
Article

**Labor's Soft Means and Hard Challenges:
Fundamental Discrepancies and the
Promise of Non-Binding Arbitration for
International Framework Agreements**

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INTRODUCTION: THE SEARCH FOR A GLOBAL
INDUSTRIAL RELATIONS SYSTEM

International framework agreements (IFAs) are agreements in which multinational companies and global union federations (“global unions”) pledge to abide by the “core labor standards” of the International Labor Organization (ILO), to wit, freedom of association and the effective recognition of the right to collective bargaining, elimination of all forms of forced or compulsory labor, effective abolition of child labor, and elimination of discrimination in respect of employment and occupation.¹ Global union federations (“global unions”) are labor organizations composed of national labor organizations, normally categorized by industry groups.² IFAs today cover almost nine

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1. Konstantinos Papadakis, *Introduction* to SHAPING GLOBAL INDUSTRIAL RELATIONS: THE IMPACT OF INTERNATIONAL FRAMEWORK AGREEMENTS 1, 2 & 17 n.1 (Konstantinos Papadakis ed., 2011).

2. To date there are eleven global unions representing workers from different global industries. See *About Us*, GLOBAL UNIONS, <http://global-unions>

million workers around the world, excluding contractors.³ The legal status and judicial enforceability of most of these agreements is yet an open question.⁴ IFAs, or at least most of them, are considered to be “soft law” instruments.⁵

IFAs are global unions’ bilateral and negotiated response to unilateral corporate codes of conduct.⁶ They may also provide global unions with a new institutional role to play in the global economy. At least one major study of union density has argued that without a global institutional framework for labor relations, labor union density—the rate of the wage and salaried workforce of a country that is member of a labor union⁷—will continue to decline in the developed, capitalist democracies.⁸ IFAs may be one way to globalize industrial relations and reinvigorate labor.

IFAs are still obscure instruments in the United States. Therefore, this Article reports on original, exploratory field research by the author to better illuminate what these instruments are about and what challenges possibly lay ahead for IFAs. The research uncovered that parties and other IFA stakeholders may disagree over the meaning of fundamental terms of their IFAs.⁹ Disagreements can become obstacles that stall the agreements and the construction of an international industrial relations system.

.org/about-us.html?lang=en (last visited Mar. 25, 2014). The website defines global unions as:

Global Unions are international trade union organisations working together with a shared commitment to the ideals and principles of the trade union movement. They share a common determination to organize, to defend human rights and labour standards everywhere, and to promote the growth of trade unions for the benefit of all working men and women and their families.

Id.

3. César F. Rosado Marzán, *Organizing with International Framework Agreements: An Exploratory Study*, 4 U.C. IRVINE L. REV. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2231564.

4. See *infra* Part I.

5. *Id.*

6. Renée-Claude Drouin, *Promoting Fundamental Labor Rights Through International Framework Agreements: Practical Outcomes and Present Challenges*, 31 COMP. LAB. L. & POL’Y J. 591, 591–95 (2010).

7. See BRUCE WESTERN, BETWEEN CLASS AND MARKET: POSTWAR UNIONIZATION IN THE CAPITALIST DEMOCRACIES 24 (1997) (“A common and useful overall measure of union membership is union density—union membership as a percentage of the dependent labor force.”).

8. *Id.* at 195–96.

9. See *infra* Part III.

The Article provides one possible solution to resolve IFA interpretation issues between the signatory parties and other stakeholders: non-binding arbitration based on ILO norms. Some commentators of IFAs have explored ways to make IFAs judicially enforceable.¹⁰ However, here the author argues that it is unlikely that parties are ready to harden their agreements by making them judicially enforceable. Non-binding arbitration based on the ILO norms could help to incrementally harden IFAs and resolve interpretation disputes.¹¹

The next part of this Article, Part I, details the ascension of IFAs, why the agreements can help rebuild labor, and why further empirical research is needed to understand the IFAs' potential. Part II describes the exploratory research that the author undertook to contribute to our knowledge of these rather obscure and novel agreements. Part III describes the results of the study. It describes that fundamental disagreements regarding the terms of the IFAs may surface after the IFAs are signed. Disagreements could be between the signatory parties and/or other stakeholders, such as national unions represented by global unions but that were not privy to the IFAs. Such disagreements may endanger IFAs if they cannot be resolved. Part IV of the Article analyzes what the exploratory field research uncovered including the disagreements between signatory parties and even signatory parties and other stakeholders. It suggests that parties should include clauses for non-binding arbitration based on ILO norms to resolve interpretation issues in future and renegotiated IFAs. Further research on how signatory parties and other IFA stakeholders resolve their differences, including the few IFAs that already have arbitration clauses, can further help us to understand the future promise of IFAs.

I. THE ASCENSION OF IFAS AND WHY WE NEED TO KNOW MORE ABOUT THEM

This is my copy of the global agreement. It's like a bible, man. When management tells me to get out, I show them this. When workers are afraid to join, I show them this. When people tell me we don't have the right, I point to this. This this this. This is the key. But only if we use it right.¹²

10. *See infra* Part I.

11. *See infra* Part IV.

12. JAMIE K. MCCALLUM, GLOBAL UNIONS, LOCAL POWER: THE NEW SPIRIT OF TRANSNATIONAL LABOR ORGANIZING 118 (2013) (quoting a South African unionist referring to his IFA with G4S, a multinational security company).

IFAs are agreements signed by global unions and multinational firms.¹³ At a minimum, the parties who sign IFAs pledge to abide by the ILO's "core labor standards."¹⁴ Some IFAs may also include procedures for implementation and provisions concerning suppliers and business partners.¹⁵ Many IFAs also include pledges regarding wages, working hours, workplace safety, training, and restructurings.¹⁶

It is uncertain whether any IFAs are legally binding instruments.¹⁷ Legal experts have argued that these agreements

13. Papadakis, *supra* note 1, at 2.

14. *See supra* note 1 and accompanying text.

15. Drouin, *supra* note 6, at 593.

16. *See* SHAPING GLOBAL INDUSTRIAL RELATIONS: THE IMPACT OF INTERNATIONAL FRAMEWORK AGREEMENTS, *supra* note 1, app. at 249–56 tbl. 2.

17. *See* Alvin L. Goldman, *Enforcement of International Framework Agreements Under U.S. Law*, 33 COMP. LAB. L. & POL'Y J. 605, 632–34 (2012) (explaining that IFAs could be enforced under U.S. federal labor laws, contract law, consumer protection laws, and investor protection laws, but noting that the legal hurdles are very significant); *see also* INT'L TRAINING CTR. OF THE INT'L LABOUR ORG., KEY ISSUES FOR MANAGEMENT TO CONSIDER WITH REGARD TO TRANSNATIONAL COMPANY AGREEMENTS (TCAS) 19 (2010), available at <http://lempnet.itcilo.org/en/tcas/admin/final-pub> ("The legal status of these agreements is unclear. They have never been tested in a court of law, so questions remain about their status and enforceability. It is a mistake, though, to assume that they have no legal status—it has still to be tested."); Kevin Banks & Elizabeth Shilton, *Corporate Commitments to Freedom of Association: Is There a Role for Enforcement Under Canadian Law?*, 33 COMP. LAB. L. & POL'Y J. 495, 511–29, 551–53 (2012) (explaining the numerous legal hurdles that must be overcome to enforce IFAs in Canadian courts under the law of contracts and labor laws); Sarah Coleman, *Enforcing International Framework Agreements in U.S. Courts: A Contract Analysis*, 41 COLUM. HUM. RTS. L. REV. 601, 603 (2010) (arguing that IFAs are enforceable under the common law of contracts and Section 301 of the Labor Management Relations Act); Rüdiger Krause, *International Framework Agreements as Instrument for the Legal Enforcement of Freedom of Association and Collective Bargaining? The German Case*, 33 COMP. LAB. L. & POL'Y J. 749, 768 (2012) ("[I]t is not out of the question that IFAs can be enforced legally in a German labor court. But there are many legal hurdles to surmount, and the prospects will depend highly on the concrete wording of the IFA and on the circumstances of its conclusion.").

generally lack the elements of legally binding contracts, such as intent to be legally bound or certainty of terms.¹⁸ Therefore, IFAs are “soft law” instruments, meaning that the parties enforce them themselves, through collaboration, rather than through judicial means.¹⁹ In industrial relations, such collaboration normally occurs against the backdrop of potential industrial conflict.²⁰

IFAs are more than an academic curiosity. The growth of IFAs has been quite significant since the mid-1990s. The French foods company, Dannon, signed the first IFA in 1988.²¹ Multinational firms and global unions have signed about 110 similar agreements since Dannon signed its IFA.²² Figure 1 shows this growth over time. These agreements cover approximately nine million workers, excluding suppliers and subcontractors.²³

18. *But see* Coleman, *supra* note 17, at 621–24, 630–33 (arguing that IFAs do not lack intent to be bound or certainty of terms). Moreover, while the consensus is that these agreements are most likely not legally enforceable, some IFAs may be. The Securitas-UNI Global Union IFA, for example, states:

Securitas and UNI recognise that this Agreement must be applied within the framework of laws and regulations that apply in each country and accept that no specific provision of the Agreement is legally enforceable if it violates such laws. However, in the event a provision of this Agreement is invalid in any country, the remainder of the Agreement that is legally enforceable will remain in full force and effect.

Global Agreement, Securitas AB-Swed. Transport Workers’ Union-UNI Global Union, ¶ 8, Oct. 26–Nov. 5, 2012 (on file with author). Therefore, the parties wanted to craft a legally binding instrument. Moreover, the agreement states: “[t]his Agreement shall be governed and construed with the laws of Sweden,” hence providing further evidence that the parties wanted courts to retain some level of supervisory authority over the instrument. *Id.* Whether the courts can issue injunctive relief compelling compliance with the instrument, or damage awards for breach of the IFA under Swedish law, or merely refrain from declaring the instrument unenforceable because it is illegal or contrary to public policy is an altogether different issue with no definite answer at this moment.

19. Goldman, *supra* note 17, at 606.

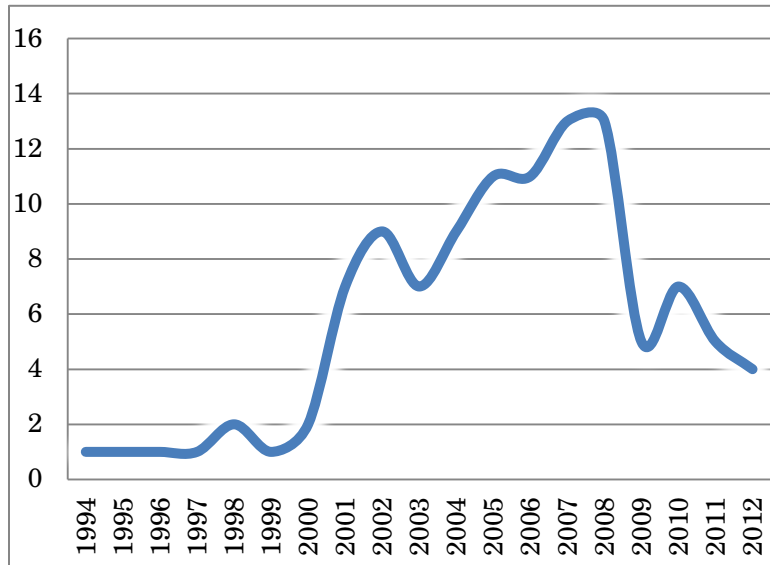
20. *See* Lance Compa & Fred Feinstein, *Enforcing European Corporate Commitments to Freedom of Association by Legal and Industrial Action in the United States: Enforcement by Industrial Action*, 33 COMP. LAB. L. & POL’Y J. 635, 635–37 (2012).

21. Papadakis, *supra* note 1, at 3.

22. *International Framework Agreements*, THE DATABASE ON EUROPEAN WORKS COUNCIL AGREEMENTS, http://www.ewcdb.eu/list_intl_framework_agreements.php (last visited Mar. 25, 2014).

23. For inference of this estimation, see *id.*

Figure 1: IFAs Signed Each Year, 1994–2012
*Number of IFAs*²⁴



Multinational companies have signed IFAs because it helps them “manage risk.”²⁵ It also helps firms undertake restructurings with collaboration from their employees.²⁶ Unions and works councils²⁷ in the home country of the signatory parties

24. Adapted from European Trade Union Institute data. See *International Framework Agreements*, *supra* note 22.

25. Papadakis, *supra* note 1, at 9.

26. *Id.*

27. Works councils are, generally, employee representation bodies embedded in the corporate governance regime of a firm. Joel Rogers & Wolfgang Streeck, *The Study of Works Councils: Concepts and Problems*, in *WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS* 3, 6 (Joel Rogers & Wolfgang Streeck eds., 1995). They are independent of labor unions. *Id.* There are two main models of works councils, the German and French. In Germany, “works councils” generally refers to “institutionalized representation of interests for employees within an establishment.” *Works Council: Germany*, EUROFOUND (last updated Aug. 14, 2009), <http://www.eurofound.europa.eu/emire/GERMANY/WORKSCOUNCIL-DE>. In France it more generally refers to an “[i]nstitution of employee representation.” *Works Council: France*, EUROFOUND (last updated Aug. 14, 2009), <http://www.eurofound.europa.eu/emire/FRANCE/WORKSCOUNCIL-FR.htm> (In the German model only employees are represented. BLANPAIN ET AL., *THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW: CASES AND MATERIALS* 598 (2nd ed. 2012). The “French” model includes both employee and management representatives. *Id.* at 661. However, works coun-

have been fundamental in persuading and compelling multinational firms to sign IFAs.²⁵ Professor Niklas Egels-Zandén has perhaps best explained why such national-level actors have mattered so much for IFAs. He argued that IFAs are part of a “continuous bargaining model” between employers and employee representatives who have had long and established relationships.²⁹ IFAs are one of many agreements made in the course of the parties’ relationship.³⁰ Labor organizations outside the national boundaries of the signatory employers’ home country simply do not have that preexisting relationship of trust with the signatory employers.³¹

IFAs matter because they can help provide labor, which is still fettered by national boundaries, a more prominent role in the global economy.³² As sociologist Jamie McCallum has detailed, IFAs “mark the first instance in the history of the labor movement that transnational companies have bargained directly with unions at the global level.”³³ They provide hope to a dwindling labor movement. As we can see in Figures 2 through 5, union density in the world’s developed capitalist democracies has generally been declining for decades.³⁴ While very few

cils are all creations of national legislation and will likely differ by country. Rogers & Streeck, *supra* at 27.

We must also note that even though works councils and unions are formally independent, unions many times play important roles within works councils, particularly in Germany. *Id.* at 11–16. However, sometimes unions and works councils may be at odds. *Id.*

28. Michael Fichter & Markus Helfen, *Going Local with Global Policies: Implementing International Framework Agreements in Brazil and the United States*, in SHAPING GLOBAL INDUSTRIAL RELATIONS: THE IMPACT OF INTERNATIONAL FRAMEWORK AGREEMENTS, *supra* note 1, at 85, 86, 91; Isabelle Schömann, *The Impact of Transnational Company Agreements on Social Dialogue and Industrial Relations*, in SHAPING GLOBAL INDUSTRIAL RELATIONS: THE IMPACT OF INTERNATIONAL FRAMEWORK AGREEMENTS, *supra* note 1, 21, 26–27.

29. Niklas Egels-Zandén, *TNC Motives for Signing International Framework Agreements: A Continuous Bargaining Model of Stakeholder Pressure*, 84 J. BUS. ETHICS 529, 540–41 (2009).

30. *See id.* at 543 (referencing various types of agreements adopted by corporations including “IFAs, codes of conduct, and/or [corporate social responsibility] policies/practices”).

31. *See id.* (describing the importance of a trusting corporate-union relationship compared to external pressures from non-governmental organizations in a corporation’s decision to enter an IFA).

