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Organizing with International Framework Agreements: An Exploratory Study

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Organizing with International Framework Agreements: An Exploratory Study

César F. Rosado Marzán*

In the United States, union density continues to decline, while income inequality increases. But while union density falls we have experienced the counterintuitive rise in international framework agreements (IFAs), or agreements signed by global union federations (“global unions”) and multinational corporations. IFAs can be construed to contain employer pledges not to oppose workers who want to organize. Can a global employer’s pledge not to oppose workers’ organization facilitate their unionization? I interviewed unions and multinational firms in the private security and auto industries that signed IFAs to better comprehend how IFAs can help to organize workers.

The results of this Study show that organizational inroads with IFAs could vary from nonexistent to very modest, even with the employers’

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pledges not to oppose unionization. Economic, political, and legal obstacles seem to significantly hinder union organization, even when the employers sign IFAs.

However, all of these organizational inroads, or lack thereof, considered here only involved the contemporary American form of collective worker representation, the so-called “exclusive representation” union. IFAs offer workers the promise to organize something different: minority unions with full strike rights. These novel working-class organizations, which American unions could experiment with, would help to restore some level of workplace representation for workers. Lacking strong rights in U.S. law, IFA-sustained minority unions would need to significantly depend on global solidarity. But these IFA-supported organizations, while capable of fighting the boss, would also be built on cooperation. They should enable mature industrial relations to flourish. While far from entirely resolving labor’s woes, minority unions with full strike rights and backed by global solidarity can provide a new platform to help reenergize labor.

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INTRODUCTION

What Can We Learn from a Study of International Framework Agreements and Union Organization in the United States?

On July 27, 2011, wood workers of a relatively small assembly plant of Swedwood, a wholly owned subsidiary of the Swedish furniture giant Ikea, voted to be represented by the International Association of Machinists (IAM).¹ The Swedwood/Ikea plant is located in the city of Danville, Virginia, a city of almost 43,000 inhabitants,² near the southern edge of the state. The Swedwood/Ikea plant employed about 312 workers, of whom 221 voted in favor of the union.³ Prior to the union election, the union complained to management of third-world-level working conditions and cuts in pay.⁴

Part of the union's strategy to organize the workers was to use a still opaque and mostly "soft law"⁵ instrument in the United States, an "International Framework Agreement" ("IFA" or "global agreement"). IFAs are agreements signed by global union federations ("global unions"), or global labor organizations composed of national labor unions,⁶ to regulate industrial relations of the signatory firms worldwide.⁷ All IFAs must express, at a minimum, that the parties will live by the "core labor standards" of the International Labor Organization (ILO),⁸ including "freedom of association and the right to collective bargaining."⁹

1. *At Ikea's Only U.S. Factory, Workers Vote to Join Union*, N.Y. TIMES, July 28, 2011, at B5.

2. *State & County QuickFacts, Danville City, Virginia*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/states/51/51590.html> (last updated June 27, 2013).

3. *At Ikea's Only U.S. Factory, Workers Vote to Join Union*, *supra* note 1.

4. *LAMAW Makes News in Stockholm*, INT'L ASS'N MACHINISTS & AEROSPACE WORKERS (Dec. 1, 2010), <http://www.goiam.org/images/articles/headquarters/departments/woodworkers/microsoft%20word%20-%20iamaw%20makes%20news%20in%20stockholm.pdf>.

5. Soft law generally refers to "law" that is not enforceable through state institutions but requires collaboration by the parties. See Alvin Goldman, *Enforcement of International Framework Agreements Under U.S. Law*, 33 COMP. LAB. L. & POL'Y J. 605, 606 (2012). The question of legal enforceability of IFAs is, however, complex. See *infra* pp. 742–43.

6. To date there are eleven global unions representing workers from different global industries. *Who Are Global Unions?*, GLOBAL UNIONS, <http://global-unions.org/about-us.html> (last visited Dec. 4, 2012).

7. Konstantinos Papadakis, *Introduction and Overview of SHAPING GLOBAL INDUSTRIAL RELATIONS: THE IMPACT OF INTERNATIONAL FRAMEWORK AGREEMENTS 1, 2* (Konstantinos Papadakis ed., 2011) [hereinafter SHAPING GLOBAL INDUSTRIAL RELATIONS].

8. The ILO is the international organization responsible for drawing up and overseeing international

Ikea signed a global agreement with the Building and Woodworkers International Union (BWI),¹⁰ a global union joined by the American union representing Swedwood/Ikea workers.¹¹

The core labor right regarding freedom of association and effective collective bargaining has been interpreted to mean, generally speaking, that an employer shall not create obstacles to worker efforts to organize and bargain collectively.¹² However, according to the union representing Swedwood/Ikea workers, despite Ikea's obligation not to be obstructionist, it opposed workers' attempts to organize.¹³ The union, therefore, brought the global agreement to the attention of BWI and Swedwood/Ikea.¹⁴ The media in Sweden widely reported Swedwood/Ikea's opposition to the union.¹⁵ Sweden's leading newspaper, *Dagens Nyheter*, opened its prestigious debate section to a discussion between Swedish labor leader Per-Olof Sjöö and Gunnar Korsell, the CEO of Swedwood/Ikea.¹⁶

labour standards. It is the only "tripartite" United Nations agency that brings together representatives of governments, employers and workers to jointly shape policies and programmes promoting Decent Work for all. This unique arrangement gives the ILO an edge in incorporating "real world" knowledge about employment and work.

Employment, U.N. ECON. & SOC. COUNCIL, <http://www.un.org/en/ecosoc/about/employment.shtml> (last visited Sept. 2, 2013).

9. Papadakis, *supra* note 7, at 2.

10. See *LAMAW Makes News in Stockholm*, *supra* note 4.

11. The Ikea IFA states in relevant part that "[b]oth parties appreciate that the agreement signed in May 1998 between IKEA and IFBWW [now BWI] had the purpose of achieving certain minimum standards based on the ILO Declaration on Fundamental Principles and Rights at Work (eight core conventions)." *BWI: IKEA, BUILDING & WOOD WORKER'S INT'L*, <http://www.bwint.org/default.asp?index=46> (last visited Sept. 12, 2013). One of the rights associated with the "eight core conventions" is freedom of association and effective collective bargaining. INT'L LABOUR OFFICE, *THE INTERNATIONAL LABOUR ORGANIZATION'S FUNDAMENTAL CONVENTIONS 7-22* (2002), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_095895.pdf. The relevant conventions related to freedom of association and effective collective bargaining are ILO Conventions 87 and 98. *Id.* at 11-22.

12. ILO, International Labor Conference, Declaration on Fundamental Principles and Rights at Work, 86th Sess. (June 1998), art. 2.

13. *LAMAW Makes News in Stockholm*, *supra* note 4. For a full description of employer union avoidance strategies, see *infra* notes 59-80 and accompanying text.

14. *LAMAW Makes News in Stockholm*, *supra* note 4.

15. *Id.* See Tove Carlén, *Svidande kritik mot Ikea i USA* [*Scathing Criticism of Ikea in the U.S.*], SVENSKA DAGBLADET (Apr. 11, 2011), http://www.svd.se/naringsliv/svidande-kritik-mot-ikea-i-usa_6082335.svd; Marie Edholm, *Facken kartlägger Ikeas övertramp* [*Unions Charts Ikea Foul*], DAGENS ARBETE (June 30, 2011), http://www.industrifacket.se/home/da/content.nsf/aget?openagent&key=facken_kartlagger_ikeas_övertramp_1317815948268; Marie Edholm, *Sjöö mötte arbetarna i Danville* [*Sjöö Met Workers in Danville*], DAGENS ARBETE (July 1, 2011), http://www.industrifacket.se/home/da/content.nsf/aget?openagent&key=sjoö_motte_arbetarna_i_danville_1317815960112; Marie Edholm, *Swedwoods anställda går till val* [*Swedwood Employees Go to the Polls*], DAGENS ARBETE (June 30, 2011), http://www.industrifacket.se/home/da/content.nsf/aget?openagent&key=swedwoods_anstallda_gar_till_val_1317815949893; *Facklig seger på Ikea-fabrik i USA* [*Union Victory at Ikea Factory in the U.S.*], DAGENS NYHETER (July 28, 2011), <http://www.dn.se/ekonomi/facklig-seger-pa-ikea-fabrik-i-usa>; Clas Svahn, *Hård kritik mot Ikea-fabrik i USA* [*Hard Criticism of IKEA Factory in the U.S.*], DAGENS NYHETER (Apr. 14, 2011), <http://www.dn.se/ekonomi/hard-kritik-mot-ikeafabrik-i-usa>.

16. Per-Olof Sjöö, Op-Ed., *Använd ängerrätten, Ikea* [*Use the Right of Withdrawal, Ikea*], DAGENS

Moreover, at least one Swedish media outlet opined that Ikea workers in Sweden should engage in solidarity actions—meaning that they should strike or picket the company in Sweden—if Swedwood/Ikea persisted in denying union rights to the American employees.¹⁷ Eventually Swedwood/Ikea desisted from its antiunion campaign.¹⁸ The workers at Danville voted in favor of the union and got their first collective bargaining agreement.¹⁹

While the American union used the little-known global agreement to carry the controversy from the assembly line in Danville to living rooms and the boardroom of Ikea in Stockholm, social scientists Dimtris Stevis and Michael Fichter reported that IAM, the American union that represented the Ikea workers in Danville, remains “skeptical” about the IFA’s effectiveness.²⁰ The employer remained, for the most part, opposed to the union and did not act in accordance with the spirit of cooperation stated in the global agreement. And IAM is not alone—other American unions also remain dubious about the effectiveness of similar IFAs.²¹

This Article attempts to evaluate the utility of IFAs to organize American workers. Given that we still know very little about IFAs, particularly in the United States, I conducted an exploratory investigation of some global agreements. I report on four firms, representing two industries: the private security firms Securitas and Group 4 Securicor (G4S) and the automakers Daimler and Volkswagen. All of these firms have signed IFAs and have significant U.S. operations.

I found that IFAs, on their own, are not sufficient to organize workers in the United States even when the signatory employers respect the terms of the agreement. Several obstacles to union organizing other than employer opposition seem to prevent workers from organizing. One of these obstacles seems to be economic—easy replacement of union with nonunion workers facilitated by subcontracting, which is the norm in the private security industry.²² In

NYHETER (July 26, 2011), <http://www.dn.se/debatt/anvand-angerratten-ikea> (supporting Ikea workers seeking union representation in the United States on the grounds that employees are always in a subordinated relationship with their employers and require collective representation); Gunnar Korsell, Op-Ed., *Våra medarbetare sade ja till facket* [Our People Said Yes to the Union], DAGENS NYHETER (July 29, 2013), <http://www.dn.se/debatt/vara-medarbetare-sade-ja-till-facket> (replying to Per-Olof Sjöo, and arguing that the firm protects employees’ right of association and that the decision of union representation was solely for the employees to make).

17. Bror Perius, *Utlös strejk på Ikea på onsdag: Debattören: Facket måste tillåtas i hela koncernen – också i USA* [Announced Strike at Ikea on Wednesday: Debate: Unions Must be Allowed in the Entire Group—Also in the U.S.], AFTONBLADET (July 11, 2011), <http://www.aftonbladet.se/debatt/article13371418.ab>.

18. 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).

19. *Id.*

20. *Id.* at 685.

21. *Id.* at 685–86.

22. *See infra* p. 750 (discussing the private security industry).

Volkswagen, moreover, entry-level workers earn more than in the “Big 3” American automakers covered by union contracts,²³ making unionization at Volkswagen an uphill battle. Another obstacle seems to be antiunion politics, which affects auto plants in the southern states where the political culture is strongly antiunion.

While the case studies clearly show that the IFAs are not sufficient to organize workers, unions could use IFAs to organize workers in a way that, although different from the exclusive representation model that American unions are normally accustomed to, could still be effective to represent some workers effectively: the “minority union.” Minority unions are unions that only represent their members.²⁴ As I explain below, employers currently do not have the legal duty to bargain with minority unions.²⁵ However, under the international norms inscribed in the IFAs,²⁶ employers should recognize minority unions. These IFA-supported minority unions would also have full strike rights. The employer, if it lives by the IFA, should not permanently replace any economic striker. While employers can permanently replace economic strikers under U.S. labor law,²⁷ it is proscribed under international standards.²⁸ Finally, such minority unions should also have the right to engage in secondary strikes and boycotts. Even though secondary strikes and boycotts are significantly limited by U.S. labor law,²⁹ international standards protect them in most instances.³⁰ Employers who sign IFAs should not pursue injunctive or damage claims against unions that engage in secondary strikes and boycotts. Given that IFAs are likely not legally binding instruments, as explained below,³¹ they need to be policed by the unions and works councils in the home countries of the signatory firms. Worker organizations in the home countries of the signatory firms are constitutive of global unions and in some instances are the real parties behind the agreements. In this manner, the IFA would provide a new organizational tool to American workers: a minority union “on steroids,” backed by global solidarity.

Moreover, as explained below, IFAs provide the opportunity for unions to better collaborate with the signatory employers both at the level of the shop and

23. E-mail from Kristin Dziczek, Dir., Labor & Indus. Grp., Ctr. for Auto. Research, to author (May 8, 2013, 9:41 AM CST) (on file with author). See also *infra* pp. 768–69 for discussion of worker payment practices at American automotive plants.

24. Catherine Fisk & Xenia Tashlitsky, *Imagine a World Where Employers Are Required to Bargain with Minority Unions*, 27 A.B.A. J. LAB. & EMP. L. 1, 2 (2011).

25. See *infra* note 76.

26. See *BWT: IKEA*, *supra* note 11.

27. LANCE COMPA, HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 31 (Cynthia Brown ed., 2000).

28. *Id.*

29. *Id.* at 32.

30. *Id.*

31. See *infra* pp. 742–43.

outside.³² Hence, while minority unions with full strike rights and backed by global friends become effective adversaries of employers, they are also suited for mature industrial relations.

This Article is organized in the following way. In Section I, I describe the slow but steady decline of American unions, and the main theories that try to explain union decline. In Section II of the Article, I detail what IFAs are and how they could help reorganize workers in light of existing theories explaining union decline. In Section III, I describe the four case studies of IFAs. In Section IV of the Article, I analyze the case studies and offer ideas for further research to understand the effectiveness of IFAs and to experiment with them as organizing tools in the United States. The Article then concludes.

I. THE DECLINE OF AMERICAN UNIONS: A REVIEW OF THE LITERATURE

U.S. private sector union density, or the percent of wage and salary earners who are members of a labor union, has been declining at a steady pace for a number of decades. At its peak during the late 1940s and early 1950s, overall union density in the United States reached almost 35%.³³ Today the rate has dropped to 11.3%.³⁴ But the overall density figures conceal a much worse situation for private sector unions. As Figure 1 shows, while in 1973 private sector union density stood at 24.2%, today the figure has dipped below 7%.³⁵ One important social scientific study has estimated that private sector union density likely will drop until it reaches an equilibrium point of about 2.1%.³⁶ At such low rates, unions will have become irrelevant to most U.S. workers.

Union decline matters because the existence of the American middle class has depended on organized labor. The National Labor Relations Act of 1935 (NLRA), also called the “Wagner Act,” helped to swell the ranks of organized labor and create a middle class in the United States—a middle class that was “the envy of the world.”³⁷ Unionization increased wages through collective bargaining and helped to provide health care and pensions to working families.³⁸ Through legislative advocacy, unions also helped to implement minimum wage legislation

32. See *infra* pp. 776–77.

33. GERALD MAYER, CONG. RESEARCH SERV., RL32553, UNION MEMBERSHIP TRENDS IN THE UNITED STATES 22–23 (2004).

34. Steven Greenhouse, *Share of the Work Force in a Union Falls to a 97-Year Low, 11.3%*, N.Y. TIMES, Jan. 24, 2013, at B1. In 2011, the official figure was about 12%. *Id.*

35. Barry T. Hirsch & David A. Macpherson, *Union Membership, Coverage, Density, and Employment Among Private Sector Workers, 1973–2012*, UNION MEMBERSHIP & COVERAGE DATABASE FROM CPS, <http://unionstats.gsu.edu/Private-Sector-workers.htm> (last visited Jan. 6, 2013).

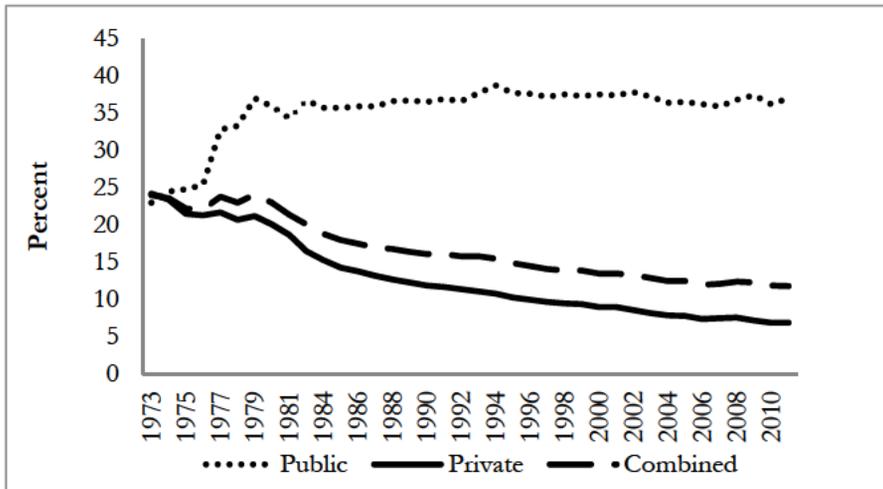
36. Henry S. Farber & Bruce Western, *Accounting for the Decline of Unions in the Private Sector, 1973–1998*, in THE FUTURE OF PRIVATE SECTOR UNIONISM IN THE UNITED STATES 28, 53 (James T. Bennett & Bruce E. Kaufman eds., 2002).

