the country's current law and practice, and 2) any obstacles to eventual ratification of the conventions.[16]

The Committee of Experts' general reports can be accessed at http://www.ilo.org/ilolex/gbe/ceacr2005.htm. The Committee's reports on individual countries that have ratified Conventions 87 and 98 can be accessed at http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?hdroff=1.

Conference Committee on the Application of Standards (often referred to as the "Conference Committee") – This is a large tripartite standing committee consisting of government delegates and constituents from workers' organizations and employers' organizations. It convenes over the course of about 20 sittings each year at the International Labour Conference. This committee receives the report of the Committee of Experts, and, on the basis of that report:

- Discusses in public individual cases involving freedom of association.
- Discusses in public the state of law and practice and obstacles to eventual ratification of the freedom of association conventions in countries that have not yet ratified them.[17]

The Conference Committee's general reports can be accessed at http://www.ilo.org/ilolex/english/confrepsq.htm, while the most recent observations and information concerning particular countries can be accessed at http://www.ilo.org/public/english/standards/norm/applying/conference.htm.

B. The ILO's Special Supervisory Mechanisms

The special supervisory mechanisms offer several different approaches to lodging a complaint in the event that freedom of association is infringed upon. While each mechanism has its particular characteristics, all involve the ILO's Governing Body and require that adequate evidence is provided to support the allegation.[18]

Committee on Freedom of Association – This committee is composed of one independent chairperson, 9 members and 9 substitutes drawn on a tripartite basis from the ILO's Governing Body. It meets three times a year and has heard more than 2,000 cases. Unlike other supervisory mechanisms, **it can hear cases relating to *all* countries that are members of the ILO, even if they have not ratified the freedom of association conventions.** This combined with the fact that it meets more often than other committees and will address cases involving individuals, makes this Committee a good place to report alleged infringement of the rights to join trade unions and/or bargain collectively.

[16] Tajman and Curtis, p.11.
[17] *Ibid,* p.12.
[18] *Ibid.*

The Committee on Freedom of Association:
- Receives allegations of infringement of freedom of association from employers' and workers' organizations.
- Reviews the arguments of all involved parties.
- Makes conclusions and recommendations based on the information it receives, and asks the governments concerned to take steps to implement the recommendations.
- Brings its conclusions and recommendations before the Governing Body.
- Where the government concerned has ratified the relevant freedom of association convention, it may pass aspects of the case to the Committee of Experts (above) for follow-up.[19]

Reports from the Committee on Freedom of Association can be accessed on LibSynd: http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?hdroff=1.

Fact-Finding and Conciliation Commission of Freedom of Association – This is a neutral body composed of 9 independent persons appointed by the Governing Body who normally work in panels of 3. Once established, a Commission examines complaints of infringement of freedom of association referred to it by the Governing Body. These may be cases that were previously heard by the Committee on Freedom of Association but were not resolved. This mechanism is used far less frequently than the Committee of Freedom of Association, in large part because a Commission can only be formed with the consent of the involved government. As a result this mechanism has been used in a total of 6 cases. While the procedures for each Commission vary with the case, they often involve hearings and a visit to the country in question by members of the Commission.[20]

Commission of Inquiry – A Commission of Inquiry is established on an ad hoc basis. Usually comprised of 3 neutral persons of high stature, a Commission of Inquiry is formed in response to a "complaint" received under Article 26 of the ILO Constitution. Such a complaint may only be filed by an ILO member government or any worker or employer delegate to the International Labour Conference. A Commission of Inquiry is the ILO's highest-level investigative procedure, and therefore is used relatively infrequently. To date, 11 Commissions of Inquiry have been set up by the Governing Body. Most of these have been activated when a country allegedly commits persistent and serious violations. What is noteworthy about this mechanism is that a country's failure to fulfill a Commission of Inquiry's recommendations can result in the Governing Body taking action against the country. This happened for the first time in 2000 when the Governing Body asked ILO members to "take measures" as serious as economic or diplomatic sanctions against Burma in response to its failure to address serious forced labor violations.[21]

The AFL-CIO's Solidarity Centre Guide: *Justice for All: A Guide to Workers Rights in the Global Economy* includes a guide to these mechanisms in its Appendix, "How to File an ILO Complaint." It can be accessed at www.solidaritycenter.org/files/JFA_Appendices.pdf.

[19] *Ibid.*
[20] The ILO's *International Labour Standards Website*. "Fact-Finding and Conciliation Commission of Freedom of Association." Accessed at http://www.ilo.org/public/english/standards/norm/enforced/foa/ffcc.htm on October 26, 2005.
[21] ILO. "Complaints." Accessed at http://www-ilo-mirror.cornell.edu/public/english/standards/norm/applying/complaints.htm on October 26, 2005.

IV. Key Definitions and Frameworks

This section defines some key terms for freedom of association and collective bargaining in order to facilitate understanding and enhance future discussions on the topic.

1. Worker Organizations and Representation

Organization – According to Article 10 of ILO Convention 87, the term "organization" means any organization of workers or of employers for furthering and defending the interest of workers or employers.

Trade Union – A trade union is an organization of workers formed to promote and defend the interest of its members. In many cases, the term trade union is used interchangeably with "worker organization", which is the term used by the ILO in Conventions 87 and 98. At the national level, a trade union may be distinguished from a "workers' organization" through recognition by government authorities. The ILO allows for competent authorities to "recognize" trade unions based on pre-established and objective criteria with regard to the organization's representative character.[22] In most cases, such recognition affords organizations certain legal protections (see R143 Workers' Representatives Recommendation for more). Union registration can both protect and undermine legitimate trade unions, however. When applied correctly, criteria ensure against the formation of "worker organizations" that are fronts for management or other illegitimate interests. On the other hand, there are many cases where these criteria have been exploited to restrict trade union numbers and influence. ILO supervisory bodies have repeatedly spoken against national provisions that limit freedom of association in this way.

The term 'trade union' can be applied to an array of organizations – from those formed at the enterprise level with a handful of members, to branch unions, industrial unions, and national and international federations and confederations.

Worker Representatives – According to Article 3 of the Workers' Representatives Convention of 1973 (135), workers' representatives are:

> "persons who are recognized as such under national law or practice, whether they are (a) trade union representatives, namely representatives designated or elected by trade unions or by members of such unions; or (b) elected representatives, namely, representatives who are freely elected by the workers of the facility in accordance with provisions of national laws or regulations of collective agreements and whose functions do not include activities which are recognized as the exclusive prerogative of trade unions in the country concerned."

Fundamental to the function of worker representatives is that the employer can not designate or control them. Whether they are elected within or outside of a trade union structure, the employer must not influence the election. There must be a

[22] The criteria should be set in consultation with representative employers' and workers' organizations.

legal framework independent of the employer in which representatives, for example those in works councils, are selected.

The Workers' Representatives Recommendation (143) of 1971 reviews the various protections and facilities that should be afforded to workers' representatives as recognized by national law. These include provisions requiring employers to justify dismissal or unfavorable treatment of worker representatives; the provision of facilities and time off to representatives for carrying out their functions; and the means for representatives to communicate with workers. It is worth noting that Article 17 provides that "trade union representatives who are not employed in the undertaking but whose trade union has members employed therein should be **granted access to the undertaking**." The Committee of Experts has furthermore interpreted Articles 2 and 3 of Convention 87 to imply that leaders of a trade union must be able to remain in contact with the members of the union and vice versa,[23] regardless of a union's status in the workplace.

Works Councils (or **Labor-Management Councils**) – Some countries' laws provide for elected works councils or labor-management councils/committees. The German system of works councils also puts worker representatives on company boards of directors in the largest firms and on the day-to-day management board of the coal, iron, and steel industries. While these works councils exchange information and hold consultations, they do not engage in collective bargaining. In the Philippines, according to the ILO, the government has promoted the spread of labor-management councils since 1994 to overcome the severe conflicts that had come to characterize labor-management relations over the previous decade.[24]

Works councils and labor-management councils can be consistent with freedom of association **if workers are also free to join trade unions and to engage in collective bargaining.** In some cases, these councils can offer an effective voice for workers, either through trade union representation elected to works council positions, or through workers acting on such councils where there is no trade union presence. In the Philippines, for example, the ILO reports that labor-management councils led to improvements in worker treatment and the spread of best practices in labor-management relations.

Nonetheless, there are cases where worker-management organizations are used to curtail unionization.[25] These cases involve a violation of freedom of association. "Solidarity associations" in Costa Rica are a case in point. These associations set up "mutual benefits societies" with a financial contribution from the employer to make loans for housing, education, and other purposes. Their spoken aim has been to promote unity and harmony among workers and management with an unspoken aim to decrease demand for trade unions.[26] While Costa Rican law has been changed to ensure that unions have the

[23] Swepston, p. 185.
[24] ILO. "Labour and social issues relating to export processing zones" (1998). Accessed at: http://www.ilo.org/public/english/dialogue/govlab/legrel/tc/epz/reports/epzrepor_w61/2_2.htm
[25] WebMILS (link provided in footnote 15).
[26] *Ibid.*

exclusive right to bargain collectively, solidarity associations are cited as one of the reasons for the lack of collective bargaining agreements in Costa Rica's export sector.