32. MCCALLUM, *supra* note 12, at 37.

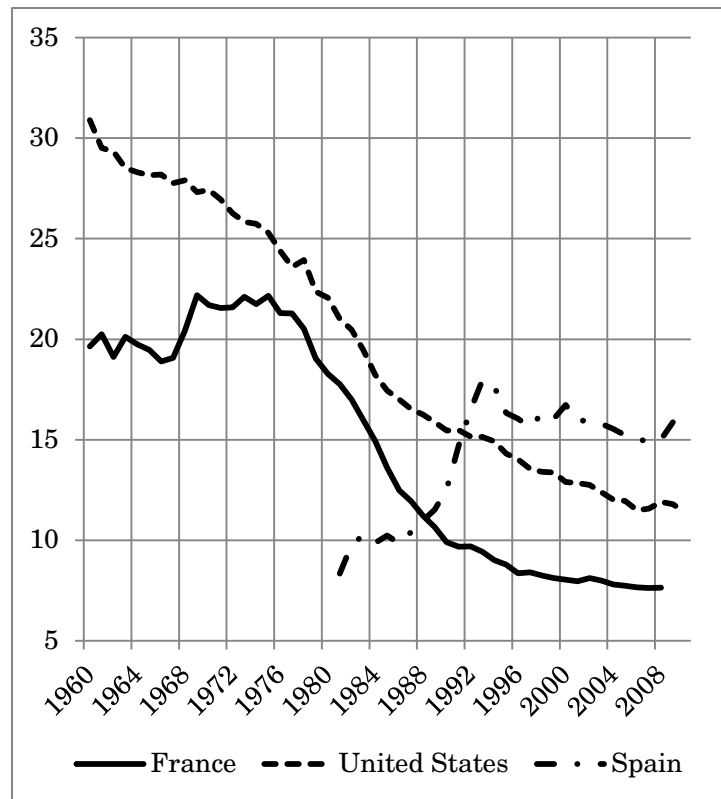
33. *Id.*

34. Organisation for Economic Co-operation and Development (OECD) estimates. For further details on sources and methodology, see OECD, <http://www.oecd.org> (search “trade union density;” follow link to “Trade union densi-

countries, such as Belgium and some Scandinavian countries, have not seen significant drops in union density since the 1970s, others such as the U.K., France, Germany, Japan, Australia, and the United States have seen dramatic declines.³⁵ In fact, private union density in the United States is now at about 6.7% and keeps dropping.³⁶

Figure 2. Union Density in Lower Density Countries, 1960–2010

*Percentage of employees*³⁷



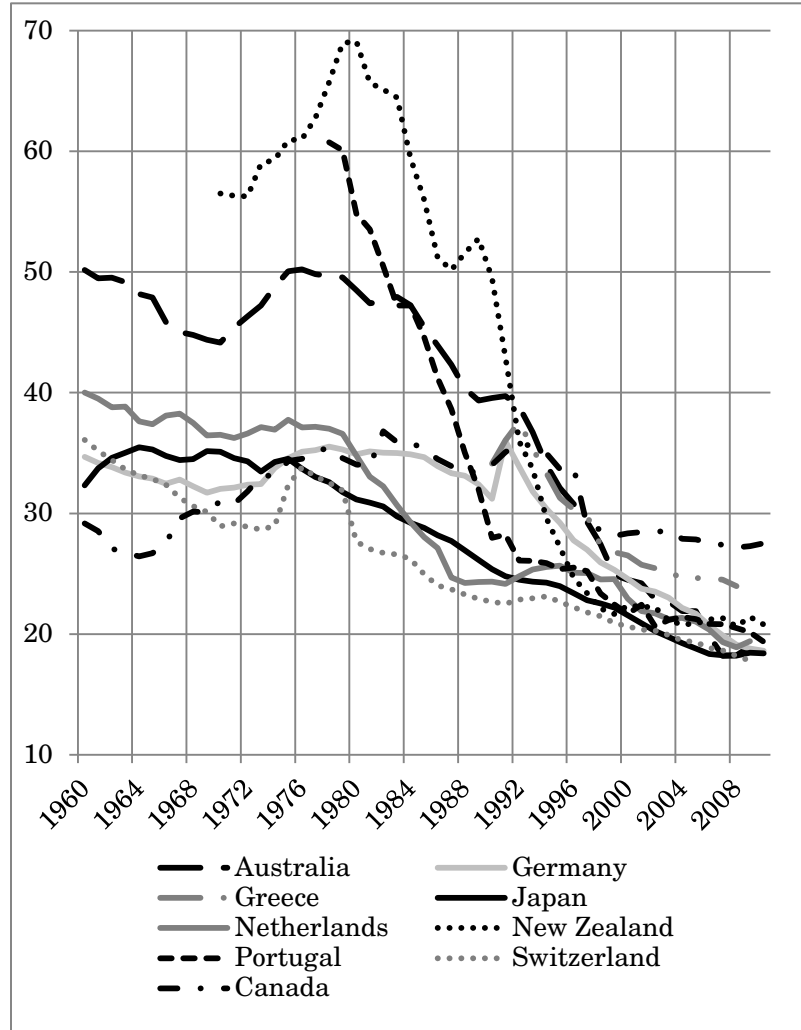
ty” to download data) (last visited Mar. 25, 2014).

35. *Id.*

36. Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database from the Current Population Survey*, UNIONSTATS.COM, <http://www.unionstats.com> (follow hyperlink under “U.S. Historical Tables: Union Membership, Coverage, Density, and Employment, 1973–2013: Private Sector”) (last visited Mar. 25, 2014).

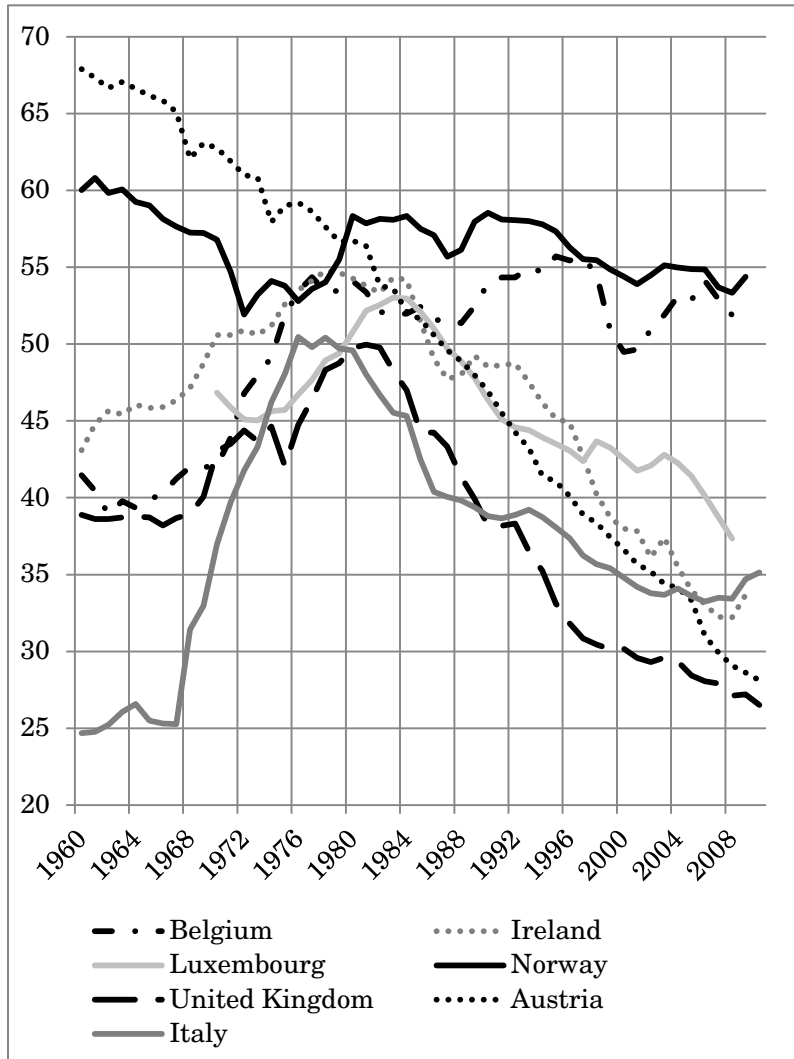
37. Organisation for Economic Co-operation and Development (OECD) estimates. For further details on sources and methodology, see <http://www.oecd.org> (search “trade union density”; follow link to “Trade union density” to download data).

Figure 3. Union Density in Middle Density Countries, 1960–2010
*Percentage of employees*³⁸



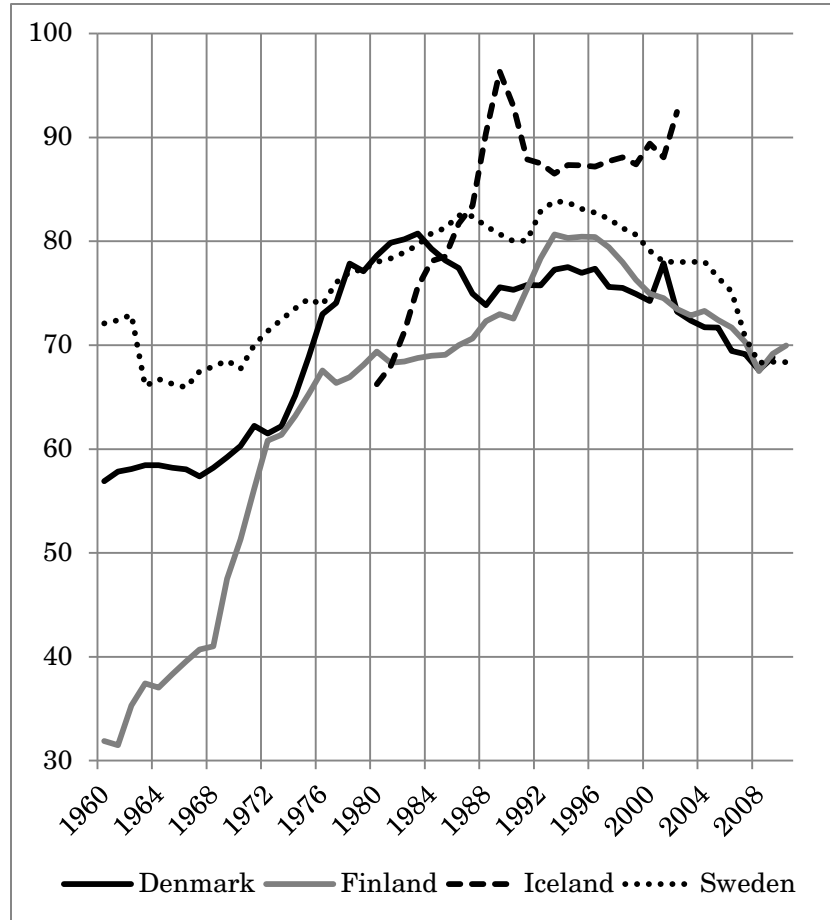
38. Organisation for Economic Co-operation and Development (OECD) estimates. For further details on sources and methodology, see <http://www.oecd.org> (search “trade union density;” follow link to “Trade union density” to download data).

Figure 4. Union Density in Middle/Higher Density Countries, 1960–2010
*Percentage of employees*³⁹



39. Organisation for Economic Co-operation and Development (OECD) estimates. For further details on sources and methodology, see <http://www.oecd.org> (search “trade union density;” follow link to “Trade union density” to download data).

Figure 5. Union Density in Higher Density Countries, 1960–2010
*Percentage of employees*⁴⁰



40. Organisation for Economic Co-operation and Development (OECD) estimates. For further details on sources and methodology, see <http://www.oecd.org> (search “trade union density;” follow link to “Trade union density” to download data).

Sociologist Bruce Western concluded that a significant reason for the decline of unions in the developed capitalist democracies is the mismatch between the rise of global business and markets and the still national character of labor market regulatory institutions, i.e., labor law and labor unions.⁴¹ According to Western, unless the collective labor market actors regulate labor markets transnationally, union density in the developed, capitalist democracies will continue to decline.⁴² From a sociological perspective, labor law seems to have lost its “empirical validity” in the developed, capitalist democracies, or its ability to shape the real world given the advent of globalization.⁴³

Also tied to the need to give global labor an institutional role in the global economy is the attempt to use IFAs as alternatives to unilateral codes of conduct.⁴⁴ Today, most multinational companies have adopted corporate codes of conduct where they make pledges regarding the firms’ social and environmental responsibilities.⁴⁵ However, these codes are difficult if not impossible to enforce or effectively use because they are unilaterally drawn by firms.⁴⁶ IFAs, being at least bilateral in nature, are better situated to be implemented and enforced by their signatory parties and stakeholders.⁴⁷

But are IFAs indeed helping to create a new framework for global industrial relations? Sociologist James McCallum reports that Stephen Lerner, a prominent American labor union strategist, has argued that IFAs cannot be enforced and, as a result, should be abandoned as a tactical tool.⁴⁸ Certainly, IFAs are hard, if not impossible to enforce legally. However, the no-

41. WESTERN, *supra* note 7, at 195–97.

42. *Id.*

43. See Michel Coutu, *With Hugo Sinzheimer and Max Weber in Mind: The Current Crisis and the Future of Labor Law*, 34 COMP. LAB. L. & POL’Y J. 605, 613, (2013) (citing MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT [ECONOMY AND SOCIETY] 355 (1988)); *id.* at 622 (“[T]he empirical validity of labor law has been greatly diminished, in light of its basic incapacity in the context of globalization.”); see also Charles Tilly, *Globalization Threatens Labor’s Rights*, 47 INT’L LAB. & WORKING CLASS HIST. 1 *passim* (1995) (explaining that the decline of the national state in contrast to the increasing power and influence of global business has made labor law—which was national for most of the Twentieth Century—ineffective).

44. See Drouin, *supra* note 6, at 591–94.

45. See *id.* at 591 (describing the “rapid proliferation of private normative instruments concerning workers’ rights” in transnational corporations).

46. *Id.* at 592.

47. *Id.*

48. MCCALLUM, *supra* note 12, at 44.

tion that soft law instruments such as IFAs cannot be enforced *at all* is not necessarily true. As the words of the South African unionist cited above depict,⁴⁹ IFAs can inspire local union activists to organize workers on the ground and bind employers morally and socially to the instrument. The literature on soft law has also shown that soft law can harden to bind actors because it helps to develop new norms that people begin to internalize.⁵⁰ It can also serve as an alternative or complement to hard law.⁵¹ Under certain conditions, hard law and soft law can even become antagonists and displace one another.⁵² Soft law, therefore, could be used to re-regulate labor at a global level, be it as an alternative or an antagonist to hard law.⁵³ Continued experimentation with and research of IFAs is therefore warranted.

Other critics could argue that IFAs are yet too marginal to be considered a significant breakthrough for global labor. Even if IFAs have been increasing at a pace of ten to fifteen a year, covering about nine million workers excluding contractors,⁵⁴ and total over 110,⁵⁵ these numbers are not extraordinary. As an ILO-related publication recently reported:

49. *See id.* at 118.

50. The literature is too vast to adequately cite and discuss here, but see Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 712–21 (2010) (describing the canonical literature of soft and hard law).

51. *See id.*; see also Susan Bisom-Rapp, *Puzzling Evidence from a Troubled Time: Rethinking State Promotion of Safe Work During the Bush Administration*, 14 EMP. RTS. & EMP. POL'Y J. 295, 309 (2010) (explaining that the National Institute of Safety and Health (NIOSH), as a soft law agency, was able to effectively promote workplace safety during the Bush administration while the targeted Office of Safety and Health Administration (OSHA) could not).

52. *See* Shaffer & Pollack, *supra* note 50, at 788–99 (noting instances where the laws counter one another).