37. Charles J. Morris, *How The National Labor Relations Act Was Stolen and How It Can Be Recovered: Taft-Hartley Revisionism and The National Labor Relations Board's Appointment Process*, 33 BERKELEY J. EMP. & LAB. L. 1, 10 (2012).

38. *Id.* at 10 n.24.

and other workplace standards that covered all workers, be they union members or not.³⁹ Nonunion employers also would base the wages and term and conditions of employment on what used to be considered model union contracts, such as those of General Motors, furthering the expansion of the American middle class.⁴⁰

Figure 1: Union Density in the United States, Private, Public and Combined Sectors, 1973–2011⁴¹



39. See Dorothy Sue Cobble, *The Intellectual Origins of an Institutional Revolution*, 26 A.B.A. J. LAB. & EMP. L. 201, 204–05 (2011).

40. STEVEN GREENHOUSE, *THE BIG SQUEEZE: TOUGH TIMES FOR THE AMERICAN WORKER 74–75* (2008). Moreover, union power has declined so much today that its influence in earlier years may be unimaginable to today's newer generations. As reporter Timothy Noah reminds us, labor unions are not merely organizations that strike and bargain contracts, but institutions that shape societal attitudes. TIMOTHY NOAH, *THE GREAT DIVERGENCE: AMERICA'S GROWING INEQUALITY CRISIS AND WHAT WE CAN DO ABOUT IT* 129 (2012). As an example, he retells the story of the 1945 conference called by President Truman to get labor and management representatives to agree on a national plan to convert military facilities back to civilian use. *Id.* Even though the parties failed to reach such an agreement, the conference was still a testament to the power and influence of labor unions:

Business leaders were sitting down with labor leaders to discuss ways to manage not just individual companies but the entire economy. They didn't do it because they wanted to. They did it because they *had* to, a circumstance wholly unimaginable today. The following year, Eric Johnson, president of U.S. Chamber of Commerce, made a statement whose spirit of conciliation would likely get any current Chamber president fired: "Labor unions are woven into our economic pattern of American life, and collective bargaining is part of the democratic process."

Id. (citing Frank S. Levy & Peter Temin, *Inequality and Institutions in 20th Century America* (MIT Dep't of Econ., Working Paper No. 07–17, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=984330).

41. See Barry T. Hirsch & David A. Macpherson, *UNION MEMBERSHIP & COVERAGE DATABASE FROM CPS*, <http://www.unionstats.com> (last visited Jan. 18, 2013) (excludes 1982 because of missing data).

But the golden era of the American middle class seems to be over. Even though the United States had less wealth inequality than European countries until about the early 1970s, today the United States stands as the industrialized democracy with the greatest wealth inequality.⁴² The “American dream” has become elusive for many American workers. We no longer live in the halcyon post-World War II days when, as economist Joseph Stiglitz says, “America grew together,” with income growing in every segment, but especially at the bottom of the income distribution.⁴³ We live in times where the wages of top earners grow the fastest while the pay of low-wage earners nosedives.⁴⁴

Union decline is certainly not the only reason for increasing American wealth inequality, but it is an important cause that needs to be addressed.⁴⁵ According to a recent study published in the flagship journal of the American Sociological Association, the *American Sociological Review*, union density decline accounts for wage inequality in the American economy even after controlling for workers’ education and other economic factors.⁴⁶ Strong unions and collective bargaining helped to equalize earnings across the board by creating a “moral economy”⁴⁷ that improved the wages and terms and conditions of employment of all workers, union and nonunion. In this sense, labor unions and collective bargaining are social institutions, with important moral and redistribution functions in a modern, capitalist economy.⁴⁸ As the study reported, when one in three American male workers were members of a union, “unions were often prominent voices for equity, not just for their members, but for all workers. Union decline marks an erosion of the moral economy and its underlying distributional norms. Wage

42. RICK FANTASIA & KIM VOSS, *HARD WORK: REMAKING THE AMERICAN LABOR MOVEMENT* 15 (2004).

43. JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY* 4 (2012).

44. *Id.*

45. Thomas W. Volscho & Nathan J. Kelly, *The Rise of the Super-Rich: Power Resources, Taxes, Financial Markets, and the Dynamics of the Top 1 Percent, 1949 to 2008*, 77 *AM. SOC. REV.* 679, 688–89 (2012) (explaining how rigorous quantitative analysis shows that labor union decline is one of various reasons for economic inequality in the United States).

46. Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 *AM. SOC. REV.* 513, 532–33 (2011).

47. A moral economy

consists of norms prescribing fair distribution that are institutionalized in the market’s formal rules and customs. In a robust moral economy, violation of distributional norms inspires condemnation and charges of injustice. . . .

Unions are pillars of the moral economy in modern labor markets. Across countries and over time, unions widely promoted norms of equity that claimed the fairness of a standard rate for low-pay workers and the injustice of unchecked earnings for managers and owners. . . . The U.S. labor movement never exerted the broad influence of the European unions, but U.S. unions often supported norms of equity that extended beyond their own membership. . . . (1) culturally, through public speech about economic inequality, (2) politically, by influencing social policy, and (3) institutionally, through rules governing the labor market.

Id. at 517–18 (internal citations omitted).

48. *Id.*

inequality in the nonunion sector increased as a result.”⁴⁹ Strong unions, therefore, help create norms for economic equality, bringing the poor and the rich closer together to create a so-called “middle class.” When union power falls, income equality suffers.

Some may argue that low levels of union density simply reflect employee choice to not join labor unions. However, surveys consistently have shown that most American workers prefer to be represented at work.⁵⁰ Fewer than seven percent of private sector workers are represented today by unions.⁵¹ There is a gap between what workers want—representation—and what they have: no representation.

As if the inequality concerns surrounding unionization were not enough cause for worry, the ability of workers to join a union and to bargain collectively is considered a human right by the United Nations⁵² and the ILO.⁵³ Thus, the absence of representation under which most private sector workers labor violates fundamental human rights. Union decline is a social problem and a human rights concern.⁵⁴

In summary, the decline of unions in the United States contributes significantly to alarming income inequality, contradicts the desires of workers, and violates fundamental human rights. Unions need to be rebuilt.

To understand how unions can be rebuilt, we need to understand why they have lost so many members. Many legal academics have pointed to employer

49. *Id.* at 514.

50. RICHARD FREEMAN, ECON. POLICY INST., DO WORKERS STILL WANT UNIONS? MORE THAN EVER (2007), available at <http://www.sharedprosperity.org/bp182.html> (describing and explaining the results of a 2006 survey that showed that most American workers preferred union representation over no representation); see also RICHARD FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 24–27 (Cornell Paperbacks updated ed. 2006) (1999) (showing survey results that indicate workers prefer either employee associations or unions to no representation in the workplace).

51. Greenhouse, *supra* note 34.

52. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at art. 23 (Dec. 10, 1948).

53. ILO, *supra* note 12.

54. See COMPA, *supra* note 27, at 17–39 (finding that American labor law fails to meet international standards for a number of reasons, including that as workers lack communication channels for organizing purposes, employers can effectively oppose unions during election campaigns, the law enables undue delays in redressing violations, significant categories of workers are bereft of collective bargaining rights, the NLRB has inadequate enforcement resources, there are insufficient remedies for bad faith bargaining, the case law permits employers to permanently replace economic strikers, among others). The ILO’s Freedom of Association Committee has found that the United States is likely in violation of freedom of association principles because of lack of collective bargaining rights in the public sector and because of denial of freedom of association rights for graduate students who work for universities. See ILO, *Committee on Freedom of Association*, Case No. 2741 (United States, Nov. 10, 2009); ILO, *Committee on Freedom of Association*, Case No. 2547 (United States, Feb. 26, 2007); ILO, *Committee on Freedom of Association*, Case No. 2460 (United States, Dec. 7, 2005); ILO, *Committee on Freedom of Association*, Case No. 2292 (United States, Aug. 14, 2003). Case materials are available by searching the Committee on Freedom of Association’s database at: <http://www.ilo.org/dyn/normlex/en/f?p=1000:20060:0::NO:20060::>

opposition to unions, itself facilitated by weak labor laws, as one of the main reasons behind union decline.⁵⁵ Organized labor has consequently made employer opposition one of the main issues it campaigns against.⁵⁶ Social scientists, on the other hand, have shown that economic and political conditions such as free markets and antiunion politics also have enduring impacts on unions.⁵⁷ If social science is correct, the efficacy of employer pledges not to oppose unions in IFAs will depend on political and economic conditions.

A. *Employer Opposition and Weak Labor Laws*

According to many legal scholars, one of the main culprits behind union decline has been employer opposition to labor unions. Professor Paul Weiler, for example, showed that a marked increase in employer unfair labor practices (ULPs) since the 1950s correlated strongly with the decline of unions.⁵⁸ Such ULPs included intimidation and termination of workers during union recognition campaigns.⁵⁹

In fact, union avoidance is a sophisticated industry in the United States. Part of what this industry does is communicate employers' views regarding unionization to workers, including the impact that unionization can have on the firm and the jobs of the workers.⁶⁰ True, employers must speak in a way that expresses a mere "opinion" that does not amount to an illegal "threat of reprisal or force or promise of benefit."⁶¹ However, employers can express their opinions

55. See *infra* notes 58–59 and accompanying text.

56. See, e.g., *infra* pp. 737–38 (explaining tactics unions use to avoid union certification elections to avoid the effects of employer opposition).

57. See *infra* pp. 740.

58. Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLR Act*, 96 HARV. L. REV. 1769, 1779–81 (1982); see also Kate Bronfenbrenner & Tom Juravich, *The Impact of Employer Opposition on Union Certification Win Rates: A Private/Public Sector Comparison* 26 n.5 (Econ. Policy Inst., Working Paper No. 113, 1994), available at <http://digitalcommons.ilr.cornell.edu/articles/19> (explaining how employer opposition in the private sector accounts for the difference in union election win rates).

59. Some important labor law scholars, however, have taken issue with the employer opposition/weak labor law hypothesis. See JULIUS G. GETMAN ET AL., UNION REPRESENTATION ELECTIONS: LAW AND REALITY 115 (1976) (concluding that employer unfair labor practices during a union certification campaign do not show statistically significant results on union election outcomes); Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at Employer Illegals*, 58 U. CHI. L. REV. 953, 1006 (1991) (reevaluating the data on employer unfair labor practices and determining that the numbers had been overestimated, giving the false impression that employer illegals drive union decline in the United States).

60. See Elizabeth J. Masson, Note, "Captive Audience" Meetings in Union Organizing Campaigns: Free Speech or Unfair Advantage?, 56 HASTINGS L.J. 169, 172 (2004).

61. 29 U.S.C. § 158(c) (2012); see also NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969) ("[A]n 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

in many settings, including in meetings with the employees, labeled “captive audience meetings” by some union supporters.⁶² When the employers organize such meetings with their employees, they need not provide equal time to the union or give it access to company property.⁶³

Even though employers may not make “threats” against workers, many labor law scholars argue that employer speech regarding unionization always lies at the border between free expression and retaliatory intimidation against employees.⁶⁴ For example, employees normally must attend the captive audience meetings or risk being fired.⁶⁵ They may have no right to speak at the meeting and express their own views.⁶⁶ As one commentator recently reported:

One of the most common anti-union tactics used by employers is the holding of “captive audience” meetings. A captive audience meeting is an anti-union meeting held on company time, at which worker attendance is mandatory, and which workers can be fired for refusing to attend. Workers can also be prohibited from asking questions or speaking during the meeting, upon pain of discipline, including discharge.

Employers held anti-union captive audience meetings in 92 percent of more than 400 union elections held by the National Labor Relations Board between January 1998 and December 1999. On average, employers held eleven anti-union captive audience meetings in the time period prior to the Board election. . . .

demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.”).

62. See *Babcock & Wilcox Co.*, 77 N.L.R.B. 577, 578 (1948).

63. 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, 357 U.S. 357, 364 (1958).

64. The literature regarding the coercive nature of employer speech, even when legal, is enormous. See Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 516–23 (1993) (explaining that employers and workers are locked in unequal bargaining relationships, and that 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); James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 832 (2005) (“When an employer delivers a series of forceful messages that unionization is looked upon with extreme disfavor, the impact upon employees is likely to reflect their perceptions about the speaker’s basic power over their work lives rather than the persuasive content of the words themselves. Captive audience speeches, oblique or direct threats to act against union supporters, and intense personal campaigning by supervisors are among the lawful or borderline lawful techniques that have proven especially effective in diminishing union support or defeating unionization over the years.”) (citations omitted); Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil 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.”).

65. See Masson, *supra* note 60, at 171.

66. *Id.*

Employers hire anti-union labor consultants in 71 percent of Board elections. These consultants encourage employers to use their virtually unlimited opportunities to communicate aggressively with their employees during union campaigns. The Department of Labor (DOL) has documented the proliferation of anti-union consulting and legal firms.⁶⁷

The captive audience meeting sanctioned by American labor law affords employers the right to require their employees to hear antiunion messages at the workplace; it is not an opportunity for debate and exchange of ideas between two equal sides.

The law not only affords employers the right to hold captive audience meetings and time to campaign against unions but also provides weak remedies against law-breaking employers.⁶⁸ In theory, workers can obtain reinstatement and back pay, minus mitigation (wages earned at other jobs during the period the employee did not work for the employer as a result of an unfair dismissal).⁶⁹ Such remedies are ineffective because employers sometimes delay reinstatement of workers for as long as three years through appeals and other tactics.⁷⁰ Even when employees are reinstated, they usually leave the job within two years as a result of vindictive treatment by the employer.⁷¹ Given the relatively high costs of a union contract and the lower costs of breaking the labor law, many employers simply internalize breaking the labor law as a cost of doing business.⁷² 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,⁷³ unions 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.⁷⁴ Under the 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.⁷⁵ Once the union obtains majority support, it retains rights to represent the workers as their "exclusive

67. *Id.* at 171–72 (citations omitted).

68. *See* Weiler, *supra* note 58, at 1787.

69. THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 2930–42 (John E. Higgins, Jr. et al. eds., 6th ed. 2012).

70. *See* Weiler, *supra* note 58, at 1797.

71. *Id.* at 1792.

72. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1537 (2002).

73. *Id.* at 1532.

74. *See* Brudney, *supra* note 64, at 835–36.

75. *Id.* at 847.

representative.”⁷⁶ Such support can be expressed through “card checks”—when more than half of the workers sign union authorization cards⁷⁷—or through a union election administered by the NLRB.⁷⁸ However, employers need not recognize the union through “card checks.” Card check recognition is legal but voluntary.⁷⁹

To summarize, legal scholarship has argued that the decline of union membership in the United States is due to increased employer opposition to unions. Weak labor laws, in turn, permit employers to oppose unions. As a result of employer opposition, unions have sought to bypass the union elections process, where employers can oppose the unions, by seeking voluntary recognition and card check agreements with employers. As we will see, IFAs’ freedom of association and effective collective bargaining clauses may function as pledges not to oppose union organization or, perhaps, sustain voluntary recognition and card check agreements. IFAs, therefore, can serve as a means to remedy one of the major alleged causes of union decline, employer opposition.

B. Free Markets and Replacement of Union Workers with Nonunion Workers

*[C]orporate power lies principally in its control over investment decisions and personnel innovation, rather than the ability to engage in short-term, case-by-case manipulation of labor law.*⁸⁰

Employer opposition and weak labor laws seem to be plausible explanations of union decline, but they are not the only likely explanations. Social scientists have shown that “globalization,” or the expansion of free markets, which puts workers in direct competition with each other and erodes the power of states to

76. Under U.S. federal labor law, recognized unions are “exclusive representatives”—meaning that they have a monopoly over representation rights. As the NLRA states:

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

29 U.S.C. § 159(a) (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 (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* p. 772.

77. *Lamons Gasket Co.*, 357 N.L.R.B. No. 72, 2010–2011 NLRB Dec. (CCH) ¶ 15,462 (Aug. 26, 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.”).

78. 29 U.S.C. § 159(b).

79. *See* Brudney, *supra* note 64, at 824.

80. Dan Clawson & Mary Ann Clawson, *What Has Happened to the U.S. Labor Movement? Union Decline and Renewal*, 25 ANN. REV. OF SOC. 95, 103 (1999) (citation omitted).

regulate labor markets, has had demonstrable effects on union density.⁸¹ Meanwhile, traditionally nonunionized firms have invested in the United States at a dramatic pace.⁸² Free markets make replacement of union workers with nonunion workers possible. The net result of losses in union jobs and gains in nonunion jobs has yielded a net decline in union density.⁸³

The structural, economic reasons behind union decline also make it apparent that traditional organizing will not be enough to increase union density. The cost of organizing is too astronomical. In 1999, when private sector union density was in better shape than today, sociologists Dan and Mary Ann Clawson reviewed the social scientific literature on unions and found that merely to maintain then-current levels of union density, organized labor had to organize 300,000 workers per year.⁸⁴ To gain significant ground, *more than one million workers per year had to join the ranks of organized labor.*⁸⁵ According to Andy Stern, former President of the Service Employee International Union (SEIU), the cost of organizing each individual worker is between \$2000 and \$3000, and can be as much as \$5000.⁸⁶ Organized labor would need to spend, at a minimum, from two billion to three billion dollars, and up to five billion dollars per year, to grow! Hence, Stern believes that union campaigns in the private sector are “uneconomical.”⁸⁷

There are many ways that markets can be “free,” enabling employers to easily replace union workers with nonunion workers. One way is through permissive contracting rules. Under existing interpretations of federal labor law, labor unions have the right to represent employees of one employer.⁸⁸ This means that they have no right to compel more than one employer to bargain with the union on a single contract.⁸⁹ While it is permissible for a union and multiple employers to bargain for one contract, there is no right to multiemployer bargaining in the United States.⁹⁰ For example, employees employed by service providers such as building maintenance and private security firms cannot legally compel all the service providers in one market to bargain with them. These workers can only legally compel the service provider that directly hires them to bargain with them. Neither can the workers legally compel the end users of the services to bargain with them. End users can remain “union free” by simply hiring nonunion subcontractors.

