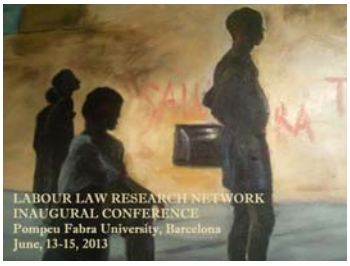


# ORGANIZING UNIONS IN THE U.S. WITH INTERNATIONAL FRAMEWORK AGREEMENTS: AN EXPLORATORY STUDY

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# ORGANIZING WITH INTERNATIONAL FRAMEWORK AGREEMENTS: WHY THE CASES OF PRIVATE SECURITY AND AUTO LEAD US TO CONSIDER MINORITY UNIONS "ON STEROIDS"[*]

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**ABSTRACT**

*In the U.S., 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 to not oppose workers who want to organize. Can a global employer's pledge to not oppose workers' organization facilitate their unionization? I interviewed union and multi-national 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' 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 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 and secondary activity rights –or what I call minority unions "on steroids." 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 to fight the boss, would be built on cooperation. They should enable mature industrial relations to flourish. While far from entirely resolving labor's woes, minority unions on steroids backed by global solidarity can provide a new platform to help reorganize the American working class in the 21st century.*

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## I. INTRODUCTION:

## WHAT CAN WE LEARN FROM A STUDY OF INTERNATIONAL FRAMEWORK AGREEMENTS AND UNION ORGANIZATION IN THE U.S.?

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 U.S., an

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[1] *At Ikea's Only U.S. Factory, Workers Vote to Join Union*, THE N.Y. TIMES, July 28, 2011, at B5, *available at* http://www.nytimes.com/2011/07/28/business/at-ikeas-only-us-factory-workers-vote-to-join-union.html?_r=0 (last visited Feb. 4, 2013).

[2] U.S. Census, State & County Quick Facts, Danville City, Virginia, *available at* http://quickfacts.census.gov/qfd/states/51/51590.html (last visited Feb. 4, 2013).

[3] *At Ikea's Only U.S. Factory, Workers Vote to Join Union*, THE N.Y. TIMES, July 28, 2011, at B5, *available at* http://www.nytimes.com/2011/07/28/business/at-ikeas-only-us-factory-workers-vote-to-join-union.html?_r=0 (last visited Feb. 4, 2013).

[4] International Association of Machinists, *IAMIU Makes Headlines in Stockholm, available at* http://www.goiam.org/images/articles/headquarters/departments/woodworkers/microsoft%20word%20-%20iamaw%20makes%20news%20in%20stockholm.pdf (last visited Feb. 4, 2013).

[5] Soft law generally refers to "law" that is not enforceable through state institutions, but requires collaboration by the parties. 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* at 24.

"International Framework Agreement" (hereinafter referred to as an "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 effective collective bargaining."[9] 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]

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[6] To date there are 11 global unions representing workers from different global industries. *See* GLOBAL UNIONS, WHO ARE GLOBAL UNIONS?, *available at* http://global-unions.org/about-us.html?lang=en (last visited Dec. 4, 2012).

[7] Konstantinos Papadakis, *Introduction and Overview, in* SHAPING GLOBAL INDUSTRIAL RELATIONS: THE IMPACT OF INTERNATIONAL FRAMEWORK AGREEMENTS, 1-18, 5 (Konstantinos Papadakis ed., 2011).

[8] The ILO is:

> [T]he international organization responsible for drawing up and overseeing international 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.

ILO, About the ILO, *available at* http://www.ilo.org/global/about-the-ilo/lang--en/index.htm (last visited Feb. 4. 2013).

[9] Papadakis, *supra* note 8, at 2.

[10] 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, 685-686 (2012).

[11] The Ikea IFA states in relevant part that,

> Both 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).

One of the rights associated with the "eight core conventions" is freedom of association and effective collective bargaining. ILO, The International Labor Organization's Fundamental Conventions 7-22, *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_095895.pdf (last visited Feb. 4, 2013). The relevant conventions related to freedom of association and effective collective bargaining are ILO Conventions 87 and 98. *Id*.

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. The media in Sweden widely reported Swedwood/Ikea's opposition to the union.[14] 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.[15]

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[12] ILO, *ILO Declaration on Fundamental Principles and Rights to Work, available at* http://www.ilo.org/declaration/lang--en/index.htm (last visited Feb. 4, 2013).at

[13] International Association of Machinists, *supra* note 5. For a full description of employer union avoidance strategies *see infra* notes 41-56 and accompanying text.

[14] International Association of Machinists, *supra* note 5. *See* Tove Carlén, *Svidande kritik mot Ikea i US* (Scathing criticism of Ikea in the USA), SVENSKA DAGBLADET, April 11, 2011, *available at* http://www.svd.se/naringsliv/svidande-kritik-mot-ikea-i-usa_6082335.svd (last visited Feb. 5, 2013); Clas Svahn, *Hård kritik mot Ikeafabrik i US* (Hard criticism of IKEA factory in the U.S.), DAGENS NYHETER, Apr. 14, 2011, *available at* http://www.dn.se/ekonomi/hard-kritik-mot-ikeafabrik-i-usa (last visited Feb. 5, 2013); Marie Edholm, Swedwoods anställda går till val (Swedwood employees go to the polls), DAGENS ARBETE, June 30, 2011, *available at* http://www.industrifacket.se/home/da/content.nsf/aget?openagent&key=swedwoods_anstallda_gar_till_val_1317815949893 (last visited Feb. 5, 2013); Marie Edholm, *Facken kartlägger Ikeas övertramp* (Unions charts Ikea foul), DAGENS ARBETE, Jun. 30, 2011, (http://www.industrifacket.se/home/da/content.nsf/aget?openagent&key=facken_kartlagger_ikeas_overtramp_1317815948268) (last visited Feb. 5, 2013); Marie Edholm, *Sjöö mötte arbetarna i Danville* (Sjöö met workers in Danville), DAGENS ARBETE, Jul. 1, 2011, *available at* http://www.industrifacket.se/home/da/content.nsf/aget?openagent&key=sjoo_motte_arbetarna_i_danville_1317815960112 (last visited Feb. 4, 2013); *Facklig seger på Ikea-fabrik i US* (Union victory at Ikea factory in the U.S.), DAGENS NYHETER, Jul. 28, 2011, *available at* http://www.dn.se/ekonomi/facklig-seger-pa-ikea-fabrik-i-usa (last visited Feb. 4, 2013).

[15] Per-Olof Sjöö, *Använd ångerrätten, Ikea* (Use the right of withdrawal, Ikea), DAGENS NYHETER, July 26, 2011 (Swedish union president writes op-ed in support of Ikea workers seeking union representation in the U.S. on the grounds that employees are always in a subordinated relationship with their employers and require collective representation.), *available at* http://www.dn.se/debatt/anvand-angerratten-ikea (last accessed Feb. 5, 2013); Gunnar Korsell, *Våra medarbetare sade ja till facket* (Our People Said Yes to the Union), DAGENS NYHETER, Jul. 29, 2013 (Swedwood´s CEO replies to Per-Olof Sjöö and argues that the firm protects employees' right of association; the decision of union representation was solely for the employees to make.), *available at* http://translate.google.com/translate?sl=sv&tl=en&js=n&prev=_t&hl=en&ie=UTF-

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.[16] Eventually Swedwood/Ikea desisted from its anti-union campaign.[17] The workers at Danville voted in favor of the union and got their first collective bargaining agreement.[18]

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 board room of Ikea in Stockholm, social scientists Dimtris Stevis and Michael Fichter reported that the IAM, the American union that represented the Ikea workers in Danville, remains "skeptical" about the IFA's effectiveness.[19] The employer remained, for the most part, opposed to the union and did not act in accordance with the spirit of cooperation verbalized in the global agreement. Other American unions also remain dubious about the global agreements' effectiveness.[20]

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 U.S., 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 U.S. 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

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8&eotf=1&u=http%3A%2F%2Fwww.dn.se%2Fdebatt%2Fvara-medarbetare-sade-ja-till-facket-&act=url&act=url&act=url (last visited Feb. 5, 2013).

[16] *Utlys strejk på Ikea på onsdag: Debattören: Facket måste tillåtas i hela koncernen – också i US (*Announced strike at Ikea on Wednesday: Debate: Unions Must be Allowed in the Entire Group - Also in the USA), AFTONBLADET, JULY 11, 2011, *available at*: http://www.aftonbladet.se/debatt/article13371418.ab (last visited Feb. 4, 2013).

[17] Stevis & Fichter, *supra* note 11, at 686.

[18] *Id*.

[19] *Id*. at 685.

[20] *Id*. at 685-686.

these obstacles seems to be economic -- easy replacement of union with non-union workers facilitated by subcontracting, which is the norm in the private security industry. In Volkswagen, moreover, entry-level workers earn more than in the "Big 3" American auto makers covered by union contracts, making unionization at Volkswagen uphill. Another obstacle seems to be anti-union politics, which affects auto plants in the southern states where the political culture is strongly anti-union.