53. In a prior work, the author has argued that transnational movement mobilization, in the form of solidarity strikes, boycotts, and similar actions, is needed to help enforce IFAs. Rosado Marzán, *supra* note 3, at 25. Others have followed a similar line of research and argument. *See, e.g.*, Compa & Feinstein, *supra* note 20, at 643–54 (investigating how industrial action can be used to enforce commitments); Dimitris Stevis & Michael Fichter, *International Framework Agreements in the United States: Escaping, Projecting, or Globalizing Social Dialogues?*, 33 COMP. LAB. L. & POL'Y J. 667, 686 (2012) (noting a sector's effective invocation of IFA obligations as part of its campaign).

54. Rosado Marzán, *supra* note 3, at 25.

55. *See International Framework Agreements*, *supra* note 22; see also *Framework Agreements*, GLOBAL UNIONS, <http://www.global-unions.org/framework-agreements.html>.

[W]e are still looking at a somewhat marginal phenomenon— the average lies between 10 and 15 agreements per year in a universe of about 80,000 multinationals worldwide. It is an activity that focuses very much on companies that have major importance to trade unions, in key sectors such as metalworking and telecommunications.⁵⁶

When one considers that there are 80,000 multinational firms in the world and only around 110 have signed IFAs, the instruments seem trivial. Coupled with the fact that the instruments are clustered in European firms, the IFAs seem like some sort of exotic European curiosity.⁵⁷

There is a long way to go before IFAs can become effective instruments for global labor. Nevertheless, some case studies show that some IFAs have helped national unions to effectively pressure employers to meet union demands.⁵⁸ The little that we know about IFAs at least suggests that we need to learn more about their impact on the ground to better comprehend their effectiveness.

Moreover, the coverage of IFAs is potentially much larger than that of the 110 firms that have currently signed the agreements. As of 2008, we know that about thirteen IFAs have mandatory terms covering suppliers.⁵⁹ We do not know how many suppliers this amounts to and how many more workers are therefore covered by the terms of the IFAs, but the numbers could be quite substantial. Therefore, the 110 IFAs represent more than their nominal value.

Finally, we should not undervalue the role that iconic firms and industry leaders that have signed IFAs can have on the rest of the global economy.⁶⁰ Industry leaders can help to ratchet up standards through best practices.⁶¹ If movement actors such as global unions can help to publicize those best practices developed through IFAs, other firms may adopt IFAs or at least internalize many of the values inherent in these instruments.

56. INT'L TRAINING CTR. OF THE INT'L LABOUR ORG., *supra* note 17, at 23.

57. Rosado Marzán, *supra* note 3, at 26 (detailing how most IFAs have been signed by companies based in Europe).

58. See Compa & Feinstein, *supra* note 20 (describing three cases of industrial action); Fichter & Helfen, *supra* note 28, at 103–10 (discussing six examples of positive IFA effects); Stevis & Fichter, *supra* note 53, at 689–90 (noting how “concerted union action has delivered results” in certain instances).

59. SHAPING GLOBAL INDUSTRIAL RELATIONS, *supra* note 1, at 259–68.

60. ARCHON FUNG ET AL., CAN WE PUT AN END TO SWEATSHOPS? 4–5 (2001).

61. *Id.*

To summarize, IFAs have been growing in number since the 1990s. They are soft law instruments. They could be hardened and enforced by the parties. More IFAs need to be signed before they can become effective global labor market regulatory instruments. However, the ones that we have may help to promote best practices that may catch on at a global level and help to diffuse IFAs. Whether or not they can be hardened, enforced and diffused are empirical questions that require further experimentation and research to be answered. Therefore, this Article reports original empirical research on existing IFAs to enrich our knowledge of IFAs. The next section details the methodology used to learn more about these instruments.

II. METHODOLOGY

The author performed original field research for six months in Europe to study IFAs. He did the research from June 2012 through November of 2012. The research was “exploratory,” meaning that it could not provide definitive answers to particular questions; rather, it helped the author better understand IFAs, a relatively obscure subject of scholarly inquiry.⁶²

In this Article, the author reported on two industry groups, the global German auto industry and the global temporary service agencies (“temp agencies”). The author chose these industries because they represent industries with different industrial relations trajectories, hence providing significant case variance to learn more about IFAs. Auto is a traditionally unionized industry where strong unions have dominated.⁶³ Temp agency workers, on the contrary, work casually and in time-limited contracts, if not precariously. They are seldom unionized.⁶⁴

62. ROBERT K. YIN, *CASE STUDY RESEARCH: DESIGNS AND METHODS* 6 (3d ed. 2003) (describing exploratory study as one that attempts “to develop pertinent hypotheses and propositions for further inquiry”).

63. See BEVERLY SILVER, *FORCES OF LABOR: WORKERS' MOVEMENTS AND GLOBALIZATION SINCE 1870* 41–43 (2003) (noting the “Fordist” organization of production in the auto industry has lent support to strong labor movements and that as the industry moves from region to region—from the United States, to Western Europe and Japan, to Brazil, to South Africa, and to South Korea—so do the autoworker unions and labor conflicts).

64. Unionization of temp agency workers is generally very low, but national variations exist. *Temporary Agency Work and Collective Bargaining in the EU*, EUROFOUND 17–19 (2009), <http://www.eurofound.europa.eu/docs/eiro/tn0807019s/tn0807019s.pdf> (last visited Mar. 25, 2014). According to the author's sources, U.S. employees of temp agencies lack union representation. Telephone Interview with Pam Berklich, Senior Vice President, OCG-Centers of Excellence at Kelly Services (Oct. 8, 2012); Telephone Interview with Göran

Traditionally unionized industries such as auto have a greater likelihood of maintaining collective bargaining relations than non-traditionally unionized industries, such as the temp agency sector.⁶⁵ Therefore, we should be able to learn different things from IFAs negotiated in traditional unionized industries and in those that are not. This said, and to reiterate, the cases were not chosen to test a specific hypothesis but, rather, to help the author learn about IFAs in an exploratory fashion.

The author studied the German auto firms Volkswagen and Daimler, the American staffing firms Manpower and Kelly Services, the Swiss staffing firm Adecco and the International Confederation of Private Employment Agencies (hereinafter referred to as “Ciett”, its acronym in French), the association representing the staffing firms.⁶⁶ The author also interviewed representatives of the German union IG Metall, which represents autoworkers; the global union IndustriALL, which also represents autoworkers; and UNI Global Union, which represents temp agency workers. The author also interviewed representatives of the work councils of Volkswagen and Daimler involved in implementing the IFAs.⁶⁷

Hultin, Government Affairs Advisor, Manpower, Inc. (July 19, 2012). According to UNI Global Union, which represents temp agency workers at a global level, a very small fraction of those workers may be unionized in the firms where the national members of the global union operate. Telephone Interview with Giedre Lelyte, Director, UNI Gaming & UNI Temp Agency Work, UNI Global Union (July 31, 2012). Indeed, temp agency work poses significant challenges to union organization. Rebecca Gumbrell-McCormick, *European Trade Unions and ‘Atypical’ Workers*, 42 *INDUS. REL. J.* 293, 297–99 (2011).

65. See Joelle Sano & John B. Williamson, *Factors Affecting Union Decline in 18 OECD Countries and Their Implications for Labor Movement Reform*, 49 *INT’L J. COMP. SOC.* 479, 479 (2008) (noting how “traditional union density” helps explain trends and cross-national variances in union membership in the OECD region).

66. The type of interviewing the author used is referred to, in the social sciences, as “elite” interviewing. Elite interviewees are those who are particularly knowledgeable about a subject and its context. BILL GILLHAM, *RESEARCH INTERVIEWING: THE RANGE OF TECHNIQUES* 54 (photo. reprint 2010) (2005).

67. The author did most of the interviews for the auto industry in Germany in person. The author digitally recorded all the interviews conducted in person. Because of time and cost concerns, the author did not transcribe any of the interviews but rather took notes during the interviews. On the day of the interview or a few days thereafter, the author used a word processor to put his notes into a more readable, accessible, and searchable format. The author also used the interview recordings to transfer his notes into a word processor. Furthermore, because of practical and economic reasons, some informants of the auto industry had to answer interview questions by e-mail.

III. RESULTS

After analyzing the IFAs signed by Daimler, Volkswagen, and Ciett, and interviewing representatives of the signers, it was evident that the parties maintain differences over the meaning of their IFAs that can stall the IFAs and the development of a global labor relations system. Some hardening of the IFAs seems necessary.

A. THE AUTO IFAS OF DAIMLER AND VOLKSWAGEN⁶⁸

The Daimler and Volkswagen IFAs have been used by global and national level unions to resolve a myriad of issues confronted by the firms, from restructurings to safeguarding freedom of association.⁶⁹ However, the particular rights that

In-person interviews are costly, especially when they require international travel, but provide the researcher with more information as the interviewer can read body language and other non-verbal forms of communications. *See id.*

Telephone interviews are cheaper, since they do not require travel, but the interviewer may lose some information provided by non-verbal communicative cues. Because of this, the telephone interviewer must remain more vigilant and alert of what is being said in an interview than an in-person interviewer. Similarly, telephone interviews are usually shorter in duration than face-to-face interviews because of the additional effort required to maintain meaningful communication. *Id.* at 103–06.

E-mail interviews, like telephone interviews, are economical and provide instant access worldwide. Respondents can also answer the e-mail at their convenience. On the other hand, some elements of face-to-face communication are lost, as in the telephone interview. Responses can at times be too informal or abbreviated for research purposes, which forces the researcher to set a tone of formality for the e-mail exchange. *Id.* at 105–12.

For similar reasons of time and economy, the author interviewed the temp agencies' and UNI Global Union representatives by telephone. The author did not record any of the telephone interviews. Rather, the author took copious notes during the interviews and on the same day, or shortly thereafter, used a word processor to transfer his notes into a more readable, accessible, and searchable format. For more information regarding the persons interviewed for this study, see *infra* Appendix.

68. The author reported most of the information contained in this section regarding the German auto IFAs in a prior article. *See* Rosado Marzán, *supra* note 3.

69. Interview with Frank Patta, General Secretary of Group Works Council, Volkswagen Group, in Wolfsburg, Ger. (Sept. 21, 2012) (freedom of association); Interview with Claudia Rahman, International Department, IG Metall, in Frankfurt, Ger. (Sept. 3, 2012) (employer restructuring). *See generally* Dimitris Stevis, *The Impacts of International Framework Agreements: Lessons from the Daimler Case*, in SHAPING GLOBAL INDUSTRIAL RELATIONS, *supra* note 1, at 116–42; Isabel da Costa & Udo Rehfeldt, *Transnational Restructuring Agreements: General Overview and Specific Evidence from the European Automobile Sector*, in SHAPING GLOBAL INDUSTRIAL RELATIONS, *supra* note 1, at 143–63.

the IFA provides to national level unions remain vague. The vagueness may lead to interpretations inapposite to those sought by the national actors that seek to use the IFA in concrete situations. Conflicts can thus ensue between national actors, e.g., German and U.S. union officers.

German subjects the author interviewed for this project told the author that U.S. union officers sought to have Daimler provide them with “card check” recognition under the IFA.⁷⁰ However, Daimler and the German unions and works councils rejected the American United Auto Workers’ (UAW) interpretation of freedom-of-association principles and what “neutrality” means under the IFA.⁷¹ The firm and German labor officials and employee representatives argue that the IFA promotes employer neutrality but not card check recognition for workers in the United States.⁷² This means that unions will need to win union elections if they want to represent employees of German auto transplant in the United States that have signed IFAs. This difference between U.S. and German unions and employee representatives marks a rift in global labor.⁷³

1. The Parties

Daimler is one of the world’s leading producers of cars, vans, trucks, and buses.⁷⁴ The company traces its history to 1886 when Gottlieb Daimler and Carl Benz invented the auto-

70. The parties interviewed could not say whether Volkswagen was asked to provide card check recognition. However, the interviews suggest that Volkswagen has not provided such recognition, since German industrial relations experts all agreed that the agreement did not provide for card check recognition. Interview with Helmut Lense, Director of Automotive and Rubber, IndustriALL Global Union, in Geneva, Switz. (July 11, 2012); Interview with Frank Patta, *supra* note 69; Interview with Claudia Rahman, *supra* note 69; Interview with Robert Steiert, Retired IMF and IG Metall Union Officer, in Zurich, Switz. (July 10, 2012).

71. Interview with Robert Steiert, *supra* note 70.

72. *Id.*

73. The author must reiterate that because the UAW failed to respond to numerous invitations for participation in this study, the author is not certain of the union’s view as to the German firms’ refusal to grant card check recognition through the IFA. However, previous press reports confirm that recognition of card checks was a “top goal[]” of the UAW in contracting in the past. See Danny Hakim, *Union Organizing Remains Muddled in Chrysler Pact*, N.Y. TIMES, Oct. 7, 2003, <http://www.nytimes.com/2003/10/07/business/07AUTO.html>.

74. *Company*, DAIMLER, <http://www.daimler.com/company> (last visited Mar. 25, 2014).

mobile.⁷⁵ Headquartered in Stuttgart, Germany, it has manufacturing operations in seventeen countries, including the United States, where it has numerous manufacturing facilities, most of which make trucks and vans.⁷⁶ In 2012, Daimler produced 2.2 million vehicles.⁷⁷ Its automobile plant in the United States is located in Tuscaloosa, Alabama.⁷⁸ In 2012 that plant employed almost 3000 employees and produced over 180,000 vehicles.⁷⁹ It is also one of the very few Daimler plants in the world where the employees lack union representation.⁸⁰

Volkswagen is the largest automaker in Europe.⁸¹ In 2012, Volkswagen delivered to its global customers more than 9.2 million vehicles, which is about twelve percent of the global passenger car market.⁸² Its headquarters are located in Wolfsburg, Germany.⁸³ The company has almost one hundred manufacturing locations in twenty-seven countries, including one in Chattanooga, Tennessee, where the company builds the Passat model.⁸⁴ The Chattanooga plant has been in operation since 2011.⁸⁵ As is the case at the Daimler plant in Tuscaloosa, Volkswagen workers at Chattanooga are not represented by a union.⁸⁶

75. *Id.*

76. *Locations in North and Central America*, DAIMLER, <http://www.daimler.com/company/daimler-worldwide> (click map over North and Central America) (last visited Mar. 25, 2014).

77. *Company*, *supra* note 74.

78. *Locations in North and Central America*, *supra* note 76 (follow “Tuscaloosa, Mercedes-Benz Plant” hyperlink).

79. *Id.* (follow “facts and figures” hyperlink).

80. Stevis, *supra* note 69, at 133.

81. *The Group*, VOLKSWAGEN, http://www.volkswagenag.com/content/vwcorp/content/en/the_group.html (last visited Mar. 25, 2014).

82. *Id.*

83. *Id.*

84. *Production Plants*, VOLKSWAGEN, http://www.volkswagenag.com/content/vwcorp/content/en/the_group/production_plants.html (last visited Mar. 25, 2014).