81. *Id.* at 101.

82. Farber & Western, *supra* note 36, at 28–29.

83. *Id.*

84. Clawson & Clawson, *supra* note 80, at 103 (citing Richard Rothstein, *Toward a More Perfect Union: New Labor's Hard Road*, 26 AM. PROSPECT 47 (1996)).

85. *Id.*

86. NOAH, *supra* note 40, at 189.

87. *Id.*

88. Oakwood Care Ctr., 343 N.L.R.B. 659, 663 (2004) (reinstating long-standing rule stating that “multiemployer units” may be appropriate only with the consent of the parties).

89. *Id.*

90. *Id.*

Moreover, nothing in American labor law prohibits an employer from subcontracting to replace union employees unless the employer has shown an “anti-union animus.”⁹¹ All employers normally need to do is show that the decision to subcontract is economically motivated and not triggered by antiunion animus to remain free of liability under the labor laws.⁹² Moreover, employers can even partially close their businesses for economic reasons without bargaining with the union about the decision to partially shut down if bargaining would be “futile.”⁹³

Given the decades-old shift to nonunion industries, facilitated by “free” market relationships such as subcontracting, can IFAs truly help to organize American workers?

C. *Antiunion Politics and Policies*

Social scientists have argued that employer power is enhanced by a “neoliberal state” that deregulates to ease investment in the United States and abroad.⁹⁴ This deregulatory neoliberal state has been the death knell of unions. While not necessarily criticizing the neoliberal state, economist Leo Troy has recognized that increased competition resulting from government deregulation has eroded the ranks of labor.⁹⁵ Unions are disempowered by economic policies that give employers great leeway to open and close businesses and that afford workers little or no say in investment decisions.

Given that governmental action can have significant impacts on unionization, political conditions in their own right should be considered in order to understand unionization. For example, in cross-national studies of unionization,

91. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 682 (1981) (“Moreover, the union’s legitimate interest in fair dealing is protected by § 8(a)(3), which prohibits partial closings motivated by antiunion animus, when done to gain an unfair advantage. . . . Under § 8(a)(3) the Board may inquire into the motivations behind a partial closing. An employer may not simply shut down part of its business and mask its desire to weaken and circumvent the union by labeling its decision ‘purely economic.’”).

92. *See id.* at 682–83. As an exception to the rule, if an employer’s employees are represented by a recognized or certified union, the employer may not replace the union workers with subcontracted employees without first bargaining with the union over its decision to “contract[] out” their jobs. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 210–11 (1964).

93. *First Nat'l*, 452 U.S. at 686 (“We conclude that the harm likely to be done to an employer’s need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union’s participation in making the decision, and we hold that the decision itself is not part of § 8(d)’s ‘terms and conditions,’ over which Congress has mandated bargaining.” (citations omitted)). The employer, must, however, bargain the “effects” of the partial closing with its employees. *Id.* at 681–82. However, the employer may completely shut down the business, even if the employer has an antiunion animus. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 268 (1965) (“[A]n employer has the absolute right to terminate his entire business for any reason he pleases . . .”).

94. DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 75–79 (2005).

95. Leo Troy, *Market Forces and Union Decline: A Response to Paul Weiler*, 59 U. CHI. L. REV. 681, 684 (1992).

social scientists normally explore the impact that a “left-wing” party, or traditional socialist, social democratic, or labor party may have on unionization in a particular country.⁹⁶ Such political parties tend to elevate worker demands to the political level and provide public policies that favor unions.⁹⁷ Strong “left-wing” parties may therefore counterbalance the forces that want to establish a “neoliberal state” or may dampen the actions of such a state, thereby aiding unionization.

We also can hypothesize that if “left-wing” political parties and governments tend to help unions, the converse also is correct: strong “conservative” parties and governments tend to hurt unions. In fact, right-to-work states, where workers represented by unions can opt out of paying union fees⁹⁸ and thereby get a free ride, have had a very deleterious effect on union organizing.⁹⁹ But more than just right-to-work rules may influence union power in right-to-work states. As sociologists Rick Fantasia and Kim Voss have argued, general political opposition creates a “hostile terrain” for unions.¹⁰⁰ Thus, a focus on employer opposition, divorced from the political context, is insufficient to fully understand union decline. Can IFAs help to effectively organize workers if the political context is stacked against unions?

D. *A Comprehensive View of IFAs as Organizing Tools*

As indicated above, employer opposition is not the only reason unions have declined. As sociologists Dan and Mary Clawson have found, the future of unions is linked to more than individual employers’ manipulation of labor laws.¹⁰¹

However, historically in the United States and comparatively in other countries, unions have counterbalanced employers’ legal, economic, and political

96. BRUCE WESTERN, *BETWEEN CLASS AND MARKET: POSTWAR UNIONIZATION IN THE CAPITALIST DEMOCRACIES* 66 (1997); see also David Brady, *Institutional, Economic, or Solidaristic? Assessing Explanations for Unionization Across Affluent Democracies*, 34 *WORK & OCCUPATIONS* 67, 67–101 (2007).

97. WESTERN, *supra* note 96, at 66.

98. The Taft-Hartley Act enabled the states and territories to pass laws that would prohibit unions from seeking union fees from all workers in the bargaining unit. As the NLRA states: “Nothing in this [Act] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.” 29 U.S.C. § 164(b) (2012). Such state laws prohibiting mandatory payment of union fees are known as “right-to-work laws.” Keith Lumsden & Craig Petersen, *The Effect of Right-to-Work Laws on Unionization in the United States*, 83 *J. POL. ECON.* 1237, 1237 (1975).

99. Andrew W. Martin, *Resources for Success: Social Movements, Strategic Resource Allocation, and Union Organizing Outcomes*, 55 *SOC. PROBS.* 501, 513 (2008); see also David T. Ellwood & Glenn Fine, *The Impact of Right-to-Work Laws on Union Organizing*, 95 *J. POL. ECON.* 250, 266 (1987) (discussing how right-to-work laws have a “sizeable” negative effect on union organizing, as high as fifty percent reduction in organizing the first five years and half that amount the next five years).

100. FANTASIA & VOSS, *supra* note 42, at 34–36 (discussing how the United States has provided unions an “exceedingly hostile terrain,” and explaining its divergence from the more class and movement based labor unions that took hold in Europe).

101. Clawson & Clawson, *supra* note 80, at 103 (internal citations omitted).

power through collective action.¹⁰² Collective action—through, for example, strikes—not only puts pressure on employers but can also help to shape industrial relations systems where wages are set nationally or regionally and, in this manner, are “taken out of competition,” eventually making at least some employers indifferent as to whether to hire union or nonunion workers.¹⁰³ In recent decades, American unions have attempted to shape similar styles of collective bargaining through so-called “comprehensive campaigns,” which combine bottom-up industrial actions and community-based activism with top-down corporate research campaigns.¹⁰⁴ Perhaps IFAs should be envisioned as part of such comprehensive campaigns? We will return to this question after reviewing what IFAs are and analyzing some empirical cases.

II. A NEW HOPE? THE INTERNATIONAL FRAMEWORK AGREEMENTS

Voluntary recognition and card checks are normally secured by American unions through agreements with employers, generally referred to as neutrality and card check agreements.¹⁰⁵ In this era of globalization, some labor unions also are attempting to obtain voluntary recognition through IFAs.¹⁰⁶ One characteristic of an IFA is that a global union and a multinational firm sign it.¹⁰⁷ Another characteristic of IFAs is that they require the parties to pledge to abide by the ILO’s “fundamental labour standards,” including freedom of association and effective collective bargaining.¹⁰⁸ Some IFAs also may include procedures for implementation and provisions concerning suppliers and business partners.¹⁰⁹ Many IFAs also include pledges regarding wages, working hours, workplace safety, training, and restructurings.¹¹⁰

It is uncertain whether IFAs are legally binding instruments.¹¹¹ As a result,

102. See WESTERN, *supra* note 96, at 30.

103. *Id.* at 31.

104. The poster children of such union organizing campaigns have been the Justice for Janitors campaign in Los Angeles and the Hotel Workers Rising campaign in Las Vegas. See FANTASIA & VOSS, *supra* note 42, at 120–21. Top-down actions aim to find particular weaknesses of employers to compel them to recognize the unions. *Id.* at 128. These campaigns may uncover, for example, that the employer depends on local government licenses that union political allies can deny. *Id.* at 142–43. Unions may also uncover potentially damaging information about the employer that may lead shareholders to divest from the firm. See *id.* at 128–29; Christopher L. Erickson et al., *Justice for Janitors in Los Angeles: Lessons from Three Rounds of Negotiations*, 40 BRIT. J. INDUS. REL. 543, 562–64 (2002).

105. See Brudney, *supra* note 64, at 821.

106. Michael Fichter & Markus Helfen, *Going Local with Global Policies: Implementing International Framework Agreements in Brazil and the United States*, in SHAPING GLOBAL INDUSTRIAL RELATIONS, *supra* note 7, at 85, 103–10; Stevis & Fichter, *supra* note 18, at 685.

107. Papadakis, *supra* note 7, at 2.

108. *Id.*

109. Renée-Claude Drouin, *Promoting Fundamental Labor Rights Through International Framework Agreements: Practical Outcomes and Present Challenges*, 31 COMP. LAB. L. & POL’Y J. 591, 593 (2010).

110. Konstantinos Papadakis, *Appendix: Overview of Provisions in International Framework Agreements*, in SHAPING GLOBAL INDUSTRIAL RELATIONS, *supra* note 7, at 243, 249–56.

111. See Sarah Coleman, *Enforcing International Framework Agreements in U.S. Courts: A Contract*

they are mostly considered “soft law,” meaning that they are enforced through cooperation by the parties.¹¹² In industrial relations, such collaboration normally occurs against the backdrop of potential industrial conflict—“strikes, stoppages, picketing, boycotts, slowdowns, overtime bans, [and] work-to-rule,”¹¹³ among other forms of conflict. Hence, any strategy for the use of global agreements for union organizing must explore not only the nonadversarial dimensions of cooperation in soft law instruments but also industrial conflict.

A. Diffusion

IFAs are more than an academic curiosity. As Figure 2 shows, the growth of IFAs has been quite significant since the mid-1990s. The French foods company Dannon signed the first IFA in 1988.¹¹⁴ From then and until about 2012, about 110 similar agreements have been entered into by multinational firms and global unions.¹¹⁵ These agreements cover approximately 8.9 million workers, excluding suppliers and subcontractors.¹¹⁶ An “eyeball” analysis of these agreements also shows that about eighty of the signatory firms have U.S. operations. IFAs are relevant in the United States.

Analysis, 41 COLUM. HUM. RTS. L. REV. 601, 634 (2009) (explaining IFAs may be enforceable, depending on the facts, under the common law of contracts and section 301 of the Labor Management Relations Act); Goldman, *supra* note 5, at 632–34 (explaining that IFAs could theoretically be enforced under U.S. federal labor laws, contract law, consumer protection laws and investor protection laws, but the legal hurdles are very significant). For the case of Canada, see 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, 552 (2012), which explains the numerous legal hurdles that must be overcome to enforce IFAs in Canadian courts under the law of contracts and under labor laws. For the case of Germany, see Rüdiger Krause, *International Framework Agreements for the Legal Enforcement of Freedom of Association and Collective Bargaining? The German Case*, 33 COMP. LAB. L. & POL'Y J. 749, 768: “[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.” For an international managerial perspective, see *Key Issues for Management to Consider with Regard to Transnational Company Agreements (TCAs): Lessons Learned from a Series of Workshops with and for Management Representatives*, ILO: INT'L TRAINING CENTRE 19 (Dec. 2010), <http://www.buinesseurope.eu/content/default.asp?PageID=568&DocID=27884>: “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.”

112. Goldman, *supra* note 5, at 606.

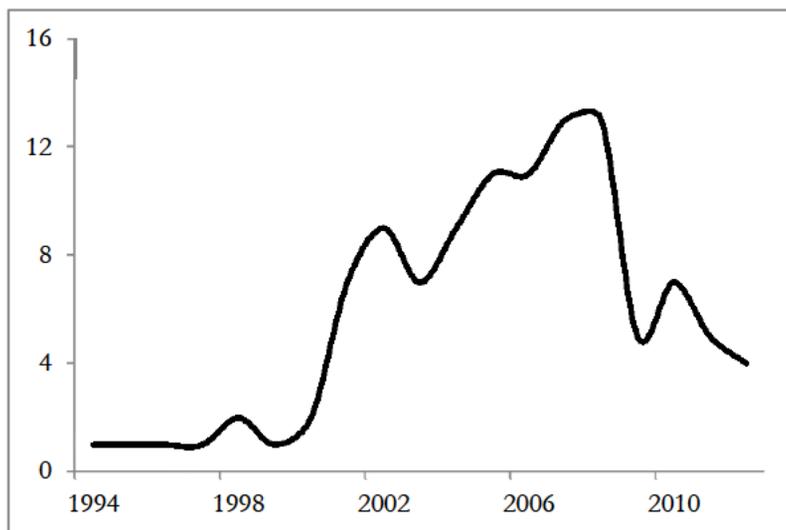
113. See Lance Compa & Fred Feinstein, *Enforcing European Corporate Commitments to Freedom of Association by Legal and Industrial Action in the United States: Enforcement by Industrial Action*, 33 COMP. LAB. L. & POL'Y J. 635, 638 (2012) (explaining how industrial action can be used to enforce international labor commitments).

114. Papadakis, *supra* note 7, at 3.

115. *International Framework Agreements*, WWW.EWCDB.EU, http://www.ewcdb.eu/list_int_framework_agreements.php (last visited Feb. 19, 2013).

116. Estimated from *id.*

Figure 2: Number of New IFAs Signed by Year, 1994–2012 (N=110)¹¹⁷



B. IFAs' European Character

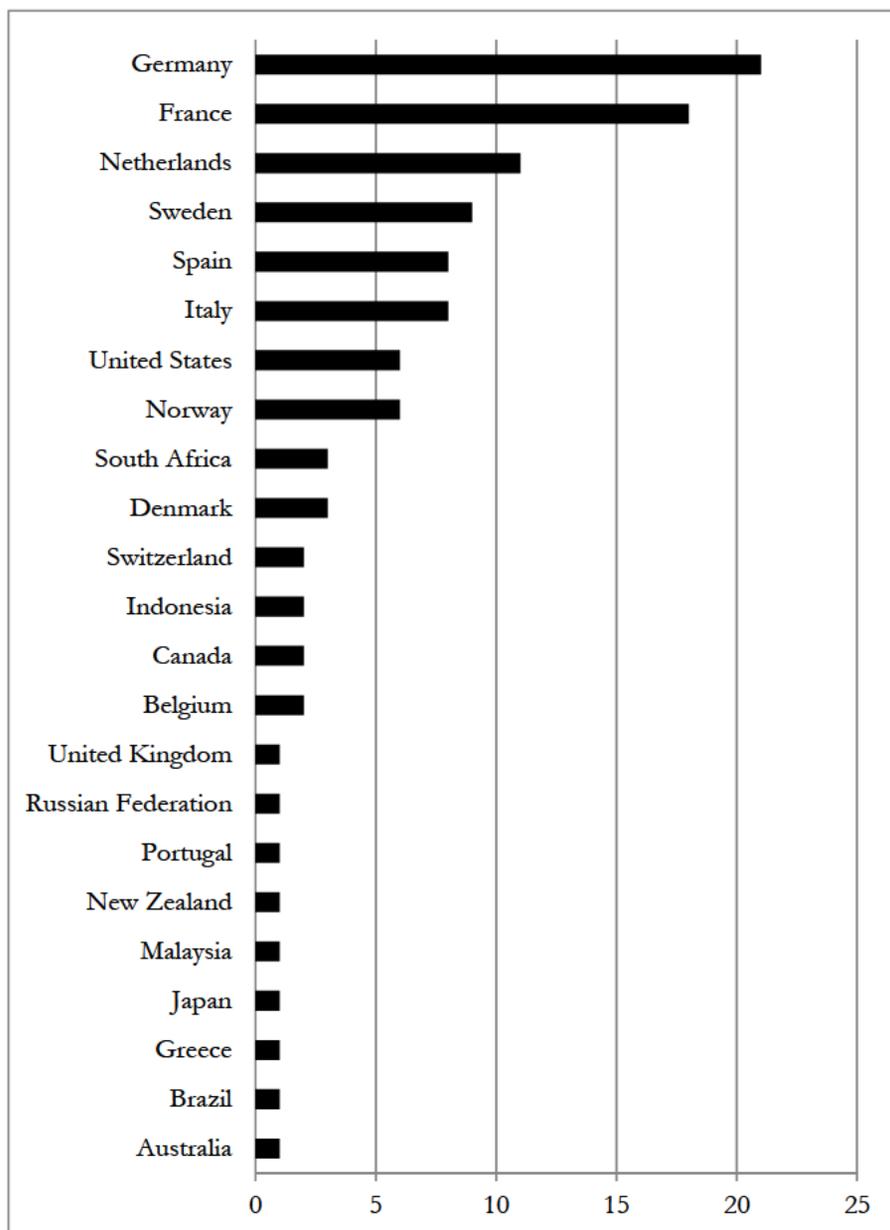
Although millions of global workers are theoretically covered by IFAs, IFAs have been mostly signed by European firms in countries where labor unions have historically been strong, as Figure 3 shows. Mostly German, French, Dutch, and Nordic multinational firms have signed IFAs.¹¹⁸ Firms in automobile manufacturing, metal industries, and other historically unionized industries also have predominated among the firms signing these agreements.¹¹⁹

117. Adapted from *International Framework Agreements*, *supra* note 115.

118. *Id.*

119. Papadakis, *supra* note 110, at 245–48.

**Figure 3: Number of IFAs, by Firm Country of Origin,
Through 2012 (N=109)¹²⁰**



120. *International Framework Agreements*, *supra* note 115 (excludes Olympia Flexgroup due to the firm's dissolution).