Trade Unions and "union security arrangements" – Industrial relation systems vary from country to country, and different systems of industrial relations are consistent with the principle of freedom of association. Systems complying with ILO standards can vary from those where one trade union is the exclusive representative of all workers in the shop (referred to as "trade union monopoly") to those where workers in one workplace can choose among different trade unions to represent them. In certain Anglophone countries, the term "shop" is used to refer to a workplace. The terms 'open shop', 'closed shop', 'agency shop' and 'union shop' are used to describe the various kinds of relationships that trade unions may have with enterprises. For example, there are enterprises (referred to as "open shops") that are unionized, but do not require employees to associate with a union or pay union fees. In other enterprises (referred to as "closed shops"), clauses in collective bargaining agreements may specify that an employer can recruit *only* workers who are members of a trade union. In such enterprises, workers must remain members of a union in order to keep their jobs. There are other collective agreements that allow the employer to hire anyone, but require that workers join the union within a designated amount of time after they start work (referred to as "union shops"). Finally, there are enterprises (referred to as "agency shops") where trade union membership is not a condition for employment. In those scenarios, however, workers must pay union dues regardless of whether they join or not. Typically, "closed," "union," and "agency" shops arise in legal environments where trade unions are obligated to represent all workers covered by the collective bargaining agreement, whether they are members or not.

While all of these arrangements can be compatible with freedom of association and the right to organize and to bargain collectively, some are more susceptible than others to violation of workers' rights. To comply with freedom of association, particularly in the last three cases, workers must be notified of the specific union requirement during the application process. The union should also be representative of workers and their interests, and the workers should vote democratically for any of these arrangements.

Shop Steward – A shop steward is a worker representative, usually a trade union member, in the workplace who is elected to represent the workers in communicating and negotiating with management. His/her role is mainly to act as a communicator, keep workers informed of their rights, and help them when they have concerns with the employer or other work-related issues.[27]

[27] Fair Labor Association. *Freedom of Association Guidance Document for Participating Companies and Monitors* (2004 DRAFT), p. 5. Here after "FLA's Draft FoA Guidance."

2. Kinds of "Social Dialogue"

As defined below, social dialogue encompasses all forms of interaction between employers, workers, and government. Key terms that fall within social dialogue relating to employer-worker interactions are defined here.

Social Dialogue – The ILO defines social dialogue as including "all types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers, and workers, on issues of common interest relating to economic and social policy. It can exist as a tripartite process, with the government as an official party to the dialogue, or it may consist of bipartite relations only between labour and management (or trade unions and employers' organizations), with or without indirect government involvement." It can be informal or institutionalized, and can take place at the national, regional, or at enterprise level. It can be inter-professional, sectoral or a combination of all of these. According to the ILO, "The main goal of social dialogue itself is to promote consensus building and democratic involvement among the main stakeholders in the world of work."[28]

Communication – In accordance with the ILO's Communications within the Undertaking Recommendation of 1967 (R129), communication is a process in which information is conveyed by one party to others with a view to developing awareness, trust, and understanding. It is most effective when it is a two-way process that allows for clarification, feedback, and responses. Ideally, information-sharing would take place between workers and management whenever decisions are taken regarding matters of mutual interest.

Consultation – is an interactive process in which a party shares information with other parties, normally in the form of a proposal, with a view to eliciting a response, comment, or feedback. The purpose is normally to secure approval of the proposal, but, in the event that agreement is not reached, the initiator makes the final decision.

Negotiation – is an interactive process involving two or more parties who seek to reach agreement on issues of mutual concern. Reaching a final decision through negotiation requires the agreement of both parties. In this sense, negotiation is the level of social dialogue where workers reach a more equal relationship with management.[29]

Negotiation in the context of industrial relations is discussed further in the following section on collective bargaining. Nonetheless, it is important to note here that, **while communication and consultation are important components of effective labor relations and may be part of a package to promote labor relation systems, such practices in the workplace cannot replace the exercise of the right to collective bargaining.** As explained above, communication and consultation by definition leave the final decision to the initiator (in most cases the employer), regardless of whether the

[28] ILO. *Social Dialogue* website, accessed at http://www.ilo.org/public/english/dialogue/themes/sd.htm
[29] Definitions of communication, consultation and negotiations are based on information provided in the FLA's Draft FoA Guidance, pp. 18-20.

other party agrees. This represents a fundamentally different power relationship from negotiation.[30]

3. Collective Bargaining

Collective Bargaining – Article 2 of the Collective Bargaining Convention of 1981 (C154), states "the term collective bargaining extends to all negotiations which take place between an employer, a group of employers or one or more employers' organizations, on the one hand, and one or more workers' organizations, on the other, for:

1. determining working conditions and terms of employment: and/or
2. regulating relations between employers and workers; and/or
3. regulating relations between employers or their organizations and a workers' organization or workers' organizations."[31]

According to the ILO, collective bargaining serves a dual purpose: 1) it provides a means of determining the wages and conditions of work through free and voluntary negotiations; and 2) it enables employers and workers to agree to the rules governing their relationship. The ILO considers this process to be beneficial for both employers and workers. Workers can ensure adequate wages and working conditions. Employers can stabilize industrial relations that otherwise could be disrupted by labor unrest, and can cooperate with workers to facilitate modernization and restructuring. Contrary to the conventional belief, an ILO study (Ozaki ed. 1999) argued that collective bargaining has been one of the main consensual means of introducing labor market flexibility in many countries.[32]

Collective Bargaining Agent/Power – Countries' national legislation often provides for the most representative trade union to have preferential or exclusive bargaining rights. In accordance with the Collective Bargaining Recommendation of 1981 (R163), the determination of the most representative union must be based on objective, predetermined, and precise criteria. The criteria must also be reasonable. For example, a rule requiring that 70 percent of the workplace be represented in order to bargain collectively effectively prevents bargaining altogether, and therefore would not comply with ILO standards. In appropriate circumstances, the employer may be required by law to recognize a union whether he wishes to or not, and may furthermore be required to enter into negotiations.[33]

Collective Bargaining at Different Levels – The ILO Collective Bargaining Recommendation of 1981 (R163) calls for measures to be taken so that collective bargaining is possible at any level – starting with a unit within an enterprise through bargaining at the enterprise, sectoral, regional, and national levels. "Different issues may

[30] *Ibid,* p. 20.
[31] It is worth noting that Article 3 of the same Convention (154) provides that, where worker representatives other than trade union representatives are recognized by national law, the laws may also extend collective bargaining negotiations to those representatives. Like in C 135, it clarifies that these representatives should not be used to undermine the negotiating position of the trade unions concerned.
[32] *Social Dialogue* website.
[33] FLA's Draft FoA Guidance, p. 5.

be addressed at different levels of bargaining. For instance, productivity and efficiency improvements may be more appropriate for negotiation within the enterprise... Broader issues of social security and national training policy, as well as structural reforms involving major employment shifts, are often dealt with at a national level."[34]

If bargaining takes place at several levels, negotiations should be coordinated. A recent World Bank study covering the last two decades states categorically that coordinated bargaining reduces labor conflict.[35]

International Framework Agreements – An important recent development in labor relations has been the emergence of framework agreements concluded between individual multinational enterprises and global union federations. A framework agreement constitutes a formal recognition by a multinational company that it has as a social partner an international trade union organization.

According to the ILO, at least 27 such accords have been signed since the early 1990s, most in the past 5 years. As reported in the ILO's 2004 report, *Organizing for Social Justice*:

> For some companies and unions, framework agreements are a response to today's world of global production chains, greater international trade, and increased economic interdependence. While they do not fit neatly into any single category of labor relations, framework accords can be viewed as a form of international social dialogue. They differ from codes of conduct, not least in that they are the product of negotiations between trade unions and management. Nonetheless, framework agreements are sometimes viewed as part of a wider trend toward improved corporate social responsibility. As noted in many of these agreements, they do not replace collective bargaining at the national or local level.[36]

Framework agreements generally aim to ensure the respect of basic principles, rather than cover terms and conditions of employment. They usually cover subsidiaries and some extend to joint ventures, suppliers, and subcontractors. Framework agreements are seen by some as a tool for addressing local freedom of association obstacles and in that sense share some characteristics with codes of conduct. Many such agreements also have follow-up procedures and dispute mechanisms, which can help improve dialogue.

Examples of framework agreements can be accessed on the Global Union website, http://www.icftu.org/displaydocument.asp?Index=991216332&Language=EN.

[34] For more about the ILO's finding relating to different levels of bargaining, refer to the *Organizing for Social Justice*, pp 60-80.
[35] T. Aidt and Z. Tzannatos: *Unions and collective bargaining: Economic effects in a global environment* (Washington DC, World Bank, 2002), p.116, as quoted in *Organizing for Social Justice*, p 62.
[36] *Organizing for Social Justice*, p. 74.

4. The Right to Strike[37]

Neither ILO Convention 87 nor 98 mentions the right to strike, but a long tradition of ILO jurisprudence has established the right to strike as an essential component of collective bargaining. As Lee Swepston observes, the ILO's supervisory bodies have had to deal with this question more often than any other subject in labor relations. It is through these mechanisms that the ILO's principles relating to strikes have developed. According to ILO jurisprudence, the provisions of Convention 87 which give legal basis for the principles are Article 3, 8 and 10. Swepston reports, "As early as its second meeting in 1952, the Committee on Freedom of Association affirmed the principle of the right to strike, stating that it is one of the 'essential elements of trade unions rights'; and stressed shortly afterwards that 'in most countries strikes are recognized as a legitimate weapon of trade unions in furtherance of their members' interests'."[38]

Prohibition and Restriction of Strikes – The right to strike is not an absolute right; it can be limited or restricted in some ways. It is generally reserved for workers' organizations (as opposed to workers, themselves), and a general prohibition of strikes is not accepted, except in the case of serious conflict or natural disaster. Certain categories of workers – e.g. public officials (only those exercising authority in the name of the state) and workers in "essential services" (only those services that would endanger the life, safety or health of the population if interrupted) – may be restricted from exercising this right.

Conditions for Strikes – In many cases, applicable national legislation requires that certain conditions be met before declaring a strike. For example, law may require the exhaustion of conciliation and mediation procedures; a waiting period and advanced notice; compliance with a collective bargaining agreement; or prior approval by a certain percentage of workers in a secret strike ballot. While the Committee on Freedom of Association considers these conditions reasonable, conditions should not be misused to substantially limit trade unions' bargaining power. For example, while requiring approval by the *majority of those voting* in a secret strike ballot can be compatible with this right, requiring an *absolute majority of workers* to call the strike is not.