85. *Id.*

86. On September 6, 2013, the *New York Times* reported that the UAW and Volkswagen were discussing ways to establish a union and a German-style works council at the firm. Steven Greenhouse, *VW and Its Workers Explore a Union at a Tennessee Plant*, N. Y. TIMES, Sept. 6, 2013, <http://www.nytimes.com/2013/09/07/business/vw-and-auto-workers-explore-union-at-tennessee-plant.html>; see also Erik Schelzig & Tom Krisheruaw, *Majority at VW Plant Have Signed Union Cards*, CHI. SUN TIMES, Sept. 11, 2013, <http://www.suntimes.com/business/22505211-420/uaw-majority-at-vw-plant-have-signed-union-cards.html>. The author attempted to get details on the subject, but the management of Volkswagen could speak no further on the matter. E-

Like most large German firms, the corporate structure of Daimler and Volkswagen include a supervisory board and a managerial board.⁸⁷ Employee representative comprise half of the supervisory board while stockowner representatives compose the other half.⁸⁸ Under German law, the supervisory board appoints and supervises the managerial board of the firm.⁸⁹ Employee representation in the firm's management accounts for German "co-determination."⁹⁰

IndustriALL Global Union is a global union based in Geneva, Switzerland. IndustriALL claims that it represents fifty million workers in 140 countries.⁹¹ Its constituent unions represent workers in the mining, energy and manufacturing sectors.⁹² The global union was founded in 2012 when three formerly separate global unions, the International Metalworkers Federation (IMF), the International Federation of Chemical, Energy, Mine, and General Workers' Unions, and International Textiles Garment and Leather Workers' Federation, merged.⁹³

Daimler entered into the IFA with the so-called "Daimler World Employee Committee," referred to here as the "Daimler World Works Council," in September 2002.⁹⁴ According to the

mail from Wolfgang Fueter, Director of Human Resources, Volkswagen Financial Services AG, to Author (Sept. 10, 2013 4:30AM) (on file with author). The UAW did not answer the author's requests to speak about the matter. On February 14, 2014, the UAW lost the union election in Volkswagen, with 712 votes against the union and 626 in favor of the union, despite management's neutrality during the union elections. Steven Greenhouse, *Volkswagen Vote Is Defeat for Labor in South*, N.Y. TIMES, Feb. 14, 2014, http://www.nytimes.com/2014/02/15/business/volkswagen-workers-reject-forming-a-union.html?hpw&rref=business&_r=0. As this article goes to press, the UAW has requested that the NLRB set aside the election results because government officials and private outside groups interfered with employees' rights to organize. Dave Flessner, *UAW appeals to keep 'outside groups' out of decision on new union vote at VW plant*, TIMES FREE PRESS, Mar. 12, 2104, <http://timesfreepress.com/news/2014/mar/12/uaw-appeals-nlr-b-board-keep-outside-groups-out-decl/>.

87. *Senior Management*, VOLKSWAGEN, http://www.volkswagenag.com/content/vwcorp/content/en/the_group/senior_management.html (last visited Mar. 25, 2014). For the law on employee participation in the supervisory boards of German firms see MANFRED WEISS & MARLENE SCHMIDT, *LABOUR LAW AND INDUSTRIAL RELATIONS IN GERMANY* § 630, at 249 (4th ed. 2008).

88. WEISS & SCHMIDT, *supra* note 87, § 630, at 249.

89. *Id.* § 647, at 254.

90. BLANPAIN, *supra* note 27, at 603.

91. *About Us*, INDUSTRIALL GLOBAL UNION, <http://www.Industriall-union.org/about-us> (last visited Mar. 25, 2014).

92. *Id.*

93. *Id.*

94. See *Social Responsibility Principles of DaimlerChrysler*, Daim-

instrument, the Daimler World Works Council signed the IFA “on behalf of the International Metalworkers Federation (IMF).”⁹⁵ Volkswagen signed its IFA in 2002. Like the Daimler IFA, the Volkswagen IFA was also entered between the IMF, today IndustriALL, and the Group Global Works Council of Volkswagen (hereinafter referred to as the “Volkswagen Global Works Council”). As in the Daimler IFA, the Global Works Council played the pivotal role.⁹⁶

The role of the Global Works Councils in the German auto IFAs was fundamental. These employer representation bodies seem to have brokered the agreements between global management and the global unions. Given that the employee representation bodies, the works councils, are governance structures of the firms—are part of the firm—German auto IFAs show that the management of these firms may be willing only to enter into a global agreement with a party that it highly trusts, e.g., its own employee representation body. The global unions remained mostly nominal parties to the agreements. In this manner, German auto IFAs fit the “continuous bargaining model” explained by Professor Egels-Zandén and prior research that has noted the importance of pre-existing relations of trust for IFAs.

2. What the IFAs Regulate

The Daimler IFA is officially called the “Social Responsibility Principles of Daimler[.]”⁹⁷ The parties pledge to condemn

lerChrysler AG, 4 (Sept. 2002), <http://www.industrialall-union.org/sites/default/files/uploads/documents/GFAs/Daimler/daimler-gfa-english.pdf> [hereinafter Daimler IFA]. Please also note that an identical version of the agreement essentially corroborating the IFAs original language, but now only on behalf of Daimler, was more recently signed in February 2012 with the World Employee Committee on behalf of IMF. See generally *Standards, Principles, and Guidelines*, DAIMLER, http://reports2.equitystory.com/cgi-bin/show.ssp?companyName=daimler&language=English&report_id=nb-2008&id=603510&quickSearch=LA9 (last visited Mar. 25, 2014). This Article only analyzes the September 2002 agreement because the 2012 agreement is too recent to evaluate its impact. Nevertheless, the article refers to the DaimlerChrysler 2002 agreement as the “Daimler IFA” because Daimler and Chrysler are no longer a merged company.

95. *Id.* The author could not verify the exact reasons why the Daimler Global Works Council signed the IFA “on behalf of the IMF” and why the IMF did not sign the instrument directly as a party. The legal meaning of such a signature is also hard to resolve.

96. See Stevis, *supra* note 69, at 122–23 (“A second important element of German industrial relations is that of works councils . . .”).

97. See Daimler IFA, *supra* note 94.

child and slave labor and promote equal opportunity and equal pay for equal work.⁹⁸ They also agreed that they would support employees' rights to form unions, establish constructive relationships with the employees, and "involve and inform" employees as much as possible.⁹⁹ The parties condemned all exploitative employment relations.¹⁰⁰ They pledged to protect the health and safety of the company's employees.¹⁰¹ They also pledged to provide "reasonable compensation of a level no less than the legally established minimum-wage and the local job market," and abide by national laws regarding working time and provide training to its employees to facilitate "good performance and high quality work."¹⁰² The parties called on and encouraged Daimler's suppliers to establish similar principles if they are to maintain a relationship with the firm.¹⁰³ Finally, the parties pledged to establish a system of implementation in which management, labor, and auditors would work together to implement the instrument in the workplace.¹⁰⁴

The Volkswagen IFA is somewhat shorter than Daimler's and is written in more general terms. It calls itself the "Declaration on Social Rights and Industrial Relationships at Volkswagen."¹⁰⁵ Generally, the IFA mentions "the Conventions of the International Labour Organisation" as "rights and principles" taken "into consideration" by the instrument.¹⁰⁶ As all IFAs, the IFA also pledges to abide by the ILO's core conventions.¹⁰⁷ In addition to pledging to respect the ILO's core labor

98. *Id.* at 1.

99. *Id.* at 2.

100. *Id.* at 3.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 4.

105. *Declaration on Social Rights and Industrial Relationships at Volkswagen*, Volkswagen AG (June 6, 2002), <http://www.Industrialunion.org/sites/default/files/uploads/documents/GFAs/Volkswagen/vweng.pdf> [hereinafter Volkswagen IFA].

106. *See id.* pml.

107. The ILO's core conventions, which map onto Volkswagen's "Basic Goals" in the IFA are, without exception: 29 Forced Labour Convention, 1930; 87 Freedom of Association and Protection of the Right to Organise Convention, 1949; 98 Right to Organise and Collective Bargaining Convention, 1949; 100 Equal Remuneration Convention, 1951; 105 Abolition of Forced Labour Convention, 1957; 111 Discrimination (Employment and Occupation) Convention, 1958; 138 Minimum Age Convention, 1973; 182 Worst Forms of Child Labour Convention, 1999. *See Conventions and Recommendations*, ILO, <http://www.ilo>

standards, the IFA also states that the firm will provide compensation, working hours and health and safety standards that at least meet national legal criteria.¹⁰⁸ Finally, the agreement has a “realisation” clause that calls for the signers to implement and enforce the agreement.¹⁰⁹ It also encourages suppliers to follow similar principles.¹¹⁰

3. No Card Checks for American Workers

Even though the parties signed agreements respecting the right of freedom of association, there does not seem to be consensus on what that clause means for U.S. workers. According to a former German officer of the IMF and IG Metall, one of the author’s sources, while UAW believes, or at least at some point assumed, that the parties agreed on “card check recognition” in the United States, the German firms, works councils, and unions disagreed.¹¹¹ For the German parties, freedom of association only entails that the employer does not proactively oppose the union in the workplace. The employer need not facilitate unionization through voluntary recognition or other means.¹¹² German and American unionists are therefore at odds over the importance of the so-called “card check” and its importance for freedom of association.¹¹³

Daimler’s IFA has explicit language regarding freedom of association and effective collective bargaining. The freedom of association language in the instrument ostensibly is strongly favorable to collective representation rights. It states:

Daimler[] acknowledges the human right to form trade unions.

During organization campaigns the *company and the executives will remain neutral*; the trade unions and the company will comply with basic democratic principles, and thus, they will ensure [that] the employees can make a free decision. Daimler[] respects the right to collective bargaining.

[.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations](http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations) (last visited Mar. 25, 2014).

108. See Volkswagen IFA, *supra* note 105, §§ 1.5–1.7.

109. *Id.*

110. *Id.*

111. Interview with Robert Steiert, *supra* note 70. The author attempted to get a response from the UAW about this matter but the union did not answer any of the author’s requests.

112. *Id.*

113. Note, however, that the UAW did not respond to the author’s request to participate in this study. The evidence presented here regarding the card check comes from interviews with German industrial relations representatives and secondary literature.

Elaboration of this human right is subject to national statutory regulations and existing agreements. *Freedom of association will be granted even in those countries in which freedom of association is not protected by law.*¹¹⁴

Management pledged to follow the ILO's core labor standards.¹¹⁵ The company would even go beyond national laws, if necessary, to live up to freedom-of-association principles.¹¹⁶

The Volkswagen IFA's "Freedom of Association" clause is somewhat similar to that of Daimler, but not exactly the same. It states, perhaps more generally than the Daimler IFA, that:

The basic right of all employees to establish and join unions and employee representations is acknowledged. Volkswagen, the unions and employee representatives respectively work together openly and in the spirit of constructive and co-operative conflict management.¹¹⁷

The clause supports a basic right to organize and of employees to be represented, and to maintain cooperative relations.¹¹⁸

The policy of both German auto manufacturers regarding union recognition seems to be that they will remain "neutral" during the organizing drive. German automakers still want a formal vote by the workers to demonstrate their support of the union. These two German automakers do not seem to favor voluntary recognition and card checks for U.S. workers even though U.S. unions today favor card checks over traditional NLRB elections.¹¹⁹ U.S. unions and many pro-union lawyers and scholars prefer the card check because traditional union elections let employers run an anti-union campaign, which unions allege will coerce and intimidate employees to vote against the union.¹²⁰ Even though, under U.S. federal labor laws, em-

114. Daimler IFA, *supra* note 94, at 2 (emphasis added).

115. *See id.* at 1 (describing their implemented policies as the policies "that are oriented at the conventions of the International Labour Organization").

116. This is evidenced by Daimler's promise that "[f]reedom of association will be granted even in those countries in which freedom of association is not protected by law." *Id.* at 2.

117. Volkswagen IFA, *supra* note 105, § 1.1.

118. *See id.*

119. *See* James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 822 (2005) (noting that "[n]eutrality agreements combined with card checks" has now "become the principal strategy pursued by many labor organizations").

120. *See* Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 516-23 (1993) (noting employers and workers are locked in unequal bargaining relationships and the union election model of the NLRA has fostered a wrong impression that unions and employers square off as equals in election campaigns, just as political parties in government elections); Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil*

ployers must campaign in a way that expresses a mere “opinion” that does not amount to an illegal “threat of reprisal or force or promise of benefit,”¹²¹ employers can express their opinions in many settings, such as “captive audience meetings” that employees have no choice but to attend and hear the employer’s message.¹²² Employers need not provide “equal time” to the union or give it access to company property.¹²³ Employees normally must attend the captive audience meetings at the risk of being fired. They may have no right to speak at the meeting and express their own views there.¹²⁴

Critics of the NLRB election process also have pointed out that the law provides weak remedies against law-breaking employers.¹²⁵ In theory, workers can obtain reinstatement and back pay, minus mitigation (wages earned at other jobs during

Rights Movement, 22 BERKELEY J. EMP. & LAB. L. 369, 372 (2001) (“[N]eutrality agreements can redress four disadvantages unions confront when organizing: employer intimidation, harmful delay, inadequate access to employees, and inability to secure a first contract.”).

121. National Labor Relations Act § 8(c), 29 U.S.C. § 158c (2012); *see also* NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969) (“Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a ‘threat of reprisal or force or promise of benefit.’ He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.”).

122. *See* Elizabeth J. Masson, Note, “Captive Audience” Meetings in Union Organizing Campaigns: Free Speech or Unfair Advantage?, 56 HASTINGS L.J. 169, 171 (2004) (describing worker attendance as “mandatory” and explaining that “workers can be fired for refusing to attend”).

123. The Supreme Court stated:

[T]he Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it.

NLRB v. United Steelworkers of Am., 357 U.S. 357, 364 (1958).

124. *See* Masson, *supra* note 122, at 171–72 (2004) (“Workers can . . . be prohibited from asking questions or speaking during the meeting, upon pain and discipline, including discharge.”).

125. Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1773–74 (1983) (“The existing representation system under the NLRA provides employers with the opportunity to coerce employees in their choice about unionization, and the remedies administered by the National Labor Relations Board . . . cannot—stem the resulting tide of abuses.”).

the period the employee did not work for the employer, as a result of an unfair dismissal).¹²⁶ According to some scholars, such remedies are ineffective because employers sometimes delay reinstatement of workers for as long as three years through appeals and other tactics.¹²⁷ Even when employees are reinstated, they usually leave the job within two years as a result of vindictive treatment by the employer.¹²⁸ Some labor law scholars agree that, given the high costs of a union contract and the low costs of breaking the labor law, many employers simply internalize breaking the labor law as a cost of doing business.¹²⁹ American labor law is thus too permissive of employer misconduct and fails to provide adequate means to police the slim protections that it does afford to workers.

Because many unions view current labor law as an ineffective instrument to protect workers' rights to join unions and bargain collectively, they have sought alternative routes to union certification. The main alternative route has been voluntary recognition and card checks, or labor-management agreements in which the employer pledges to recognize the union if the union can show it has support from a majority of the workers without necessarily going through a formal union vote.¹³⁰ Under the National Labor Relations Act (NLRA), unions can represent workers for collective bargaining only if the union has obtained "majority support"—fifty percent plus one—from the workers it seeks to represent. Once the union obtains majority support, it retains the right to represent the workers as their "exclusive representative."¹³¹ Such support can be expressed through card

126. See *id.* at 1787–93 (discussing the remedies available to employees under the NLRA and assessing their functionality).

127. See Weiler, *supra* note 125, at 1795 (explaining that enforcement orders in unfair labor practice proceedings can be forestalled "nearly 1000 days").

128. See *id.* at 1792 (noting that eighty percent of employees who accepted reinstatement "were gone within a year or two" blaming their departure on "vindictive treatment").

129. See, e.g., Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1537 (2002) (arguing that the remedies of reinstatement and back pay after mitigation "may be seen as a minor cost of doing business by an employer committed to avoiding unionization").

130. See Brudney, *supra* note 119, at 822 (referring to neutrality agreements and card checks as "the principal strategy pursued by many labor organizations").

131. Under U.S. Federal labor law, recognized unions are "exclusive representatives"—meaning that they have a monopoly over representation rights. As the NLRA states:

checks¹³²—when more than half of the workers sign union authorization cards—or through a union election, administered by the NLRB.¹³³ However, employers need not recognize the union through “card checks.” Card check recognition is legal but voluntary.¹³⁴

German automakers—and the German unions and employee representatives interviewed—did not agree with American unions on the desirability of “card checks.” A retired officer of IMF and the German metalworkers union that bargained the Volkswagen IFA, IG Metall, told the author that, in his opinion, the IFA does not include voluntary recognition and card checks even though it contains a pledge in favor of freedom of association.¹³⁵ The former German union officer’s comments were not just stray remarks. A current officer of IndustriALL told the author that IFAs “secure the job of workers.”¹³⁶ The employers pledge not to retaliate against union activists for engaging in union activity.¹³⁷ Such pledges matter because in

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the *exclusive representatives* of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

National Labor Relations Act § 9(a), 29 U.S.C. § 159a (2012) (emphasis added).