The reason why IFAs have been embraced primarily by European employers seems to be simple: some particularly strong national unions and works councils¹²¹ in Europe with relatively collaborative relations with their employers have requested that their employers sign IFAs.¹²² Professor Niklas Egels-Zandén has argued that IFAs are part of a “continuous bargaining process” between employers and employee representatives who have had long-established relationships.¹²³ An IFA is one of many agreements made in the course of the parties’ relationship. Moreover, employers only sign IFAs with parties they trust.¹²⁴ That party normally is the national union or works council in the home country of the signatory firm.¹²⁵ In this regard, global unions may only be nominal parties in some of the global agreements.

Moreover, most of the employers that have signed IFAs also are those who have works councils and European Works Councils (EWCs), or EU-wide employee representation bodies.¹²⁶ EU law mandates EWCs for employers (“undertakings”) with at least 1000 employees in one member state and 150 in another.¹²⁷ Given that many companies with EWCs also have operations beyond Europe, some of them have felt compelled to expand their EWCs globally and to

121. Works councils are, generally, employee representation bodies embedded in the corporate governance regime of a firm. *Works Council, Germany*, EUROFOUND (Aug. 14, 2009), <http://www.eurofound.europa.eu/emire/GERMANY/WORKSCOUNCIL-DE.htm>. They are independent of labor unions. *See 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.” *Id.* In France, the phrase more generally refers to an “[i]nstitution of employee representation.” *Works Council, France*, EUROFOUND (Aug. 14, 2009), <http://www.eurofound.europa.eu/emire/FRANCE/WORKSCOUNCIL-FR.htm>. In the German model, only employees are represented. ROGER BLANPAIN ET AL., *THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW: CASES AND MATERIALS* 598 (2d ed. 2012). The “French” model includes both employee and management representatives. *Id.* at 661. However, works councils are all creations of national legislation and therefore will likely differ by country. 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. Joel Rogers & Wolfgang Streeck, *The Study of Works Councils: Concepts and Problems*, in *WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS* 3, 13–14 (Joel Rogers & Wolfgang Streeck eds., 1995) [hereinafter *WORKS COUNCILS*]. However, sometimes unions and works councils may be at odds. *See id.* at 11–16.

122. Fichter & Helfen, *supra* note 106, at 88–89; Isabelle Schömann, *The Impact of Transnational Company Agreements on Social Dialogue and Industrial Relations*, in *SHAPING GLOBAL INDUSTRIAL RELATIONS*, *supra* note 7, at 21, 21–27.

123. Nilkas Egels-Zandén, *TNC Motives for Signing International Framework Agreements: A Continuous Bargaining Model of Stakeholder Pressure*, 84 J. BUS. ETHICS 529, 529–47 (2009).

124. *See id.* at 536–43.

125. Stevis & Fichter, *supra* note 18, at 675–77.

126. *Id.*

127. The goal of EWCs is to facilitate rights of information and consultation in European enterprises. Council Directive 94/45, 1994 O.J. (L 254) 64 (EC). For a description of the EU law on works councils, see BLANPAIN ET AL., *supra* note 121, at 439–40.

create so-called world or global works councils,¹²⁸ particularly to deal with complicated and many times conflict-ridden global company restructurings.¹²⁹ Global works councils help a firm to communicate with its workers around the world during a restructuring to better guarantee that the restructuring is done equitably.¹³⁰ In some instances, employee representatives request explicit global governance norms for industrial relations at the firm, leading to IFAs.¹³¹ Global works councils have played an important role in promoting at least some IFAs.¹³²

Because there is significant overlap between unions and works councils, meaning that union members often are many times also works council members,¹³³ and because in many instances national works councils (and the national union officers who sit on them) have significant influence over the European and global works councils,¹³⁴ national unions and works councils end up playing an important role in promoting IFAs. Thus, national unions and works councils matter greatly for so-called “global” agreements.

C. *The Limits of Prior Studies*

IFAs have caught the attention of scholars, policy makers, and others, leading to at least one important EU-concerned report,¹³⁵ two edited books by the ILO,¹³⁶ and one full volume of the *American Comparative Labor Law and Policy Journal*,¹³⁷ among other works cited throughout this Article. However, IFAs’ overall potential impact is still relatively unexplored, particularly in the United States.

Social scientists Michael Fichter and Markus Helfen reported on the impact

128. Stefan Rüb, *World Works Councils and Other Forms of Global Employee Representation in Transnational Undertakings*, 55 ARBEITSPAPIER, May 2002, at 5–6 (Ger.); Stevis & Fichter, *supra* note 18, at 675–77.

129. Papadakis, *supra* note 7, at 3.

130. *Id.*

131. *Id.*; Stevis & Fichter, *supra* note 18, at 675–76.

132. Papadakis, *supra* note 7, at 3; Stevis & Fichter, *supra* note 18, at 681–82.

133. For the case of Germany, see Walther Muller-Jentsch, *Germany: From Collective Voice to Co-management*, in WORKS COUNCILS, *supra* note 121, at 53, 61. For a more complicated picture, where works councils and unions are sometimes at odds, see Jelle Visser, *The Netherlands: From Paternalism to Representation*, in WORKS COUNCILS, *supra* note 121, at 79, 105–07. For the case of France, see Robert Tchobanian, *France: From Conflict to Social Dialogue?*, in WORKS COUNCILS, *supra* note 121, at 115, 139.

134. See, for example, the case of Daimler’s version of a world works council, its “World Employee Committee.” Dimitris Stevis, *The Impacts of International Framework Agreements: Lessons from the Daimler Case*, in SHAPING GLOBAL INDUSTRIAL RELATIONS, *supra* note 7, at 116, 123–25. Acknowledging that European concerns may play too powerful a role in the implementation of the IFA, the company created this global body to better represent global concerns. *Id.* at 119–40. However, even though it is formally independent of the EWC, it has heavy German and European representation. *Id.* at 124.

135. Schömann, *supra* note 122, at 23–37.

136. CROSS-BORDER SOCIAL DIALOGUE AND AGREEMENTS: AN EMERGING GLOBAL INDUSTRIAL RELATIONS FRAMEWORK? (Konstantinos Papadakis ed., 2008); SHAPING GLOBAL INDUSTRIAL RELATIONS, *supra* note 7.

137. 33 COMP. LAB. L. & POL’Y J. (2011–2012).

of IFAs in four cases: those of Lafarge, Skanska, Dannon, and G4S.¹³⁸ The authors reported that, because of the IFA and international pressures, a union engaged in collective bargaining negotiations with Lafarge was able to stop the company from unilaterally implementing its final offer after reaching impasse with the union.¹³⁹ By agreeing to cease implementing its final offer, the company cooperated with the union in a manner not required under American labor law.¹⁴⁰ Therefore, IFAs can have significant impact at the national level; they can compel an employer to provide legal guarantees to workers that exceed those provided by national laws.

In the case of Skanska, a global construction firm based in Sweden, the IFA helped the American Teamsters union to mobilize its counterpart in Sweden to pressure the company to recognize the union and to bargain with it.¹⁴¹ However, in that case the employer bargained with the union only after the union won a union election.¹⁴² The employer seemed moved by hard law and not the agreement. In Dannon's case, the company refused to recognize a union voluntarily after the union showed the employer that it had majority support.¹⁴³ The employer eventually bargained with the union, but only after the NLRB certified the union.¹⁴⁴ As in the Skanska case, it is unclear whether the IFA added anything beyond what was already imposed by law. Finally, the authors reported that G4S signed an IFA and a complementary national agreement recognizing the SEIU as the representative of G4S employees.¹⁴⁵ The impact of that national agreement was unknown at the time the authors submitted their report.¹⁴⁶

In another report, social scientists Dimitris Stevis and Michael Fichter detailed how the United Food and Commercial Workers Union (UFCW) successfully organized the store clerks of the Swedish retailer H&M in a number

138. Fichter & Helfen, *supra* note 106, at 106–10.

139. *Id.* at 107–08. Under the NLRA, the employer and the union have the obligation to bargain “in good faith.” *Id.* If the parties bargain in good faith and still reach an impasse, the employer may unilaterally implement its last offer. *Id.* At that point, the union’s recourse to bring the employer closer to its terms would be to implement a strike and continue bargaining with the employer. *See* Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967) (“An employer violates his duty to bargain if, when negotiations are sought or are in progress, he unilaterally institutes changes in existing terms and conditions of employment. On the other hand, after bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals.” (citations omitted)).

140. Fichter & Helfen, *supra* note 106, at 107–08.

141. *Id.* at 108–09.

142. *Id.*

143. *Id.* at 109.

144. *Id.*

145. *Id.* at 109–10.

146. *Id.* *But see* JAMIE K. MCCALLUM, GLOBAL UNIONS, LOCAL POWER: THE NEW SPIRIT OF TRANSNATIONAL LABOR ORGANIZING 99–144, 146–47 (2013) (describing how the G4S IFA helped South African unions obtain neutrality and access to the workplace and Indian unions to effectively lobby the Indian government for new legislation to raise the employment standards of security guards).

of stores.¹⁴⁷ However, the IFA apparently played no role in the union's strategy.¹⁴⁸ It was never used. In two other campaigns, involving the German automaker BMW in Southern California and Ikea in Danville, Virginia, the IFA helped unions to organize workers, but only after the unions pressured the employers.¹⁴⁹ Because the unions had to resort to pressuring the employers, the authors reported that American unionists did not think that the IFAs played an important role in the union drives at BMW and Ikea.¹⁵⁰ However, the union leaders may have been too quick to dismiss the role of the IFA and its impact in the organizing process. After all, it was the IFA that helped the union stir the Swedish counterparts in the case of Ikea to put pressure on the employer to stop opposing the union in Danville.¹⁵¹ Could it be that unions must use IFAs beyond recognition purposes, or to muster economic and political power to challenge employers effectively? Is the evidence pointing toward the use of IFAs as part of a "comprehensive campaign"? We will return to this question during the discussion of the Article.

D. *An Exploratory Study*

Prior studies describe useful examples of partial successes and some failures of IFAs in the United States, some in connection with organizing.¹⁵² However, these studies do not provide a theoretically explicit account of how global agreements can contribute to union organization, even though theory suggests that legal, economic, and political factors impact unionization.¹⁵³ This Study aims to advance our understanding of IFAs' organizing potential from such a theoretical perspective. The Study attempts to generalize to theory, or what has otherwise been termed as "analytical generalization" in the social science literature.¹⁵⁴ It does not attempt to generalize to a population, as sampling and similar statistical techniques normally attempt to do.¹⁵⁵

Moreover, the Study was explicitly exploratory because it did not seek to definitively explain the organizational results of each of the cases.¹⁵⁶ Rather, given the limited knowledge that we have about IFAs, the goal of the Study was to derive hypotheses of how IFAs can serve as useful organizational tools.

Here I report on four IFA cases, those concerning Securitas, G4S, Daimler,

147. Stevis & Fichter, *supra* note 18, at 685.

148. *Id.*

149. *Id.* at 685–86.

150. *Id.*

151. *Id.* at 686.

152. Fichter & Helfen, *supra* note 106, at 100–15; Stevis & Fichter, *supra* note 18, at 685–87.

153. See Fichter & Helfen, *supra* note 106, at 100–15; Stevis & Fichter, *supra* note 18, at 685–87.

154. See ROBERT K. YIN, CASE STUDY RESEARCH: DESIGNS AND METHODS 32–33 (3d ed. 2003) (explaining how analytical generalization differs from sampling techniques that aim to generalize to a population).

155. *Id.*

156. An exploratory study is one that attempts to develop "pertinent hypotheses and propositions for further inquiry." *Id.* at 6.

and Volkswagen. I collected the evidence during the months of June through November of 2012. With a grant from the Regulating Markets and Labor Program based at Stockholm University, I interviewed global and national union representatives of workers of all four firms who had been responsible for the signing and implementation of the IFAs. These representatives were located in Germany, Sweden, Switzerland, the United Kingdom, and the United States.¹⁵⁷ I performed most interviews in person, but I had to perform some via telephone and e-mail.¹⁵⁸

I chose to study Securitas, G4S, Volkswagen, and Daimler because all those firms have U.S. operations and have signed IFAs.¹⁵⁹ Moreover, they represent two different industries in different political and economic conditions that may impact unionization, even though all the firms have signed IFAs. G4S and Securitas represent cases where union workers can be easily replaced with nonunion workers. The end users of private security services—i.e., property owners—are principals in contracting relations with private security firms.¹⁶⁰ Subcontracted security guards often will work alongside other workers in a building, some of whom may be employees of the building owners or of other subcontractors.¹⁶¹ Hence, organizing private security guards is complicated by the contracting relationships. These private security cases can help us understand what we can learn from further empirical investigation of IFAs as organizational tools in the presence of “free markets,” or particularly when end users can “contract out” the union workers.

The cases of Volkswagen and Daimler involve firms located in a particularly politically “hostile terrain” for unions—the U.S. South. Both plants are in right-to-work states: Volkswagen’s automobile plant is in Chattanooga, Tennessee; Daimler’s is in Tuscaloosa, Alabama.¹⁶² The cases can help us understand what we can learn from further empirical investigation of IFAs as organizing tools when the local political context, independent of the firms, is stacked against unions.

157. Technically, the type of interviewing that I did is referred to in the social sciences as the “élite” interview. Élite interviewees are those who are particularly knowledgeable about a subject and its context. BILL GILLHAM, RESEARCH INTERVIEWING: THE RANGE OF TECHNIQUES 54 (2011).

158. 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 nonverbal forms of communication. *See id.* at 103. Telephone interviews are cheaper, since they do not require travel, but the interviewer may lose some information provided by nonverbal communicative cues. Hence, the telephone interviewer has to remain more vigilant and alert of what is being said in an interview than the interviewer in person does. *Id.* For the same reasons, telephone interviews are usually shorter in duration than face-to-face interviews because of the additional effort that it takes to maintain meaningful communication. *See id.*

159. For a complete list of the persons that I interviewed see *infra* Appendix: List of Individuals Interviewed by Author for This Article.

160. *Our Approach*, SECURITAS, <http://www.securitas.com/us/en/About-Securitas/Our-Approach> (last visited Sept. 14, 2013).

161. *Our Responsibility*, SECURITAS, <http://www.securitas.com/us/en/About-Securitas/Sustainability> (last visited Sept. 14, 2013).

162. *See infra* notes 224, 233.

III. FINDINGS

The Securitas and G4S IFAs seem extraordinary from an American perspective. They include language that sustains voluntary recognition and card checks for unions in the United States.¹⁶³ In fact, some of the employees of these private security firms are covered by union contracts that can clearly be linked to the IFA.¹⁶⁴ Nevertheless, as explained below, the organizational inroads in the private security services firms have been very modest. It seems that economic conditions, namely the availability of cheaper, nonunion security guards who can be easily contracted out by the end users of these services (the property owners), plague unionization in this particular industry.

The organizational inroads seem equally modest in Daimler and Volkswagen. Daimler runs a plant in Tuscaloosa, Alabama, that has been operating since 1997.¹⁶⁵ Volkswagen has operated a plant in Chattanooga, Tennessee, since 2011.¹⁶⁶ Workers in both factories lack union representation. The United Automobile Workers (UAW) conducted a failed attempt to organize Daimler's Tuscaloosa plant in 1999.¹⁶⁷ Although there was no IFA back then, management pledged to remain neutral during union elections, but the union was still unable to gather sufficient employee support.¹⁶⁸ Although there is a current organizing campaign in Volkswagen that has caught the attention of the national press, workers remain disorganized in the plant.¹⁶⁹ As we will see, a politically "hostile terrain" seems to make organizing at both plants difficult, even with the existence of an IFA. Volkswagen workers also seem to earn more than comparable autoworkers covered by UAW contracts,¹⁷⁰ further complicating the challenge of organizing workers in these foreign transplants.

A. Easily Replaced? Securitas and G4S

Securitas is a global security firm headquartered in Stockholm, Sweden.¹⁷¹ It employs more than 300,000 people in fifty-one countries.¹⁷² In 2011, its total sales

163. *Infra* p. 762.

164. *Infra* p. 756.

165. *Mercedes-Benz Tuscaloosa Plant*, DAIMLER, <http://www.daimler.com/dccom/0-5-1382119-1-1333338-1-0-0-0-0-9506-7145-0-0-0-0-0-0.html> (follow "History" tab) (last visited Sept. 1, 2012).

166. See Bertel Schmitt, *Volkswagen's Chattanooga Plant Open For Business*, TRUTH ABOUT CARS (May 25, 2011), <http://www.thetruthaboutcars.com/2011/05/volkswagen%E2%80%99s-chattanooga-plant-open-for-business> (stating that the plant opened in early 2011).

167. See *infra* note 257.

168. See *infra* note 257.

169. But see *infra* notes 276–282.

170. See *infra* notes 276–282.

171. *Contact Us*, SECURITAS, <http://www.securitas.com/en/About-Securitas/Contact-us> (last visited Sept. 1, 2013).

172. *Securitas in Brief*, SECURITAS, <http://www.securitas.com/en/About-Securitas/Securitas-in-brief> (last visited Sept. 1, 2013).

amounted to about \$9.6 billion.¹⁷³ In the United States it employs about 90,000 people,¹⁷⁴ making the United States one of the largest operations of this global Swedish security firm.