Forms of Strike Action – Strikes can take various forms. In addition to work stoppages, actions such as a slow down in work (a **"go-slow" strike**), work rules being applied to the letter (**"work-to-rule" strikes**), and **occupation of the workplace** are all forms of strike action. The supervisory bodies have accepted that these are valid forms of striking. Limitations imposed by governments on such actions would only be justified if the strike ceased to be peaceful. Similarly, **sympathy strikes**, which take place when a trade union strikes in support of another strike, should be allowed as long as the initial strike is lawful. A general prohibition of sympathy strikes, which are becoming more frequent with globalization, could lead to abuse. **Picketing** is acceptable as long as it is in accordance with the law, remains peaceful, and does not disturb public order. **General**

[37] This section is based on Swepston, pp. 187-190. There additional information can be found regarding ILO decisions and reports relating to strikes.
[38] *Ibid*, p 187.

strikes with the objective of influencing public policies that impact trade union members or workers in general are consistent with the principles of freedom of association.

Sanctions for Strike Action – The supervisory bodies consider that labor relations may be endangered if authorities apply severe punishments for strikes. "Arrests and dismissals of strikers on a large scale involve serious risks of abuse, and place freedom of association in grave jeopardy; and generally, the authorities should not have recourse to imprisonment" for organizing or participating in any peaceful strike.[39]

5. Resolving Disputes

Dispute Resolution – Workers and employers have the right to resolve any disputes by themselves without interference by the authorities. The methods they decide upon are part of the organization of their activities and programs. Disputes are likely to arise, and when they do, the chances of reaching a settlement are likely to be greater if the two parties have agreed beforehand on how to deal with them.

According to the ILO, dispute resolution mechanisms help workers and employers settle disputes peacefully with a minimum disruption of work. The ILO reports that the prevention and settlement of labor disputes

> ...remains at the core of sound labour relations and in creating a conducive environment for efficiency, economic growth and development.
>
> Disputes manifest themselves in many ways. **Disputes of right** relate to the implementation or interpretation of an existing right, whether embodied in law, collective agreement or in an individual contract. **Interest disputes** usually arise when collective bargaining fails to lead to agreement. At another level of analysis, a dispute may involve an individual worker (**individual disputes or grievances**), or a group of workers (**collective disputes**).
>
> The settlement procedures are most often established in national legislation incorporating voluntary procedures reached by the parties themselves. A key objective of the settlement procedure is to promote collective bargaining, hence, where possible, bipartite settlement is preferred. [40]

The ILO and most code initiatives promote the resolution of disputes at **as local a level as possible**, ideally through direct negotiation. If workers are not able to resolve disputes directly through grievance procedures or other mechanisms, they general engage the help of a third party to resolve disputes. These procedures fall into three categories: 1) conciliation and mediation, 2) arbitration, and 3) adjudication through a tribunal or labor court.

Grievances – According to the ILO's Examination of Grievances Recommendation of 1967 (R130), any worker who, acting individually or jointly with others, considers that he/she has grounds for a grievance should have the right (a) to submit the grievance

[39] *Ibid,* p. 190.
[40] *Social Dialogue* website.

without suffering any prejudice whatsoever as a result; and (b) have the grievance examined in accordance with the appropriate procedure. This normally consists of a series of steps usually within a stipulated time frame, beginning with efforts to settle grievances directly between the worker affected (who may be assisted by a union or elected representative, or another person) and the immediate supervisor. If no solution is found, and the grievance is of a serious nature, it "goes up the ladder." It may possibly end in a meeting between a senior manager and a senior trade union official.

The recommendation distinguishes between employee grievances and "collective claims aimed at the modification of terms and conditions of employment," which would be handled through other channels. In both cases, if there is a collective agreement already in place, the agreement's procedures for the examination of grievances should be used. Moreover, they should be settled within the enterprise whenever possible. Grievance procedures should:

- Be formulated and applied so that at every step of the procedure a settlement can be achieved.
- Be uncomplicated and as rapid as possible - appropriate time limits may be prescribed for this purpose.
- Ensure that workers who have submitted grievances are kept informed of the action taken on the grievance.

If all efforts to settle the grievance within the undertaking have failed, it should be possible to seek final settlement through: a joint examination of the case by the employers' and workers' organizations concerned; conciliation and mediation; arbitration, or adjudication through a tribunal or labor court.

Voluntary Conciliation, Mediation, and Arbitration – The ILO Voluntary Conciliation and Arbitration Recommendation of 1951 (R92) states that voluntary conciliation machinery should be made available to prevent and settle industrial disputes. All parties to a dispute should be able to set the process in motion, free of charge and expeditiously. Strikes and lockouts should not take place if a dispute is submitted for settlement with the consent of all parties concerned.

Mediation and Conciliation – While the ILO uses the terminology of *conciliation,* the term is often used interchangeably with *mediation.* Many dispute resolution experts refer to conciliation as a specific type or form of mediation.

> **Mediation**, broadly defined, is an informal method of dispute resolution in which a neutral third party – an ombudsman or mediator – attempts to assist workers and employers in finding a resolution to their problem. While mediation depends on the context, participation in mediation is typically voluntary and the nature of the process generally does not *require* parties to reach a conclusion. The third party facilitates the resolution process but does not impose a resolution on the parties. Although mediation generally does not have legal standing, agreements between the parties can be committed in writing and signed as a legally-binding contract.[41]

[41] "Mediation." *The Columbia Electronic Encyclopedia*, Sixth Edition, Columbia University Press, 2003.

> **Conciliation** is a process whereby parties to a dispute agree to utilize the services of conciliator, who then meets with the parties separately in an attempt to resolve their differences. It differs from mediation in that it usually seeks to reconcile the parties by seeking concessions from both sides and parties seldom, if ever, face each other in the presence of the conciliator. Like mediation, when an understanding is reached between two parties, it is usually committed to in writing and usually becomes a legally-binding contract.[42]
>
> A recent development in the context of codes and freedom of association is the use of an **ombudsman** to mediate disputes, which commonly relate to violations of freedom of association. Technically, an ombudsman is "an official appointed by a government or other organization to investigate complaints against those in authority" – in these cases, companies. "The position is designed to give those with less power... a voice in the operation of large organizations."[43]

Arbitration – is the process of resolving a dispute between two parties outside of the court system by presenting it to an impartial third party or a panel for a decision (which may or may not be binding, depending upon legislation or the agreed procedure). Like mediation and conciliation, arbitration should be voluntary (although some countries' national legislation makes it compulsory). Unlike mediation and conciliation, however, there is a third party who both *facilitates* the resolution process and *imposes a resolution*. It is common practice for a case that has failed in mediation to go to arbitration, where an arbitrator is empowered to make a final judgment.

There are many aspects of arbitration that resemble adjudication in the courtroom. However, unlike judges, in countries like the US and Canada, "arbitrators are not bound by precedent and have great leeway in such matters as active participation in the proceedings, accepting evidence, questioning witnesses, and deciding appropriate remedies. Arbitrators may visit sites outside the hearing room, call expert witnesses, seek out additional evidence, decide whether or not the parties may be represented by legal counsel, and perform many other actions not normally within the purview of a court."[44]

In the context of labor arbitration, **interest arbitration** applies to disputes around terms in a new contract, while **grievance arbitration** is used with regard to the interpretation of a collective bargaining agreement.

Complaints – In common law, a complaint is a formal legal document that sets out the basic facts and legal reasons that one party files a claim against another.[45] The term "complaint" is often used interchangeably with "grievance." However, in the context of codes of conduct, the term "grievance" is usually used at the level of the workplace, while the term "complaint" is used with regard to buying company complaints procedures or code organizations' complaints mechanisms at the international level. Workplace-level grievance systems should deal with all forms of worker issues – whether code violations

[42] "Conciliation." *Dictionary.LaborLaw.Talk*, 2005. http://encyclopedia.laborlawtalk.com/Conciliation.
[43] "Ombudsman." *The New Dictionary of Cultural Literacy, Third Edition.* Houghton Mifflin Company, 2002.
[44] "Arbitration." *Dictionary.LaborLaw.Talk*, 2005. Accessed at http://encyclopedia.laborlawtalk.com/Arbitration.
[45] "Complaint." *Dictionary.LaborLaw.Talk*, 2005. Accessed at http://encyclopedia.laborlawtalk.com/complaint.

or other issues that do not relate to code standards (e.g. disagreements between workers, issues with management style, etc.). On the other hand, international code initiatives limit use of their complaints systems to alleged violations of the relevant code. As stated above, the rule of thumb is that all issues (referred to as complaints, grievances or otherwise) should be resolved at as local a level as possible.

The Clean Clothes Campaign's document, *Considering Complaint Mechanisms: An Important Tool for Code Monitoring and Verification*, accessed at http://www.cleanclothes.org/codes/03-12-complaints-report.htm provides details on the various code initiatives' complaints mechanisms.

V. Codes and Freedom of Association

This section reviews the way in which various codes – those of sourcing companies (retailers and brands) and multi-stakeholder initiatives – deal with freedom of association. In such a discussion, it is important to keep in mind the ILO standards and interpretations discussed in previous sections. Given the breadth of ILO guidance on freedom of association (through conventions, recommendations, and supervisory body decisions), companies and multinational initiatives should rely on ILO standards and guidance in drafting their codes of conduct. **Significant departures from ILO language often represent efforts to water down the meaning of these rights.**

Due to the number of sourcing companies with codes around the world, this document does not address the commitments of sourcing companies in detail. Instead it briefly introduces the range of commitments that sourcing companies make and then focuses on the various multi-stakeholder codes' treatment of these standards. This information aims to enable worker rights advocates to evaluate more effectively the contents of specific codes of conduct with regard to freedom of association.