While the case studies clearly show that the IFAs are not sufficient to organize workers, unions could use IFAs to organize workers in ways that, although different from those that American unions are normally accustomed to –the exclusive representation union—could still be effective to represent some workers effectively: the "minority union." Minority unions are unions that only represent its members. As I explain below, employers currently do not have the duty to bargain with minority unions. However, under the international norms inscribed in the IFAs 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, it is proscribed under international standards. Finally, such minority unions should also have the right to engage in secondary strikes and boycotts. Even though secondary strikes and boycotts are banned by U.S. labor law, they are they are protected under international standards. Employers who sign IFAs should not seek injunction or damage claims against unions that engage in secondary strikes and boycotts. Given that IFAs are likely not legally binding instruments, as explained below, they need to be policed by the unions and works councils in the home country of the signatory firms. Worker organizations in the home country of the signatory firms are constitutive of global unions and 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 outside. Hence, while minority unions on steroids, backed

by global friends, can fight, they are also suited for mature industrial relations.

The article is organized in the following way:

Section I of this article is this Introduction. In Section II I describe the slow but steady decline of American unions. In Section III I explain why we have experienced union decline. In Section IV of the article I detail what IFAs are. In Sections V and VI I describe the four case studies of IFAs that I performed. In Section VII of the article I analyze the case studies and conclude. I also offer ideas for further research and experimentation to understand the effectiveness of IFAs as organizing tools in the U.S.

## II. THE DECLINE OF AMERICAN UNIONS

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 U.S. reached almost 35%.[21] Today the rate has dropped to 11.3%.[22] 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%.[23] 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%.[24] At such low rates, unions will have become irrelevant to most U.S. workers.

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[21] Barry Hirsh and David McPherson, *Union Membership and Coverage Database from the Current Population Survey (Documentation)*, Unionstats.com , http://www.unionstats.comhttp://www.unionstats.comhttp://www.unionstats.comhttp://www.unionstats.com (last visited Jan. 6, 2013).

[22] Steven Greenhouse, Share of the Work Force in a Union Falls to a 97-Year Low, 11.3%, *The N.Y. Times*, Jan. 24, 2013, http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth.html?ref=stevengreenhouse&_r=0 (last visited Jan. 25, 2013). In 2011 the official figure was about 12%.

[23] Hirsch and McPherson, *supra* note 22.

[24] Henry Farber and Bruce Western, *Accounting for the Decline of Unions in the Private Sector, 1973-1998, in* THE FUTURE OF PRIVATE SECTOR UNIONS IN THE UNITED STATES 28, 53 (James T. Bennett & Bruce E. Kaufman eds. 202).

INSERT FIGURE 1 ABOUT HERE

Union decline matters because the existence of the American middle class has depended on organized labor. The National Labor Relations Act ("NLRA") of 1935, also called the "Wagner Act," helped to swell the ranks of organized labor and create a middle class in the U.S. – a middle class that was "the envy of the world." [25] Unionization increased wages through collective bargaining and helped to provide health care and pensions to working families. Through legislative advocacy, unions also helped to implement minimum wage legislation and other workplace standards that covered all workers, be they union members or not.[26] Non-union 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.[27]

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[25] Charles Morrill, *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).

[26] Dorothy Sue Cobble, *The Intellectual Origins of an Institutional Revolution*, 26 A.B.A. J. LAB. & EMP. L. 201, 204-205 (2011).

[27] STEVEN GREENHOUSE THE BIG SQUEEZE: TOUGH TIMES FOR THE AMERICAN WORKER 74 (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. As an example, he retells 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. Even though the parties failed to reach such an agreement, the conference still testified about the power and influence of labor unions. As it reminded us:

> 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."

TIMOTHY NOAH, THE GREAT DIVERGENCE: AMERICA'S GROWING INEQUALITY CRISIS AND WHAT WE CAN DO ABOUT IT 2331 (Kindle Edition 2011), citing Frank Levy &

But the golden era of the American middle class seems to be over. Even though the U.S. had less wealth inequality than European countries until about the early 1970s, today the U.S. stands as the industrialized democracy with the greatest wealth inequality.[28] 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.[29] We live in times where the wages of top earners grow the fastest while the pay of low wage earners nosedives.[30]

Union decline is certainly not the only reason for increasing American wealth inequality, but it is an important cause that needs to be addressed.[31] 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.[32] Strong unions and collective bargaining helped to equalize earnings across the board by creating a "moral economy"[33]

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Peter Temin, *Inequality and Institutions in 20th Century America*, MIT Dept. of Economics Working Paper 07-17 (2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=984330 (last visited Dec. 10, 2012).

[28] RICK FANTASIA AND KIM VOSS, HARD WORK: REMAKING THE AMERICAN LABOR MOVEMENT 15 (2005).

[29] JOSEPH STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE 4 (2012).

[30] *Id*.

[31] 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. Sociological Rev. 679, 688-689 (2012). (Explaining how rigorous quantitative analysis shows that labor union decline is one of various reasons for economic inequality in the U.S.)

[32] Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AMER. SOCIOLOGICAL REV. 513, 533 (2011).

[33] A moral economy,

> [c] onsists 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

that improved the wages and terms and conditions of employment of all workers, union and non-union. In this sense, labor unions and collective bargaining are social institutions, with important moral and redistribution functions in a modern, capitalist economy.[34] As the study reported, when one in three American male workers were members of a union,

> [U]nions 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 inequality in the nonunion sector increased as a result.[35]

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.

Today's low union membership levels in the U.S. also obstruct workers' desires to be represented at work. Surveys consistently have shown that most American workers prefer to be represented at work.[36] However, fewer than 7% of the private sector workers are represented today by unions. 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

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> 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 517-518 (internal citations omitted.)

[34] *Id*.

[35] *Id*. at 514.

[36] Richard Freeman, *Do Workers Still Want Unions? More Than Ever, Economic Policy Institute, Briefing Paper* 182, *available at* http://www.sharedprosperity.org/bp182.html (last visited Jan. 15, 2013). (Describes and explains the results of the 2006 survey that showed that most American workers preferred union representation over no representation). *See also* RICHARD FREEMAN AND JOEL ROGERS, WHAT WORKERS WANT (2nd ed. 2007).

bargain collectively is considered a human right by the United Nations[37] and the International Labor Organization ("ILO").[38] 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.[39]

In summary, the decline of unions in the U.S. contributes significantly to alarming income inequality, contradicts the desires of workers, and violates fundamental human rights. It needs to be addressed.

## III. UNDERSTANDING UNION DECLINE

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

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[37] Universal Declaration of Human Rights, Article 23.

[38] Int'l Lab. Org., ILO Declaration on Fundamental Principles and Rights at Work, Art. 2, 86th Sess. (June 18, 1998).

[39] *See* LANCE COMPA, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (2004) (American labor law fails to meet international standards inasmuch 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 permissibility of strike replacements, among others). The ILO's Freedom of Association Committee has found the U.S. in likely 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 of Freedom of Association*, Case No. 2741 (United States, Nov. 10, 2009); Case No. 2547 (United States, Feb. 26, 2007); Case No. 2460 (United States, Dec. 7, 2005); Case No. 2292 (United States, Aug. 14, 2003), *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:20060:0:FIND:NO:20060:P20060_COUNTRY_ID,P20060_COMPLAINT_STATU_ID:102871,1495811 (last visited Jan. 6, 2013).

### A. Employer Opposition and Weak Labor Laws

As noted above, 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.[40] Such ULPs included intimidation and termination of workers during union recognition campaigns.[41]

In fact, union avoidance is a sophisticated industry in the U.S. 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. 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."[42] However, employers can express their opinions in many settings, including in meetings with the employees, labeled "captive audience meetings" by some union

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[40] Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1779-1781 (1982); *See also* Kate Bronfenbrenner & Tom Juravich, *The Impact of Employer Opposition on Union Certification Win Rates: A Private/Public Sector Comparison*, WORKING PAPER NO. 113, 26. (Economic Policy Institute 1994), *available at* http://digitalcommons.ilr.cornell.edu/articles/19 (last visited Oct. 30, 2012) (Explaining how employer opposition in the private sector accounts for the difference in union election win rates).

[41] 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 35 (1976) (Employer unfair labor practices during a union a 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 Illegalities*, 58 U. CHI. L. REV. 953 (1991) (The authors re-evaluate the data on employer unfair labor practices and determine that the numbers had ben overestimated, giving the false impression that employer illegalities drive union decline in the U.S.)

[42] U.S.C. § 158 (c). NLRA § 8(c). *See* also *NLRB v. Gissel Packing Co.*, 357 U.S. 357, 618 (1969) ("Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.")

supporters. 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.[43]

Even though employers may not make "threats" to workers, many labor law scholars argue that employer speech regarding unionization always lies at the border between free expression and retaliatory intimidations against employees.[44] For example, employees normally must attend the captive audience meetings or risk being fired. They may have no right to speak at the meeting and express their own views. 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,

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[43] The Supreme Court stated that,

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

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

[44] 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) (Employers and workers are locked in unequal bargaining relationships and the union election model of the NLRA has fostered a wrong impression that unions and employers square off as equals in election campaigns, just as political parties in government elections); 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.") (internal 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, 372-373 (2001) (Neutrality agreements can redress four disadvantages unions confront when organizing: employer intimidation, harmful delay, inadequate access to employees, and inability to secure a first contract.)