G4S is a global security firm headquartered in London, United Kingdom.¹⁷⁵ The firm operates in 125 countries and employs 657,000 people.¹⁷⁶ In the United States and Canada it employs 50,000 people,¹⁷⁷ making North America a significant part of its global business. The global company's revenues were over \$12 billion in 2011.¹⁷⁸

1. *What the Private Security IFAs Say*

The 2006 Securitas IFA was signed by Securitas, UNI Global Union, and the Transport Workers Union of Sweden, the Swedish union that bargains collectively with the company in Sweden.¹⁷⁹ The IFA guarantees the employees' rights of association.¹⁸⁰ It also states that union recognition will be granted based on the minimum legal requirements for recognition under applicable laws, that the company will assist the union under applicable laws, and that it will be sensitive to national, cultural, and other particular conditions.¹⁸¹ It makes reference to national UNI affiliates and local management.¹⁸² By presuming third party beneficiaries, the agreement may be legally binding.¹⁸³ In fact, the parties seem to have intended

173. According to the Securitas website, in 2011 the company made 64,057 million krona (MSEK) and its operating income was MSEK 3,385. *Id.* I made currency conversions using the MSN Currency calculator. *Currency Conversion Calculator*, MSN MONEY, <http://investing.money.msn.com/investments/currency-converter-calculator> (last visited Dec. 11, 2012).

174. *About Us*, SECURITAS, <http://www.securitas.com/us/en/About-Securitas> (last visited Dec. 11, 2012).

175. *Contact Us*, G4S, <http://www.g4s.com/en/Site%20Tools/Contact%20us> (last visited Sept. 1, 2013).

176. *Who We Are*, G4S, <http://www.g4s.com/en/Who%20we%20are> (last visited Sept. 1, 2013).

177. No disaggregated numbers for the United States and Canada were available on G4S's company website. *Our Employees*, G4S, <http://www.g4s.com/en/Who%20we%20are/Our%20people/Our%20employees> (last visited Sept. 1, 2013).

178. G4S PLC, ANNUAL REPORT AND ACCOUNTS 2011: SECURING YOUR WORLD (2011), available at http://www.g4s.com/~media/Files/Annual%20Reports/g4s_annualreport_2011.ashx. The original figures were in British pounds sterling, or £7.5 billion for total revenue, and U.S. \$531 million for profit before interest, tax, and amortization. *Id.*

179. Securitas, *Agreement between Securitas AB, Union Network International and Swedish Transport Workers' Union on Development of Good Working Relations in Securitas Group* (2006) (on file with author) [hereinafter *Securitas Global Agreement*]. Please note that Securitas signed a new IFA with UNI Global in November of 2012. See *Global Agreement Between Securitas AB and UNI Global Union and Swedish Transport Workers' Union*, SECURITAS (Nov. 2012), http://www.securitas.com/Global/_DotCom/CSR/Global_Agreement_UNI_Nov2012.pdf. This Study focuses on the 2006 agreement because the 2012 agreement is too recent to assess its impact.

180. *Id.* § 2.

181. *Id.*

182. *Id.* §§ 2–3. For example, in section 2, the IFA states that the “company will enable local union representatives to arrange meetings with employees in a non-disruptive manner.”

183. See Goldman, *supra* note 5, at 610.

to make at least some of its terms legally binding, in contrast to most IFAs, as it states that the agreement will be “governed and construed in accordance with the laws of Sweden.”¹⁸⁴

The fact that the parties agreed that the union would be recognized under the “minimum legal requirements” is also significant.¹⁸⁵ The minimal legal requirements for union recognition in the United States are, generally, voluntary recognition and card checks.¹⁸⁶ It is also significant that the employer will provide the union with relevant employee information, such as a list of the relevant employees (without any union election petition having been filed with the NLRB), and access to company property.¹⁸⁷ The employer is not obligated to provide such information and access under American federal labor law.¹⁸⁸

In 2008, G4S signed its IFA with UNI Global Union and the General Boilermakers Union (GMB), the union with which G4S bargains collectively in its home country of Great Britain.¹⁸⁹ Its section 3 clearly establishes G4S’s commitment to live up to the core labor standards.¹⁹⁰ The IFA also makes particular reference to freedom of association when it mentions, in relevant part, that such commitments include “the rights of [G4S’s] employees to freedom of association and to be members of trade unions, and the right of unions to be recognised for the purposes of collective bargaining.”¹⁹¹

In section 6, “Union Rights,” the agreement goes further and states:

G4S supports the right of employees to join and be represented by a union of their choosing, and has agreed to work with UNI to support these rights as set below:

a) Freedom of association

UNI and G4S share the view that employees should be able to make

184. *Securitas Global Agreement*, *supra* note 179, § 4.

185. *Id.* § 2.

186. *See* Lamons Gasket Co., 357 N.L.R.B. No. 72 (Aug. 26, 2011).

187. *Securitas Global Agreement*, *supra* note 179, § 2.

188. *See* Excelsior Underwear, Inc., 156 N.L.R.B. 1236, 1239–40 (1966). Under current law, an employer need only provide the names and addresses of employees of a bargaining unit to be organized only seven days before an NLRB election is to be held. *Id.* Moreover, so-called “non-employee” union members—normally the staff union organizers—do not have rights to access employees on the premises and properties of employers. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 530–39 (1992).

189. *A Global Agreement Between UNI and G4S, Ethical Employment Partnership*, G4S 12 (2008), http://www.google.com/url?sa=t&rc=t=j&q=&esrc=s&frm=1&source=web&cd=2&ved=0CDkQFjAB&url=http%3A%2F%2Fplace.uniglobalunion.org%2Fservlet%2FQuickrSupportUtil%3Ftype%3Dquickrdownload%26key%3D%2FLOTUSQuickr%2Fpub%2FPageLibraryC1257824003A7C09.nsP%2F0%2FC881952D79023E28C12578AA00508960%2F%24file%2FUNI%252520PS%252520GA.G4S.signed.w-appendix.EN.pdf&ei=MmKmUcfzK8WxywHQ_4GgDg&usg=AFQjCNG-NGRPHtnxKKCwAYBNEY5aKdbZTQ&sig2=5tKfW1tlHOJXwCIVk0LD3w&bvm=bv.47008514,d.aWc [hereinafter *G4S Global Agreement*].

190. *Id.* § 3.

191. *Id.*

the choice about whether or not to join a union, free from threat or intimidation by either company or union. G4S managers will not oppose this process and upon request G4S will communicate to employees that they are entitled to a free choice over whether or not to join and become active in a union.

The parties commit to work with their national affiliates and managers in order to enable freedom of association to be exercised in a non-confrontational environment, avoiding misunderstanding and minimising conflict. UNI and G4S are committed to working together in an ethical partnership and therefore any concerns with the reputation or ethical conduct of specific local parties may be raised for discussion at the Review Meeting to help pre-empt any local disputes. . . .

b) Union access

Subject to the terms of paragraph 8 (Implementation), to enable employees to meaningfully exercise freedom of association, G4S will agree [sic] specific access arrangements for local unions to explain the benefits of joining and supporting the union.¹⁹²

The section then goes on to detail how union access would be handled, including provisions requiring that unions be given “reasonable time and opportunity” to communicate their messages to workers, that such worker meetings will not affect productivity, that special permission will be required when the union wants to speak to workers at the property of a client (the end user), and that management will not be present at such meetings. In regards to union recognition, the agreement states:

To ensure the views and interests of all workers are safeguarded, the means of establishing union recognition will be determined locally based on the principle that the company will recognise representative and legitimate unions. As part of this process the parties should agree [sic] a fair and expeditious system for checking support for the union. If local agreement cannot be reached and it has been demonstrated that the union satisfies *the minimum legal requirements under applicable law* for recognition (which may go beyond the basic criteria required to register a union), the dispute shall be referred to the Review Meeting for resolution.¹⁹³

Hence, G4S pledged not to oppose workers’ organization at the workplace, to provide access to the union so that it could give its message to the employees, and to bargain with the union a manner for recognition under the *legally minimum requirements*. All this amounts to a pathway to voluntary recognition in the United States.

192. *Id.* § 6(a)–(b).

193. *Id.* § 6(c) (emphasis added).

2. How Have the Private Security IFAs Been Used?

Both Securitas and G4S have, indeed, voluntarily recognized the SEIU, a UNI affiliate, in every instance where the union is duly recognized as the representative of its security guards.¹⁹⁴ Without such voluntary recognition, the SEIU would not be able to legally represent those workers because the SEIU is an “international,” “mixed” union, or a labor organization that represents more than just security guards.¹⁹⁵ Under U.S. federal labor law, only security guard unions can be certified by the NLRB to represent security guards.¹⁹⁶ The NLRB cannot certify “mixed” unions as bargaining representatives of security guards. However, employers may *voluntarily* recognize mixed unions such as the SEIU to represent security guards.¹⁹⁷ As Tom Balanoff, President of Chicago’s SEIU Local 1 and Vice President of the SEIU (who also heads the Property Services division of the organization) told me, the SEIU has been able to get around this particular legal hurdle by seeking voluntary recognition.¹⁹⁸ The IFA has been instrumental in achieving such voluntary recognition.¹⁹⁹

The companies seem to value the IFA. Professor Lance Compa has reported that the IFA has improved relations between the global security firm and the SEIU.²⁰⁰ In the past, G4S engaged in very aggressive antiunion campaigns.²⁰¹ However, since the 2008 agreement the company has voluntarily recognized a number of bargaining units.²⁰² As Lance Compa reported in the Human Rights Watch report:

G4S told Human Rights Watch “we take pride in being the first UK-based multinational company to enter into a global agreement safeguarding employee rights throughout our operations” and added “we have made significant progress under the US agreement. G4S has recognized SEIU as the bargaining representative for employees working

194. See generally *Major Union Win: 500 Portland Security Officers Join SEIU*, NW LAB. PRESS, (Aug. 1, 2012), <http://nwlaborpress.org/2012/08/seiu-11> (recognizing the SEIU in a union contract for Portland-area security officers).

195. See 29 U.S.C. § 159(b)(3) (2012).

196. *Id.*

197. *Truck Drivers Local Union No. 807 v. NLRB*, 755 F.2d 5, 8 (2d Cir. 1985) (noting that the NLRB cannot compel an employer to recognize a mixed union of guards and nonguards; however, an employer may voluntarily recognize a mixed union of guards and nonguards if the union provides evidence of majority support).

198. Interview with Thomas Balanoff, President of SEIU Local 1, Chi., Ill., and President of the Prop. Servs. Div. of SEIU, in Chi., Ill. (July 19, 2012) (on file with author).

199. *Id.*

200. See LANCE COMPA, HUMAN RIGHTS WATCH, A STRANGE CASE: VIOLATIONS OF WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES BY EUROPEAN MULTINATIONAL CORPORATIONS 98–99 (Arvind Ganesan et al. eds., 2010).

201. *Id.* at 87–97. G4S management “told employees that surveillance cameras were monitoring them and that they would be fired if cameras caught them in organizing activity. Management [also] interrogated employees about organizing activity and asked employees to report the actions of organizing leaders among them.” *Id.* at 97.

202. See *id.* at 99.

in the Chicago, Minneapolis and Seattle markets. We are in the process of rolling out the agreement in New York, the District of Columbia and in multiple cities in California.”²⁰³

Therefore, cooperation between SEIU and G4S through the IFA with UNI has greatly improved.

Although Securitas refused to be interviewed for this report, the existing literature shows that the company was content with the IFA when it was signed. The IFA helped to promote the “Nordic way of doing social dialogue,” based on consultation and participation of the employees in the company’s operations.²⁰⁴

3. *The Challenge of Industry-Wide Organization of Security Guards*

Despite what seems to be a real commitment to voluntary recognition in the security services industry, the IFAs’ impact on union organization has been very modest. About 10,000 security guards may have been organized with the help of the IFAs.²⁰⁵ Ten thousand new union members is something, but in the general scheme of things it is “a drop in the bucket” of what is needed to reorganize American workers. Moreover, of these perhaps 10,000 organized workers, most seem to be in Chicago. According to Tom Balanoff, the Chicago Securitas bargaining unit covers 8000 workers.²⁰⁶

G4S has 50,000 employees in North America.²⁰⁷ Securitas employs about 90,000 in the United States.²⁰⁸ While North American operations for G4S include Canadian operations, it is likely that most of the 50,000 North American employees of the firm are in the United States. If even only half of those 50,000 employees were in the United States, the combined number of U.S. employees for Securitas and G4S in 2011 was about 115,000. If 10,000 of them were unionized, 8.6% of the security guards of both firms were represented by the union. This is hardly great union density.

The situation looks even bleaker once one accounts for the entire private security services market. The SEIU has organized only 40,000 of the security guards in the United States.²⁰⁹ According to the SEIU, there are about 1.1 million security guards employed in the United States.²¹⁰ Forty-four percent of the market is controlled by G4S, Securitas, and four other companies without IFAs—Allied

203. *Id.*

204. Schömann, *supra* note 122, at 29 (internal citations omitted).

205. Interview with Balanoff, *supra* note 198; *see also* E-mail from Kevin O’Donnell, SEIU Commc’ns, to author (Jan. 24, 2013) (on file with author).

206. Interview with Balanoff, *supra* note 198.

207. G4S PLC, *supra* note 178.

208. *About Us*, *supra* note 174.

209. E-mail from Kevin O’Donnell, SEIU Commc’ns, to author (Jan. 29, 2013) (on file with author). As of this writing, I could not verify how many security guards are organized in the United States in any union out of the 1.1 million in the country.

210. *Our Industry*, SEIU, <http://www.seiu.org/a/standforsecurity/about-the-ind.php> (last visited Dec. 11, 2012).

Barton, U.S. Security Associates, Guardsmark, and ABM/ACSS Security Services.²¹¹ The other 56% of the market seems to be dominated by smaller firms. The reason for the low union density in the sector seems clear. With so many employers and so few on board with the SEIU to organize industrially, union or potentially union Securitas and G4S security guards are always in danger of being replaced by nonunion guards.

The parties admit that not all private security companies follow the “high road” paved by Securitas and G4S, which strive to build a cadre of well-remunerated, skilled, high-quality security professionals.²¹² Union contracts are typically focused on achieving increased wages, which put the unionized security services companies at a competitive disadvantage, all else being equal. Even if the unions are voluntarily recognized, they must have a plan of action with management to avoid putting the employers out of business; otherwise, the whole organizational campaign would collapse. In fact, the parties recognized such competitive limits in the IFAs. The Securitas IFA states in relevant part that “[t]he organisational process shall ensure that the company shall remain competitive within the market being organized.”²¹³ The G4S IFA states, in relevant part:

The parties recognize that G4S operates in a highly competitive environment in which many local competitors do not respect laws on working hours and pay. If any improvements to terms and conditions of employment appear likely to result in a loss of market share or margin to G4S, the local union and management team will develop a joint strategy and action plan to monitor and raise standards among all of the companies in the market and create an environment in which G4S will be able to raise standards without compromising its competitive position.²¹⁴

In fact, the Swedish Transport Workers Union, which brokered the agreement between UNI Global and Securitas, and which is also a signatory of the IFA, told Securitas that it would strive to organize the *industry* and not just that particular employer.²¹⁵ As an officer of the TWU of Sweden told me in an interview:

[The problems in the United States were] about organization, organizing. . . . The local management of Securitas in U.S., in that time, they were going to new cities. . . . And the global management at that time were saying: “No, no, no, you don’t come here! Stop, stop stop!”

[The union said,] “But this is a global agreement.”

[Management responded,] “But it is not valid in the U.S. But U.S. is not ‘global.’”

211. *Id.*

212. Interview with Göran Larsson, Int’l Sec’y, Transp. Workers Union of Swed., in Stockholm, Swed. (June 25, 2012) (on file with author).

213. *Securitas Global Agreement*, *supra* note 179, § 2(a).

214. *G4S Global Agreement*, *supra* note 189, § 5.

215. Interview with Göran Larsson, *supra* note 212.

Then when we approached the company, [the CEO said], “If I sit down, only me, and discuss regarding regulations and so on, then we will be driven out of the market. Competitiveness is very important for me.”

So then we discussed on how we can get off this problem.²¹⁶

According to the TWU official, this is when the SEIU and Securitas agreed on a ten-city market agreement for the United States, and the SEIU pledged to organize the market more broadly.²¹⁷

Moreover, the current President of TWU in Sweden, Lars Lindgren, who led the international work of the union and helped to draft the 2006 IFA, told me that one of the things that he most tried to push was to organize the industry, not just Securitas.²¹⁸ As he told me, “We said that we would go against the other big companies. . . . We said that we would go and demand a global framework agreement, which would be on the same level or higher as this one.”²¹⁹ Thus the union pursued the IFA with G4S.²²⁰

Of course, it must be emphasized that the need to organize an entire industry is not a necessary precondition to recognition under the IFA, but rather a goal that both management and the unions understand is important if they want sustainable collective bargaining. As a UNI officer told me, industry-wide organizing

is not a precondition to recognition of the union—otherwise the standard would be even tougher for union recognition than country law requires and that would undermine other provisions of the [IFA]. But, in our industry[], it is an important concept to the employer and the union to organise industry-wide, and we both take it seriously. UNI affiliates always work to do this. It has not been a source of conflict with G4S or Securitas.²²¹

National agreements in the United States aimed at organizing an industry and not just discrete bargaining units also point to this bilateral goal.

Hence, the problems of organizing security employees in the United States, who belong to an industry that is for the most part union-free, and where the end users of services easily can contract out the union companies, are difficult. IFAs could serve as the basis for national voluntary recognition agreements, but their use seems limited given the legal—contractual—and economic constraints that currently exist in the industry.