1. Company Codes

Freedom of association is referenced in many (though not all) of the codes of conduct put forth by individual sourcing companies. However, the language of the codes varies considerably – with some sourcing companies making vague statements of principle and others committing to ensure that both freedom of association and collective bargaining are upheld. According to an ILO publication:

> Some codes make 'soft' commitments, such as stating that the company 'will seek business partners who share its commitment' to these rights, while other codes state that the MNE partners with suppliers dedicated to 'continuous improvement in management practices ... [including] the freedom of association and collective bargaining'. Nuances in language may in effect function to absolve a company from responsibility for a violation of rights, or merely hold a company to a standard of 'improvement' with no specific benchmark. Most codes make provisions along the following lines:
>
> > Our business partners must recognise and respect the right of workers to form and join associations of their own choosing, and to bargain collectively.
>
> Codes may further stipulate that management must not discriminate against, penalize or interfere with workers or their representatives involved in union activity. Some codes also place a proactive obligation on the management of supplier factories to allow alternative means of worker representation in those countries that restrict the freedom of association and collective bargaining.[46]

Reviewing the freedom of association sections of codes can help one begin to gauge sourcing company commitments to freedom of association. The following discussions

[46] Ivanka Mamic. *Implementing Codes of Conduct: How Business Manage Social Performance in Global Supply Chains*. Geneva: ILO, 2004, p. 50

about multi-stakeholder codes and issues, such as parallel means, informal workers, and export processing zones, can further inform efforts to analyze the meaning and implications of the language in sourcing companies' codes.

2. Multi-stakeholder Initiatives' (MSIs) Codes

The table below includes the code provisions for freedom of association and collective bargaining for the six leading code monitoring and verification organizations. It also includes an excerpt from the draft Common Code of the Joint Initiative for Corporate Accountability and Workers Rights (Jo-In), which is an exercise by the six organizations to explore consolidation of their codes.

Clean Clothes Campaign (CCC)

Excerpt from CCC Code of Labour Practices - http://www.cleanclothes.org/codes/ccccode.htm

Freedom of association and the right to collective bargaining are respected.

The right of all workers to form and join trade unions and to bargain collectively shall be recognized (ILO Conventions 87 and 98).

Workers' representatives shall not be the subject of discrimination and shall have access to all workplaces necessary to enable them to carry out their representation functions (ILO Convention 135 and Recommendation 143).

Employers shall adopt a positive approach towards the activities of trade unions and an open attitude towards their organisational activities.

Ethical Trading Initiative (ETI)

Excerpt from ETI Base Code - http://www.ethicaltrade.org/Z/lib/base/code_en.shtml

2. Freedom of Association and the Right to Collective Bargaining Are Respected

2.1 Workers, without distinction, have the right to join or form trade unions of their own choosing and to bargain collectively.

2.2 The employer adopts an open attitude towards the activities of trade unions and their organisational activities.

2.3 Workers representatives are not discriminated against and have access to carry out their representative functions in the workplace.

2.4 Where the right to freedom of association and collective bargaining is restricted under law, the employer facilitates, and does not hinder, the development of parallel means for independent and free association and bargaining.

Fair Labor Association (FLA)

Excerpt from FLA Workplace Code of Conduct - http://www.fairlabor.org/all/code/index.html *

Freedom of Association and Collective Bargaining

Employers shall recognize and respect the right of employees to freedom of association and collective bargaining.

** The FLA Code is more condensed than the other codes here, relying on the FLA Compliance Benchmarks to define the provisions of its Code in greater detail. The Benchmarks for freedom of association can be accessed in Appendix C or at http://www.fairlabor.org/all/monitor/compliance.html*

Fair Wear Foundation (FWF)

Excerpt from the FWF Code of Labour Practices, part of the FWF's Principles and Policies Document –
http://en.fairwear.nl/tmp/Principes%20&%20Beleid%20-%20mei%202002%20-%20Engels%20-%20zl.pdf

3.4 Freedom of Association and the right to collective bargaining

The right of all workers to form and join trade unions and bargain collectively shall be recognized. (ILO Conventions 87 and 98)

The company shall, in those situations in which the right to freedom of association and collective bargaining are restricted under law, facilitate parallel means of independent and free association and bargaining for all workers.

Workers' representatives shall not be the subject of discrimination and shall have access to all workplaces necessary to carry out their representation functions. (ILO Convention 135 and Recommendation 143)

Social Accountability International (SAI)

Excerpt from SA8000 Standard –
http://www.sa-intl.org/Document%20Center/2001StdEnglishFinal.doc

SA800 4.1 The company shall respect the right of all personnel to form and join trade unions of their choice and to bargain collectively.

SA8000 4.2 The company shall, in those situations in which the right to freedom of association and collective bargaining are restricted under law, facilitate parallel means of independent and free association and bargaining for all such personnel.

SA8000 4.3 The company shall ensure representatives of such personnel are not the subject of discrimination and that such representatives have access to their members in the workplace.

In its Introduction, the Standard also refers to ILO Conventions 87 and 98.

Workers Rights Consortium (WRC)

Excerpt from WRC's Model Code of Conduct – http://www.workersrights.org/coc.asp

9. *Freedom of Association and Collective Bargaining*:

Licensees shall recognize and respect the right of employees to freedom of association and collective bargaining.

No employee shall be subject to harassment, intimidation or retaliation in their efforts to freely associate or bargain collectively.

Licensees shall not cooperate with governmental agencies and other organizations that use the power of the State to prevent workers from organizing a union of their choice.

Licensees shall allow union organizers free access to employees.

Licensees shall recognize the union of the employees' choice.

Joint Initiative for Corporate Accountability and Workers Rights (Jo-In)

Excerpt from Jo-In's Draft Code of Labour Practice –
http://www.jo-in.org/pub/docs/JoIn-DraftCodeofLabourPrac3_en.pdf

Freedom of Association & Right to Collective Bargaining

(Relevant ILO conventions are: No. 87, 98, 135 and 154 - Relevant ILO Recommendation 143)

The right of all workers to form or join trade unions of their choice and to bargain collectively shall be recognized and respected.

The company shall recognise the trade union(s) of the workers' choice.

The company shall adopt a positive approach towards the activities of trade unions and an open attitude towards the organisational activities of workers.

No worker, or prospective worker, shall be subject to dismissal, discrimination, harassment, intimidation or retaliation for reason of union membership or participation in trade union activities.

The company shall ensure that workers' representatives have free access to all workplaces to carry out their representation functions and shall not, without justification, impede access for union organisers to employees.

These code provisions are similar in many ways. This has been reinforced through discussions by the six organizations through the Jo-In project, an initiative that in part aims to develop a "draft Common Code" and test its application through trials in Turkey (access www.jo-in.org to learn more about Jo-In). Nonetheless, differences do exist among the codes.

For example:

- CCC, ETI, and FWF refer to "workers" while FLA and WRC refer to "employees" and SAI refers to "personnel." Using language that differs from the ILO language of "workers" could lead to some questions about code application to informal or unregistered workers. The FLA Benchmarks and Guidance, SAI Guidance, and WRC documents all refer to workers, however, implying that the codes do indeed apply to all workers regardless of their legal status.

- The WRC Code and FLA Benchmarks protect all workers from anti-union discrimination, while CCC, ETI, FWF, and SAI protect "worker representatives." The language of those codes referring to "worker representatives" seems to be a direct reference to Article 1 of the Workers Representatives Convention (135). Again, based on documentation from the latter four organizations, this seems to represent more differences in drafting style, rather than any effort to limit protections to a certain kind of worker.

- ETI and CCC Codes require employers/companies to adopt an "open" or "positive" attitude towards unions and organizing activities, while the others do not. The WRC Code and FLA Benchmarks prohibit government or employer interference in worker organizations, while the SAI Guidance Document protects both workers' and employers'

organizations against interference by each other. This difference is significant in that the ETI and CCC provisions require more of companies than what's required in ILO standards, which emphasize non-intervention on the part of employers. Based on the ETI and CCC Codes, the Jo-In draft Code includes "open" and "positive" language. It will be interesting to observe how Jo-In applies and measures compliance with this requirement – and if it can help improve compliance with freedom of association more generally.

- The ETI, FWF, and SAI Codes include almost identical provisions for the development of parallel means for independent and free association and bargaining. CCC, FLA, and WFC do not provide for parallel means. Interestingly, the Jo-In draft Code does not contain parallel means language either. Parallel means are discussed further in the following section.

While Jo-In discussions indicate that these differences are far from insurmountable, it is important to be aware of them. Indeed, code language and its interpretation can become especially important when complaints or serious noncompliance issues arise. The trials undertaken in Turkey by Jo-In over the next 18 months should demonstrate the extent to which these differences are significant, and the extent to which the spirit of these provisions really is the same.

3. MSIs' Guidance for Freedom of Association

A. Key Sources

In addition to the codes provided above, below are the documents provided to the CCC by the four code initiatives with company membership (ETI, FWF, FLA, and SAI) for the purposes of this paper. These documents have been developed to provide further guidance to companies and auditors with regard to freedom of association.

ETI:

- *ETI Freedom of Association and Collective Bargaining Guidance Document*, by the ETI Trade Union Caucus, March 2005. See Appendix A, also available at http://www.ethicaltrade.org/Z/lib/2005/03/brief-foa-cb/index.shtml
- *Finding Common Ground: Working with Trade Unions in Developing Countries,* a briefing paper resulting from one of the workshops at ETI's Biennial Conference, May 2005, available at http://www.ethicaltrade.org/Z/lib/2005/05/eticonf/index.shtml
- Report on ETI Members' Roundtable on Freedom of Association and Collective Bargaining, 9 March 2005, available at http://www.eti2.org.uk/Z/lib/2005/03/rt-foa-cb/ETI-sem-foa-cb_200503.pdf

FWF:

- FWF "Auditing Guidance Grid," excerpt focusing on freedom of association. See Appendix B. The FWF is in the process of drafting guidance relating to freedom of association and collective bargaining for public consumption.
- Limited guidance on freedom of association is also available in the FWF Company Manual, available at http://en.fairwear.nl/?p=316.