> 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. …
>
> 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.[45]

The captive audience meeting sanctioned by American labor law affords employers the right to require their employees to hear anti-union messages at the workplace; it is not an opportunity for honest 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.[46] 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).[47] Such remedies are ineffective because employers sometimes delay reinstatement of workers for as long as three years through appeals and other tactics.[48] Even when employees are reinstated, they usually leave the job within two years as a result of

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[45] Elisabeth Masson, *"Captive Audience" Meetings In Union Organizing Campaigns: Free Speech Or Unfair Advantage?*, 56 HASTINGS L.J. 169, 171-172 (2004).
[46] Weiler, *supra* note 41, at 1781.
[47] THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 24-66 (Patrick Hardin et al. eds., 4th ed., 2001).
[48] Weiler, *supra* note 41, at 1781.

vindictive treatment by the employer.[49] Given the high costs of a union contract and the low costs of breaking the labor law, many employers simply internalize breaking the labor law as a cost of doing business.[50] 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, unions have sought alternative routes to union certification. The main alternative route has been voluntary recognition and card checks, or labor-management agreements where 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.[51] Under the NLRA, unions can represent workers for collective bargaining only if the union has obtained "majority support" – 50% plus one – from the workers it seeks to represent. Once the union obtains majority support it retains rights to represent the workers as their "exclusive representative."[52] Such support can be expressed through "card checks"[53]

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[49] *Id*. at 1795.

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

[51] *See* Brudney, *supra* note 45.

[52] 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). NLRA § 9(a). (emphasis added).

Professor Charles Morrill 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 MORRILL, 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

– when more than half of the workers sign union authorization cards – or through a union election administered by the NLRB.[54] However, employers need not recognize the union through "card checks." Card check recognition is legal but voluntary.[55]

To summarize, significant legal scholarship has argued that the decline of union membership in the U.S. is due to increased employer opposition of 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 and card check agreements with employers. As we will see, IFA's 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 Non-Union 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.*[56]

Employer opposition and weak labor laws seem to be plausible explanations of union decline, but they are not the only explanations. Social scientists have demonstrated that traditionally unionized employers often exit the U.S. in search of cheaper labor costs elsewhere. Meanwhile, traditionally non-unionized firms invest in the U.S. at a dramatic pace.[57]

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union 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* at pp.__.

[53] *Lamons Gasket Company*, 357 NLRB No. 72 at *3 (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.")

[54] 29 U.S.C. §§ 159(b). NLRA § 9(b).

[55] Brudney, *supr*a note 45, at 824.

[56] Dan Clawson & Mary Ann Clawson, *What Has Happened to the U.S. Labor Movement? Union Decline and Renewal*, 25 ANN. REV. OF SOCIOLOGY, 95-119, 103 (1999) (internal citations of omitted).

[57] Farber & Western, *supra* note 25, at 28-29.

Free markets make replacement of union workers with non-union workers possible. The net result of losses in union jobs and gains in non-union jobs has been a net decline in union density.[58]

The structural, economic reasons behind union decline also make it apparent that traditional organizing will not be enough to increase union density. The cost 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.[59] To gain significant ground, *more than one million workers per year had to join the ranks of organized labor*.[60] According to Andy Stern, former President of the Service Employee International Union ("SEIU"), one of the most active and successful American unions in the last decades,[61] the cost of organizing each individual worker is between $2,000 and $3,000, and can be as much as $5,000.[62] Organized labor would need to spend, at a minimum, from $2 billion to $3 billion, and up to $5 billion per year, to grow! Hence, Stern believes that union campaigns in the private sector are "uneconomical."[63]

There are many ways that markets can be "free," enabling employers to easily replace union workers with non-union 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. [64] This means that they have no right to compel more than

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[58] *Id*.
[59] Clawson & Clawson, *supra* note 57, at 103, citing R. Rothstein, *Toward a More Perfect Union: New Labor's Hard Road*, 26 THE AM. PROSPECT 36-42 (July-Aug. 1996).
[60] *Id*.
[61] RUTH MILKMAN, L.A. STORY: IMMIGRANT WORKERS AND THE FUTURE IF THE U.S. LABOR MOVEMENT 2, 16-25 (2006) (Over the past quarter century, while organized labor has seen a dramatic decline, the SEIU's numbers have tripled. SEIU and other "Change to Win" unions have been particularly successful because they have reinvented themselves as "social movement unions" which seek community coalitions and invest in research and organizing, among other reasons. They have combined a "bottom-up" and "top-down" approach to organizing.)
[62] NOAH, *supra* note 28, at 3395.
[63] *Id*. at 3391.
[64] *H.S. Care L.L.C., D/B/A Oakwood Care Center*, 343 NLRB 659 (2004) (NLRB reinstates long-standing rule where even in bargaining units that combine employees who are solely employed by a user employer and employees who are jointly employed by the

one employer to bargain with the union on a single contract.[65] While it is permissible for a union and multiple employers to bargain for one contract, there is no right to multi-employer bargaining in the United States. 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 non-union subcontractors.

Moreover, nothing in American labor law prohibits an employer from subcontracting to replace union employees unless the employer has shown an "anti-union animus."[66] All employers normally need to do is express that the decision is economic to remain free of liability under the labor laws. 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 its decision to "contract them out."[67] Moreover, employers can even partially close their businesses for economic reasons without bargaining with the union about the decision to partially shut down.[68]

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user employer and a supplier employer are "multiemployer units" which may be appropriate only with the consent of the parties.)

[65] *Id*.

[66] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 682-683 (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.")

[67] *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 210-211 (1964). ("Contracting out" is a mandatory subject of bargaining under the NLRA.)

[68] *Id* 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.") (internal citations omitted). The employer, must, however, bargain the "effects" of the partial closing with its employees. *Id*. at 681-682. However, the employer may completely shut down the business, even if the employer has an anti-union animus. *Textile Workers v.*

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

### C. Anti-Union Politics and Policies

Social scientists have argued that employer power is enhanced by a "neoliberal state" that deregulates to ease investment in the U.S. and abroad.[69] 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.[70] Unions are disempowered by economic policies that give employers great leeway to open and close businesses and that afford little or no say in investment decisions to workers.

Given that governmental action can have significant impacts on unionization, political conditions in their own right must be considered in order to understand unionization. For example, in cross-national studies of unionization, 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.[71] Such political parties tend to elevate worker demands to the political level and provide public policies that favor unions.[72] 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-

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*Darlington Co., 380 U.S.* 268, 268 (1981) ("[A]n employer has an absolute right to terminate his entire business for any reason he pleases.").

[69] DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM CH. 3 (2005).

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

[71] Bruce WESTERN, Between Class and Market: Postwar Unionization in the Capitalist Democracies 66 (199). *See also* David Brady, *Institutional, Economic, or Solidaristic? Assessing Explanations for Unionization Across Affluent Democracies*, 34 WORK AND OCC. 67–101 (2007).

[72] WESTERN, *supra* note 72, at 66.

to-work states, where workers represented by unions can opt-out of paying union fees[73] and, in this manner free ride, have had a very deleterious effect on union organizing.[74] 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.[75] The wide dissemination of anti-union ideologies, such as that unions hurt investment, also can have long-lasting, negative effects on unionization. Thus, a focus on employers, 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.[76]

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[73] 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 [subchapter] 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. § 169(c)(2), NLRA §14(c)(2).

Such state laws prohibiting payment of union fees are known as "right to work laws."

[74] Andrew W. Martin, *Resources for Success: Social Movements, Strategic Resource Allocation, and Union Organizing Outcomes*, 55 SOCIAL PROBS. 501-524, 510, 513 (2008). *See also* David T. Ellwood & Glenn Fine, *The Impact of Right-to Work Laws on Union Organizing*, 95 J. OF POL. ECON. 250 (1987) (Right to work laws have a "sizeable" negative effect on union organizing, as high as 50% reduction in organizing the first 5 years and half that amount the next 5 years. The negative effect decays through time but the impact on union membership may remain permanent.)

[75] FANTASIA AND VOSS, *supra* note 29, at Ch. 2. (The United States has provided unions an "exceptionally hostile terrain," explaining its divergence from the more class and movement based labor unions that took hold in Europe.)

[76] Dan Clawson & Mary Clawson, *supra* note 57, at 103 (internal citations omitted).

However, historically in the U.S. and comparatively in other countries unions have counter-balanced employer legal, economic and political power through collective action. 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 non-union workers.[77] 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.[78] Perhaps IFAs should be envisioned as part of such comprehensive campaigns? We will return to this question after reviewing our case studies.

## IV. 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. In this era of globalization some labor unions also are attempting to obtain voluntary recognition through IFAs.[79] One characteristic of an IFA is that a global union and a multi-national firm sign it. [80] Another characteristic of IFAs is that they require the parties to pledge to abide by the ILO's "core labor standards,"

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[77] WESTERN, *supra* note 72, at 31

[78] 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. Top-down actions aim to find particular weaknesses of employers to compel them to recognize the unions. These campaigns may uncover, for example, that the employer depends on local government licenses that union political allies can deny. Unions may also uncover potentially damaging information of the employer that may lead shareholders to divest from the firm. *See* FANTASIA & VOSS, *supra* note 29, at 120-159; Erickson et al., *Justice for Janitors in Los Angeles: Lessons from Three Rounds of Negotiations*, 40 BRITISH J. IND. REL. 543-, 562-564 (2002).