Professor Charles Morris has argued, however, that the idea that only exclusive representatives certified by the NLRB have the legal right to compel employers to bargain is merely “conventional wisdom” as minority unions, absent an exclusive representative, have the same rights to bargain with an employer to the extent they bargain only for the union members. *See* CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* 85–88 (2005) (explaining how the notion that only certified or recognized exclusive representative unions have a right to bargain with an employer is merely a conventional wisdom that is inapposite to the NLRA and its history); *see also infra* Part IV.A (discussing minority unions in the context of IFAs and the International Labour Organization).

132. Lamons Gasket Co., 357 N.L.R.B. 72, 2 (2011) (“Congress has expressly recognized the legality of employers’ voluntary recognition of their employees’ freely chosen representative, as well as the place of such voluntary recognition in the statutory system of workplace representation.”).

133. 29 U.S.C. § 159(b).

134. *See* Brudney, *supra* note 119, at 824 (“The employer may lawfully accede to this request (provided there is in fact uncoerced majority support for the union).”).

135. Interview with Robert Steiert, *supra* note 70; *see also* Volkswagen IFA, *supra* note 105, § 1.1.

136. Interview with Helmut Lense, *supra* note 70.

137. *See, e.g.*, Daimler IFA, *supra* note 94, at 2 (promising non-interference of management in labor organization efforts and recognizing the right to free

some countries, such as the United States, employers often fire union activists.¹³⁸ According to the IndustriALL officer, the IFA prohibits “obvious” and “clear” violations of freedom-of-association principles, such as dismissing a worker because of his or her union activities.¹³⁹ It does not, however, necessarily support voluntary recognition and card checks.¹⁴⁰

A similar viewpoint was expressed by an officer of the powerful German union IG Metall, which represents millions of metallurgical workers in Germany, including autoworkers.¹⁴¹ She told the author that the IFAs’ language clearly bans intimidation and union busting tactics.¹⁴² However, as she told me, the IFA’s freedom of association clause “does not . . . automatically recognize the union” if workers bring the signed union cards to the firm.¹⁴³

A member of the Volkswagen Global Works Council opined to the author that the IFA clearly established “positive neutrality,” meaning that Volkswagen would not engage in anti-union tactics.¹⁴⁴ Therefore, the company should not try to engage in union avoidance techniques.¹⁴⁵ Workers should feel at liberty to speak about the union without fearing retaliation.¹⁴⁶ However, the IFA did not necessarily imply that management would facilitate unionization by providing voluntary recognition.¹⁴⁷

association); Volkswagen IFA, *supra* note 105, § 1.1 (acknowledging the basic right of all employees to organize).

138. For recent examples of such occurrences, see, e.g., Davie Jamieson, *Walmart Striker Fired 6 Months After Solo Walkout in Florida*, HUFFINGTON POST (May 30, 2013, 7:42 AM), http://www.huffingtonpost.com/2013/05/30/walmart-walkout-florida_n_3354689.html and Michael Levenson, *At Rally, Walsh Urged to Support Fired School Bus Drivers*, BOS. GLOBE, Feb. 2, 2014, <http://www.bostonglobe.com/metro/2014/02/02/union-rally-mayor-walsh-urged-support-fired-school-bus-drivers/QijNlz8rTcg8sH338woreM/story.html>.

139. Interview with Helmut Lense, *supra* note 70.

140. *Id.*

141. *Industriegewerkschaft Metall (IG Metall)*, EUR. METALWORKERS’ FED’N, <http://www.emf-fem.org/Affiliates/Germany/IG-Metall> (last visited Mar. 25, 2014).

142. Interview with Claudia Rahman, *supra* note 69.

143. *Id.*

144. Interview with Frank Patta, *supra* note 69.

145. *Id.*

146. *See id.*

147. The works council member acknowledged that he personally believed that the union should be organized in simplest possible pathway—e.g., voluntary recognition through card checks. *See id.* However, he thought that the agreement did not necessarily provide for voluntary recognition and card checks. *See id.*

In sum, German unionists and the Volkswagen Global Works Council member do not think the IFA includes language that necessarily provides voluntary recognition and card checks for American workers. Rather, they think the IFAs provide language that stops the employers from proactively (“positively”) engaging in union opposition, as is frequently done by employers in the United States

My exploratory research suggests that, at a global level, the union movement does not share consensus as to what freedom of association should entail for U.S. workers, e.g., card checks or union elections where employers remain “neutral.” With such lack of consensus, U.S. unions have a difficult task to legitimately call for card checks based on basic freedom of association rights developed by international norms. Meanwhile, some skeptics may argue that *German* workers could gain from weak unions and lower wages in the United States and elsewhere, as lower wages abroad enable German firms to get richer and be more able to increase wages and other benefits for their *German* workers.¹⁴⁸ As German firms become more transnational, to the point where the sales revenues of German subsidiaries outside of Germany outpace the total value of Germany’s exports, the German political economy and its labor-friendly corporate models may depend on disparate labor costs and conditions at home and abroad.¹⁴⁹ These disparities open

Evidence of the German automakers’ position can be traced back to 1999, when the *Wall Street Journal* reported that the UAW’s President at the time, Stephen Yokich, was surprised by Daimler’s refusal to voluntarily recognize the union in Tuscaloosa through card checks even though the company had stated that it would not oppose the union. Jeffrey Ball, *UAW’s Reception in Alabama Mercedes Plant Is Sour*, WALL ST. J., Jan. 31, 2000, at A15. The UAW’s President sat on the very influential Supervisory Board of the firm, half of whom were employee representatives. *Id.*; see also *Supervisory Board of Daimler AG*, DAIMLER AG, <http://www.daimler.com/supervisoryboard> (referencing the German legal requirement that half of Board members be representatives of employees). Yokich raised complaints there, but to no avail. See, e.g., Lindsay Chappell, *Mercedes Union Bid Attacked on Two Fronts*, AUTO. NEWS (Aug. 17, 2006, 12:01 AM) <http://www.autonews.com/article/20060417/SUB/60413029> (referencing the eventual failure of Yokich’s efforts in 2000).

148. For example, research has shown a positive correlation between outsourcing and domestic plant productivity in the German manufacturing sector, buttressing some suspicions that currently employed German industrial workers may benefit from outsourcing if increased productivity at home aided by outsourcing translates into higher pay at home. See Craig Aubuchon et al., *The Extant and Impact of Outsourcing: Evidence from Germany*, 94 FED. RES. BANK ST. LOUIS REV. 287 (2012).

149. See, e.g., Bertrand Benoit & Richard Milne, *Germany’s Best-Kept Secret: How Its Exporters Are Beating the World*, FIN. TIMES, May 16, 2006,

possibilities for opportunism, or at least suspicions of it, and bode ill for the fledgling global labor movement.

B. THE TEMP AGENCY IFA

A global representative of temp agencies, Ciett, many of its global corporate members, and UNI Global Union signed the temp agency IFA.¹⁵⁰ The temp agency IFA establishes pledges to live by the ILO core labor rights, ILO Convention 181¹⁵¹ and ILO Recommendation 188¹⁵² on temp agency work, which attempt to provide a regulatory environment for legitimate and socially beneficial temp agency work.¹⁵³ Importantly, it got a pledge from Ciett to not provide employees who may be used as strike breakers by user firms.¹⁵⁴ However, after signing the IFA, UNI Global Union signed a document with all other global unions titled “Global Union Principles on Temporary Work Agencies” where temp agency work was strongly criticized by the global unions.¹⁵⁵ Ciett disagreed with the criticism,¹⁵⁶ leading its relation with UNI to sour and the IFA to lose potency.¹⁵⁷

<http://www.ft.com/cms/s/0/54730f00-e6d4-11da-a36e-0000779e2340.html#axzz2cYSxqgv0>.

150. See Memorandum of Understanding Between Ciett Corporate Members & UNI Global Union on Temporary Agency Work (Oct. 24, 2008), <http://www2.asetuc.org/media/04c%20%28ENG%29%20MOU%20CIETT%20UNI.pdf> [hereinafter Temp Agency IFA].

151. Convention (No. 181) Concerning Private Employment Agencies, June 19, 1997, 2115 U.N.T.S. 249 [hereinafter ILO Convention 181].

152. Int'l Labour Org., Recommendation Concerning Private Employment Agencies (June 19, 1997), http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0:NO:12100:P12100_INSTRUMENT_ID:312526 (establishing detailed rules for temporary employment agencies, including but not limited to rules pertaining to non-discrimination, privacy, and bans against provision of strikebreakers).

153. See Temp Agency IFA, *supra* note 150, ¶ 3.

154. *Id.*

155. Statement, Council of Global Unions, Global Union Principles on Temporary Work Agencies (Jan. 23–24, 2012), http://www.global-unions.org/spip.php?action=acceder_document&arg=471&cle=9c244964753f3de9a97372156a49fb567f009f34&file=pdf%2Fgu_temp_work_agencies_principles.pdf.

156. See *Ciett Reacts to Global Unions' Principles on TAW: "TAW Is the Most Secure Form of External Flexible Employment"*, CIETT, [http://www.ciett.org/index.php?id=110&tx_ttnews\[tt_news\]=118&tx_ttnews\[backPid\]=1&cHash=0e274d2c9c](http://www.ciett.org/index.php?id=110&tx_ttnews[tt_news]=118&tx_ttnews[backPid]=1&cHash=0e274d2c9c) (last visited Mar. 25, 2014).

157. For a contemporaneous reaction from Ciett, see *Meeting with Philip Jennings—UNI Global*, CIETT & EUROCIETT PUB. AFF. 2 (Apr. 2012), http://www.rcsa.com.au/documents/other_docs/Ciett%20Public%20Affairs%20Report%20-%20April%202012.pdf.

1. The Parties

CiETT, its corporate members Adecco, Kelly Services, Manpower, Randstad, USG People, and Olympia Flexgroup, and UNI Global Union signed the temp agency IFA on October 24, 2008.¹⁵⁸ UNI Global Union signed the IFA in representation of its member unions in the following sectors: agency staff, commerce, electricity, finance, gaming, hair and beauty, graphical, IT and business services, media and entertainment, postal, property services, social insurance, and telecom.¹⁵⁹

CiETT is a global organization based in Brussels, Belgium, representing temp agencies.¹⁶⁰ It was established in 1967.¹⁶¹ Its main goals are to support friendly regulatory environments for temp agency work and transmit a positive message about said work.¹⁶² As its website states, CiETT's "main objectives are to help its members conduct their businesses in a legal and regulatory environment that is positive and supportive and to gain recognition for the positive contribution the industry brings to better functioning labour markets."¹⁶³ In this manner, CiETT has a very clear regulatory goal in favor of temp agencies and a commitment to disseminate a message showcasing the positive contributions of temp agency work to labor markets.

CiETT has two parallel lines of membership: "national members" and "corporate members."¹⁶⁴ The website provides: "CiETT consists of 48 national federations of private employment agencies and 9 of the largest staffing companies worldwide: Adecco, Allegis Group, Gi Group, Kelly Group Limited, Kelly Services, Manpower, Randstad, Recruit Co., LTD. and USG People."¹⁶⁵ The IFA between UNI and CiETT was signed by most of its corporate members.¹⁶⁶

158. Temp Agency IFA, *supra* note 150, ¶ 5. Olympia, a signatory of the IFA, was a German temp agency. However, it went out of business after it signed the IFA. *See, e.g., Olympia Flexgroup Sells Business in a Few European Countries*, UNI GLOBAL UNION (Mar. 29, 2010), <http://www.uniglobalunion.org/news/olympia-flexgroup-sells-business-a-few-european-countries>.

159. Temp Agency IFA, *supra* note 150, at 1 n.1.

160. *See* CIETT, <http://www.ciett.org> (last visited Mar. 25, 2014).

161. *History & Main Achievements*, CIETT, <http://www.ciett.org/index.php?id=34> (last visited Mar. 25, 2014).

162. *See Mission & Objectives*, CIETT, <http://www.ciett.org/index.php?id=35> (last visited Mar. 25, 2014).

163. *See* CIETT, *supra* note 160.

164. Telephone Interview with Denis Pennel, Managing Director, CiETT (July 20, 2012).

165. CIETT, *supra* note 160.

166. *See* Temp Agency IFA, *supra* note 150, ¶ 5.

Adecco considers itself the largest employment agency¹⁶⁷ in the world, with over 31,000 in-house employees and around 5100 branches in over 60 countries and territories.¹⁶⁸ It states that on any given day it places 650,000 workers with user firms.¹⁶⁹

Manpower is another staffing giant, making U.S. \$22 billion in revenue from its staffing operations in 2011.¹⁷⁰ It is based in the United States.¹⁷¹ It transacts business in over eighty countries¹⁷² and has over 3500 offices.¹⁷³

Randstad is a Dutch corporation.¹⁷⁴ Its company website states that it has over 29,000 in-house employees, working in 4496 branches.¹⁷⁵ Every day the company places about 581,000 people in user firms.¹⁷⁶

Kelly Services is an American firm.¹⁷⁷ It has approximately 8100 in-house employees around the world and placed about 540,000 people in user firms in 2013.¹⁷⁸

USG People is a firm based in the Netherlands.¹⁷⁹ According to its website, the company provides employment services

167. According to an Adecco representative, the firm considers itself more than a temp agency. It considers itself a “private employment agency” that provides “the full scale of HR solutions.” E-mail from Bettina Schaller, Grp. Pub. Affairs, Adecco, to author (Sept. 17, 2013, 04:31 CST) (on file with author). The Article refers to Adecco as a “temp agency” for shorthand only.

168. *Who We Are and What We Do*, ADECCO GRP., <http://www.adecco.com/about/default.aspx> (last visited Mar. 25, 2014).

169. *Id.*

170. *See ManpowerGroup 2012 Annual Report*, MANPOWERGRP. 50 (2013), http://files.shareholder.com/downloads/MAN/2949689866x0x648084/0293B1D4-61C0-4702-8467-9E60BF4D9344/MAN_Annual_Report_2012.pdf.

171. *Id.* at 96.

172. *About ManpowerGroup*, MANPOWERGRP., http://www.manpowergroup.com/wps/wcm/connect/manpowergroup-en/home/about/#.Uvg_g7Sh6tZ (last visited Mar. 25, 2014).

173. *Brands*, MANPOWERGRP., <http://www.manpowergroup.com/wps/wcm/connect/manpowergroup-en/home/about/brands/#.UvhEP7Sh6tY> (last visited Mar. 25, 2014).

174. *See Contact Us*, RANDSTAD HOLDING N.V., <http://www.randstad.com/contact-us> (last visited Mar. 25, 2014).

175. *Company Information*, RANDSTAD HOLDING N.V., <http://www.randstad.com/about-us/company-information> (last visited July 11, 2013).

176. *See id.*

177. *Company Overview*, KELLY SVCS. INC., http://www.kellyservices.com/Global/About-Us/Company_Overview/ (last visited Mar. 25, 2014).