FLA:
- FLA *Compliance Benchmarks*. See Appendix C or access http://www.fairlabor.org/all/monitor/compliance.html.
- *FLA Monitoring Alert on Freedom of Association*, September 2003. See Appendix D.
- *FLA Freedom of Association Guidance Document for Participating Companies and Monitors* (DRAFT), 2004. Not currently available for circulation.
- FLA Guidelines of Good Practice, April 2005. A tool developed by the FLA's Central America Project, which seeks to address common issues in Central America relating to freedom of association, harassment and abuse, and nondiscrimination. It is currently available in Spanish at http://www.fairlabor.org/all/reports/FLA_GGP_v2-0_esp.pdf, and will soon become available in English.

SAI:
- *Guidance Document for Social Accountability 8000*, Excerpt on "Freedom of Association and the Right to Collective Bargaining," pp. 55-71. See Appendix E.

B. Company Obligations for Freedom of Association[47]

The organizations discussed above take a range of approaches to defining company obligations with regard to freedom of association. This is due in large part to the different approaches the organizations take to codes implementation in general. The best way to get a sense for each organization's requirements for companies is to review their respective guidance documents, which are available in Appendices A-E. The bullets below offer a few key points worth noting about each organization's treatment of company obligations.

- **Ethical Trading Initiative:** With a focus on shared learning and experimentation, ETI only requires that member companies give an "explicit endorsement" of the Base Code provision above. Its guidance document and seminar on freedom of association therefore focused mainly on the international standards that form the basis of the code element and good practice suggested by trade union and some companies. Interestingly, a great deal of ETI suggestions for good practice focus on consultation and cooperation with trade unions at the international, national, regional and local levels – ideally through consultation with ETI trade union members. See Appendix A for more information.

- **Fair Wear Foundation:** FWF lays out explicit obligations for member companies and audits the extent to which companies have upheld those obligations. Therefore, its guidance provides relatively explicit requirements for implementing freedom of association at the factory level. FWF is in the process of developing a full-fledged guidance document for freedom of association, but in the meantime uses its auditing guidance grid (see Appendix B) to train auditors and inform companies. The grid describes various situations and provides suggestions for appropriate corrective action. FWF staff members, who often play a hands-on role in FWF factory verification visits and

[47] CCC is not discussed in this section because it does not officially provide guidance for company implementation of codes.

ensuing remediation, frequently work directly with companies to inform them of their obligations in certain situations.

- **Fair Labor Association:** The FLA's draft freedom of association guidance document goes into considerable detail with regard to FLA participating company obligations and suggested actions with regard to freedom of association and collective bargaining. It requires companies to uphold the FLA standard and remediate and prevent noncompliance. Such activities may range from mediation between competing unions to the development of policies and procedures to guard against anti-union discrimination. A main theme of FLA guidance to participating companies is balancing activities to create a space for worker organizing with the principle of non-interference. It explains, "FLA constituents therefore have to be very careful to ensure that their intervention to protect that right does not amount to interference."[48]

- **Social Accountability International:** The SA8000 system focuses on facilities, rather than sourcing companies, as having primary responsibility for upholding the SA8000 Code. This means that SA8000 certification is granted to those factories that prove to have systems in place to achieve SA8000 requirements. SAI's Guidance Document discusses requirements for factories to comply with the SA8000 standard. These include non-interference with union activities, good faith efforts to engage in collective bargaining, and, in cases where freedom of association is limited by law (e.g. EPZs), exceeding the provisions of the law and ensuring that workers' freedom of association is upheld. It also addresses parallel means, requiring factories where independent trade unions are outlawed (e.g. China) to "make sure workers know they are free to organize themselves." See Appendix E and discussions below about parallel means for further details.

- **Workers Rights Consortium:** The WRC investigates complaints received from workers and their advocates regarding violations of the WRC Code in factories where university licensees produce. It does not have company membership and therefore does not have a guidance document dealing with company obligations. Most of its investigations have dealt with freedom of association, however. The WRC therefore offers some advice for companies seeking to respect workers' freedom of association based on its experiences in the field.

    - First – realize that workers not being able to organize is the rule rather than the exception. Given this is the case, sourcing companies need an aggressive action plan for change.
    - Sourcing companies should require suppliers to craft a statement about their commitment to freedom of association in conjunction with local unions and distribute it to workers.
    - Sourcing companies should also communicate their commitment to freedom of association directly to workers.
    - Sourcing companies should not speak against unions and should prevent suppliers from speaking against unions, since this can be misinterpreted by workers as coercive opposition to organizing (even if it is not).

[48] FLA's Draft FoA Guidance, p. 11.

- Sourcing companies should work with suppliers to provide access to unions or their civil society allies to train workers about freedom of association and other rights. Due to conflicts of interests, this should not be done by factories or companies.
- Sourcing companies should beware of company unions, and should not simply accept union presence as a sign of compliance.
- Sourcing companies should take a long-term, country-specific approach to remediation – in conjunction with local civil society.
- Sourcing companies should lobby governments to revise laws that do not comply with international standards, and enforce those that do. Due to the understanding of many governments that sourcing companies prefer to invest where laws are not enforced, failing to communicate to governments essentially reinforces this understanding.
- Sourcing companies should reward suppliers who comply with freedom of association. Labor costs are likely to go up if worker organizations are effective, so sourcing companies should show their support for freedom of association by increasing orders and/or prices in factories that comply.[49]

C. Auditing Freedom of Association

In their evaluation of social auditing, freedom of association, and the right to collective bargaining, Philip Hunter and Michael Urminsky of the ILO consider that "auditing methods are underdeveloped with respect to these rights and freedoms, and need significant improvement and reconceptualization before offering a sufficient level of assurance."[50] The fact that most, if not all, of these organizations now have a programmatic focus on freedom of association implies that they are aware of the need to develop their capacity to enhance workers' freedom of association.[51]

To this end, the **FWF** and **FLA** take somewhat similar approaches in their guidance for auditors. They discuss typical factory scenarios and appropriate responses. In general, FWF auditors are known to invest in worker interviews outside the factory and cooperation with local stakeholders. FLA's updated monitoring model calls on auditors to analyze the labor-management relationship in a factory and the policies that can be in place to build industrial relations structures. To this end, the FLA draft monitoring guidance document differentiates, for example, between negotiation, communication, and consultation. "FLA 3.0" is a project to devise a new approach to monitoring that will assess the root causes of noncompliance and then help to build industrial relations systems accordingly. The current publicly-available FLA documentation takes a more conventional approach to auditing freedom of association, however. Generally, FLA and FWF auditors are expected to:

- Conduct interviews (with management and workers)

[49] Based on presentation by WRC Executive Director Scott Nova at the Cornell University ILR School's Freedom of Association seminar, May 2005.
[50] Philip Hunter and Michael Urminsky. "Social auditing, freedom of association and the right to collective bargaining" (2003), p. 47. Accessed at http://www.ilo.org/public/english/dialogue/actrav/publ/130/8.pdf
[51] Although ETI and CCC have focused their programs on freedom of association, they are not discussed in this section because they do not conduct audits or investigations.

- Review policies and procedures (hiring, promotions, termination, disciplinary, and grievance)
- Review other records/documentation (records of dismissed workers, workers who were refused work, etc.)
- Consult with external sources in order to ascertain anti-union behavior, the history of labor relations in the area, government policy, and union history in the factory

This approach generally corresponds with that suggested by **SAI** in the *SA8000 Guidance Document*, as well, although the section on freedom of association provides relatively limited concrete auditing guidance. (For a list of suggested audit questions for freedom of association, access page 66 of the *SA8000 Guidance Document* -- Appendix E.) Perhaps most notable in the SAI *Guidance Document*, however, is the level of responsibility placed on SA8000 auditors with regard to parallel means. According to the document, auditors are expected to assess a country's laws in order to determine whether, according to SAI guidelines, parallel means can be implemented in a given factory. This represents added reliance on auditors to monitor the regional context and consult with unions at all levels on an ongoing basis.

Although a guidance document for WRC investigations is not available, **WRC**'s experiences with investigations can inform discussions about auditing and freedom of association. Below are some tips offered by WRC to improve the effectiveness of auditing freedom of association.

- The presence of a union does not prove that a factory is compliant with the Code. In the case that there is a union present in a factory, it is important to understand the local context, find out what the union does, and talk to people who have first-hand knowledge about the union.
- Ask for records of union elections and labor/management meetings to ascertain the whether the union is independent of management.
- Where there isn't a union, find out why. Understand the context and the history. Violations may be buried, so strong investigation skills are required.
- Don't rely on in-factory interviews or interviews arranged through management.
- Talk to former workers, and, wherever possible, rejected job applicants to determine reasons for dismissal or refusal of work.
- Review records of personnel actions, including transfers and demotions, as well as dismissals.
- Respond rapidly to firings, threats, and intimidation. If workers observe several workers fired for organizing, it has a real chilling effect.
- Auditors have to spend more time in order to unearth freedom of association violations.
- By helping to create an environment where a legitimate union can be established, an auditor can ultimately rely on the union to help check and maintain compliance.[52]

[52] Based on presentation by WRC Executive Director Scott Nova at the Cornell University ILR School's Freedom of Association seminar, May 2005.