[79] Stevis & Fichter, *supra* note 11, at 682-687; Michael Fichter & Markus Helfen, *Going Local with Global Policies: Implementing International Framework Agreements in Brazil and the U.S.A.*, *in* SHAPING GLOBAL INDUSTRIAL RELATIONS: THE IMPACT OF INTERNATIONAL FRAMEWORK AGREEMENTS 85, 103-110 (Konstantinos Papadakis ed., 2011).

[80] Konstantinos Papadakis, *Introduction and Overview* to SHAPING GLOBAL INDUSTRIAL RELATIONS: THE IMPACT OF INTERNATIONAL FRAMEWORK AGREEMENTS, 1-120, 2 (Konstantinos Papadakis ed., 2011).

including freedom of association and effective collective bargaining.[81] Some IFAs also may include procedures for implementation and provisions concerning suppliers and business partners.[82] Many IFAs also include pledges regarding wages, working hours, workplace safety, training, and restructurings.[83]

It is uncertain whether IFAs are legally binding instruments.[84] As a result, they are mostly considered "soft law," meaning that they are enforced through cooperation by the parties.[85] In industrial relations, such collaboration normally occurs against the backdrop of potential industrial conflict – "strikes, stoppages, picketing, boycotts, slowdowns, overtime bans, work-to-rule,"[86] among others. Hence, any strategy for the use of

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[81] *Id*.

[82] 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).

[83] PAPADAKIS, *supra* note 8, at 249-256.

[84] See Goldman, *supra* note 6 (2012) (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.); Sarah Coleman, *Enforcing International Framework Agreements in U.S. Courts: A Contract Analysis*, 41 COLUM. HUM. RTS. L. REV. 601 (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.). For the case of Canada see Kevin Banks and 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, 511-529, 552 (2012) (Explaining 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 as Instruments for the Legal Enforcement of Freedom of Association and Collective Bargaining? The German Case*, 33 COMP. LAB. L. & POL'Y J. 749 ("[I]t is not out of the question that IFAs can be legally enforced 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 International Training Centre of the ILO, *Key Issues for Management to Consider with Regard to Transnational Company Agreements: Lessons Learned from Workshops with and for Management Representatives* (Dec. 2010), http://lempnet.itcilo.org/en/tcas/admin/final-pub (last visited Jan. 31, 2013) ("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 to be tested.")

[85] Goldman, *supra* note 6, at 606.

[86] *See* Lance Compa and 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.)

global agreements for union organizing must explore not only the non-adversarial 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.[87] Since then and until about 2012, about 110 similar agreements have been entered into by multi-national firms and global unions.[88] These agreements cover approximately 8.9 million workers, excluding suppliers and subcontractors.[89] An "eyeball" analysis of these agreements also shows that about 80 of the signatory firms have U.S. operations. IFAs are relevant in the U.S.

INSERT FIGURE 2 ABOUT HERE

### B. IFA's European Character

Can IFAs serve as organizing tools in the U.S. when they seem to be alien to U.S. industrial relations? Albeit millions of global workers are theoretically covered by IFAs, as Figure 3 shows, IFAs have been mostly signed by European firms in countries where labor unions have historically been strong. Mostly German, French, Dutch and Nordic multi-national firms signed IFAs. Firms in automobile manufacturing, metal industries and other historically unionized industries also have predominated among the firms signing these agreements.[90]

INSERT FIGURE 3 ABOUT HERE

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[87] PAPADAKIS, *supra* note 8, at 3.
[88] European Works Councils Database, International Framework Agreements, http://www.ewcdb.eu/list_intl_framework_agreements.php (last visited Feb. 19, 2013).
[89] Estimated from *Id*.
[90] PAPADAKIS, *supra* note 8, at 245-258.

The reason why most IFAs have been embraced primarily by European employers seems to be simple: strong national unions and works councils[91] generally have requested that their employers sign IFAs.[92] 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.[93] IFAs are one of many agreements made in the course of the parties' relationship. Moreover, employers only sign IFAs with parties they trust. That party normally is the national union in the home country of the signatory firm.[94] 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

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[91] Works councils are, generally, employee representation bodies embedded in the corporate governance regime of a firm. They are independent of labor unions. 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." Eurofund, Works Council, Germany, http://www.eurofound.europa.eu/emire/GERMANY/WORKSCOUNCIL-DE.htm (last visited Dec. 12, 2012). In France it more generally refers to an "[i]nstitution of employee representation." In the German model only employees are represented. BLANPAIN ET AL, THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW: CASES AND MATERIALS 498 (2nd ed. 2012). The "French" model includes both employee and management representatives. *Id*. at 598. However, works councils are all creations of national legislation 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. However, sometimes unions and works councils may be at odds. *See* Joel Rogers & Wolfgang Streeck, *The Study of Works Councils: Concepts and Problems*, *in* WORKS COUNCILS: CONSULTATION, REPRESENTATION AND COOPERATION IN INDUSTRIAL RELATIONS 3-26, 11-16 (Joel Rogers & Wolfgang Streeck eds., 1995).

[92] Fichter & Helfen, *supra* note 80, *at* 91; Isabelle Schömann, *TCAs, Social Dialogue and Industrial Relations*, *in* SHAPING GLOBAL INDUSTRIAL RELATIONS: THE IMPACT OF INTERNATIONAL FRAMEWORK AGREEMENTS 21-37, 27 (Konstantinos Papadakis ed., 2011).

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

[94] SCHÖMANN, *supra* note 93, at 23.

("EWCs").[95] EU law mandates EWCs – or EU-wide employee representation bodies – for employers ("undertakings") with at least 1,000 employees in one member state and 150 in another.[96] Given that many companies with EWCs also have operations beyond Europe, some of them have felt compelled to expand their EWCs globally and to create so-called world or global works councils,[97] particularly to deal with complicated and many times conflict-ridden global company restructurings.[98] 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 and that workers in one plant or country will not benefit or be hurt more than its other workers. In some instances, employee representatives request explicit global governance norms for industrial relations at the firm, leading to IFAs.[99] Global works councils have played an important role in promoting at least some IFAs.[100]

Because there is significant overlap between unions and works councils, meaning that union members often are many times also works council members,[101] and because in many instances national works councils (and the national union officers who sit on them) have significant

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[95] SCHÖMANN, *supr*a note 93, at 23; 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, 675-676 (2012).

[96] The goal of EWCs is to facilitate rights of information and consultation in European enterprises. Directive 94/45/EC. For a description of the EU law on works councils see BLANPAIN ET AL, *supra* note 92, at 439-440 (2nd ed. 2012).

[97] Stefan Rüb, *World Works Councils and Other Forms of Global Employee Representation in Transnational Undertakings For the role of world works councils in IFAs*, 55 Hans Böckler Stiftung Arbeitspapier 6 (2002); Stevis & Fichter , *supra* note 11, at 675-676.

[98] PAPADAKIS, *supra* note 8, at 3.

[99] *See* PAPADAKIS, *supra* note 8, at 3; Stevis & Fichter, *supra* note 11, at 675-676.

[100] PAPADAKIS, *supra* note 8, at 3; Stevis & Fichter, *supra* note 11, at 675-676.

[101] For the case of Germany see Walther Muller-Jentsch, *Germany: From Collective Voice to Co-management*, *in* WORKS COUNCILS: CONSULTATION, REPRESENTATION AND COOPERATION IN INDUSTRIAL RELATIONS 53-78, 61(Joel Rogers & Wolfgang Streeck eds., 1995). 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: CONSULTATION, REPRESENTATION AND COOPERATION IN INDUSTRIAL RELATIONS 79-114, 105-107 (Joel Rogers & Wolfgang Streeck eds., 1995); *See* also Robert Thobanian, *France: From Conflict to Social Dialogue*, *in* WORKS COUNCILS: CONSULTATION, REPRESENTATION AND COOPERATION IN INDUSTRIAL RELATIONS 115-152, 139 (Joel Rogers & Wolfgang Streeck eds., 1995).

influence over the European and global works councils,[102] national level unions and works council bodies 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,[103] two edited books by the ILO,[104] and one full volume of the American *Comparative and International Labor Law and Policy Journal*, [105] among other works cited throughout this article. However, IFAs' overall potential impact is still relatively unexplored, particularly in the U.S.

Social scientists Michael Fichter and Markus Helfen reported on the impact of IFAs in four cases: those of Lafarge, Skanska, Dannon and G4S. [106] 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.[107] By agreeing to cease

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[102] See, for example, the case of the Daimler's version of a world works council, its "World Employee Committee." Acknowledging that European concerns may play too powerful of a role in the implementation of the IFA, the company created this global body to better represent global concerns. However, even though it is formally independent of the EWC, it has heavy German and European representation. Dimitris Stevis, *The Impacts of International Framework Agreements: Lessons from the Daimler Case*, *in* SHAPING GLOBAL INDUSTRIAL RELATIONS: THE IMPACT OF INTERNATIONAL FRAMEWORK AGREEMENTS 116-142, 124 (Konstantinos Papadakis ed., 2011).

[103] SCHÖMANN ET AL., *supra* note 93.

[104] SHAPING GLOBAL INDUSTRIAL RELATIONS: THE IMPACT OF INTERNATIONAL FRAMEWORK AGREEMENTS (Konstantinos Papadakis ed., 2011); CROSS-BORDER SOCIAL DIALOGUE AND AGREEMENTS: AN EMERGING GLOBAL INDUSTRIAL RELATIONS FRAMEWORK?, (Konstantinos Papadakis ed., 2008), *available at* http://www.ilo.org/public/english/bureau/inst/download/cross.pdf (last visited March 9, 2012).