216. *Id.*

217. *Id.*

218. Interview with Lars Lindgren, President of the Transp. Workers Union of Swed. (June 25, 2012) (on file with author).

219. *Id.*

220. *Id.*

221. E-mail from Alice Dale, Prop. Servs., UNI Global Union (Oct. 20, 2012) (on file with author).

B. *A Politically "Hostile Terrain"? Volkswagen and Daimler*

Daimler is one of the world's leading firms and producers of cars, vans, trucks, and buses.²²² The company traces its history to 1886, when Gottlieb Daimler and Carl Benz invented the automobile.²²³ Headquartered in Stuttgart, Germany, it has manufacturing operations in seventeen countries, including the United States, where it has numerous manufacturing facilities, of which most make trucks and vans, rather than automobiles.²²⁴ In 2011, Daimler produced globally more than 2.1 million vehicles.²²⁵ Its automobile plant in the United States is located in Tuscaloosa, Alabama.²²⁶ In 2011, that plant employed 2828 employees and produced 148,092 vehicles.²²⁷ It is also one of very few Daimler plants in the world where the employees lack union representation.²²⁸

Volkswagen is also one of the world's leading automobile producers.²²⁹ In fact, it is the largest automaker in Europe.²³⁰ In 2011, Volkswagen delivered to customers 8.265 million vehicles, or a "12.3 percent share of the world passenger car market."²³¹ Its headquarters are located in Wolfsburg, Germany.²³² The company has ninety-nine manufacturing locations in twenty-seven countries, including one in Chattanooga, Tennessee, where the company builds the Passat model.²³³ The plant has been in operation since 2011 and, despite an ongoing organizing campaign in Chattanooga, workers there are not represented by a union.

As is true of most large German firms, the corporate structure of both firms includes a supervisory board and a managerial board.²³⁴ Half of the supervisory board is comprised of employee representatives; stock owner representatives compose the other half.²³⁵ Under German law, the supervisory board appoints

222. *Company*, DAIMLER, <http://www.daimler.com/company> (last visited Sept. 1, 2013).

223. *Id.*

224. *See Locations in North and Central America*, DAIMLER, <http://www.daimler.com/dccom/0-5-8793-1-1382286-1-0-0-0-0-8-7145-0-0-0-0-0-0-0.html> (last visited Dec. 8, 2012).

225. *Company*, *supra* note 222.

226. *Mercedes-Benz Tuscaloosa Plant*, *supra* note 165.

227. *Id.* (follow "Facts and Figures" tab).

228. Stevis & Fichter, *supra* note 18, at 133.

229. *The Group*, VOLKSWAGEN, http://www.volkswagenag.com/content/vwcorp/content/en/the_group.html (last visited Dec. 8, 2012).

230. *Id.*

231. *Id.*

232. *Id.*

233. *Production Plants*, VOLKSWAGEN, http://www.volkswagenag.com/content/vwcorp/content/en/the_group/production_plants.html (last visited Dec. 8, 2012).

234. *Bodies*, DAIMLER, <http://www.daimler.com/company/corporate-governance/bodies> (last visited Jan. 25, 2013); *Senior Management*, VOLKSWAGEN, http://www.volkswagenag.com/content/vwcorp/content/en/the_group/senior_management.html (last visited Dec. 8, 2012). 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 (4th ed. 2008).

235. WEISS & SCHMIDT, *supra* note 234, § 630.

and supervises the managerial board of the firm.²³⁶ Employee representation in the firm's management accounts for German "co-determination."²³⁷

1. *What the IFAs Say*

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, when Daimler and Chrysler were merged.²³⁸ The Daimler World Works Council signed the IFA, according to the instrument, "on behalf of the International Metalworkers Federation ("IMF")."²³⁹ The IMF was the global union that preceded what today is known as IndustriAll global union.²⁴⁰

Daimler's IFA has explicit language regarding freedom of association and effective collective bargaining.²⁴¹ 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 executive will remain neutral*; the trade unions and the company will comply with basic democratic principles, and thus, they will ensure the employees can make a free decision. DaimlerChrysler respects the right to collective bargaining.

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.*²⁴²

Therefore, management pledged not merely to follow the ILO's core labor standards and acknowledged their source in human rights, but also to remain

236. *Id.*

237. BLANPAIN ET AL., *supra* note 121, at 603.

238. *Social Responsibility Principles of DaimlerChrysler*, INT'L METALWORKERS FED'N (Sept. 2002), <http://www.industriall-union.org/sites/default/files/uploads/documents/GFAs/Daimler/daimler-gfa-english.pdf>.

239. *Id.* at 4. I could not verify the exact reasons why the Daimler 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. *See id.* Please also note that an identical version of the agreement essentially corroborating the IFA's original language, but now only on behalf of Daimler, was more recently signed in February 2012 on behalf of Daimler and the World Employee Committee on behalf of IMF. *Principles of Social Responsibility at Daimler*, INT'L METALWORKERS' FED'N (Feb. 2012), <http://uawvance.org/wp-content/uploads/2012/12/IFA-document.pdf>. This Article, however, only analyzes the September 2002 agreement. *See Social Responsibility Principles of DaimlerChrysler*, *supra* note 238. The February 1, 2012, agreement has essentially the same language as the 2002 agreement. However, the 2012 agreement is too recent to evaluate its impact. *See id.*

240. *See About Us*, INDUSTRIAL GLOBAL UNION, <http://www.industriall-union.org/about-us> (last visited Jan. 31, 2013).

241. *Social Responsibility Principles of DaimlerChrysler*, *supra* note 238, at 2.

242. *Id.* (emphasis added).

“neutral” in an organization campaign. The company would even go beyond national laws if necessary to live up to freedom of association principles.

Volkswagen signed its IFA in 2002.²⁴³ The IFA was agreed to by Volkswagen, the IMF (today IndustriAll), and the Group Global Works Council of Volkswagen (Volkswagen Global Works Council).²⁴⁴ It was signed in Bratislava, Slovakia, perhaps to send a message to former Eastern bloc workers that the company wanted to include them in the global industrial governance of the firm.²⁴⁵

The IFA is short: a mere two pages, plus an additional few lines.²⁴⁶ While the document does not formally call itself an IFA, but rather a “Declaration on Social Rights and Industrial Relationships at Volkswagen,”²⁴⁷ it exhibits the components of an IFA.²⁴⁸ It was negotiated and signed by a multinational corporation, Volkswagen, and a global union, in this case IndustriAll’s predecessor, the IMF.²⁴⁹ The Volkswagen Global Works Council is also a party to the agreement.²⁵⁰ The IFA mentions “the Conventions of the International Labour Organisation” as “rights and principles” taken “into consideration” by the instrument.²⁵¹ The IFA also pledges to abide by the ILO’s core conventions regarding freedom of association, the absence of discrimination, free choice of employment, rejection of child labor, compensation, work hours, and occupational safety and health protection.²⁵² Regarding freedom of association, the IFA states: “The basic right

243. Jesper Nilsson, *IFA: Volkswagen*, INT’L METALWORKERS’ FED’N (Jan. 7, 2003), <http://www.imfmetal.org/index.cfm?l=2&c=7789>.

244. *Id.*

245. The history of Volkswagen’s attempts to establish a global governance regime for industrial relations, particularly its creation of an EWC before EU law mandated EWCs, is telling of its attempt to include former Eastern bloc workers in the firm’s industrial relations structures. Volkswagen very quickly established an EWC to establish cooperative relationships with its workers in Skoda and Seat, two auto manufacturers bought by and merged with Volkswagen in 1986 and 1991, respectively, and with its workers in the new Slovakian and East German plants in 1991. Ian Greer & Marco Hauptmeier, *Political Entrepreneurs and Co-Managers: Labour Transnationalism at Four Multinational Auto Companies*, 46 BRIT. J. INDUS. REL. 76, 89 (2008). One of the main interests of Volkswagen was to provide a system that can better ease plant restructuring at a global scale. *Id.*

246. *See Declaration on Social Rights and Industrial Relationships at Volkswagen*, INT’L METALWORKERS FED’N (June 6, 2002), <http://www.industriall-union.org/sites/default/files/uploads/documents/GFAs/Volkswagen/vweng.pdf>.

247. *Id.*

248. *See id.*

249. *Id.*

250. *Id.*

251. *Id.* at Preamble.

252. *Id.* The ILOs “[f]undamental” 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. *Conventions and Recommendations*, INT’L LABOUR ORG., <http://www.ilo.org/global/standards>

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 cooperative conflict management.”²⁵³ Therefore, Volkswagen guarantees workers the right to form unions and to establish a cooperative relationship with its employee representatives. Very few employers offer these guarantees to unions in the United States.

2. *Neutrality but Not Voluntary Recognition and Card Checks*

Exactly how Volkswagen and Daimler will ensure protection of freedom of association in the United States is unclear. The IFAs do not seem to incorporate voluntary recognition and card checks for American workers as the private security IFAs do. But they contain language that seems to bar employers from proactively opposing unions.²⁵⁴

The policy of German auto manufacturers regarding union recognition seems to be that they will remain “neutral” during the organizing drive.²⁵⁵ However, German automakers still seem to want a formal vote by the workers to demonstrate their support of the union as exclusive representative of the workers.²⁵⁶ These two German automakers do not seem to favor voluntary recognition and card checks for U.S. workers.²⁵⁷

/introduction-to-international-labour-standards/conventions-and-recommendations (last visited Jan. 22, 2013).

253. *Declaration on Social Rights and Industrial Relationships at Volkswagen*, *supra* note 246.

254. A management representative of one Volkswagen plant could not tell me whether the company would oppose the union or if the IFA included voluntary recognition and card checks because an organizing campaign was underway at Volkswagen’s Chattanooga plant. Interview with Wolfgang Fueter, Volkswagen Grp. Human Res. Int’l, in Wolfsburg, Ger. (Sept. 21, 2012) (on file with author). The company policy was not to comment on that ongoing campaign. *Id.* All he could say was that union recognition was an ongoing affair that was still being negotiated between the parties. *Id.* Daimler’s management refused to directly talk to me about the IFA. E-mail from Dr. Wolfram Heger, Senior Manager of Corporate Social Responsibility, Daimler AG, to author (Feb. 13, 2013) (on file with author). The company directed me to secondary sources cited herein. *Id.* Therefore, most of the information reported in this section regarding how the IFAs have been used comes from the viewpoints of German unions, IndustriAll Global Union, works council representatives, and secondary sources.

255. Jeff Ball, *UAW’s Reception in Alabama Mercedes Plant Is Sour*, WALL ST. J., Jan. 31, 2000, at A15.

256. *Id.*

257. But note that as this Article goes to press, recent developments in the Volkswagen Chattanooga plant suggest that the UAW believes that management may voluntarily recognize the union. Erik Schelzig & Tom Krisher, *UAW: Majority at VW Plant Have Signed Union Cards*, CBS DETROIT (Sept. 11, 2013, 10:32 PM), <http://detroit.cbslocal.com/2013/09/11/uaw-majority-at-vw-plant-have-signed-union-cards>. According to one news source, the UAW has declared that the majority of the Volkswagen employees in the Chattanooga plant have signed union cards. Even though the union has not requested recognition, it seems that it soon will do so. *Id.* I could not corroborate these facts because the UAW did not respond to my interview requests. Volkswagen could not provide further information. *See* E-mail from Wolfgang Fueter, Volkswagen Grp. Human Res. Int’l, to author (Sept. 10, 2013) (on file with author).

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.²⁵⁸ The UAW's President sat on the very influential supervisory board of the firm, half of whose members were employee representatives.²⁵⁹ Yokich raised complaints there, but to no avail.²⁶⁰

Today, even with the IFAs, German unionists and other industrial relations officers agree that IFAs do not necessarily support voluntary recognition and card checks for American workers. A retired officer of IMF and the German metalworkers union, IG Metall, who bargained the Volkswagen IFA, told me 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.²⁶¹ The former German union officer's comments were not just a stray remark. A current officer of IndustriAll told me that IFAs "secure the jobs of workers."²⁶² The employers pledge not to retaliate against union activists for engaging in union activity.²⁶³ Such pledges matter because in some countries, such as the United States, employers often fire union activists.²⁶⁴ 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.²⁶⁵ It does not, however, necessarily support voluntary recognition and card checks.²⁶⁶

A similar viewpoint was shared with me by an officer of the powerful German union IG Metall, which represents millions of metallurgical workers in Germany, including autoworkers.²⁶⁷ She told me that the IFAs clearly include language banning intimidation and union-busting tactics.²⁶⁸ 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.²⁶⁹

A member of the Volkswagen Global Works Council opined to me that the IFA clearly established "positive neutrality," meaning that Volkswagen would not

258. See Ball, *supra* note 255.

259. *Id.*

260. *Id.*

261. Interview with Robert Steiert, retired I.M.F. (today IndustriAll) and IG Metall union officer, in Switz. (July 10, 2012) (on file with author).

262. Interview with Helmut Lense, Dir., Auto. and Rubber, IndustriAll Global Union, in Geneva, Switz. (July 11, 2012) (on file with author).

263. Ball, *supra* note 255.

264. Interview with Helmut Lense, *supra* note 262.

265. *Id.*

266. *Id.*

267. Interview with Claudia Rahman, Int'l Dep't, IG Metall, in Frankfurt, Ger. (Sept. 3, 2012) (on file with author).

268. *Id.*

269. *Id.*

engage in antiunion tactics.²⁷⁰ Therefore, the company should not try to engage in union-avoidance techniques.²⁷¹ Workers should feel at liberty to speak about the union without fearing retaliation.²⁷² However, the IFA did not necessarily imply that management would facilitate unionization by providing voluntary recognition.²⁷³

In sum, German unionists and the Volkswagen Global Works Council member do not think that the IFAs include language that necessarily provides voluntary recognition and card checks for American workers. However, they think that they do include language that stops the employers from proactively (“positively”) engaging in union opposition, as is frequently done by employers in the United States. In this sense, the German auto IFAs provide less than what American labor unions may desire—voluntary recognition and card checks—but much more than what is required from employers by American labor law, which permits employer opposition during union elections.²⁷⁴

3. *Local Politics and the Limits of Employer Neutrality*

Because I failed to secure a response from the UAW for this Study, I am not completely certain how the IFA has been used to organize the workers at either Daimler or Volkswagen. Moreover, as reported above, management at Daimler refused to directly speak to me.²⁷⁵ Volkswagen could not provide any information to me about this matter because there was an ongoing union drive in the Chattanooga plant.²⁷⁶ The company’s policy was not to comment on that union effort.²⁷⁷

However, one can reasonably surmise how the IFA has been used by looking at the experience of UAW organizing in 1999, which was reported in newspapers, three years before the IFA was signed by the parties. The UAW at the time attempted to organize the Daimler Tuscaloosa plant.²⁷⁸ Even though the IFA did not then exist, Daimler took a “hands-off approach” and pledged neutrality during the organizing drive,²⁷⁹ which would very likely be the extent of its pledge today

270. Interview with Frank Patta, Works Council Member, Volkswagen Grp., in Wolfsburg, Ger. (Sept. 21, 2012) (on file with author).

271. *Id.*

272. *Id.*

273. The works council member acknowledged that he personally believed that the union should be organized in the simplest possible way—i.e., voluntary recognition through cards checks. *Id.* However, he thought that the agreement did not necessarily provide for voluntary recognition and card checks. *Id.*

274. *Id.*

275. *See infra* Appendix: List of Individuals Interviewed by Author for this Article.

276. Interview with Wolfgang Fueter, *supra* note 254.

277. *Id.*

278. Ball, *supra* note 255.

279. *Id.*

under the IFA given that the policy remains the same—neutrality but not voluntary recognition and card checks.²⁸⁰

In 1999, the union failed to organize the workers even though the employer remained neutral.²⁸¹ Perhaps because of this failure, the union today has attempted a new organizing strategy for the entire auto industry called the “Fair Union Elections” campaign.²⁸² As this Article goes to press, there is evidence suggesting that antiunion groups external to Volkswagen are organizing an antiunion campaign in Chattanooga. Below, I explain the 1999 failed bid to represent the Tuscaloosa workers and how it could have led to the current “Fair Union Elections” campaign. I also detail the ongoing organizing campaign in Chattanooga.

a. Organizing in Tuscaloosa and Chattanooga

In 1999, the UAW attempted to organize the Tuscaloosa plant, but it failed to obtain sufficient worker support.²⁸³ The company did not voluntarily recognize the union through card checks, but it did pledge to remain neutral and not to oppose the union during its organizing effort.²⁸⁴ However, as a *Wall Street Journal* report recounted, the surrounding business community near the Tuscaloosa plant decided to take the lead in an antiunion campaign when it realized that Daimler would remain neutral.²⁸⁵ The business community may have been worried about the power and influence that the UAW might bring with it, and about its capacity to change the probusiness and “union free” brand of Alabama.²⁸⁶ Whatever the reasons, the *Wall Street Journal* reported as follows:

[T]he Economic Development Partnership of Alabama, a private statewide business group, created a “Right to Work Foundation” which hired Jay Cole, a Chicago consultant with a successful record of helping employers in Alabama and around the country fight unionization efforts. Partnership officials told him that because of DaimlerChrysler’s²⁸⁷ neutrality pledge, “no one was assisting the folks in the plant who didn’t want to be unionized,” Mr. Cole says.

Mr. Cole flew to Alabama, where, he says, he spent several weeks with the group of workers who oppose the UAW. When the partnership’s role in the Right to Work Foundation was publicized, the partnership

280. *Id.*

281. *Id.*

282. See *UAW Principles for Fair Union Elections*, UAW, <http://www.uaw.org/page/uaw-principles-fair-union-elections> (last visited Dec. 6, 2012).