D. Complaints Mechanisms and Freedom of Association

In its 2004 Public Report, which featured freedom of association, the FLA explains: "In the first two years of FLA independent external monitoring, the FLA observed that monitors seemed to have underreported the incidence of noncompliance with the FLA Code provision for freedom of association."[53] The report is frank in observing that many of the auditors who work with the FLA as well as other initiatives and sourcing companies need to improve their knowledge and skills with regard to freedom of association and collective bargaining. It states "these findings highlighted the need for a more sophisticated understanding of this standard among monitors, as well as a need for enhanced investigation techniques and reporting tools."[54]

While auditing improvements are reportedly underway, as discussed above, this assessment underscores how auditing in its current form is not finding, reporting, or remediating violations of freedom of association. Code initiatives continue to need a safety net for issues that are not reported through auditing. All six organizations discussed above offer workers a complaints mechanism by which they or their advocates can report serious code violations. Depending on the code and the particular mechanism, an organization would then be able to press for change at the international level. Perhaps not surprisingly, most workers' complaints to the six initiatives relate to freedom of association. According to CCC records, for example, 15 of its 21 successful cases (71%) between 1999 and 2003 involved violations of the rights to form, join, and organize unions. And, of the 192 violations recorded, 107 (55.7%) involved violations of freedom of association.[55] Anecdotal evidence from the other initiatives supports this data, as well.

To better understand freedom of association, it is worth considering the complaints that various initiatives have already dealt with. These can provide valuable information about typical conflicts and some good practice. In addition to reports about CCC urgent appeals, which are available at www.cleanclothes.org/appeals.htm, investigation reports by the WRC and reports from third party complaints to the FLA can also be instructive. To date, the WRC has published 13 reports on factories, which can be accessed at http://www.workersrights.org/freports.asp. FLA reports on third party complaints are released sporadically; case studies on complaints can be accessed in the FLA's 2004 Public Report (http://www.fairlabor.org/2004report/thirdparty/index.html), and updated reports are expected shortly in the 2005 Public Report. SAI and ETI also have third party complaints systems which may be instructive, but information about the complaints made to these systems is not publicly available. FWF is currently developing its systems for complaints and reporting.

The Clean Clothes Campaign's document, *Considering Complaint Mechanisms: An Important Tool for Code Monitoring and Verification*, accessed at

[53] "Freedom of Association" in FLA *2004 Public Report*, accessed at http://www.fairlabor.org/2004report/freedom/improve.html.
[54] FLA "Year Two Findings – Freedom of Association," *2004 Public Report*, accessed at http://www.fairlabor.org/2004report/overview/freedom.html
[55] Dent, Kelly. *Urgent Appeals Impact Assessment Study.* CCC (2005), p. 27. Currently not available for circulation.

http://www.cleanclothes.org/codes/03-12-complaints-report.htm, provides details on the various code initiatives' complaints mechanisms. It also brings to light ways in which these procedures need to be strengthened further.

VI. Points for Further Consideration

When discussing freedom of association and collective bargaining in the context of codes, there are several particular scenarios in which workers' freedom of association and right to collective bargaining are open to misinterpretation and, in turn, violation. These are worthy of further consideration by the various code-related initiatives.

1. Parallel Means

Members of various multi-stakeholder code initiatives have disagreed about how their organizations should address code provisions concerning freedom of association in countries where free and independent trade unions are prohibited by law – i.e. where trade unions are banned completely (e.g., the Gulf States) – or in countries where the government grants a monopoly to a labor organization that it effectively controls (e.g., China and Vietnam). Some participants in these initiatives consider that truly ethical or fair production is not possible where genuine trade unions are not permitted. They call for a moratorium on member companies doing business in these countries until laws change. Other participants want to use code implementation to address these challenging situations. They do not believe that any moratorium on doing business in countries such as China is a realistic alternative.

"Parallel means" is a concept developed for situations where workers' freedom of association is prohibited by the authorities. It calls upon employers to recognize, or to otherwise encourage, the organization of workers outside a prohibitive legal framework. This idea is loosely based on experiences in apartheid-era South Africa where independent trade unions of black workers were established outside of the legal framework that governed the process of establishing trade unions. Companies, particularly multinational enterprises, were encouraged by opponents of apartheid around the world to engage with these independent trade unions. This proved critical, as the emergence of a strong trade union movement played a central role in apartheid's demise.

Today, "parallel means" is most often used with respect to China where the government-controlled labor organization has a monopoly and genuinely independent trade unions are prohibited. Unlike South Africa under apartheid, however, no genuine Chinese trade union organizations operating outside the legal framework are known to date. The term "parallel means" is now used more broadly in practice and with regard to activities other than the engagement of independent trade unions. In implementing their supply chain codes, some companies describe a variety of activities involving their suppliers in China or other countries as examples of "parallel means." These activities are intended, in one way or another, to elicit workers' views or increase their involvement with the enterprise. Terms such as "input", "feedback," "empowerment," or "voice" are frequently used in connection with these activities, which are promoted as a means of obtaining some of the positive benefits associated with a industrial relations system that genuinely includes collective bargaining. In some cases these activities have involved the election of workers to participate in health and safety committees, productivity committees, or similar bodies.

Some consider such elections as early steps in a process that can ultimately lead to true trade union structures.

These activities are becoming increasingly controversial, however. Some critics argue that efforts to provide a substitute for trade unions reinforce paternalism rather than addressing the prohibition of Chinese workers to exercise a fundamental human right. Others voice concern that employer-sponsored elections of "worker representatives" can constitute a violation of workers' right to form and join independent trade unions, rather than any advancement of true freedom of association.

The multi-stakeholder code initiatives have responded to the problem posed by government repression of freedom of association in a variety of ways. ETI, FWF, and SAI included (almost identical) language in their codes that specifically addresses parallel means where unions are banned, while the FLA addressed participating companies' obligations with regard to these countries in its Charter. Those without company membership, CCC and WRC, continue to voice concern about companies moving production to locations where freedom of association and other key civil liberties are limited. Their official documents do not offer guidance on this topic.

What the Initiatives Say about Parallel Means:

"Where the right to freedom of association and collective bargaining is restricted under law, the employer facilitates, and does not hinder, the development of parallel means for independent and free association and bargaining."
- ETI Base Code

"The company shall, in those situations in which the right to freedom of association and collective bargaining are restricted under law, facilitate parallel means of independent and free association and bargaining for all workers."
- FWF Code of Labour Practice

"The company shall, in those situations in which the right to freedom of association and collective bargaining are restricted under law, facilitate parallel means of independent and free association and bargaining for all such personnel."
- SA8000 Standard

"Implementation of some of the standards contained in the Workplace Code may be problematic in certain countries where the rights embodied in the standards are not fully recognized or enforced either through law or practice. Despite these difficulties, one of the principal goals of the Association is to promote and encourage positive change in these countries so these standards become fully recognized, respected and enforced. When deemed necessary and appropriate by the Board, the Association shall provide Participating Companies with appropriate country guidelines to address such special problems. The Association staff also shall provide to Participating Companies periodic reports on country practices from sources such as the International Labor Organization, local and international non-governmental organizations and the annual U.S. State Department human rights country reports. With regard to the standard on **freedom of association and collective bargaining** [emphasis added] contained in the Workplace Code, the Association expects all Participating Companies to address this issue by taking steps to ensure that employees have the ability to exercise these rights without fear of discrimination or punishment. Such steps include contracting with factory owners that understand and recognize these rights and who shall not affirmatively seek the assistance of state authorities

> to prevent workers from exercising these rights. The resort to violence by either employers or employees shall be considered inconsistent with the right to freedom of association and collective bargaining, as provided by ILO Conventions 87 and 98."[56]
>
> - FLA Charter

The central theme in all of these texts is the demand that companies establish parallel means of *independent and free association and bargaining for all workers*. This means encouraging nascent forms of worker-representation **only** in countries or areas where independent unions are prohibited. Examples of these structures include the establishment of workers' councils, welfare committees, complaints resolution committees, and basic-needs wage committees. But, as discussed above, approaches to parallel means are heavily criticized by some, particularly when the concept is misused to undermine the position of trade unions or misinterpreted to justify the employer dominated election of "worker representatives" in situations where this practice would constitute a violation of human rights. As noted by an ILO publication:

> [Parallel means] is sometimes used in countries that have legislation upholding the right to freedom of association but where in practice such rights are not upheld. There are also instances where parallel structures are used to undermine existing legal trade unions. Moreover, as the term is often broadly defined, it is not clear exactly what qualifies as an effective non-union means of representation, or how independent of management these means might be. Often little guidance is provided by codes on this matter.
>
> It must be remembered that the right to freedom of association is a core labor standard... As such, all parties need to exercise care and due diligence to ensure that application of freedom of association and not to promote the concept of parallel means... Otherwise, as workers' organizations point out, there is the potential for the disempowerment of workers as a direct consequence of having been given so-called parallel-means representation but without the safeguards that they would be given if they were to have a legitimate voice through the fully fledged exercise of their right to associate freely.[57]

The code initiatives seem to recognize pitfalls of misapplication of their code provisions. Indeed, when drafting the ETI *Guidance Document* (Appendix A), the ETI trade union caucus stresses first its opposition to production in "countries where fundamental workers rights are denied in this systematic manner." The caucus then goes on to explain their recognition of the reality of China's dominance in global manufacturing and the relevance of the parallel means clause, but stresses in several places that it should **only** be applied in those countries where trade unions are completely prohibited by law. The document refers to: China, Burma, Vietnam, Syria, Cuba, and most of the Gulf States.[58]

SAI's *Guidance Document* (Appendix E) does not include such a list and seems allow for the application of the parallel means clause in more countries than ETI does – or even for the application of parallel means in certain areas within countries, stating:

[56] FLA Charter, Section VII – Special Country Guidelines, p. 26. Accessed at http://www.fairlabor.org/all/about/FLAcharter.pdf.
[57] Mamic, p. 50.
[58] Ethical Trading Initiative, *FoA and Collective Bargaining Guidance Document,* Edition 1, March 2005, p.8.