178. *See id.*

179. *About Us*, USG PEOPLE, <http://www.usgpeople.com/about-us> (last visited Mar. 25, 2014).

in Austria, Belgium, France, Germany, Italy, Luxembourg, the Netherlands, and Switzerland.¹⁸⁰

UNI Global Union is a service industry global union based in Nyon, Switzerland.¹⁸¹ Its website says that it represents about twenty million service sector workers around the world.¹⁸² It has about 900 affiliated unions in 140 countries.¹⁸³ These unions represent workers in the cleaning and security sectors, commerce, finance, gaming, graphical and packaging, hair and beauty, information technologies, media, entertainment and arts, mail and logistics, social insurance, sport, temporary and agency worker, and tourism industries.¹⁸⁴

2. UNI Signs IFA Accepting a “Positive Role” for Temp Agency Work

The temp agency IFA recognizes Convention 181 and Recommendation 188 regarding temp agency work.¹⁸⁵ The IFA states that it provides a “framework that allows for the improved functioning of private employment agencies[.]”¹⁸⁶ Many of the principles in Convention 181 are contained, as we will see, in the temp agency IFA.¹⁸⁷ The IFA then proceeds with the parties’ pledge to live up to the ILO’s core labor rights. The temp agency IFA reads: “The signatories to this MoU [Memorandum of Understanding] recognize . . .[t]hat temporary agency work contributes to improve the functioning of labour markets and fulfils [sic] specific needs for both companies and workers and aims at complementing other forms of employment[.]”¹⁸⁸

This language tracks Convention 181, which states that the ILO is “aware of the importance of flexibility in the func-

180. *Id.* The firm realized over €2.8 billion in revenue for 2012, though the author was unable to find figures regarding the number of workers it places in user firms. See Press Release, USG People N.V., Transitional Year Strengthens Foundation for the Future (Mar. 1, 2013), <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTczOTY5fENoaWxkSUQ9LTF8VHlwZT0z&t=1>.

181. *About Us*, UNI GLOBAL UNION, <http://www.uniglobalunion.org/about-us> (last visited Mar. 25, 2014).

182. *Id.*

183. See *Regions*, UNI GLOBAL UNION, <http://www.uniglobalunion.org/regions> (last visited Mar. 25, 2014).

184. *About Us*, *supra* note 180.

185. Temp Agency IFA, *supra* note 150, ¶ 3.

186. *Id.* at 2.

187. Compare *id.* with ILO Convention 181, *supra* note 151.

188. Temp Agency IFA, *supra* note 150, at 2.

tioning of labour markets” and recognizes “the role which private employment agencies may play in a well-functioning labour market[.]. . .”¹⁸⁹ Hence, the temp agency IFA, like Convention 181, recognizes temp agencies as legitimate and useful labor market actors. As we saw above, it also follows Ciett’s goal to disseminate positive messages regarding temp agency work.

Management representatives that the author interviewed were particularly pleased with the laudatory language in the IFA favoring the industry.¹⁹⁰ Partly because of this language, Ciett called the IFA a “win-win” agreement.¹⁹¹ Citing the IFA at length is warranted to better comprehend why temp agencies were so pleased with their agreement. The relevant language states that temp agencies contribute to the labor market by:

- Facilitating fluctuations in the labour market, e.g. the matching of supply and demand.
- Implementing active labour market policies and creating pathways between unemployment and employment by:
 - Helping jobseekers entering or re-entering the labour market.
 - Helping disadvantaged people entering into the labour market.
 - Providing more work opportunities for more people.
- Facilitating the transition between education and work, e.g. by providing students and young workers with their first access to professional life and an opportunity to gain work experience.
- Facilitating the transition between assignments and jobs by providing agency workers with vocational training.
- Promoting conversion between different types of work contracts, e.g. by assisting in a transition from a temporary agency contract to fixed-term or open-ended contracts.
- Improving life work balance, e.g. by providing flexible working time arrangements such as part-time work and flexible working hours.
- Helping fight undeclared work.¹⁹²

As we can see, the IFA attempts to provide balanced language recognizing that regulated temp agency work can find a legitimate place in the labor market to benefit employers and workers. The IFA seems to build on ILO Convention 181 to greater

189. ILO Convention 181, *supra* note 151, at 251.

190. *See, e.g.*, Telephone Interview with Göran Hultin, *supra* note 64.

191. Telephone Interview with Denis Pennel, *supra* note 164.

192. Temp Agency IFA, *supra* note 150, ¶ 1.

detail “the role which private employment agencies may play in a well-functioning labour market.”¹⁹³

Under paragraph two of the temp agency IFA, the parties agreed on regulatory principles to protect workers.¹⁹⁴ The IFA calls for practices where workers’ rights are not harmed, where unionization is better safeguarded, and where the worst kinds of abuses, such as human trafficking, are avoided, among other pledges.¹⁹⁵

In its paragraph three, the agreement reiterates ILO Convention 181.¹⁹⁶ It also references Recommendation 188 on private agencies, including the provision that calls for no fees to be levied on employees placed by the agencies.¹⁹⁷ The IFA states the need to protect freedom of association, social dialogue, and attention to employee benefits.¹⁹⁸ Perhaps very importantly, the temp agencies also pledged not to provide workers to end users who could be used as strike replacements.¹⁹⁹ The temp agency agreement states: “UNI and Ciett Corporate Members agree that a regulatory framework on temporary agency work must include and promote . . . [p]rohibition of the replacement of striking workers by temporary agency workers without prejudice to national legislation or practices.”²⁰⁰ Ciett and its corporate members pledged not to provide strikebreakers to end users.

In addition, the agreement sets some actions that the parties should take at the national and global levels. At the national level, the parties pledged to eliminate obstacles that make it difficult for temp agencies to operate.²⁰¹ The parties also pledged to promote a balanced regulatory system for the agencies and for employees.²⁰² The parties should attain such goals through social dialogue.²⁰³

193. ILO Convention 181, *supra* note 151, at 251.

194. Temp Agency IFA, *supra* note 150, ¶ 1.

195. *See id.*

196. *Id.* ¶ 3.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. The exact language reads: “Identify and review obstacles of a legal or administrative nature which may limit the opportunities for temporary agency work to operate, and, where appropriate, work with the national governments to eliminate them.” Temp Agency IFA, *supra* note 150, ¶ 4.

202. *See id.*

203. The exact language reads:

At the global level, the parties pledged to “[w]ork with the ILO to promote ratification of ILO Convention 181 and the application of Recommendation 188,” and cooperate with international organizations to eliminate human trafficking.²⁰⁴ They also agreed to continue to research the industry and further improve on “perceptions and conditions for both workers and employers[.]”²⁰⁵ Finally, the agreement provides guidelines for implementation, including pledges to disseminate the agreement and meet twice a year to discuss it in a “review committee” composed of the signatory parties.²⁰⁶

3. Trust Facilitated the IFA

At first blush, the temp agency IFA looks extraordinary. It is a multi-employer agreement and appears to be industry-wide. The IFA sets a general framework for UNI, Ciett, and its corporate members to work together for an agenda to regulate temp agency work. The parties were able to reach agreement to sign the IFA as a result of their longstanding prior dealings, which likely have led the parties to establish trust.²⁰⁷

Since about 1999, European labor has been trying to establish a regulatory framework for temp agencies in Europe, par-

Review the need for systems of licensing and inspection and when relevant, work with the national governments for the introduction of such systems (which can include financial guarantees), which will contribute to the development of good industry standards, provided that such systems are proportional, non-discriminatory and objective and do not aim at hampering the development of temporary agency work.

Id.

204. *Id.*

205. *Id.*

206. *See id.* ¶ 5.

207. Prior and current dealings and agreements pertaining to Ciett and UNI European collaborations seem to have been deemed successful by Ciett members. For example, a representative of Adecco told me that agreements between Ciett and UNI “are a testimony to the fact that the Social Dialogue in our Industry does work!” E-mail from Bettina Schaller, *supra* note 167. She mentioned as an example the *Joint Eurociett/UNI Europa Recommendations on Temporary Agency Work Facilitating Transitions in the Labour Market* of 2012, which “is aimed at EU policy makers on how to maximise the role of temporary agency work in facilitating labour market transitions.” *Id.*; *see also* EUROCIETT & UNI EUROPA, JOINT EUROCIETT/UNI EUROPA RECOMMENDATIONS ON TEMPORARY AGENCY WORK FACILITATING TRANSITIONS IN THE LABOUR MARKET (2012), available at http://www.eurociett.eu/fileadmin/templates/eurociett/docs/Social_dialogue/Transitions_project/Recommendations/Eurociett_UNI_Europa_-_Joint_recommendations_on_transitions_-_signed.pdf (recommending how to improve the experience of temporary workers).

ticularly during the European Union discussions for a directive on temp agency work.²⁰⁸ In Europe, the Union of Industrial and Employers' Confederations of Europe (UNICE which today is renamed BUSINESSEUROPE) and the European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP) represented employers as "social partners" on all issues regarding labor regulation, including temp agency work.²⁰⁹ However, Ciett came to the fore as an independent group to represent the temp agency sector during European debates in 1999.²¹⁰ UNI Europa, the Europe branch of UNI, became Ciett's European department and Eurociett's labor counterpart.²¹¹ Ciett was generally more willing to make concessions on some issues than UNICE and CEEP had been, such as in the provision of strikebreakers.²¹²

The IFA became an extension of what UNI and Ciett had been doing for Europe, but now for the rest of the world. In this way, the agreement conforms to the kind of "continuous bargaining model" explained by Professor Egels-Zandén and prior research that has shown the importance of trust for IFAs.²¹³ In that particular time when the temp agency IFA was signed, in 2008, Ciett and its corporate members sought to further the legitimacy of temp agency work around the world.²¹⁴ UNI was seeking to find a global regulatory environment for said work and also to organize the sector.²¹⁵

208. See Kerstin Ahlberg, *A Story of a Failure—But Also of Success*, in TRANSNATIONAL LABOUR REGULATION: A CASE STUDY OF TEMPORARY AGENCY WORK 191, 196–97, 207–08, 216, 220 (SALTSA—Joint Programme for Working Life Research in Eur. ed., 2008) (explaining how Ciett came to the fore in European debates in 1999 to represent the temp agency sector when the European Union attempted to jump-start discussions for a temp agency work legislation. Ciett was generally more willing to make concessions on some issues that users of temp agency workers did not in order to pursue its goals of gaining a more friendly regulatory environment for temp agency work and gaining legitimacy as a social partner. One of those concessions included not providing workers to end users that could use them to replace strikers); see also Emma L. Jones, *Temporary Agency Labour: Back to Square One?*, 31 INDUS. L.J. 183, 183–84, 187–88 (2002) (discussing Social Partners' difficulty agreeing about the role of temporary workers during negotiations).

209. Ahlberg, *supra* note 208, at 196, 198.

210. *Id.* at 196.

211. *Id.* at 196, 218.

212. *Id.* at 208.

213. Egels-Zandén, *supra* note 29, at 538–41.

214. See Telephone Interview with Denis Pennel, *supra* note 164.

215. See Telephone Interview with Giedre Lelyte, *supra* note 64.

The Ciett representative told the author that UNI approached Ciett to sign the temp agency IFA at a time when it was looking for global acceptance of the industry.²¹⁶ Temporary service firms are generally denounced as anti-worker and anti-union by some labor unions and governments around the world. Hence, the IFA was intended to be used to gain more global legitimacy for temp agency work.²¹⁷

A representative of Kelly Services told the author a similar account of why the organization signed the IFA. To paraphrase the representative's statement, Kelly Services in particular favored the IFA because UNI Global Union represents workers employed by the sector around the world.²¹⁸ The idea behind the IFA was to send a signal that temp agencies and unions could work together and discuss issues that concerned both parties, such as human trafficking and unfair labor practices, which could be committed by the less ethical companies involved in global staffing work.²¹⁹

Adecco's representative also voiced a similar reason accounting for the signing of the temp agency IFA, i.e. insufficient legitimacy of temp agency work. An excerpt from the author's notes states as follows: "Adecco is very open to hav[ing] interactions with labor unions because it is looking for recognition since the industry players [have] a problem with 'recognition' as social partners."²²⁰ Adecco's representative further elaborated on her statement, telling the author that:

Adecco is very open to hav[ing] interactions with labor unions because it is looking to build the proper regulatory environment to guarantee worker[s]' rights. Despite their efforts, Staffing Industry players have a problem with recognition as social partners in many countries, so this [IFA] provided a perfect opportunity to signal that one global labor union partner was willing to mutually move ahead.²²¹

Hence, we can conclude that Adecco's goal was to actively engage with labor unions globally and obtain more legitimacy for temp agency work and for Ciett as a "social partner."²²²

Similarly, Manpower also was looking for legitimacy in industrial relations at the global level. An excerpt from the au-

216. Telephone Interview with Denis Pennel, *supra* note 164.

217. *Id.*

218. Telephone Interview with Pam Berklich, *supra* note 64.

219. *See id.*

220. Telephone Interview with Bettina Schaller, Grp. Pub. Affairs, Adecco (August 14, 2012).

221. E-mail from Bettina Schaller, *supra* note 167.

222. *Id.*

thor's notes reads the following way: "[T]he IFA was made possible because UNI Global [Union] started the process with the position that temporary service employers have something positive to contribute to society (this language was found in the agreement), and this was tremendously important for the [IFA] to come to fruition."²²³

Moreover, for Manpower, the parties were binding themselves to work together to find more legitimate spaces for temp agency work.²²⁴ The parties were committing themselves as social partners.²²⁵ Notes from the author's interview with the Manpower representative state: "In this sense, the IFA was different from others because according to [Manpower], other[] [agreements] are 'one-sided' towards the union. Here, the union had to 'deliver' as both parties pledged to work together."²²⁶ Each party was expected to contribute to the relationship.

UNI shares some of Ciett's motivations for the IFA. A UNI representative told the author that the main goal of UNI was to develop "social dialogue" with temp agencies because temp agency work was becoming more predominant globally.²²⁷ But UNI also wanted to regulate temp agency work, not just give legitimacy to the sector and to Ciett.²²⁸ According to UNI, many large employers use agency work to undermine trade union rights.²²⁹ Many industries hire temporary workers to replace core permanent staff.²³⁰ They do it to cut costs, weaken collective bargaining, union power and density.²³¹ Given this reality, UNI felt that it could not just sit on its hands. It had to engage with this global player and seek ways to regulate it.²³²

According to UNI, it was difficult to jump-start discussions with Ciett because many of its affiliates and other global unions either opposed temp agencies altogether or did not see Ciett as a legitimate partner for social dialogue.²³³ However, as the UNI representative told the author, UNI believed that "if

223. Telephone Interview with Göran Hultin, *supra* note 64.

224. *Id.*

225. *Id.*

226. *Id.*

227. Telephone Interview with Giedre Lelyte, *supra* note 64.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *See id.*

we wanted to protect workers[,] we had to talk to these firms.”²³⁴

Moreover, UNI wanted to have a social partner on the side of management, and Ciett became the leading prospect.²³⁵ Perhaps most importantly, UNI also wanted to organize the agency workers, starting with their in-house staff.²³⁶ We can therefore conclude that UNI’s preexisting relationship with Ciett was pivotal for the IFA.

Finally, UNI had a goal to cover agency workers with the collective agreements of the relevant user sector.²³⁷ However, this goal was not achieved.²³⁸ Ciett wanted its corporate members to have a collective agreement of their own, so there was no agreement on this point.²³⁹ As we will see below, separate collective bargaining agreement for temp agencies issue also became a sticking point for the rest of the global union movement.

To summarize, the temp agency IFA is an entryway into global social dialogue and industrial relations for Ciett. It also helped UNI to negotiate ways to better regulate temp agency work in the sector where it represents workers. UNI’s preexisting relationship with Ciett helped the parties reach the global agreement.²⁴⁰ The IFA aims to create social dialogue for legislative and regulatory initiatives related to temp agencies. However, as the author will explain below, even this limited goal to pursue legislative and regulatory changes was at least on partial hold because the global union movement was unwilling to give Ciett the degree of legitimacy that Ciett expected after signing the IFA.