283. Ball, *supra* note 255.

284. *Id.*

285. *Id.*

286. *Id.*

287. At the time Daimler had merged with Chrysler Corporation, a relationship that lasted until 2007, when DaimlerChrysler changed its name back to Daimler. It sold its 19.9% share in Chrysler in 2009. *Company History*, DAIMLER, <http://www.daimler.com/dcom/0-5-1324891-1-1324904-1-0-0-1345593-0-0-135-0-0-0-0-0-0-0-0-0-0.html> (last visited Dec. 11, 2012).

disbanded the foundation in September, afraid of getting tagged with too nasty an antiunion image. Mr. Cole continued to work with the group of workers. Since then, Mr. Cole says, his bills were paid by the workers' group, which is called the Team Member Information Committee. The committee gets money partly from area businesses, members say.²⁸⁸

In this manner, the local business community and some Daimler workers in the Tuscaloosa area led the campaign against the union even though Daimler remained neutral.

According to the *Wall Street Journal*, part of what the antiunion campaign did was deliver messages to the workers stating that Daimler jobs could be threatened by UAW members from Detroit.²⁸⁹ One billboard read, "No UAW, Save our Jobs for Alabamians."²⁹⁰ According to the newspaper, the union never truly refuted those claims.²⁹¹ As a result, "Alabamians" could reasonably have had a basis for worry, even if not true.

While it is very difficult to ascertain, with the evidence presented in this article, whether the business community's opposition to unionizing the Daimler plant was a significant reason for the failed representation bid, it seems clear that there was a very "hostile terrain" against unionization in Tuscaloosa. The bottom line is that the UAW was not able to garner enough support from the workers.²⁹² The plant remains nonunion today.²⁹³

Similar to the Daimler experience, local public figures are making their voices heard against unionization in Chattanooga. In a recent article published by the *Chattanooga Times*, the former mayor of Chattanooga and current Republican Senator from Tennessee, Bob Corker, said that unionization of the plant would not help workers at the plant.²⁹⁴ He pleaded with Volkswagen not to bargain a contract with the UAW.²⁹⁵ As the *Chattanooga Times* reported:

"I certainly shared with [VW] I couldn't see how there was any possibility it could be a benefit to them to enter into a contract with UAW," said Corker, a former Chattanooga mayor.

He stressed he is not "anti-union" and said he often employed union craftsmen when he ran a construction company.

But the UAW "breeds an "us versus they" [sic] relationship, and I just don't think it's healthy for a company to be set up in that regard," Corker said.²⁹⁶

288. Ball, *supra* note 255.

289. *Id.*

290. *Id.*

291. *Id.*

292. Philip Mattera, *Daimler*, CORPORATE RESEARCH PROJECT, <http://www.corp-research.org/daimler> (last updated Sept. 30, 2012).

293. *Id.*

294. Andy Sher, *Corker to VW: No Union*, CHATTANOOGA TIMES, Nov. 28, 2010.

295. *Id.*

296. *Id.*

The union has become a political target of the state's senator and former Chattanooga mayor.

Despite the political opposition, the union alleged that it had majority support among the workers of the Chattanooga plant.²⁹⁷ Part of the union strategy to convince workers to join the union has been to seek a novel organizing model, one where the union would help to establish a German style works council at the plant.²⁹⁸ Volkswagen's Global Works Council has supported the UAW's efforts to organize a local works council in Chattanooga.²⁹⁹ The Global Works Council has also stated that it may condition its support of expanding production at the plant if employees establish a local works council.³⁰⁰

As a result of the organizing campaign, Bob Corker reiterated his opposition to the UAW with even more stringent words. As the *New York Times* recently reported, the Senator thought that such organizing was a "job-destroying idea." He even said that the German automaker would become the "laughingstock in the business world" if it recognized the union.³⁰¹ Five hundred and sixty-three employees of the plant, or about a third of the workforce, also signed a petition against union representation.³⁰² Finally, on October 16, 2013, Reuters reported that four employees of the plant, aided by the National Right to Work Legal Defense Foundation, filed charges in the NLRB alleging that Volkswagen officials were coercing them to agree to UAW representation.³⁰³ The charges claimed that the company's management conditioned jobs on the creation of a German-style works council with the collaboration of the UAW. As this Article goes to press, the saga continues.

In sum, Daimler and Volkswagen have union-free plants in the United States, in spite of the IFAs.³⁰⁴ Local political pressures have interfered in the UAW's unionization campaigns. It is perhaps for these reasons that the UAW has launched a public campaign to organize the U.S. South, which attempts to neutralize local political opposition and cooperate with management. Let us see what this strategy is all about.

297. See Associated Press, *Majority of Workers at Chattanooga VW Plant Have Signed Union Cards, UAW Says*, TIMES FREE PRESS, Sept. 11, 2013, available at <http://www.timesfreepress.com/news/2013/sep/11/majority-workers-chattanooga-vw-plant-have-signed-/?print>; Schelzig & Krisher, *supra* note 257. *But see* Epilogue (UAW lost election at Chattanooga).

298. See Schelzig & Krisher, *supra* note 257; Associated Press, *supra* note 297.

299. Andreas Cremer, *VW Labour Chief Backs UAW Union Bid for U.S. Works Council*, REUTERS, Oct. 7, 2013, available at <http://www.reuters.com/article/2013/10/07/us-vw-uaw-idUSBRE9960N120131007>.

300. See *id.*; Jack Ewing & Bill Vlasic, *VW Plant Opens Door to Union and Dispute*, NY TIMES, Oct. 11, 2013, at B1, available at <http://www.nytimes.com/2013/10/11/business/vw-plant-opens-door-to-union-and-dispute.html?smid=tw-share&pagewanted=print>.

301. *Id.*

302. See *id.*; see also Cremer, *supra* note 299.

303. Bernie Woodall, *Tennessee VW Workers Say Company Coercing Them to Join UAW*, REUTERS, Oct. 16, 2013, available at <http://www.reuters.com/article/2013/10/16/us-autos-volkswagen-uaw-idUSBRE99FORZ20131016>.

304. *But see* Epilogue *infra*. p. 779.

b. The UAW's Fair Election Campaign

As we saw above, there is significant local opposition to the union in Tuscaloosa and Chattanooga, mostly from the business community, but also from some workers. Perhaps as a result, the UAW has taken a different strategy in seeking to organize workers in the U.S. South. Its campaign is called the "Fair Union Elections" campaign.³⁰⁵ It calls for employer neutrality during the representation process, access to the workplace, and even partnering with the employers against antiunion forces from the surrounding communities.³⁰⁶

The Fair Union Elections campaign is based on a number of principles. These principles include the ideas that the right to organize is a fundamental human right, that the employer will not intimidate or threaten workers engaged in union activities or union activists, that management and labor will not make wage or benefit promises to workers, that management must provide equal access to the union if it calls for mandatory meetings regarding unionization, that management and labor will disavow any negative messages made from community allies, and that the union and employers will not make disparaging remarks about each other, among others.³⁰⁷

There is no evidence suggesting that either Volkswagen or Daimler have officially endorsed the UAW's Fair Union Elections campaign principles. However, the remarks of German union officers and works council members discussed above seem consistent with the principles. These principles could also become the source for viable labor-management cooperation in the United States when firms sign IFAs. Importantly, the Fair Union Elections campaign shows that there may be more obstacles to union organizing than mere employer opposition. Voluntary recognition agreements and IFAs seem to require a viable political environment to make them successful. At the same time, IFAs can help create labor-management coalitions that could enable such political conditions to prosper. We will need to wait a while, however, to see whether employers accept the Fair Union Elections campaign principles and whether labor-management cooperation will improve the local political conditions.

c. Economics Also Hurt Organizing in the Auto Transplants

As if the politically "hostile terrain" did not already provide sufficient challenges to organized labor in the German transplants, the economics of organizing, as in private security, seem to make the situation more uphill for

305. *UAW Principles for Fair Union Elections*, *supra* note 282.

306. As the Principles state:

Management will explicitly disavow, reject and discourage messages from corporate and community groups that send the message that a union would jeopardize jobs. Likewise, the UAW will explicitly disavow, reject and discourage messages from community groups that send the message that the company is not operating in a socially responsible way.

Id.

307. *Id.*

organizing workers. Publicly available data provided by the Center for Automotive Research (CAR), an independent industry research organization, show that the hourly labor costs of Ford, GM, and Chrysler in 2011 were \$58, \$56, and \$52 per worker, respectively, while being only \$38 at Volkswagen.³⁰⁸ Some may be led to think that the lower labor costs at Volkswagen could be attributed to Volkswagen's nonunion condition, which lets the company pay lower wages to its workers. However, Volkswagen pays its entry-level workers, which includes almost all of its workers given that the plant is only two years old, about \$18 an hour.³⁰⁹ The Big Three pay their entry-level workers, all covered by UAW contracts, about \$16 an hour.³¹⁰ The reason why labor costs are higher at the Big Three is that most of their workers are not entry-level workers.³¹¹ Senior workers make much higher wages at the Big Three.³¹² Whether or not such seniority transfers into higher productivity is something that I could not corroborate. The fact remains, however, that the Volkswagen workers are paid more than their equals in the Big Three. As a result, Volkswagen workers may have little incentive to unionize. Perhaps because of these economic constraints, the UAW has centered its organizing drive in Chattanooga not on wages, but on expanding employee voice through the creation of a works council at the plant.

To summarize, Daimler and Volkswagen have pledged neutrality during union campaigns in their IFAs.³¹³ They seem to have kept their pledges. They have not voluntarily recognized the UAW, but they have not opposed unions at the workplace.³¹⁴ However, the UAW has still been unable to organize either plant.³¹⁵ A politically hostile terrain against unions in the states where Daimler and Volkswagen operate, Alabama and Tennessee, seems to be putting serious pressures against auto organizing. Such hostile political forces take the shape of business community-led antiunion campaigns,³¹⁶ and attacks on unions by high-level political figures, such as U.S. Senator Bob Corker in Chattanooga.³¹⁷ The economics also do not seem to help the unions. In Volkswagen, practically all workers are entry-level and have higher wages than their peers in the Big Three.³¹⁸ Below, I will explain the possibility of organizing autoworkers with the IFAs despite these challenges.

308. CTR. FOR AUTO. RESEARCH, 2011 DETROIT 3—UAW LABOR CONTRACT NEGOTIATIONS (2011), available at <http://www.cargroup.org/?module=Publications&event=View&pubID=36>.

309. E-mail from Kristin Dziczek, *supra* note 23.

310. *Id.*

311. *Id.*

312. *Id.*

313. See *Declaration on Social Rights and Industrial Relationships at Volkswagen*, *supra* note 246; *Social Responsibility Principles of DaimlerChrysler*, *supra* note 238.

314. See Ball, *supra* note 255.

315. See Mattera, *supra* note 292.

316. See Ball, *supra* note 255.

317. See Sher, *supra* note 294.

318. See E-mail from Kristin Dziczek, *supra* note 23.

IV. DISCUSSION: SUGGESTIONS FOR FURTHER RESEARCH AND EXPERIMENTATION

This Article is mainly concerned with what we can learn from an empirical investigation about IFAs as organizing tools, particularly given what theory tells us about organizing: that legal, economic, and political conditions may heavily affect union organizing.³¹⁹ My interviews of mostly global and company leaders were intended to be exploratory and to provide a bird's-eye view of these agreements. The bird's-eye view helped us to see that the principles of freedom of association and effective collective bargaining in the IFAs are intended to assure that employers, at a minimum, will not oppose unions during organizing drives.³²⁰ This is a significant advancement in cooperative labor-management relations. Under U.S. labor law, employers can oppose unions during union elections, creating situations in which unions believe that workers cannot make a free choice regarding unionization.³²¹ The language of the Daimler agreement clearly calls for employer "neutrality."³²² The language in the private security IFAs goes even further to state that employers will recognize unions under the "minimum legal requirements,"³²³ which in the United States has meant voluntary recognition and card checks.³²⁴ All of these principles advance union recognition in the United States. Therefore, we can hypothesize as follows:

Hypothesis 1: if IFAs are construed as global neutrality pacts between employers and unions, the likelihood of unionization of the firm's workers increases.

However, the bird's-eye view of IFAs provided by this Study also suggests that there may be gaps between the commitments in the IFAs and actual union organization outcomes. Organizational inroads have not been deep. Economic and political conditions still seem to place obstacles to union organizing even when the employer remains "neutral" during a union drive or even when it has pledged to voluntarily recognize the union.³²⁵ Therefore, we can also hypothesize the following:

Hypothesis 2: even with the presence of IFAs, if employers exist in free market arrangements and can easily replace union workers, the likelihood of unionization will be significantly diminished.

Hypothesis 3: even with the presence of IFAs, if local political opposition to unions is strong, the likelihood of unionization will be significantly diminished.

Further empirical research, including interviews of American union organizers that have actually used the agreements in the United States, participant observation during union campaigns that have used the agreements, and survey

319. See WESTERN, *supra* note 96, at 30.

320. See Ball, *supra* note 255.

321. See UAW Principles for Fair Union Elections, *supra* note 282.

322. See Social Responsibility Principles of DaimlerChrysler, *supra* note 238.

323. *Id.*

324. Brudney, *supra* note 64, at 832.

325. COMPA, *supra* note 27, at 17–39.

research that can generalize to the population of all IFAs, could prove useful to test how economic and political conditions impact workers' organizational activities on the ground.

But assuming that my bird's-eye view is not entirely blurred and the last two hypotheses stated above are accurate, we still should not conclude that IFAs are useless. Organizers use the IFAs strategically, as part of comprehensive campaigns that consider economic and political conditions. For example, they can use IFAs to organize unions that require less worker power, the so-called "minority unions," as explained below.³²⁶ Given the spirit of cooperation enshrined in IFAs, these minority unions should be respected by management as bargaining agents of their members. Workers who join them can help to promote industrial democracy in the United States. Moreover, IFAs can be used to support strikes, pickets, and similar industrial actions. Industrial action is liberally supported by the international standards contained in the IFAs³²⁷ but not by U.S. labor law,³²⁸ as explained below. If the signatory employers respect their obligations under the IFAs—which can be guaranteed through global solidarity, principally through pressure exerted by signatory global unions, the national unions in the home country of the signatory firms, and works councils—then these agreements could be used to organize minority unions with significant rights to engage in industrial action. These minority unions "on steroids"—cooperative with management but capable of engaging in assertive industrial action when needed—would be a dramatically new organizational form for workers in the United States.

But before turning to further options that could advance the use of IFAs for organizing purposes, one should consider the possibility that there simply may be no problem here. That is, all four employers studied here seem to have remained committed to their neutrality obligations, for the most part. If workers decided not to join the union, one might conclude that the workers did not want to. End of story?

Not quite. Even if there is a minority of workers who want to bargain collectively with the employer, they should have the right to do so. That is the international standard, as explained in the next section. Moreover, to the extent that the nonunion employers are paying below the union contract terms, there is a very serious problem. When nonunion employers do not pay the union contract wage, industry wages are depressed, hurting all workers, union and nonunion.³²⁹ Under such conditions, unions' capacity to promote economic equality, a "public good,"³³⁰ is diminished. Minority unions "on steroids," supported by the IFAs, could also help begin a process for wage equalization in the industry.

326. See *infra* note 331–332 and accompanying text.

327. See *infra* note 331–332 and accompanying text.

328. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 682–83 (1981).

329. Martin, *supra* note 99, at 513; see *supra* text accompanying note 99.

330. Public goods are goods enjoyed by everyone. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 14–15 (1965). By their

A. IFAs Can Support Organization if Used to Seek Recognition of Minority Unions

One of the problems that some unions may confront, even when employers sign IFAs or other kinds of neutrality or voluntary recognition agreements, is that a majority of the workers still do not support the union. This may be the situation in the transplant auto plants, for example, especially as a result of political and economic forces that lower incentives for workers to join unions.³³¹ In this context, to further union membership, unions could request that nonunion employers who have signed IFAs bargain with “minority unions” for “members-only” contracts. Minority unions are useful when unions lack majority support. Minority unions cannot bargain on behalf of all the employees of the employer, as “exclusive representation” unions can, but they can bargain on behalf of the union members.³³²

Under international labor standards, employers have the duty to bargain with a group of workers, regardless of their minority status, to the extent that there is no certified or recognized exclusive representative.³³³ Denying workers the right to bargain collectively merely because they are a minority violates freedom of association principles.³³⁴ The ILO has been clear that minority unions should have the right to bargain with employers when there is no majority union. As the Freedom of Association Committee of the ILO has stated:

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 its own members.³³⁵

Employers should thus bargain with a minority union in the absence of an exclusive representative.

Hence, the pledges in the IFAs favoring the ILO’s recognition of freedom of

definition, public goods cannot be feasibly withheld from anyone in the group that uses or consumes the good, even those who do not pay for it, as is the case with non-public goods. *Id.* at 14–16. The non-exclusionary nature of public goods creates incentives for individuals to “free ride.” *Id.* at 36–62. Hence, groups that produce public goods must create “selective incentives” to support group membership and curb free riding. *Id.* at 60–65. Such incentives for group membership can be negative or positive. *Id.* at 14–15, 51. The present American model of exclusive representation and payment of union fees through dues check-off provides a negative sanction—exclusion from employment—from union membership. *Id.* at 133–41.

331. See Ball, *supra* note 255; Sher, *supra* note 294.

332. See MORRIS, *supra* note 76, at 84–88.

333. *Id.* at xvi, 88, 151.

334. *Id.* at 99.

335. Freedom of Association and Collective Bargaining: International Labour Conference 81st Session, 1994 (Geneva: International Labour Office, 1994) at ¶ 241.

association as a core labor right³³⁶ provide a foundation from which the signatory employers can be compelled to bargain collectively with a minority union in the United States. This leads us to our fourth hypothesis:

Hypothesis 4: IFAs increase the likelihood that an employer will recognize a minority union in the United States.