> Countries where the parallel means clause may apply are often those countries ruled by a dictator or a single party system. It is possible however, that political interference by the state of a single, ruling party is not pervasive in every factory. To that end, if one or more of the following restrictions on workers rights occur, then the parallel means clause should apply…
>
> a) workers are not permitted by law to voluntarily apply or not to apply for membership in a trade union; or
> b) workers are not legally permitted to directly elect their own trade union representatives; or
> c) only one official trade union structure is permitted by the state and workers have no choice concerning the trade union organization with which they can affiliate; or
> d) workers' first-level organizations are not free to establish and join federations and confederations and any such organization is not free to affiliate with international organizations of workers; or
> e) the right to bargain collectively is not granted to federations and confederations of workers' first-level organizations.[59]

The SAI Guidance document also instructs auditors to consult the ICFTU website for updates on countries that ban trade unions and to contact SAI headquarters directly if they have any questions. While some have voiced concern that SAI relies too heavily on independent SA8000 certification bodies to analyze national laws and determine where parallel means structures can be applied, SAI does highlight that parallel means should **only** be instituted where the restriction is mandated by law or public policy and not just a de facto condition – i.e. where there is no other means for workers to "express their concerns and collectively negotiate solutions with management." [60] SAI also reports that it is exploring approaches to parallel means in countries where it applies.

As noted above, FWF is still in the process of developing guidance on freedom of association and collective bargaining, but it seems to appreciate the need to provide clear guidance regarding parallel means in order to guard against its misapplication, which could ultimately undermine unions. The FLA's guidance documents do not discuss parallel means explicitly. Nonetheless, there seems to be an unspoken acceptance of parallel structures for worker representation. FLA projects in China, its approach in developing its new FLA 3.0 implementation systems, and other activities involve exploring alternative means for giving workers voice.

What is clear from observations in the field is that there is considerable misunderstanding among companies, monitors, and even worker advocates over the parallel means concept and how it can be applied in the situations in which it was intended. This is an area worthy of further discussion to ensure that workers' freedom of association is upheld.

[59] Social Accountability International. *SA8000 Guidance Document* (undated), p. 60.
[60] *Ibid.*

2. Workers in the Informal Economy

An increasing number of workers in the garment industry work in informal employment arrangements. This can mean they work in non-registered workplaces or are home based, however such arrangements also stretch into formally recognized workplaces that keep some portion of the workforce "off the books." The number of workers in informal work arrangements seems to be on the rise, as more firms decentralize production and increasingly rely on smaller production units – some of which are unregistered and informal. Moreover, the move towards flexible employment arrangements to cut costs and increase competitiveness often creates irregular work and contractual situations that tend to fall between the cracks of coverage by labor law and social protection.[61] All of this indicates that number of ambiguous and disguised employment relationships is increasing globally, and women tend to work in such positions.

The needs and problems of such a diverse international workforce are as varied as the barriers and constraints they face in organizing. The absence of a legal employment relationship in and of itself forms a major barrier to exercising the right to freedom of association and collective bargaining. Although there may be situations where workers are able to band together and bargain collectively without having a legally-recognized employment relationship, collective bargaining almost always needs a legal framework to be sustainable. Indeed, recognized employment relationships are used to define the bargaining parties, clearly delineating who fits into the "employer" category and the "employee" category, which is an important starting point for bargaining. Moreover, without formal status, it is difficult to apply national labor legislation that requires employers to recognize and bargain with worker organizations.

In this context, one obvious obligation for companies with codes of conduct is to require that work be performed within the appropriate legal framework so that workers and their rights, including their right to form and join trade unions, can be protected. While taking actions that result in work being performed within a legal framework is clearly a priority, workers' efforts to organize and to collectively advance their interests should also be recognized and supported. Workers are most vulnerable to exploitation and abuse when they are not legally recognized and are beyond legal safety nets. Organizing can be an effective means of reducing this vulnerability and of obtaining legal recognition for economic relationships.

For more information about workers in the informal economy, please access the ILO's reports from the 2002 International Labour Conference discussions on this subject, accessed at http://www.ilo.org/public/english/employment/infeco/ilc2002.htm.

[61] ILO. *The scope of the employment relationship.* Report V, International Labour Conference, 91st Session, Geneva, 2003, as quoted in *Organizing for Social Justice*, p. 45.

3. Export Processing Zones

The ILO defines export processing zones (EPZs) as "industrial zones with special incentives set up to attract foreign investors, in which imported materials undergo some degree of processing before being exported again."[62] EPZs represent challenges for code implementation both in terms of the nature of the work conducted in these zones and the ways in which limitations are placed on labor standards there. As reported by the ILO, "the way in which global production chains currently function means that workers and companies in EPZs often struggle to meet tough production deadlines and pricing requirements. Analysis of these production chains also shows that profit margins are very small at the labor-intensive end in which many EPZs operate..."[63] Perhaps in response to these pricing pressures – or to attract investment – governments have been known to limit the application of national labor law in EPZs, particularly for freedom of association and collective bargaining. Countries, such as Bangladesh, Nigeria, Pakistan, and Turkey barred industrial action in EPZs.

In recent years, the ILO Committee of Experts on the Application of Conventions and Recommendations has looked into problems posed by certain countries' legislation relating to EPZs. It highlighted workers' universal freedom of associate (Article 2 of Convention 87) and the ILO MNE Declaration of 1977 (discussed in section II above), which explicitly bars placing limitations on freedom of association and collective bargaining in order to attract investment. The Committee found, for example, that legislation in Bangladesh and Pakistan that limited workers' rights in EPZs does not comply with ILO standards.

The guidance provided by ETI, SAI, and FLA correspond with one another in calling any limitation of freedom of association and collective bargaining rights in EPZs noncompliant with their respective codes. SAI's guidance points out that while these laws do not require the factory to recognize a trade union and bargaining collectively with workers, these actions generally are not forbidden either. Likewise, laws usually do not require punishment of workers who exercise those rights (though they do not provide legal protections for them either). SAI therefore calls on facilities in EPZs to implement the code standard regardless of EPZ-specific legislation. While ETI, FLA, and FWF take a similar approach, challenges remain with regard to implementation. The FLA's Central America project, which focuses on anti-union discrimination and blacklisting, seeks to address this issue. The project's Code of Labor Practice[64] suggests concrete steps to address these challenges.

The application of provision of freedom of association in EPZs is also worthy of further discussion.

[62] ILO. *Labour and social issues relating to export processing zones.* Report for discussion at the Tripartite Meeting on Export Processing Zones – Operating Countries, Geneva, 1998, doc TMEPZ/1998, p. 3.
[63] *Organizing for Social Justice*, p. 38.
[64] Fair Labor Association's Central American Project Code of Labour Practice, accessed at http://www.fairlabor.org/all/reports/FLA_GGP_v2-0_esp.pdf.

VII. Additional Sources

Sources for more information relating to freedom of association are listed below.[65] Most of these sources have been referred to in this paper, but are collected and summarized here for easy access.

1. ILO Sources on Freedom of Association

A. ILO Databases

Below are some ILO databases that relate to freedom of association. The portal for most of these databases, as well as other topic- and country-specific information is http://www.ilo.org/public/english/support/lib/dblist.htm#country.

- **ILOLEX** (http://www.ilo.org/ilolex/english/index.htm) is a trilingual database containing ILO conventions and recommendations, ratification information, comments of the Committee of Experts and the Committee on Freedom of Association, representations, complaints, interpretations, General Surveys, and numerous related documents. It is a good place to start a search on freedom of association.

- **LibSynd** is the ILO Committee on Freedom of Association (CFA) database, which includes records of CFA cases, reports, and an updated collection comments by the Committee of Experts regarding countries that have ratified Conventions 87 and 98. The database is updated following every Committee meeting and can be accessed through the ILO's *International Labor Standards* website or at: http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?Lang=EN&hdroff=1.

- **QVILIS** (http://www.oit.org.pe/qvilis_world/index.php) is the ILO's database of complaints of violations of trade union rights around the world. ILO's ACTRAV (the arm supporting the work of trade union delegates) has made information about offences and offenders public to better ensure trade union freedom.

- **NATLEX** (http://www.ilo.org/dyn/natlex/natlex_browse.home?p_lang=en) is the ILO's database that focuses on national legislation. It compiles labor, social security, and related human rights legislation, which is maintained by the ILO's International Labour Standards Department. Records in NATLEX provide abstracts of legislation and relevant citation information, and are indexed by keywords and by subject classifications. Each record in NATLEX appears in only one of the three ILO official languages (English/French/Spanish). Where possible, the full text of the law or a relevant electronic source is linked to the record.

[65] The following section is based in large part on information provided in an article by Lance Compa, "Assessing Assessments: A Survey of Efforts to Measure Countries' Compliance with Freedom of Association Standards," in *Comparative Labor Law and Policy Journal,* Vol. 24, No. 2, Winter 2003.

B. Other ILO Sources

- ***Freedom of Association: A User's Guide*****,** by David Tajman and Karen Curtis. Geneva: International Labour Organization (2002). This manual is highly recommended for those seeking step-by-step guidance about the various ILO supervisory mechanisms or user-friendly information about the ILO's freedom of association jurisprudence. It can be purchased online or accessed on the ILO's ***Freedom of Association and Collective Bargaining Electronic Library*** (2005). This CD-Rom contains a rich collection of freedom of association procedures, cases, and manuals and articles drafted by ILO experts. Contact normes@ilo.org to obtain a copy.