[105] 33 COMP. LAB. L. AND POL'Y J. (Matthew Finkin & Stanford M. Jacoby eds., 2011-2012).

[106] Fichter & Helfen, *supra* note 80, at 106-110.

[107] *Id*. at 107-108. Under the NLRA, the employer and the union have the obligation to bargain "in good faith." If the parties bargain in good faith and still reach an impasse, the employer may unilaterally implement its last offer. 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 NLRB 475, 478 (1967) ("An employer violates his duty to bargain if, when negotiations are sought or are in

implementing its final offer, the company cooperated with the union in a manner that it is not obligated to do so under American labor law.

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.[108] However, in that case the employer bargained with the union only after the union won a union election.[109] The employer seemed moved by "hard" law and not the agreement. In Dannon, the company refused to recognize a union voluntarily after the union showed the employer that it had majority support. [110] The employer eventually bargained with the union, but only after the NLRB certified the union.[111] 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.[112] The impact of that national agreement was unknown at the time the authors submitted their report.[113]

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 of stores. [114] However, the IFA apparently played no role in the union's strategy.[115] It was never used. In two other campaigns involving the German automaker BMW in Southern California and Ikea in Danville, Virginia, which was detailed above, the IFA helped the union to organize workers, but only after the unions exerted pressures of different

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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.").

[108] Fichter & Helfen, *supra* note 80, at 108-109.

[109] *Id*.

[110] *Id*. at 109.

[111] *Id*.

[112] *Id*. at 109-110.

[113] *Id*.

[114] Stevis & Fichter, *supra* note 11, at 685.

[115] *Id*.

kinds on the employers.[116] As a result, the authors reported that American unionists did not think that the IFAs played an important role in the union drives at BMW and Ikea.[117] 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. 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 towards the use of IFAs as part of a "comprehensive campaign"? We will return to this question during the discussion of the article.

### D. An Empirical Study to Build Theory and Suggest Ways to Move Forward with IFAs

Prior studies describe useful examples of partial successes and some failures of IFAs in the U.S., some in connection with organizing. 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. This study aimed to advance our understanding of IFA's 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. [118] It does not attempt to generalize to a population, as sampling and similar statistical techniques normally attempt to do.[119]

Moreover, the study was explicitly exploratory because it did not seek to definitively explain the organizational results of each of the cases.[120] 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.

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[116] *Id*. at 685-686.
[117] *Id*.
[118] *See* ROBERT K. YIN, CASE STUDY RESEARCH: DESIGNS AND METHODS 32-33 (3rd ed. 2003) (Explaining how analytical generalization differs from sampling techniques that aim to generalize to a population).
[119] *Id*.
[120] An exploratory study is one that attempts to develop "pertinent hypotheses and propositions for further inquiry." *Id*. at 6.

Here I report on four IFA cases, those concerning Securitas, G4S, Daimler 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 U.K., and the U.S.[121] I performed most interviews in person, but I had to perform some via telephone and email.[122]

I chose to study Securitas, G4S, Volkswagen and Daimler because all those firms have U.S. operations and have signed IFAs.[123] 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 non-union workers. The end users of private security services – e.g., property owners – are principals in contracting relations with private security firms. 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. Hence, organizing private security guards is complicated by the contracting relationships. The 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.

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[121] Technically, the type of interviewing that I did is referred to in the social sciences as the "elite" interview. Elite interviewees are those who are particularly knowledgeable about a subject and its context. BILL GILLHAM, RESEARCH INTERVIEWING: THE RANGE OF TECHNIQUES 54 (2011).

[122] In person interviews are costly, especially when they require international travel, but provide the researcher with more information, as the interviewer can read body language and other non-verbal forms of communications. *See Id*. at 103. Telephone interviews are cheaper, since they do not require travel, but the interviewer may lose some information provided by non-verbal communicative cues. Hence why the telephone interviewer has to remain more vigilant and alert of what is being said in an interview than the interviewer in person does. 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*.

[123] For a complete list of the persons that I interviewed see *infra* at "Methodological Appendix."

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. 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.

## V. EASILY REPLACED? SECURITAS AND G4S

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 U.S. In fact, some of the employees of these private security firms are covered by union contracts that can clearly be linked to the IFA. 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, non-union security guards who can be easily contracted by the end users of these services, the property owners, plague unionization in this particular industry.

### A. Securitas and G4S

Securitas is a global security firm headquartered in Stockholm, Sweden.[124] It employs 300,000 people in 51 countries. In 2011 its total sales amounted to about U.S. $ 9.6 billion.[125] In the U.S. it employs about 90,000 employees,[126] making the U.S. one of the largest operations of this global Swedish security firm.

G4S is a global security firm headquartered in London, United Kingdom. The firm operates in 125 countries and employs 657,000

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[124] Securitas, *About*, http://www.securitas.com/en/About-Securitas/Contact-us (last visited Dec. 11, 2012).

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

[126] Securitas, *About Us*, http://www.securitas.com/us/en/About-Securitas (last visited Dec. 11, 2012).

people.[127] In the U.S. and Canada it employs 50,000 people,[128] making North America a significant part of its global business. The global company's revenues were over U.S. $12 billion in 2011.[129]

### B. What the IFAs Say

The 2006 Securitas IFA[130] ("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.[131] The IFA guarantees the employees' rights of association. It also states that union recognition will be granted based on the "minimum legal requirements 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."[132] Thus, the freedom of association clause of the agreement has some notable level of detail. By making reference to national UNI affiliates and local management, the agreement presumes third party beneficiaries, which may have significance for legal enforcement of the IFA.[133] In fact, the parties seem to have intended to make at least some of its terms legally binding,

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[127] G4S, *Who We Are*, http://www.g4s.com/en/Who%20we%20are (last visited Dec. 11, 2012).

[128] No disaggregated numbers for the U.S. and Canada were available in G4S' company website. G4S, *Who We Are*, http://www.g4s.com/en/Who%20we%20are (last visited Dec. 11, 2012).

[129] G4S, *2011 Annual Report*, Page 2, *available at* http://www.g4s.com/~/media/Files/Annual%20Reports/g4s_annualreport_2011.ashx (last visited Dec. 11, 2012). 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*.

[130] While Securitas signed an IFA with UNI Global in November of 2012, this study focuses on the 2006 agreement by the same parties because the 2012 agreement is too recent to assess its impact. For the 2012 Securitas IFA see http://www.securitas.com/Global/_DotCom/CSR/Global_Agreement_UNI_Nov2012.pdf (last visited Feb. 11, 2013).

[131] 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); *See* also Eurofund, Codes of conduct and international framework agreements: New forms of governance at company level, Case study: Securitas, *available at* http://www.eurofound.europa.eu/pubdocs/2007/929/en/1/ef07929en.pdf (last visited Feb. 5, 2013).

[132] Securitas, *supra* note 132, at ¶ 2.

[133] Goldman, *supra* note 6, at 610.

different from most IFAs, as it states that the agreement will be "governed and construed in accordance with the laws of Sweden."[134]

I will cite at length the language of the IFA to communicate the level of detail and specificity in the agreement:

> The parties believe in co-operation and Securitas will respect the rights of all employees to form and join trade unions of their choice and to bargain collectively in accordance with local laws and principles. In order to ensure harmonious labour relations, the parties agree that when a UNI affiliated union notifies Securitas of its intention to organize security officers in a given area, the local parties should, in accordance with local laws and principles, designate appropriate representatives to meet in order to establish a relation built upon a professional and respectful manner. The local parties will adhere to the following principles:
>
> …
>
> b) The company shall recognize the union as the representative of the employees so long as the union satisfies the *minimum legal requirements* for recognition under applicable law. Upon recognition the local parties will agree on the principles for the continuous cooperation and after recognition the ongoing mechanism for union access to employees. This could include, for example, access to company sponsored training and access to introduction meetings.
>
> c) The company will provide assistance in the organizational process in accordance with local laws and principles. Such assistance shall, if possible in accordance with local laws and principles, include *the supply of relevant employee related information. The company will enable the local union representatives to arrange meetings with employees in a non-disruptive manner*….[135]

This language is relatively specific on the parties' rights and obligations regarding union recognition. Securitas pledges to recognize the union under the *minimal legal requirements*, which in the U.S. could mean

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[134] Securitas, *supra* note 132, at ¶ 4.
[135] *Id*. at ¶ 3(emphases added).

voluntary recognition and card checks. Moreover, according to the agreement, 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. The employer is not obligated to do those things under American federal labor law.[136]

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.[137] Its Section 3 clearly establishes G4S' commitment to live up to the core labor standards. The IFA also makes particular reference to freedom of association when it mentions, in relevant part, that such commitments include:

> [T]he rights of its employees to freedom of association and to be members of trade unions, and the right of unions to be recognized for the purposes of collective bargaining.[138]

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

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[136] Under current law, an employer need only to 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. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1969). Moreover, so-called "non-employee" union members – normally, the staff union organizers – do not have rights to access employees in the premises and properties of employers. *Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527 (1992).

[137] G4S, *A Global Agreement Between UNI and G4S, Ethical Employment Partnership* (2008), available at http://www.google.com/url?sa=t&rct=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.nsf%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 (last visited on May 29, 2013).