We should recognize that minority unions could be stepping-stones to full exclusive representation.³³⁷ Professor Charles Morris has shown that “members only” contracts were common prior and shortly after the enactment of the Wagner Act.³³⁸ Unions, including the UAW, used minority representation, or members’ only agreements, as the first step towards exclusive representation when they initially did not have majority support from the workers.³³⁹ Unions should think about how to use this strategy to better build an organizational foundation from which full, exclusive, representative unions can be developed. What better way than with an instrument that pledges to live by the ILO’s core labor standards?

B. IFAs Can Support Industrial Action and Solidarity

Recall the Ikea story from the beginning of this Article. At least one media outlet reported that some forces in Sweden wanted Ikea workers to strike against the firm in Sweden if the firm continued to deny collective bargaining rights to their American workers.³⁴⁰ The firm stopped its antiunion tactics shortly thereafter.³⁴¹ Therefore, industrial action can play an important role in organizing campaigns.

However, strike rights in the United States are very limited. Under current federal labor law, strikes are effectively unprotected. Employers may “permanently replace” economic strikers.³⁴² One of the reasons permanent striker replacements

336. See *BWT: IKEA*, *supra* note 11.

337. MORRIS, *supra* note 76, at 88, 151.

338. *Id.* at 81.

339. *Id.* at 84–85.

340. Perius, *supra* note 17.

341. Korsell, *supra* note 16.

342. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345–46 (1938). When employers permanently replace striking workers, they are not necessarily dismissing them. *Id.* at 345. Rather, employers replace a striker and that replacement may remain on the job permanently. *Id.* at 345–46. Strikers always retain their employee status. *Id.* at 346. The employer must return them to work, but only after a position has opened up for the striker. *Id.* As the U.S. Supreme Court stated, in dicta: Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although section 13 of the act, 29 U.S.C.A. § 163, provides, “Nothing in this Act [chapter] shall be construed so as to interfere with or impede or diminish in any way the right to strike,” it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as

hurt unions today is that employers replace economic strikers and then call for decertification elections, with remarkable effectiveness.³⁴³ Because strike replacements destroy unions, there were attempts to statutorily reverse *NLRB v. Mackay Radio*,³⁴⁴ which determined that economic strike replacements did not violate the federal labor law. While the strike bill passed in the House of Representatives in the early 1990s, it could not survive a Senate filibuster.³⁴⁵

The ILO, on the other hand, has determined that the American rule in favor of permanent strike replacements violates workers' freedom of association and effective collective bargaining rights.³⁴⁶ As Professor Lance Compa and former NLRB General Counsel Fred Feinstein have argued, employers who permanently replace workers threaten to undermine workers' free exercise of trade union rights.³⁴⁷ Therefore, employers who voluntarily agree to live up to the ILO's freedom of association principles should not permanently replace employees who go on strike.

With protected strike rights, workers of IFA signatory firms should have

there were vacant places to be filled. But the claim put forward is that the unfair labor practice indulged by the respondent was discrimination in reinstating striking employees by keeping out certain of them for the sole reason that they had been active in the union. As we have said, the strikers retained, under the act, the status of employees. Any such discrimination in putting them back to work is, therefore, prohibited by § 8.

Id. at 345–46 (citation omitted).

343. Normally, the employer will bargain to impasse. *See* JULIUS GETMAN, *THE BETRAYAL OF LOCAL 14*, at 31–40 (1998). Then it will unilaterally implement terms and conditions of employment. *See id.* at 40. This may force the union to call a strike. *See id.* The employer will then replace the striking workers and files for a decertification election. *See id.* at 192–200. The practice has proven devastating in key cases. *Id.* at 224–28; *see also* KENNETH G. DAU-SCHMIDT ET AL., *LABOR LAW IN THE CONTEMPORARY WORKPLACE* 614 (2009).

344. *Mackay Radio*, 304 U.S. at 345–46.

345. GETMAN, *supra* note 343, at 102–04. Even though merely dicta, the *Mackay* proclamation that employers may permanently replace striking workers as a matter of absolute right to run the business has been accepted by the courts to be the correct interpretation of the NLRA. ELLEN DANNIN, *TAKING BACK THE WORKERS' LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS* 86–88 (2006) (describing that even though the NLRA protects the right to strike in section 13 and is silent about strike replacements, the Supreme Court found it evident that employers can permanently replace striking workers to keep the firm going); James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 530–34 (2004) (discussing how the Supreme Court's dictum in *Mackay* resulted from implicit assumptions that employers have a Fifth Amendment right to hire employees).

346. As the ILO has stated:

The right to strike is one of the essential means through which workers and their organisations may promote and defend their economic and social interests. The Committee considers that this basic right is not really guaranteed when a worker who exercises it legally runs the risk of seeing his or her job taken up permanently by another worker, just as legally. The Committee considers that, if a strike is otherwise legal, the use of labour drawn from outside the undertaking to replace strikers for an indeterminate period entails a risk of derogation from the right to strike which may affect the free exercise of trade union rights.

ILO, Comm. on Freedom Ass'n, Complaint Against the Government of the United States Presented by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), Report No. 278, Case No. 1543, ¶ 92 (1991); *see also* Compa & Feinstein, *supra* note 113, at 641 n.5.

347. Compa & Feinstein, *supra* note 113, at 641 n.5.

added tools to back their collective interests, particularly when negotiating first contracts. Workers with added collective rights to strike will be more effective to pursue their own interests. More effective unions will also be noticed by nonunion employees, giving added legitimacy to unions. IFA-covered employees could organize minority unions with augmented strike rights—a novel organizational form for working-class collective representation in the United States. This leads us to our fifth set of hypotheses:

Hypothesis 5a: employees of an employer that has signed an IFA are less likely to be permanently replaced during a strike.

Hypothesis 5b: if strikers are not permanently replaced by an employer that has signed an IFA, the striking employees will be more likely to effectively press their collective demands at work.

Hypothesis 5c: if workers and unions are more effectively pressing their demands at work, it is more likely that nonunion workers will recognize the legitimacy of unions as worker representatives, increasing the likelihood of unionization in the plant.

Of course, convincing employers not to permanently replace striking workers, when they have the legal right to do so in the United States,³⁴⁸ may be difficult when economic losses loom in the horizon as the result of a strike. Lance Compa and Fred Feinstein have expressed serious misgivings about naïve beliefs that employers who have expressed support for international labor norms will easily live up to their commitments when embroiled in real industrial disputes.³⁴⁹ This is when solidarity may be of help.

IFAs will be as good as workers' global solidarity. Recall again the Ikea case that opened this Article. In that case, the Swedish workers who originally pressured and compelled Ikea to sign the IFA put continued pressure on the firm so that it would live up to its global commitments.³⁵⁰ As explained earlier, IFAs are part of “continuing bargaining processes” between the firms and the national unions and works councils that lie behind the IFAs.³⁵¹ It is up to the signatory parties in the home countries of the global firms to police compliance of IFA norms. I cannot be more emphatic about this point: transnational solidarity will be fundamental for effective compliance of the IFAs. This takes us to our next hypotheses:

Hypothesis 5d: if the parties who bargained and signed the IFA (national unions and works councils in the signatory firm's home country) police the IFA assertively, then

348. *Id.* at 640–41.

349. *Id.* at 641 (discussing how even though many European firms have signed statements pledging to live by international labor standards incompatible with parts of American labor laws which do not protect workers, such as the doctrine of permanent strike replacements, “[they] are likely to wait in vain” before any of those companies condemn permanent strike replacements in the United States).

350. Stevis & Fichter, *supra* note 18, at 686.

351. Fichter & Helfen, *supra* note 106, at 88–89; Schömann, *supra* note 122, at 21–27.

the probabilities of effective compliance with the IFA at a global level will increase, further increasing the likelihood of unionization in the plant.

Some may also argue that compliance could be compelled through the courts. However, as explained earlier, there is an open question regarding the legal status of IFAs as legally binding and enforceable instruments.³⁵² Moreover, it is my opinion that the promise of enforcement through law pales in comparison to that offered by industrial action even if the IFAs were legally enforceable. First, employers would likely stop making global commitments in IFAs if they risked legal liability across the globe. Second, the historical record has shown that courts' protection of labor rights is fickle. In the United States, courts have readily undermined collective labor rights when issues of property rights percolate into cases and controversies.³⁵³ In recent times, the Supreme Court has even taken the task of making policy and creating hierarchies of law, giving, for example, more importance to strict adherence to immigration law than to worker protections.³⁵⁴ National security has also been used to undermine workers' rights.³⁵⁵ Narrow readings of procedural rules have also been used by the Supreme Court to undermine collective action lawsuits involving workplace equality.³⁵⁶ Things are not better elsewhere. In the EU, the European Court of Justice seems to favor market freedoms over labor rights.³⁵⁷ While "hard" law could be used to compel employers to live up to their IFA commitments, solidarity and collective action seem as necessary as ever.

C. IFAs Can Be Used as Political Tools

The UAW's Fair Elections Campaign, described above, is a creative and bold initiative that attempts to build a political alliance with employers that pledge to follow internationally recognized freedom of association principles against political

352. See Coleman, *supra* note 111, at 634; Goldman, *supra* note 5, at 632–34.

353. See JAMES B. ATLESON, VALUES AND ASSUMPTIONS OF AMERICAN LABOR LAW 8–9 (1983); DANNIN, *supra* note 345, at 58–59; Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, (1978).

354. See Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, the New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1, 2–7 (2003).

355. Ruben J. García, *Labor's Fragile Freedom of Association Post-9/11*, 8 U. PA. J. LAB. & EMP. L. 283, 284 (2006).

356. See Michael J. Zimmer, *Wal-Mart v. Dukes: Taking the Protection Out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409, 437–39 (2012); Martin H. Malin, *The Employment Decisions of the Supreme Court's 2012–13 Term*, ABA J. LAB. EMPL. L. (2014).

357. See RECONCILING FUNDAMENTAL SOCIAL RIGHTS AND ECONOMIC FREEDOMS AFTER VIKING, LAVAL AND RÜFFERT 3–18 (Andreas Bückler & Wiebke Warneck eds., 2011). For a historical and comparative account of the role of courts and labor rights see OTTO KAHN-FREUND ET AL., KAHN-FREUND'S LABOUR AND THE LAW 12–13 (3d ed. 1983) (discussing how courts should play a limited role in safeguarding workers' rights given the way that courts historically favor employers.); K.W. WEDDERBURN, THE WORKER AND THE LAW 24 (2d ed. 1981) (discussing how courts were inimical to trade unions in Great Britain, leading unions to advocate for nonintervention of the state in industrial relations).

forces that do not follow such principles.³⁵⁸ As discussed above, theory tells us that antiunion politics create serious difficulties for union growth.³⁵⁹ The UAW has experienced such antiunion politics in the U.S. South.³⁶⁰ The union's campaign seems to aim at political targets through a political coalition with employers who pledge to live by the principles of freedom of association and effective collective bargaining.³⁶¹ We will need some time before we can evaluate the fruits of the campaign. Inevitably, however, this discussion leads us to our sixth set of hypotheses:

Hypothesis 6a: if an employer has signed an IFA, there is an increased likelihood that the employer will collaborate with the union to defend internationally recognized principles of freedom of association and effective collective bargaining from attack by local and national political forces.

Hypothesis 6b: if an employer and a union collaborate to defend freedom of association and effective collective bargaining, there will be a diminished likelihood of a politically "hostile terrain" for unions.

Hypothesis 6c: if there is a diminished likelihood of a politically "hostile terrain" for unions, the likelihood of unionization in the plant increases.

A different and more complicated scenario seems to exist in the security services industry. The traditional industrial action strategy for the organization of security guards would entail already unionized employees, such as union doormen and janitors, striking and picketing buildings whose security firms hire nonunion security guards or do not pay the wages and provide the terms and conditions of employment provided for in union contracts. Such solidarity actions could help the security workers and their unions compel the building owners, the end users, to hire unionized security firms.

However, under the present interpretation of the Taft-Hartley limitations on secondary activity, such strikes could be considered "secondary" and in violation of the Act.³⁶² And yet, the "fortuitous business arrangement" caused by "contracting out" work, which creates situations where union and nonunion workers are compelled to work side-by-side,³⁶³ undermining the power of the

358. See *UAW Principles for Fair Union Elections*, *supra* note 282.

359. *Supra* Part I.C.

360. *Supra* Part III.B.3.

361. See *UAW Principles for Fair Union Elections*, *supra* note 282.

362. See *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 677 (1951) (holding that a labor organization commits an unfair labor practice within the meaning of section 8(b)(4) by engaging in a strike, an object of which was to force the general contractor on a construction project to terminate its contract with a certain subcontractor on that project). In this manner, for example, union doormen and janitors of a certain building would commit an ULP if they strike the building owner with the purpose of compelling the building owner to fire a nonunion security firm and hire a union security firm.

363. This was precisely Justice Douglas's reason for dissent in *Denver Building & Construction Trades Council*. *Id.* at 692–93 (Douglas, J., dissenting). As Justice Douglas stated:

The picketing would undoubtedly have been legal if there had been no subcontractor involved—if the general contractor had put nonunion men on the job. The presence of a

union and workers' capacity to act in concert, remains a reality that goes against the principles of the NLRA and international norms.³⁶⁴ Professor Ellen Dannin has proposed that labor's reinvigoration requires "taking back the workers' law," the NLRA, through a litigation strategy aimed at convincing the courts to reverse decisions that contradict the stated purposes of the labor law.³⁶⁵ Such strategies are beyond the purview of this Article on IFAs. However, we can conclude that there are real limits regarding the promise of IFAs in the private security industry given the "hard" rules against worker collective action in the United States and the prevalence of free markets.³⁶⁶ In this manner, and as suggested by Hypothesis 2, IFAs could be useful, but only when workers can muster structural power, e.g., when they have power resources that exist outside of law. It's hard to escape the economics of unionism.

CONCLUSION: EXPLORING AND EXPERIMENTING WITH SOLIDARITY

The conclusion that we inevitably reach here is that IFAs, construed as neutrality or voluntary recognition and card check agreements, are not direct tickets to union recognition and collective bargaining. Economic, political, and "hard" legal realities pose significant obstacles to union organization, even after an employer has pledged not to oppose the union. I have suggested a number of ways in which the IFAs could be used to challenge some of those obstructions, namely by organizing minority unions with full strike rights and collaborating politically with signatory employers, where practicable, following the initial attempts of the UAW. My suggestions may or may not work. Further research and experimentation with IFAs will be required to better comprehend the effectiveness of these instruments.

To conclude, while the successes of IFAs are limited, unions have not exhausted the global agreements' possibilities as organizing tools. Amidst diminishing union membership, globalization, a restrictive labor law, and a revival of antiunion policies, such as right-to-work laws in U.S. states, IFAs offer something to American workers. They provide an opportunity to experiment with solidarity.

subcontractor does not alter one whit the realities of the situation; the protest of the union is precisely the same. In each the union was trying to protect the job on which union men were employed. If that is forbidden, the Taft-Hartley Act makes the right to strike, guaranteed by § 13, dependent on fortuitous business arrangements that have no significance so far as the evils of the secondary boycott are concerned. I would give scope to both § 8(b)(4) and § 13 by reading the restrictions of § 8(b)(4) to reach the case where an industrial dispute spreads from the job to another front.

Id.

364. The NLRA states in relevant part that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." 29 U.S.C. § 157 (2012).

365. See DANNIN, *supra* note 345, at 86–88.

366. *Id.*

EPILOGUE

During the time that this Article was being revised by the *UC Irvine Law Review*, the UAW filed for a union election in Chattanooga.³⁶⁷ It lost the election.³⁶⁸ State and local politicians put up a very aggressive campaign against the UAW, despite Volkswagen's neutrality, including threats to withhold state funds previously promised for the Volkswagen plant.³⁶⁹ Despite its loss, the UAW insisted that it would create a "works council" with management at the firm.³⁷⁰ I received off-the-record communications informing me that UAW advisors were studying the possibility of establishing a "members-only," minority union in Chattanooga as part of a strategy to create the "works council." I could not confirm these claims. However, the evidence on the ground in Chattanooga suggests what this Article predicted: that the collaborative, internationally-influenced industrial relations, such as those in IFAs, backed by labor solidarity abroad, may facilitate alternative forms of union organizing in the United States.

367. Jan Schwartz and Andreas Cremer, *VW Works Council Says Will Pursue Labor Representation at U.S. Plant*, REUTERS (Feb. 16, 2014), <http://www.reuters.com/article/2014/02/16/us-vw-chattanooga-idUSBREA1F0A920140216>.

368. *Id.*

369. Gary Casteel, *Casteel: UAW committed to VW workers*, TIMESFREEPRESS.COM (Apr. 29, 2014), <http://timesfreepress.com/news/2014/apr/29/uaw-committedto-vw-workers/?opinioncolumns>.

370. Schwartz and Cremer, *supra* note 367.

Appendix A:
List of Individuals Interviewed By Author For This Article

Interviewed In Person

Alice Dale, Property Services, UNI Global Union, Nyon, Switzerland (July 9, 2012).³⁷¹

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

Göran Larsson, International Secretary, Swedish Transport Workers Union, Stockholm, Sweden (June 25, 2012).

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

Lars Lindgren, President of the Transport Workers Union of Sweden, (June 25, 2012).

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

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

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

Interviewed By Telephone

Thomas Balanoff, President of SEIU Local 1, Chicago and President of the Property Services Division of SEIU, Chi., Ill. (July 19, 2012).

Individuals Who Only Answered E-mail Questions For This Article

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

Kevin O'Donnell, SEIU Communications (January 24 and 29, 2013)

Theresa White, International Employee Relations of G4S (Sept. 27, 2012)

Organizations That Refused to Participate in this Study

Daimler management (information obtained through secondary sources)

Securitas management (information obtained through secondary sources)

371. Only follow-up e-mail from interview cited in this Article.