- **ILO Global Reports on Core Labor Standards** following up on the ILO Declaration on Fundamental Principles and Rights at Work, have focused on freedom of association, once in 2000 and again in 2004. Rather than being country-specific, the reports assess freedom of association and collective bargaining globally. Nonetheless, specific cases from the reporting period are cited throughout the document. http://www.ilo.org/dyn/declaris/DECLARATIONWEB.GLOBALREPORTSLIST?var_language=EN

- **ILO International Institute for Labor Studies** - Established as an autonomous facility of the ILO, the mandate of the Institute is "to promote research, public debate and knowledge sharing on emerging issues of concern to the ILO and its constituents - government, business and labor." Papers and reports sometimes deal with freedom of association and collective bargaining. The recent paper series can be accessed at: http://www.ilo.org/public/english/bureau/inst/papers/

- The **ILO's glossary of terms** is a handy reference tool for those seeking key definitions – http://www.ilo.org/public/english/standards/norm/sources/glossry.htm#c

2. Governmental and Intergovernmental Sources

- **U.S. State Department Human Rights Reports** are released annually in February. Section 6 of each country section deals with countries' labor rights implementation in the past year. While there are cases of negotiated language representing various interests, reports usually contain valid information and are an important, consistent source for country-specific labor rights information. http://www.state.gov/g/drl/hr/c1470.htm

- The **OECD** has attempted to quantify labor rights violations in order to rank countries. So, for example, in its 1996 and 2000 reports, it used information from ILO, US State Department, and ICFTU reports to calculate an index of compliance with freedom of association for more than 70 countries. The index places countries in one of four groups, based on their performance with regard to freedom of association. Other country-specific information on freedom of association is also available. http://www.oecd.org/department/0,2688,en_2649_33729_1_1_1_1_1,00.html)

- The **US Department of Labor** produces labor-focused reports, particularly for countries that are negotiating a trade agreement with the US. http://www.dol.gov/ilab/media/reports/usfta/main.htm

- **EU reports generated by European Generalized System of Preferences (GSP) program** are fairly limited. These reports are made public only in the event of alleged violations that could threaten a country's tariff benefits. Decisions to improve a country's benefits are published, but in the form of succinct reports. http://europa.eu.int/comm/trade/icentre/publica_en.htm

- Chaired by the Office of the US Trade Representative (USTR), the **Trade Policy Staff Committee** is the interagency group that reviews GSP labor rights complaints. It also takes up complaints under labor rights clauses in Caribbean Basin, Andean Pact, Africa Growth Initiative and other trade statutes. The Committee assesses a country's worker rights performance to determine if GSP beneficiary status should be maintained or cut-off. OPIC also relies on this information. http://www.ustr.gov/Trade_Agreements/Monitoring_Enforcement/Section_Index.html

- The **North American Agreement on Labor Cooperation (NAALC)**, NAFTA's labor side agreement, enables trade unions, NGOs and other groups to file complaints with the National Administrative Office (NAO) of one of the other two countries in the pact (i.e. not the one where the violation occurred). While NAOs have no enforcement power, they undertake investigations and produce reports. Reports of the US NAO on freedom of association complaints from Mexico and Canada reflect careful analysis and reporting. These reports may provide useful information for ongoing freedom of association cases -- http://www.naalc.org/english/annual_reports.shtml.

- **WebMILS** (http://www.dol.gov/ilab/webmils/index.html) is an online searchable database designed to provide a wide range of qualitative information and statistical data to support efforts to assess countries' compliance with international labor standards. It was developed as part of a U.S. Department of Labor project with the National Academies on monitoring international labor standards, and compiles information from a wide range of sources, from the ILO to NGOs. While many sections of the database are not fully functional at the time of writing this report, it has the potential to be a useful tool for investigating country-specific information relating to freedom of association.

3. Reports by Trade Unions and Labor Federations

- The **ICFTU's *Annual Survey of Violations of Trade Union Rights*** (http://www.icftu.org/survey/) has become a standard reference on workers' freedom of association. The survey provides an overview of the application of the relevant international standards in each country and describes specific cases of violations during the year reported. The survey is based on trade unionists' accounts of events each year and provides a comprehensive overview of the situation worldwide.

- The **AFL-CIO Solidarity Centre** has recently started a series of in-depth reports on labor conditions in various countries. To date, reports have focused on Mexico, Indonesia, Sri Lanka, China, Colombia, Namibia, Swaziland, Jordan, and Thailand, although not all have been released yet this year. The reports cover all the core labor standards. http://www.solidaritycenter.org/content.asp?contentid=426)

4. Reports by NGOs and Other Groups

- The **Clean Clothes Campaign** (www.cleanclothes.org) regularly updates its website with labor rights information. With a focus on urgent appeals, many of the cases featured on the CCC website involve violations of freedom of association in various countries. The approach to past and current campaigns, as well as the corrective actions that have evolved out of past campaigns, can inform activists dealing with freedom of association violations.

- **Human Rights Watch** (http://hrw.org/doc/?t=labor) has published major reports on workers' rights, offering detailed analysis and valuable information. Recent reports focusing on freedom of association are the 2000 report on workers' freedom of association in the US, and the 2002 report on freedom of association and child labor in Ecuador's banana sector.

- The **International Labor Rights Fund (ILRF)** (www.laborrights.org) does not do regular country reporting, but has occasionally published interesting country report on key labor issues. The ILRF collects a great deal of country information in relation to its other work bringing GSP petitions (including those involving Guatemala, Colombia, Chile, Malaysia, Indonesia, and Sri Lanka); NAALC complaints; and civil lawsuits against major companies on behalf of workers internationally. ILRF petitions, complaints, and related briefs can be mined for information on company and country behavior.

- **Campaign for Labor Rights** (http://www.campaignforlaborrights.org/) is a "rapid action network" so does not do long-term, systematic research. Nonetheless, its information is usually well-founded and it serves as an "early warning signal" pointing to freedom of association issues in different countries.

- **Maquila Solidarity Network** (www.maquilasolidarity.org) is a labor and women's rights advocacy organization promoting solidarity with grassroots groups in Mexico, Central America, and Asia working to improve conditions in maquiladora factories and export processing zones. It publishes excellent reports on codes and their application in various parts of the world.

- The **CalPERS labor rights screen** (www.calpers.ca.gov/invest/emergingmkt/verite) was a project conducted for the California Public Employees Retirement System (CalPERS). CalPERS is the largest pension fund in the US. In 2000, it contracted with Verite monitoring group to provide a quantitative ranking of 27 "emerging market" countries to determine the appropriateness of CalPERS investments in those countries. Based on the findings, CalPERS announced withdrawal of its investments in four Asian

countries because of labor rights violations. Each country was ranked on its performance in 44 separate indicators of labor rights compliance. Of these, 12 indicators addressed freedom of association. CalPERS's overall rating put Hungary at the top and China at the bottom of the 27 countries reviewed, based on the four core labor standards. Rankings on freedom of association or any other single standard are not presented.

5. Other Relevant Publications on Freedom of Association

While the list of research conducted by academics and other experts dealing with freedom of association is too long to include here, some of the sources accessed for this report have proven especially relevant to these discussions. Below is a *non-exhaustive* list of good sources on this topic.

- **Compa, Lance and Fay Lyle. *Justice for All: A Guide to Worker Rights in the Global Economy*. American Centre for International Labor Solidarity/AFL-CIO (2003).**

  This worker rights manual is an excellent resource (and greatly informed this report). It provides good summaries of relevant conventions, and clearly reviews unilateral and regional trade pacts' treatment of worker rights. Perhaps most notable with regard to freedom of association, however, is its compilation of violations as determined by ILO supervisory mechanisms. Among other things, it also cites strategies for promoting corporate accountability. www.solidaritycenter.org/content.asp?contentid=481

- **Compa, Lance. "Assessing Assessments: A survey of efforts to measure countries' compliance with freedom of association standards" 24 *Comparative Labor Law & Policy Journal* 101 (Winter 2003 volume; published August 2004).**

  This paper was the basis for this final section (VII) of this primer. It offers insights into the various initiatives seeking to measure countries' compliance with freedom of association.

- **"Rocks and Hard Places," Cornell's ILR School's Seminar on Monitoring and Freedom of Association under Corporate Codes of Conduct.**

  A noteworthy text in the context of this paper, this is a summary account of the Cornell ILR School's first seminar on monitoring and freedom of association under corporate codes of conduct, which gives a general overview of the seminar and the exchanges it inspired. www.ilr.cornell.edu/international/news/080905_SummaryFreedomOfAssociation.html.

- **Hunter, Philip and Michael Urminsky. "Social auditing, freedom of association and the right to collective bargaining" (2003), p. 47.**

This article offers an analysis of audit methodologies and their coverage of freedom of association and the right to collective bargaining. It examines the work of FLA, SAI, SASA, IHS, TUCP, and the ILO's Cambodia program.
http://www.ilo.org/public/english/dialogue/actrav/publ/130/8.pdf

- **International Labour Office. *Organizing for Social Justice: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*. Geneva: ILO (2004).**

  Referenced extensively in this paper, this 2004 follow-up to the 1998 Declaration provides important and relatively up-to-date insights into the international community's treatment of freedom of association.

- **"Special Issue: Labour Rights, Human Rights," *International Labour Review*, Vol. 137, No. 2, 1998/2.**

  This periodical contains several interesting articles by ILO staff on freedom of association, including:
  - Lee Swepston's "Human rights law and freedom of association: Development through ILO supervision," *International Labour Review,* Vol. 137 (1998), No. 2.
  - Geraldo von Potovsky's "Freedom of association: The impact of Convention No. 87 and ILO action," *International Labour Review*, Vol. 137 (1998), No. 2.

  The articles can be accessed at:
  http://training.itcilo.org/ils/foa/library/labour_review/1998_2/english/index_en.html