4. A Relationship on “Neutral”?

Despite the collaborative language in the temp agency IFA, Ciett and its corporate members communicated disappointment

234. *Id.*

235. *See id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. UNI-Europa, the European branch of UNI, and Eurociett, the European branch of Ciett, had worked together at least since 1999 for European Union legislation on temp agency work, sometimes amidst opposition from other union and employer associations. Hence, UNI and Ciett have a long relationship where they attempt to work together to pursue common goals. *See* Ahlberg, *supra* note 208, at 196, 200–01, 218–20.

with the IFA because the response of the global unions' movement to the IFA was rather cool.²⁴¹ Some global unions seem to have rejected the IFA altogether. Part of the global union backlash that disappointed Ciett included the so-called Global Union Principles on Temporary Work Agencies that, according to Ciett, lacked the "win-win" language contained in the IFA.²⁴² These principles were signed by all global unions including UNI.²⁴³ They stated that:

- "The primary form of employment shall be permanent, open-ended and direct"²⁴⁴
- "Agency workers must . . . be covered by all collective bargaining agreements applying to the user enterprise."²⁴⁵
- "[Temporary agency workers] must be accorded equal treatment and opportunities . . . with regular and permanent employees with respect to terms and conditions of employment."²⁴⁶
- The use of temporary agencies should not increase the gender gap on wages, social protections, and conditions;²⁴⁷
- "Temporary work agencies must not be used to eliminate permanent and direct employment relationships"²⁴⁸
- The use of agency workers should never be used to weaken

241. See, e.g., Telephone Interview with Göran Hultin, *supra* note 64 (explaining political, inter-union conflicts are barring the IFA's implementation); Telephone Interview with Pam Berklich, *supra* note 64 (expressing disappointment with dismissive manner of global unions towards the IFA); Telephone Interview with Denis Pennel, *supra* note 164 (noting some global unions questioned the IFA's ability to really represent the interests of all workers across all sectors); Telephone interview with Bettina Schaller, *supra* note 220 (acknowledging it is always easy to find a union that does not support the temporary work industry).

242. See Telephone Interview with Denis Pennel, *supra* note 164 (for example, they did not endorse support of the temporary worker industry); see also *Ciett Reacts to Global Unions' Principles on TAW*, *supra* note 156 (calling for "further dialogue between the two organisations").

243. The document containing the principles reads:

Policy positions differ in the trade union movement, both at national and international levels concerning the use of temporary work agencies. Views vary from total bans on such agencies, to partial bans, to strict regulation. There are also differences as to on what basis workers should be covered by collective bargaining agreements. However, there are certain views shared by *all Global Unions*.

Council of Global Unions, *supra* note 155 (emphasis added).

244. *Id.* at 3.

245. *Id.* at 1.

246. *Id.* at 3.

247. See *id.* at 4.

248. *Id.* at 3.

trade unions or to undermine organizing or collective bargaining rights.²⁴⁹

The Global Union Principles on Temporary Work Agencies, as we can see, made explicit reference to the less desirable work provided by temp agencies and underscored the possibility of anti-union, gender and other biases and inequalities that agency work may foment.²⁵⁰ The laudatory language of temp agency work was absent in the global union principles.²⁵¹ Ciett was not pleased by the statements from the global unions.²⁵²

Moreover, one of the largest global unions, IndustriALL, publicly scorned Ciett, raising doubts as to whether the global union gave any legitimacy to Ciett as a social partner for the fledgling global labor industrial relations system. In its latest pamphlet on temp agencies it called Ciett part of a “strong industry lobby” that pushed “myths” regarding temp agency work.²⁵³ IndustriALL stated that:

Ciett produces a range of publications that support these objectives and give insight to the arguments the industry uses to gloss over the negative consequences of agency work and to promote it to employers and governments. Ciett’s characterization of the private employment industry falls far short of the reality experienced by millions of agency workers worldwide, and by the unions that try to improve their working conditions.

Ciett bases its claims on narrow surveys of companies almost entirely in the US and western Europe, yet generalizes the claims to encompass all agency work worldwide.²⁵⁴

Moreover, in its pamphlet against temp agency work, IndustriALL included a “Ciett Myth Buster” section that listed Ciett’s alleged lies about temp agency work.²⁵⁵ According to IndustriALL, these myths were that:

- “Agencies create jobs without substituting permanent jobs”,²⁵⁶

249. *See id.* at 2–3.

250. *See id.*

251. *See id.*

252. *See Ciett Reacts to Global Unions’ Principles on TAW*, *supra* note 156 (stating “a number of points mentioned in [the] document . . . need to be clarified and/or corrected”).

253. INDUSTRIALL GLOBAL UNION, THE TRIANGULAR TRAP: UNIONS TAKE ACTION AGAINST AGENCY LABOUR 9–10 (2012), *available at* http://www.industriall-union.org/sites/default/files/uploads/documents/Triangular_Trap_agency_work_final.pdf.

254. *Id.* at 9.

255. *Id.* at 9–11.

256. *Id.* at 10.

- “Agency work is an effective way of finding permanent work”,²⁵⁷
- “Private employment services only contribute to better labour markets when properly regulated”,²⁵⁸
- “Private employment services deliver decent work”,²⁵⁹ [and]
- “In many countries agency work is being recognized as a lifestyle choice.”²⁶⁰

Whether or not IndustriALL was correct in its appreciation of temp agency work, we can clearly see that IndustriALL directly targeted Ciett as an adversary. IndustriALL’s statements contradicted the temp agency IFA in as much as IndustriALL did not recognize any positive elements of temp agency work and viewed any positive language about such work as “myths.”²⁶¹ This was a significant contradiction with the letter and the spirit of the temp agency IFA.

As of November of 2012, when the research here was concluded, UNI did not express the same feelings of disappointment regarding the temp agency IFA that Ciett had expressed, but it acknowledged that the relationship with Ciett and its corporate members had deteriorated.²⁶² According to the UNI representative, the relationship had become neither cooperative nor adversarial but “neutral.”²⁶³ Part of this souring of the relationship was that Ciett and its corporate members believed that UNI had agreed to support a balanced regulatory environment for temp agency work and not to oppose it.²⁶⁴ UNI does not believe that signing the Union Global Principles on Temporary Work Agencies violates the IFA.²⁶⁵ This different view of the IFA, at least until November of 2012, generated a stalemate that made it difficult for the parties to implement the IFA broadly.

257. *Id.*

258. *Id.*

259. *Id.* at 11.

260. *Id.*

261. *See id.* at 9–11.

262. *See* Telephone Interview with Giedre Lelyte, *supra* note 64.

263. *Id.*

264. *See* Temp Agency IFA, *supra* note 150, at 3–4.

265. *See* Telephone Interview with Giedre Lelyte, *supra* note 64.

IV. DISCUSSION: THE NEED FOR NON-BINDING ARBITRATION BASED ON ILO NORMS

The previous discussion has shown that IFAs are a product of trust between parties who have had enduring bargaining relationships. The Volkswagen IFA and Daimler IFA were signed by German firms and employee representation bodies that have been negotiating issues for many years.²⁶⁶ Perhaps to the chagrin of American stakeholders in these agreements, German employee representatives and unions have sided with management over the meaning of freedom of association and what “neutrality” would mean in a U.S. organizing situation.²⁶⁷ The Germans have argued that freedom of association principles do not include card check recognition in the United States, which is the preferred method of union recognition for most U.S. unions.²⁶⁸ Differences between unions such as these may endanger IFAs.

On the other hand, the temp agency IFA seems more “global.” UNI brokered the IFA and helped obtain pledges from the temp agencies to abide with ILO norms, including those pertinent to regulating temp agencies and to ban the provision of strikebreakers to end users. The agreement was made possible by UNI’s prior engagements with Ciett in European Union discussions for a directive on temp agencies, among others.²⁶⁹ However, Ciett was not given the legitimacy it sought as a result of the IFA.²⁷⁰ The global unions, including UNI, proclaimed “principles” of temp agency work that contradict the balanced approach set in the IFA and Convention 181 of the ILO.²⁷¹ At least as of November of 2012, UNI expressed the view that the relationship was not very cordial—“neutral”²⁷²—while Ciett and the corporate members were unsure about the progress, if any, that had been made with the IFA.²⁷³

One way to resolve these disputes over IFA interpretation is to make the IFAs judicially enforceable and authorize courts

266. Stevis, *supra* note 69, at 122–25.

267. Interview with Claudia Rahman, *supra* note 69.

268. *Id.*

269. See Ahlberg, *supra* note 208, at 196, 200–01, 218–20.

270. See *supra* note 253 and accompanying text.

271. See *supra* notes 242–52 and accompanying text.

272. Telephone Interview with Giedre Lelyte, *supra* note 64.

273. See Telephone Interview with Göran Hultin, *supra* note 64; Telephone Interview with Pam Berklich, *supra* note 64; Telephone Interview with Denis Pennel, *supra* note 164; Telephone Interview with Bettina Schaller, *supra* note 220.

to interpret the terms. However, parties may not want to bind themselves legally. If trust between the parties has been pivotal to create these agreements, parties may be unwilling to formally include strangers such as courts in their relationships. The parties could, however, be willing to request expert advisory opinions, or non-binding, voluntary arbitration, to resolve interpretation impasses. Therefore, non-binding arbitration based on ILO norms can help to resolve issues of interpretation. In fact, at least one IFA, Inditex's IFA with IndustriALL, has such an arbitration clause.²⁷⁴ In that IFA, the parties subjected interpretation issues to advisory opinions of the ILO if the parties could not find agreement.²⁷⁵ As the Inditex IFA states: "Questions concerning the interpretation of the Agreement shall be resolved through consultation between Inditex and [IndustriALL]. Every effort will be made to find common agreement but where this is not possible Inditex and [IndustriALL] will, in appropriate circumstances, seek the expert advice of the ILO."²⁷⁶ Similar advisory opinions, from the ILO or other neutrals who can base their judgments on ILO norms, could help the parties find agreement when they exhaust possibilities within bilateral talks. The Article explains below how the conflicts in the German auto and temp agency IFAs may be resolved by a neutral arbitrator inspired by ILO norms.

A. CARD CHECKS? "NO." EMPLOYER NON-INTERFERENCE AND MINORITY UNIONS? "YES."

The ILO has never taken a position on whether card checks are necessary to protect freedom of association in the United States, but if it had to do so, it almost certainly would determine that card checks are not necessary to guarantee freedom of association if U.S. employers refrain from opposing the union during an organizing attempt. Therefore, non-interference and

274. International Framework Agreement on the Implementation of International Labour Standards Throughout the Inditex Supply Chain, Industria de Diseño Textil, S.A. (Inditex, S.A.)-The International Textile, Garment and Leather Workers' Federation (ITGLWF), Oct. 4, 2007, *available at* <http://www.industriall-union.org/sites/default/files/uploads/documents/GFAs/Inditex/inditex-gfa-english.pdf> [hereinafter Inditex Agreement]. ITGLWF is IndustriALL's predecessor organization. *Inditex*, INDUSTRIALL (May 5, 2012), <http://www.industriall-union.org/inditex/>.

275. Inditex Agreement, *supra* note 274, at 4.

276. *Id.*

union elections, the German automakers' view of their pledge in the IFAs,²⁷⁷ meet ILO freedom of association principles.

First, the ILO adheres to the principle of "non-interference," which has meant that individuals, organizations and public authorities should not interfere with the rights of association of others.²⁷⁸ This should mean, as German automakers, their works councils and the German labor unions have stated, that employers are obligated under the IFAs not to proactively oppose the union.²⁷⁹ Agreeing to recognize the union through a card check would oblige the parties to more than international norms mandate.

The ILO has dealt with the question of union recognition and how to better determine which labor organizations are "most representative." On numerous occasions the ILO has pronounced the standard to determine union representativeness; it requires "pre-established, precise and objective criteria. . . ."²⁸⁰ Such criteria, moreover, can include systems in which representativeness is evaluated based on the union's membership or whether workers vote for their representatives, or a combination of both. As the Committee on Freedom of Association recently expressed in a case involving the Basque region of Spain:

The Committee wishes to recall, firstly, that Conventions Nos. 87 and 98 are compatible both with systems which foresee union representation, for the exercise of collective trade union rights, based upon the

277. See Daimler IFA, *supra* note 94; Volkswagen IFA, *supra* note 105.

278. As Article 2(1) of Convention 98 of the ILO states, "[w]orkers' and employers' organisations shall enjoy adequate protection against any *acts of interference* by each other or each others' agents or members in their establishment, functioning or administration." Right to Organise and Collective Bargaining Convention, July 1, 1949, Int'l Labor Org. (emphasis added), available at http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_168332.pdf; see also International Labour Conference, June 8–July 2, 1949, *Record of Proceedings*, 306, 469, available at [http://www.ilo.org/public/libdoc/ilo/P/09616/09616\(1949-32\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09616/09616(1949-32).pdf) (discussing arguments over principle of reciprocal protection); LANCE COMPA, INT'L TRADE UNION CONFEDERATION, FREE SPEECH AND FREEDOM OF ASSOCIATION: FINDING THE BALANCE, 3 (2013), available at http://www.ituc-csi.org/IMG/pdf/free_speech_and_freedom_of_association_final-2.pdf.

279. See *supra* note 277 and accompanying text.

280. International Labor Organization [ILO], Rep. of Comm. on Freedom of Ass'n, (302nd Rep.) Vol. LXXIX, 1996, Series B, No. 1, Case No. 1817 (India) ¶ 325; ILO, Comm. On Freedom of Ass'n, (330th Rep.) Vol. LXXXVI, 2003, Series B, No. 1, Case No. 2132 (Madagascar) ¶ 588; ILO, Comm. On Freedom of Ass'n, (333rd Rep.) Vol. LXXXVII, 2004, Series B, No. 1, Case No. 2288 (Niger) ¶ 827; ILO, Comm. On Freedom of Ass'n, (336th Rep.) Vol. LXXXVIII, 2005, Series B, No. 1, Case No. 2334 (Portugal) ¶ 1220.

degree of actual union membership, as well as with those foreseeing such union representation on the basis of general ballots of workers or officials, or, yet again, with systems constituting a combination of both.²⁸¹

Therefore, the Committee on Freedom of Association would find that the American “card check,” where actual union membership is used to establish a union’s representativeness, is a legitimate instrument to determine the representativeness of an organization. But such a method would not be the only one sanctioned by the ILO. Elections also would be legitimate instruments to determine a union’s representativeness, as long as workers are exercising their right to choose freely and without employer interference. Given ILO jurisprudence, and assuming that employees can choose their union representatives without interference through union elections, it would be hard to envision a Committee on Freedom of Association decision stating that the card check procedure is the only guarantor of freedom of association in the United States. The Daimler and Volkswagen IFAs, therefore, abide by ILO norms to the extent the firms remain “neutral” during a union election, i.e., do not interfere with workers’ rights to choose their representatives.

Moreover, even though the Committee on Freedom of Association has jurisprudence that would not invalidate the “card check,” it has stated that the ideal form of verifying representativeness of an organization is through something akin to a secret ballot election supervised by a neutral party. The Committee on Freedom of Association recently declared the following in a case concerning the ways that India verified a labor organization’s representativeness:

The Committee is of the view that pre-established, precise and objective criteria for the determination of the representativity of workers’ and employers’ organizations should exist in the legislation and such a determination should not be left to the discretion of governments. The Committee believes that such a determination of ascertaining or verifying the representative character of trade unions can best be made when strong guarantees of secrecy and impartiality are offered. Thus, verification of the representative character of a union should a priori be carried out by an independent and impartial body.²⁸²

281. ILO, Comm. on Freedom of Ass’n, (320th Rep.) Vol. LXXXIII, 2000, Series B, No. 1, Case No. 2040 (Spain) ¶ 669.

282. ILO, Rep. of the Committee on Freedom of Association (302nd Rep.) Vol. LXXIX, 1996, Series B, No. 1, Case No. 1817 (India) ¶ 325 (citation omitted).

While the Committee on Freedom of Association has not provided that only government-administered union elections, or NLRB-type elections, are the most desirable, it has stated that an “independent and impartial” body should carry out a verification process where “secrecy and impartiality” are guaranteed.²⁸³ That process, under the American system, seems best provided by the secret ballot election, to the extent workers have free choice. Hence, the card check system, while likely to be legitimate under international standards, may not be the most optimal under ILO norms.