[138] *Id*. at ¶ 6 *et. seq.*

> UNI and G4S share the view that employees should be able to make 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 minimizing 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.[139]

The section then goes on to detail how union access would be handled, including provisions for "reasonable time and opportunity" for the unions 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 that:
>
> 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*

[139] G4S *supra* note 138, at ¶ 6 et seq.

> *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. . . .[140]

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 U.S.

### C. How Have the 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 representatives of its security guards. Without such voluntary recognition, the SEIU would not be able to legally represent those workers because the SEIU is an "international" union, an American labor organization of service workers that represents more than just security guards. Under U.S. federal labor law, only security guard unions can be certified by the NLRB to represent security guards.[141] 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.[142] 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. The IFA has been instrumental in achieving such voluntary recognition.[143]

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[140] G4S, *supra* note 138, at ¶ 6(c) (emphasis added).
[141] 29 U.S.C. §§ 159(b)(3), NLRA § 9(b)(3).
[142] *Truck Drivers Local Union No. 807 v. NLRB*, 755 F.2d 5, 8 (2d Cir. 1984), *cert. denied*, 474 U.S. 901 (1985). (The NLRB cannot compel an employer to recognize a mixed union of guards and non-guards; however, an employer may voluntarily recognize a mixed union of guards and non-guards if the union provides evidence of majority support.)
[143] Interview of Thomas Balanoff, President of SEIU Local 1, Chicago and President of the Property Services Division of SEIU, Chi., Ill. (July 19, 2012).

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. In the past, G4S engaged in very aggressive anti-union campaigns.[144] However, since the 2008 agreement the company has voluntarily recognized a number of bargaining units. 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 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."[145]

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.[146]

### D. 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.[147] Ten thousand new

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[144] Human Rights Watch, A Strange Case: Violations of Workers' Freedom of Association in the United States by European Multinational Corporations 87-99 (2010), available at http://www.hrw.org/en/reports/2010/09/02/strange-case-0 (last visited on May 29, 2013).
[145] *Id*. at 99.
[146] SCHÖMANN, *supra* note 93, at 29 (internal citations omitted).
[147] Interview with Balanoff, *supra* note 144. *See* also E-mail from Kevin O'Donnell, SEIU Communications, to author (January 24, 2013, ) (on file with author).

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 8,000 workers.[148]

G4S has 50,000 employees in North America.[149] Securitas employs about 90,000 in the U.S.[150] 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 U.S. If even only half of those 50,000 employees were in the U.S., the combined number of 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 hardy 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 U.S.[151] According to the SEIU, there are about 1.1 million security guards employed in the U.S. [152] Forty-four percent (44%) of the market is controlled by G4S, Securitas and four other companies without IFAs – Allied Barton, U.S. Security Associates, Guardsmark and ABM/ACSS Security Services.[153] 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 such 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 non-union 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

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[148] Interview with Balanoff, *supra* note 144.
[149] G4S, *supra* note 129.
[150] Securitas, *supra* note 132.
[151] E-mail from Kevin O'Donnell, SEIU Communications, to author (January 29, 2013) (on file with author). As of this writing I could not verify how many security guards are organized in the U.S. in any union out of the 1.1 million in the country.
[152] SEIU, *Our Industry*, http://www.seiu.org/a/standforsecurity/about-the-ind.php (last visited Dec. 11, 2012).
[153] *Id*.

well-remunerated, skilled, high quality security professionals.[154] Union contracts, are typically focused in achieving increased wages, which put the unionized security services companies at a 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, "The organizational process shall ensure that the company shall remain competitive within the market being organized."[155] The G4S IFA states, in relevant part, that:

> 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.[156]

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. As an officer of the TWU of Sweden told me in an interview:

> **Interviewer**: So you mentioned the problems in the U.S. What were these problems about?
>
> **TWU**: It was 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!"… "But this is a global agreement [, said the union to local management]." "But it is not valid in the

[154] Interview of Göran Larsson, International Secretary, Swedish Transport Workers Union, Stockholm, Sweden (June 25, 2012).
[155] Securitas, *supra* note 132, at ¶ 2 (a).
[156] G4S, *supra* note 138, at ¶ 5.

> U.S. But U.S. is not "global" [, responded management]." ….
>
> Then when we approached the company [and 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.…[157]

According to the TWU official, this is when the SEIU and Securitas agreed on a 10-city market agreement, and the SEIU pledged to organize the market more broadly.[158]

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.[159] 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.[160]

In fact, once the IFA with G4S was signed, another agreement was made between the SEIU, G4S and Securitas to attempt to organize other security employers in the U.S.[161]

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,

> [i]s 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

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[157] Interview with Göran Larsson, *supra* note 155.
[158] *Id*.
[159] Interview with Lars Lindgren, President of the Transport Workers Union of Sweden, (June 25, 2012).
[160] *Id*.
[161] *Id*.

> undermine other provisions of the [IFA]. But, in our industry, it is an important concept to the employer and the union to organize 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….[162]

National agreements in the U.S. aimed at organizing an industry and not just discrete bargaining units also points to this bilateral goal.

Hence, the problems of organizing security employees in the U.S., 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 be useful as voluntary recognition agreements, but their use seems limited given the legal (contractual) and economic constraints that currently exist.

## VI. A POLITICAL "HOSTILE TERRAIN"? VOLKSWAGEN AND DAIMLER

Daimler runs a plant in Tuscaloosa, Alabama, that has been operating since 1997.[163] Volkswagen has operated a plant in Chattanooga, Tennessee, since 2011.[164] Workers in both factories lack union representation. The UAW conducted a failed attempt to organize Daimler's Tuscaloosa plant in 1999.[165] 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. No union election has been called in Volkswagen's plant, yet.[166] 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

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[162] Email of Alice Dale, Property Services, UNI Global Union, July 10, 2013 (on file with author).

[163] Daimler Group, *Mercedes-Benz Tuscaloosa Plant*, http://www.daimler.com/dccom/0-5-1382119-1-1333338-1-0-0-0-0-0-9506-7145-0-0-0-0-0-0-0.html (last visited Nov. 6, 2012).

[164] Volkswagen Group America, *FAQs*, http://www.volkswagengroupamerica.com/chattanooga/faqs.htm (last visited Nov. 6, 2012).

[165] *See infra* at__.

[166] *But see* Bernie Woodall & Deepa Seetharaman, *Exclusive: UAW Steps Up Bid to Organize VW U.S. Plant: Sources*, REUTERS, Mar. 23, 2012, *available at* http://www.reuters.com/article/2012/03/23/us-uaw-vw-idUSBRE82M00M20120323 (last visited January 31, 2013).

seem to earn more than comparable auto workers covered by UAW contracts, further complicating the challenge of organizing workers in these foreign transplants.

### A. Daimler and Volkswagen, Globally and in the U.S.

Daimler is one of the world's leading firms and producers of cars, vans, trucks, and buses. The company traces its history to 1886 when Gottlieb Daimler and Carl Benz invented the automobile. Headquartered in Stuttgart, Germany, it has manufacturing operations in 17 countries, including the U.S., where it has numerous manufacturing facilities, of which most make trucks and vans, rather than automobiles.[167] In 2011 Daimler produced globally more than 2.1 million vehicles.[168] Its automobile plant in the U.S. is located in Tuscaloosa, Alabama. In 2011 that plant employed 2,828 employees and produced 148,092 vehicles. It is also one of very few Daimler plants in the world where the employees lack union representation.[169]

Volkswagen is also one of the world's leading automobile producers. In fact, it the largest automaker in Europe.[170] In 2011 Volkswagen delivered to customers 8.265 million vehicles, or "12.3 percent share of the world passenger car market."[171] Its headquarters are located in Wolfsburg, Germany.[172] The company has 99 manufacturing locations in 27 countries, including one in Chattanooga, Tennessee, where the company builds the Passat model.[173] The plant has been in operation since 2011 and, as is the case at the Daimler plant in Tuscaloosa, workers there are not represented by a union.

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[167] Daimler, *Locations in North and Central America*, http://www.daimler.com/dccom/0-5-8793-1-1382286-1-0-0-0-0-0-8-7145-0-0-0-0-0-0-0.html (last visited Dec. 8, 2012).
[168] *Id*.
[169] Stevis, *supra* note 103, at 133.
[170] Volkswagen, *The Group*, http://www.volkswagenag.com/content/vwcorp/content/en/the_group.html (last visited Dec. 8, 2012).
[171] *Id*.
[172] *Id*.
[173] Volkswagen, *Production Plants*, http://www.volkswagenag.com/content/vwcorp/content/en/the_group/production_plants.html (last visited Dec. 8, 2012).

As is true of most large German firms, the corporate structure of both firms include a supervisory board and a managerial board.[174] Half of the supervisory board is comprised of employee representatives; stock owner representatives compose the other half.[175] Under German law, the supervisory board appoints and supervises the managerial board of the firm.[176] Employee representation in the firm's management accounts for German "co-determination."[177]

### B. 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.[178] The Daimler World Works Council signed the IFA, according to the instrument, "on behalf of the International Metalworkers Federation ("IMF")."[179] The IMF was the global union that preceded what today is known as IndustriAll global union.[180]

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[174] Daimler, *Daimler at a Glance*, http://www.daimler.com/dccom/0-5-1259480-1-12898-1-0-0-0-0-0-36-7145-0-0-0-0-0-0-0.html (last visited Jan. 25, 2013). Volkswagen, *Senior Management*, 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).