We want to emphasize that American labor law fails to meet ILO freedom of association principles. First, it provides employers with the right to interfere with the employee’s choice to join a union.²⁸⁴ This issue is being discussed in Canada, a country that closely follows the American NLRA in many regards and where the Supreme Court of Canada has had to determine if and how Canadian labor law meets freedom of association principles.²⁸⁵ One scholar has noted that Canada infringes upon international freedom of association rights by excluding union organizers from the workplace during a unionization campaign.²⁸⁶ The almost total exclusion of union organizers from employer property in the United States, which has been permitted since the U.S. Supreme Court decided *Lechmere, Inc. v. NLRB*²⁸⁷ in 1992, would similarly violate freedom of association principles. But U.S. violations of international labor standards do not stop with the exclusion of union organizers from the workplace. Employer opposition during election campaigns, administrative and legal inertia to redress violations, exclusion of entire categories of workers from coverage such as agricultural workers, inadequate enforcement resources, insufficient remedies for bad faith bargaining, the

283. *Id.*

284. See LANCE COMPA, UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 9–10 (2004).

285. David J. Doorey, *Union Access to Workers During Organizing Campaigns: A New Look Through the Lens of B.C. Health Services*, 15 CAN. LAB. & EMP. L.J. 1, 12–17, 22–29 (2009) (explaining how Canadian law violates freedom of association principles because it lets employers exclude union organizers from workplaces); see also *Health Servs. and Support-Facilities Subsector Bargaining Ass’n v. B.C.*, [2007] 2 S.C.R. 391 ¶¶ 70, 79 (Can.) (stating that Canadian labor law should provide the same level of protection as ILO Convention 87, which Canada has ratified).

286. Doorey, *supra* note 285, at 12–17.

287. 502 U.S. 527 (1992).

permissibility of permanent strike replacements, among other things, make the American NLRA fall short of meeting international norms.²⁸⁸ In fact, the ILO's Committee on Freedom of Association has found the United States to be in likely violation of freedom of association principles because it fails to provide effective collective bargaining rights in the public sector and because it denies freedom of association rights to graduate students who work for universities.²⁸⁹ U.S. labor law is not a bastion for workers' free association.²⁹⁰

Employers who have signed on to IFAs should also recognize "minority unions," which are labor unions that lack majority support.²⁹¹ Such labor organizations would represent only their members.²⁹² Employers who do not recognize bargaining rights of employees simply because the union lacks majority support eviscerate freedom of association rights. The ILO has been clear that minority unions should have the right to bargain with employers when there is no majority union or formal union in place.²⁹³ As the Freedom of Association Committee of the ILO has stated:

288. See COMPA, *supra* note 284, at 9; see also David S. Weissbrodt & Matthew Mason, *Compliance of the United States with International Labor Law*, 98 MINN. L. REV. 1842 (2014).

289. ILO, Rep. of Committee on Freedom of Association (362nd Rep.), 2011, Case No. 2741 (United States), available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50002:0::NO::P50002_COMPLAINT_TEXT_ID:2912150; *Id.* at (350th Rep.), 2008, Case No. 2547 (United States), available at http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2910631; *Id.* at (344th Rep.), 2007, Case No. 2460 (United States), available at http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2909835; *Id.* at (343rd Rep.), 2006, Case No. 2292 (United States), available at http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2908140.

290. See JAMES A. GROSS, *A SHAMEFUL BUSINESS: THE CASE FOR HUMAN RIGHTS IN THE AMERICAN WORKPLACE* 96–103 (2010).

291. See CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* 88 (2005).

292. *Id.*

293. Recommendation 91 of the ILO states the following:

For the purpose of this Recommendation, the term *collective agreements* means all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other.

ILO Recommendation (No. 91), *Collective Agreements Recommendation* (June

Problems may arise when the law stipulates that a trade union must receive the support of 50 per cent of the members of a bargaining unit to be recognized as a bargaining agent: a majority union which fails to secure this absolute majority is thus denied the possibility of bargaining. The Committee considers that under such a system, if no union covers more than 50 per cent of the workers, collective bargaining rights should be granted to all the unions in this unit, at least on behalf of their own members.²⁹⁴

ILO norms cannot be clearer about the right of minority unions where there is no majority bargaining agent available. Therefore, while IFA signatories need not recognize unions through card checks, they still should recognize a minority of workers who want to bargain collectively with the employer.

Professor David Doorey has made precisely this kind of suggestion to help Canada conform to international labor norms and its own Charter, which guarantees the right to collective bargaining.²⁹⁵ Canadian labor law, as American labor law, leaves millions of Canadian workers bereft of collective bargaining right because it sanctions the right only when there is a legally-sanctioned, majority union.²⁹⁶ Professor Doorey has argued that Canadian employers should recognize minority unions when “thicker” rights are unavailable under the strictures of Canadian labor law.²⁹⁷ Recognition of minority unions for members only would bring Canada closer to meeting ILO norms.²⁹⁸

In conclusion, an arbitrator following the spirit of ILO norms would likely find that the German industrial relations parties are correct in their interpretation of the IFAs’ freedom

29. 1951) (emphasis added); see also ILO Freedom of Association 2006 Digest, ¶ 944 and cases cited therein.

294. Freedom of Association and Collective Bargaining: International Labour Conference 81st Sess., 1994, International Labour Office, Geneva, Switz., Rep. III (Part 4B) ¶ 241.

295. David J. Doorey, *Graduated Freedom of Association: Worker Voice Beyond the Wagner Model*, 38 QUEEN’S L.J. 511, 513–14, 521 (2013).

296. *Id.* at 536–37.

297. *Id.*

298. *Id.* (citing Freedom of Association and Collective Bargaining: International Labour Conference 81st Sess., 1994, International Labour Office, Geneva, Switz., Rep. III (Part 4B) ¶ 241 and Mark Harcourt & Helen Lam, *Non-Majority Union Representation Conforms to ILO Freedom of Association Principles and (Potentially) Promotes Inter-Union Collaboration: New Zealand Lessons for Canada*, 34 DALHOUSIE L.J. 115, 119–20 (2011)); see also ROY J. ADAMS, *LABOUR LEFT OUT: CANADA’S FAILURE TO PROTECT AND PROMOTE COLLECTIVE BARGAINING AS A HUMAN RIGHT* 28–40 (2006) (explaining how Canadian labor law should recognize minority unions in the absence of majority unions to comply with international labor standards).

of association clause. The most adequate process for union recognition is one where the employer does not interfere with the workers' right to choose union representatives and where workers choose through secret ballot elections administered by a neutral party. However, an arbitrator should add that workers have the right to bargain collectively with the signatory employers, in representation only of themselves, when a majority of the employees do not support the union. Non-binding arbitration inspired by ILO norms would thus give and take from both sides, labor and management, in this issue regarding union recognition in the United States. Perhaps neither side will be completely happy with such a compromise, but such a compromise is better than a stalemate. In any case, concrete knowledge of how international labor standards would be used to interpret the IFA may create further incentives that compel the parties to agree over union recognition rules under the IFA.

B. THE TEMP AGENCY IFA AND THE GLOBAL UNION PRINCIPLES ON TEMPORARY WORK AGENCIES ARE INCOMPATIBLE

Ciett is concerned by UNI's alleged failure to support temp agency work. Ciett alleges UNI's consent to the Global Union's Principles on Temporary Work Agencies violates UNI's IFA obligations. Ciett is likely correct.

The IFA has laudatory language regarding temp agency work. Convention 181 of the ILO regarding temp agency work contains similar, positive language regarding temp agency work.²⁹⁹ The Convention does not ban temp agency work but, as Ciett has argued, and as the IFA advocates, it provides temp agency work should be regulated to make it work for all the parties involved. Therefore, the Global Union Principles on Temporary Work Agencies are at odds with the spirit of Convention 181 of the ILO and the temp agency IFA. UNI should distance itself from one-sided language that mostly condemns temp agency work.

However, Ciett and UNI are not the only social partners relevant for discussions regarding temp agency work. Convention 181 calls on member states to consult with the "most representative"³⁰⁰ employer and employee organizations to deter-

299. See ILO, Convention 181, *supra* note 151, at pmbl.

300. The term "most representative" organization is likely to have come to being in international labor law when the ILO was founded and its Constitution was drafted. The ILO Constitution states:

mine what a temp agency covered by the convention is;³⁰¹ exclude certain workers from coverage or ban agency work altogether in certain branches of economic activity;³⁰² determine the legal status of temp agencies;³⁰³ establish exceptions to the gen-

The Members undertake to nominate non-Government delegates and advisers chosen in agreement with the industrial organisations, if such organisations exist, which are most representative of employers or workpeople, as the case may be, in their respective countries.

ILO CONSTITUTION, art. 3(5).

Normally, the most representative organizations are the employer and employee organizations that represent the most number of employers or employees, in a relative or absolute sense, in a given country. The ILO did not develop a more specific definition of the term because at the time international organizations attempted to be more inclusive and tried not to exclude particular groups. Faina Milman-Sivan, *The Virtuous Cycle: A New Paradigm for Democratizing Global Governance Through Deliberation*, 30 COMP. LAB. L. & POL'Y J. 801, 816 (2009). Professor Milman-Sivan further explains as follows:

Due to the complexity of the Credential Committee's task, the Council of the League of Nations requested an advisory opinion from the Permanent Court of International Justice, in order to clarify the content of Article 3(5). This opinion, issued in 1922, established the foundation for interpreting this constitutional provision and the basis for subsequent precedents. "Organizations" in this context was construed by the Permanent Court of International Justice to permit the inclusion of multiple organizations. The Court rejected the contention of the Netherlands Confederation of Trade Unions that it was the most representative trade union organization in the country, and did not give its consent to the nomination of the non-governmental delegates. The Government of the Netherlands preferred to consult three other trade organizations that *together* constituted the most representative organizations.

Id. at 816 n.62 (citations omitted).

Different countries also have different ways to determine "most representative status." In Spain, for example, "most representative status" unions are those that represent at least ten percent of the national workforce or fifteen percent of a sub-national division, known in Spain as "communities." See *Spain: Most Representative Union*, EUROFOUND, <http://www.eurofound.europa.eu/emire/SPAIN/MOSTREPRESENTATIVEUNION-ES.htm> (last visited Mar. 25, 2014). A similar rule applies to establish the most representative employer organization. See *Spain: Most Representative Employers' Association*, EUROFOUND, <http://www.eurofound.europa.eu/emire/SPAIN/MOSTREPRESENTATIVEEMPLOYERSASSOCIATION-ES.htm> (last visited Mar. 25, 2014) (explaining about the most representative employer in Spain). In Italy, the most representative labor organizations are the ones that meet certain criteria, including some related to membership, presence in a broad range of occupational categories, presence throughout national territory, active participation in handling labour disputes and ability to bargain for its members. See *Italy: Most Representative Union*, EUROFOUND, <http://www.eurofound.europa.eu/emire/ITALY/MOSTREPRESENTATIVEUNION-IT.htm> (last visited Mar. 25, 2014).

301. ILO Convention 181, *supra* note 151, at art. 1(c).

302. *Id.* at art. 2(4)(a), (b).

303. *Id.* at art. 3(1).

eral ban on fees paid by workers to temp agencies under the Convention;³⁰⁴ and provide protections to migrant workers under the Convention.³⁰⁵ The most representative employee organizations also need to be involved in the investigation of complaints regarding abuses and violations of workers' rights by temp agencies³⁰⁶ and to provide better cooperation between public and private employment agencies.³⁰⁷ Assuming that most workers in any given economy are employed directly by user firms, the only or most relevant representatives for temp agency work are not Ciett and UNI, unless UNI represents the permanent employees of the relevant sector. The user firms and their management and labor organizations can and should form part of such consultations.

Given the plurality of social partners involved in the regulation of temp agency work, we should expect divergent voices including IndustriALL's. UNI and Ciett should try to persuade other social partners of perspective temp agency work and stir other social partners closer to their position.

Therefore, an arbitrator inspired by ILO norms would likely conclude that UNI should distance itself from one-sided statements critical of temp agency work. While a non-binding opinion from a neutral third party cannot be used to compel UNI Global from rescinding its support of the Global Unions' Principles on Temporary Work Agencies, it can become a powerful tool to "shame" and cajole the global union to comply with its commitments. This said, neither Ciett nor UNI are exclusive social partners for the regulation of temp agency work. Different views on the role of agency work on the labor market may be voiced by other global industrial relations players. The parties will need to work together to bring other social partners closer to their own viewpoint on this issue.

CONCLUSION: FURTHER RESEARCH AND THE PROMISE OF IFAS

Labor unions are losing members and influence across the world's developed, capitalist democracies. The post-World War II social contract seems to have ended. However, the decline of unions in the developed, capitalist democracies is occurring at a

304. *Id.* at art. 7(2).

305. *Id.* at art. 8(1).

306. *Id.* at art. 10.

307. *Id.* at art. 13.

time when global labor seems to be growing. IFAs, a product of global labor, now cover about nine million workers worldwide, excluding contractors. IFAs have been the product of longstanding bargaining relationships between multi-national companies and particular labor actors. In the case of German auto, the Global Works Councils' relationships with the companies made the IFAs possible. In the case of the temp agency IFA, UNI Global's longstanding relationship with Ciett enabled the IFA.

But this exploratory study has shown that fundamental differences may surface between the signatory parties and other stakeholders. In auto, we saw how freedom of association principles fail to include the American unions' preferred method of union recognition, the card check. German industrial relations representatives and American unions differ on this issue. In the temp agency IFA, we saw how UNI Global signed the Global Unions Principles of Temporary Work, which contradicted the balanced approach to temp agency work it agreed to support in the IFA, likely in violation of its commitments. Such fundamental differences could significantly halt the effective use of IFAs.

The parties and their stakeholders could solve their disagreements through non-binding arbitration based on ILO norms. The IFAs incorporate the ILO's standards; the parties have agreed to them. Moreover, international labor standards seem neutral enough to provide a balanced resolution to practical interpretation issues under the IFAs. Further research of how parties are resolving interpretation issues of their IFAs, including those parties who have included arbitration clauses, non-binding or otherwise, will help us to better ascertain the effectiveness of arbitration in IFAs.

APPENDIX: LIST OF INDIVIDUALS THE AUTHOR
INTERVIEWED FOR THIS ARTICLE

Interviewed in Person

Interview with Wolfgang Fueter, Volkswagen Group Human Resources International, in Wolfsburg, Germany (Sept. 21, 2012).

Interview with Helmut Lense, Director of Automotive and Rubber, IndustriALL Global Union, Geneva, Switzerland (July 11, 2012).

Interview with Thomas Metz, Staff of the General Works Council, Daimler AG, in Stuttgart, Germany (Sept. 4, 2012).³⁰⁸

Interview with Frank Patta, Works Council Member of the Volkswagen Group, in Wolfsburg, Germany (Sept. 21, 2012).

Interview with Claudia Rahman, International Department, IG Metall, in Frankfurt, Germany (Sept. 3, 2012).

Interview with Robert Steiert, retired I.M.F. (today IndustriALL) and IG Metall union officer, in Zurich, Switzerland (July 10, 2012).

Interviewed by Telephone

Telephone Interview with Pam Berklich, Senior Vice President, Kelly Services (Oct. 8, 2012).

Telephone Interview with Göran Hultin, Legal Representative, Manpower, Inc. (July 19, 2012).

Telephone Interview with Giedre Lelyte, Policy Officer, Temporary Services Agency Branch, UNI Global Union (July 13, 2012).

Telephone Interview with Denis Patel, Managing Director, CIETT (July 20, 2012).

Telephone Interview with Bettina Schaller, Public Affairs Specialist, Adecco (Aug. 14, 2012).

Individuals Who Only Answered E-mail Questions for this Article

Kristin Dziczek, Center for Automotive Research (May 8, 2013).

308. This interview is used to corroborate general facts and is not cited in this article.

**Organizations that Refused to Participate in this Study
or that Failed to Respond to the Author's Queries**

Daimler management (information obtained through secondary sources).

United Auto Workers (information obtained through secondary sources).