[175] WEISS & SCHMIDT, *supra* note 175, at § 630.

[176] *Id*.

[177] BLANPAIN, *supra* note 92, at 603.

[178] Daimler, *Principles of Social Responsibility at Daimler* 2 (2002), *available at* http://www.imfmetal.org/files/DC%20code%20in%20English.pdf (last visited Jan. 31, 2013).

[179] 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. Please also note that an identical version of the agreement essentially corroborating the IFAs original language but now only on behalf of Daimler was more recently signed in February 2012 on behalf of Daimler and the World Employee Committee on behalf of IMF. This article, however, only analyzes the September 2002 agreement. 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* Daimler, *Principles of Social Responsibility at Daimler* 2 (2012) (on file with author).

[180] IndustriAll Global Union, *About Us*, http://www.industriall-union.org/about-us (last visited January 31, 2013).

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

> Daimler acknowledges the human right to form trade unions.
>
> During organization campaigns the *company and the 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. Daimler 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.* [181]

Therefore, management pledged not merely to follow the ILO's core labor standards and acknowledged their source in human rights, but went further to say that it would remain "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. The IFA was agreed to by Volkswagen, the IMF, (today IndustriAll) and the Group Global Works Council of Volkswagen ("Volkswagen Global Works Council"). 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.[182]

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[181] Daimler, *supra* note 179, *at* 2 (emphasis added).

[182] The history of Volkswagen's attempts to establish a global governance regime for industrial relations, particularly its creation of a EWC before EWCs were mandated by EU law is telling of its attempt to include former Eastern bloc workers into 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. One of the main interests of Volkswagen was to provide a system that can better ease plant restructuring at a global scale. Ian Greer & Marco Haupmeier, *Political Entrepreneurs and Co-Managers: Labour*

The IFA is short, a mere two pages, plus an additional few lines. While the document does not formally call itself an IFA, but a "Declaration on Social Rights and Industrial Relationships at Volkswagen,"[183] it exhibits the components of an IFA. First, it was negotiated and signed by a multinational corporation, Volkswagen, and a global union, in this case IndustriAll's predecessor, the IMF. The Volkswagen Global Works Council is also a party to the agreement. The IFA mentions "the Conventions of the International Labour Organisation" as "rights and principles" taken "into consideration" by the instrument.[184] 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.[185]

> Regarding freedom of association, the IFA states,
>
> The basic right of all employees to establish and join unions and employee representatives is acknowledged. Volkswagen, the unions and employee representatives respectively work together openly and in the spirit of constructive and co-operative conflict management.[186]

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 U.S.

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*Transnationalism at Four Multinational Auto Companies*, 46 BRIT. J. INDUS. REL. 76, 89 (2008).

[183] Volkswagen, *Declaration on Social Rights and Industrial Relationships at Volkswagen* (2002), *available at* http://www.imfmetal.org/files/Sozialcharta_eng3l.pdf (last visited on May 29, 2013).

[184] *Id*. at Preamble.

[185] The ILOs "core" conventions, which map onto Volkswagen's "Basic Goals" in the IFA are, without exception: 29 Forced Labour Convention, 1930; 87 Freedom of Association and Protection of the Right to Organise Convention, 1949; 98 Right to Organise and Collective Bargaining Convention, 1949; 100 Equal Remuneration Convention, 1951; 105 Abolition of Forced Labour Convention, 1957; 111 Discrimination (Employment and Occupation) Convention, 1958; 138 Minimum Age Convention, 1973; 182 Worst Forms of Child Labour Convention, 1999. ILO, Conventions and Recommendations , *available at* http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations (last visited Jan. 22, 2013).

[186] *Declaration on Social and Industrial Relationships at Volkswagen* § 1.1, *available at* http://www.imfmetal.org/files/Sozialcharta_eng3l.pdf (last visited Jan. 22, 2013).

### C. Neutrality But not Voluntary Recognition and Card Checks

Exactly how Volkswagen and Daimler will ensure protection of freedom of association in the U.S. is unclear. The IFAs do not seem to incorporate voluntary recognition and card checks for American workers. But they seem to contain language that bars employers from proactively opposing unions.[187]

The policy of German auto manufacturers regarding union recognition seems to be that they will remain "neutral" during the organizing drive. However, German automakers still want a formal vote by the workers to demonstrate their support of the union.[188] These two German auto makers do not seem to favor voluntary recognition and card checks for U.S. workers.

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.[189] The UAW's President sat on the very influential Supervisory Board of the firm, half of whom were employee representatives. Yokich raised complaints there, but to no avail.[190]

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

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[187] 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. The company policy was not to comment on that ongoing campaign. All he could say was that union recognition was an ongoing affair that was still being negotiated between the parties. Interview with Wolfgang Fueter, Volkswagen Group Human Resources International, Wolfsburg, Germany (Sept. 21, 2012). Daimler's management refused to directly talk to me about the IFA. The company directed me to secondary sources cited herein. 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.

[188] *Id*.

[189] *Id*.

[190] Jeffrey Ball, *UAW's Reception in Alabama Mercedes Plant Is Sour*, WALL ST. J., Jan. 31, 2000, at A15.

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.[191] The former German union officer's comments were not just a stray remark. A current officer of IndustriAll told me that IFAs "secure the job of workers."[192] The employers pledge not to retaliate against union activists for engaging in union activity. Such pledges matter because in some countries, such as the U.S., employers often fire union activists. 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.[193] It does not, however, necessarily support voluntary recognition and card checks.

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. She told me that the IFAs clearly include language banning intimidation and union busting tactics. 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.[194]

A member of the Volkswagen Global Works Council opined to me that the IFA clearly established "positive neutrality," meaning that Volkswagen would not engage in anti-union tactics.[195] Therefore, the company should not try to engage in union avoidance techniques. Workers should feel at liberty to speak about the union without fearing retaliation.

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[191] Interview with Robert Steiert, retired I.M.F. (today IndistriAll) and IG Metall union officer, Switzerland (July 10, 2012).
[192] Interview with Helmut Lense, Director, Automotive and Rubber, IndustriAll Global Union, Geneva, Switzerland (July 11, 2012).
[193] *Id*.
[194] Interview with Claudia Rahman, International Department, IG Metall, Frankfurt, Germany (Sept. 3, 2012).
[195] Interview with Frank Patta, Works Council Member of the Volkswagen Group, Wolfsburg, Germany (Sept. 21, 2012).

However, the IFA did not necessarily imply that management would facilitate unionization by providing voluntary recognition.[196]

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

### D. 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. As reported above, management at Daimler refused to directly speak to me. Volkswagen could not provide any information to me about this matter because there was an ongoing union drive in the Chattanooga plant. The company's policy was to not comment on that union effort.[197]

However, one can reasonably predict how the IFA would be used by looking at the experience of UAW organizing in 1999, three years before the IFA was signed by the parties. The UAW at time attempted to organize the Daimler Tuscaloosa plant. Even though the IFA did not then exist, Daimler took a "hands off approach" and pledged neutrality during the organizing drive,[198] which would very likely be the extent of its pledge today under the IFA given that the policy remains the same – neutrality but not voluntary recognition and card checks.

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[196] The works council member acknowledged that he personally believed that the union should be organized in simplest possible pathway – e.g., voluntary recognition through cards checks. However, he thought that the agreement did not necessarily provide for voluntary recognition and card checks. *Id*.

[197] Fueter, *supra* note 188.

[198] Ball, *supra* note 191, at A15.

In 1999 the union failed to organize the workers even though the employer remained neutral. Perhaps because of this failure, the union today has attempted a new organizing strategy for the entire auto industry called the "Fair Election Campaign." Below I explain the 1999 failed bid to represent the Tuscaloosa workers and how it could have led to the current "Fair Elections Campaign."

### D.1. The Failed Bid to Organize the Tuscaloosa Daimler Plant in 1999

In 1999, the UAW attempted to organize the Tuscaloosa plant, but it failed to obtain sufficient worker support. The company did not voluntarily recognize the union through card checks but it did pledge to remain neutral and to not oppose the union during its organizing effort. However, as a *Wall Street Journal* report recounted, the surrounding business community near the Tuscaloosa plant decided to take the lead in an anti-union campaign when it realized that Daimler would remain neutral. 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 pro-business and "union free" brand of Alabama. 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's[199] 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 disbanded the

[199] At the time Daimler had merged with Chrysler Corporation, a relationship that lasted until 2007, when DamilerChrysler changed its name back to Daimler. It sold its 19% share in Chrysler in 2009. Daimler, *Company History*, http://www.daimler.com/dccom/0-5-1324891-1-1324904-1-0-0-1345593-0-0-135-0-0-0-0-0-0-0.html (last visited Dec. 11, 2012).

> 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.[200]

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 anti-union campaign did was deliver messages to the workers stating that Volkswagen jobs could be threatened by UAW members from Detroit. One billboard read, "No UAW, Save our Jobs for Alabamians."[201] According to the newspaper, the union never truly refuted those claims.[202] 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 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.[203] The plant remains nonunion today.

Since the Volkswagen plant has been in operation only about two years as of the date of the writing of this article, little has been reported on any unionization attempts at the Volkswagen Chattanooga plant.[204] However, 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

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[200] Ball, *supra* note 191, at A15.
[201] *Id*.
[202] *Id*.
[203] Daimler, *Corporate Research Project*, http://www.corp-research.org/daimler (last visited Dec. 6, 2012).
[204] *But see* Bernie Woodall and Deepa Seetharaman, *Exclusive: UAW steps up bid to organize VW U.S. plant: Sources*, REUTERS, Mar. 23, 2012, *available at* http://www.reuters.com/article/2012/03/23/us-uaw-vw-idUSBRE82M00M20120323 (last visited Feb. 26, 2013).

Chattanooga and current Republican Senator from Tennessee, Bob Corker, said that unionization of the plant would not help workers at the plant. He pleaded with Volkswagen not to bargain a contract with the UAW.[205] 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.[206]

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

In sum, Daimler and Volkswagen have union-free plants in the U.S., in spite of the IFAs. We know that local political pressure has interfered in the UAW's unionization campaigns. It is perhaps for these reasons that the UAW has today 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.

### D.2. The IFA as a Political Tool: The UAW's Fair Election Campaign

As we saw above, there is significant local opposition to the union in Tuscaloosa, mostly from the business community, but also from some workers. Perhaps as a result, the UAW has taken a different tack in seeking to organize workers in the U.S. South. Its campaign is called the "Fair Elections Campaign."[207] It calls for employer neutrality during the

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[205] Andy Cher, *Corker to VW: No union*, CHATTANOOGA TIMES, Nov. 28, 2010.
[206] *Id*.
[207] UAW, *UAW Principles for a Fair Election*, http://www.uaw.org/page/uaw-principles-fair-union-elections (last visited Dec. 6, 2012).

representation process, access to the workplace, and even partnering with the employers against anti-union forces from the surrounding communities.[208]

The fair 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.[209]

There is no evidence suggesting that either Volkswagen or Daimler have officially endorsed the UAW's Fair 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 U.S., when firms sign IFAs. Importantly, the Fair 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 Elections Campaign principles and whether labor-management cooperation will improve the local political conditions.

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[208] 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*.

[209] *Id*.

### D.3. 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 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.[210] The lower labor costs at Volkswagen could be understandable given that Volkswagen remains non-union and, perhaps, pays lower wages to its workers. However, Volkswagen production in the U.S. is more recent than at any of the Big Three U.S. auto makers. Entry-level workers at Volkswagen, who are practically all of the company's workers, make about $18 an hour.[211] The Big Three pay their entry level workers, all covered by UAW contracts, about $16 an hour.[212] The reason why labor costs are higher at the Big Three is that most of their workers are not entry-level workers.[213] Senior workers make much higher wages at the Big Three. 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 organize a union.

To summarize, Daimler and Volkswagen have pledged neutrality during union campaigns in their IFAs. They seem to have kept their pledges. They do not voluntarily recognize unions, but they also do not oppose unions at the workplace. However, the UAW has still been unable to organize either plant. A political hostile terrain against unions in the states where Daimler and Volkswagen operate, Alabama and Tennessee, seem to be putting serious challenges on auto organizing. Such hostile political forces take the shape of business community led anti-union campaigns in Tuscaloosa and direct attacks by high level political figures

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[210] Center for Automotive Research, 2011 Detroit 3-UAW Labor Contract Negotiations, available at http://www.cargroup.org/?module=Publications&event=View&pubID=36 (last visited on May 28, 2013).
[211] E-mail of Kristin Dziczek, Center for Automotive Research, to author (May 8, 2013, 9:41 a.m. CST) (on file with author).
[212] *Id*.
[213] *Id*.

such as U.S. Senator Bob Corker in Chattanooga. The economics also do not seem to help the unions. In Volkswagen, entry-level workers, which are all the Volkswagen workers, have higher wages than their peers in the Big Three. Below I will explain the possibility of organizing auto workers with the IFA despite these challenges.

## VII. CONCLUSION: SUGGESTIONS FOR FURTHER RESEARCH AND EXPERIMENTATION

This article is mainly concerned about 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. My interviews of mostly global and company leaders were intended to be exploratory and to provide a "birds' eye" view of these agreements. The birds' 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. 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. The language of the Daimler agreement clearly calls for employer "neutrality." The language in the private security IFAs goes even further to state that employers will recognize unions under the "minimum legal requirements," which in the U.S. has meant voluntary recognition and card checks. All of these principles advance union recognition in the U.S. Therefore, we can hypothesize that:

> *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 birds' 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. Therefore, we can also conclude that:

> *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.*

Moreover,

> *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 U.S., participant observation during a union campaigns that have used of the agreements, and survey 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. IFAs can be used to organize unions that require less worker power, the so-called "minority unions," as explained below. Given the spirit of cooperation enshrined in IFAs, these minority unions should be respected by management as bargaining agents of its members. Workers who join them can help to promote industrial democracy in the U.S. 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 IFAs but not by U.S. labor law, 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-- 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 to engage in assertive industrial action when needed-- would be a dramatically new organizational form for workers in the U.S.

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 above. Moreover, to the extent that the non-union employers are paying below the union contract terms, there is a very serious problem. When non-union employers do not pay the union contract wage, industry wages are depressed, hurting all workers, union and non-union. Under such conditions, unions' capacity to promote economic equality, a "public good,"[214] is diminished. Minority unions on steroids supported by the IFAs could also help begin a process for wage equalization in the industry.

### 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. In this context, to further union membership, unions could request that non-union employers who have signed IFAs bargain with "minority unions" for "members only" contracts. Minority

[214] Public goods are goods enjoyed by everyone. By their 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. The non-exclusionary nature of public goods creates incentives for individuals to "free ride." Hence, groups that produce public goods must create "selective incentives" to support group membership and curb free riding. Such incentives for group membership can be negative or positive. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 14-15, 51 (1965). The present American model of exclusive representation and payment of union fees through dues check-off provides a negative sanction –exclusion from employment – for union membership.

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. While the "conventional wisdom" is that there is no legal obligation on an employer to bargain with a minority union,[215] Professor Charles Morris has argued that under international labor standards employers should 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.[216] Denying workers the right to bargain collectively merely because they are a minority is a violation of the principle of freedom of association and effective collective bargaining. As Professor Morris states,

> Certainly the current and conventional assumption, that certification or recognition of employee majority status is a precondition for union representation, provides employers with both the incentive and the means to deprive most private-sector employees of their right to engage in collective bargaining.[217]

Moreover, Professor Morris argues that,

> The 1998 ILO Declaration [and its freedom of association core labor right] provides additional international support for judicial and administrative recognition of the right of *all* employees covered by the NLRA – not just a majority employees – to gain *effective* access to union representation and collective bargaining.[218]

Hence, the pledges in the IFAs favoring the ILO's freedom of association core labor right provides a foundation from which the signatory employers

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[215] The Courts and the NLRB have never ruled on whether or not certified or recognized, exclusive representatives only have the right to bargain with management, and whether a minority of workers, in the absence of an exclusive representative, can still legally compel an employer to bargain with them. *See* CHARLES J. MORRIS, THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE 88 (2005). However, bargaining rights conferred only to majority unions became the "conventional wisdom" after decades of strong unions that needed not first bargain as minority unions, but could immediately jump to exclusive representation. *Id*. at 85-86.
[216] *Id*. at 151.
[217] *Id*. at 151.
[218] *Id*.

can be compelled to bargain collectively with a minority union in the U.S. Neutrality and recognition and card check agreements need not be the only standards favoring freedom of association that can be read into the IFA clauses. This leads us to our third hypothesis:

> *Hypothesis 3: IFAs increase the likelihood that an employer will recognize a minority union in the U.S.*

We should recognize that minority unions could be stepping-stones to full exclusive representation.[219] Professor Charles Morris has shown that "members only" contracts were common prior and shortly after the enactment of Wagner Act. Unions, including the UAW, used minority representation, or members' only agreements, as the first steps towards exclusive representation when they initially did not have majority support from the workers.[220] 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 Help 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. The firm stopped its anti-union tactics shortly thereafter. Therefore, industrial action can play an important role in organizing campaigns.

However, strike rights in the U.S. are very limited. Under current federal labor law, strikes are effectively unprotected. Employers may "permanently replace" economic strikers.[221] One of the reasons

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[219] *Id*. at 85.
[220] *Id*.
[221] *See N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). When employers permanently replace striking workers they are not necessarily dismissing them. Rather, employers replace a striker and that replacement may remain on the job permanently. Strikers always retain their employee status. The employer must return them to work, but only after a position has opened up for the striker. As the U.S. Supreme Court stated, in dicta:

permanent striker replacements hurt unions today is that employers replace economic strikers and then call for decertification elections, with remarkable effectiveness.[222] Because strike replacements destroy unions, Professor Julius Getman has advocated for reversal of the Supreme Court decision *NLRB v. Mackay Radio*,[223] which determined that economic strike replacements did not violate the federal labor law.[224]

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> 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 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, prohibiting by section 8.

*Id*. at 345-346.

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

[223] 304 U.S. 333 (1938).

[224] 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 thereafter accepted by the courts to be the correct interpretation of the NLRA. James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 534 (2004) (The Supreme Court's dictum in Mackay resulted from implicit assumptions that employers have a 5th Amendment right to hire employees); ELLEN DANNIN, TAKING BACK THE WORKERS' LAW: HOW TO FIGHT THE ASSAULT IN LABOR RIGHTS 86-88 (2006) (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).

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.[225] 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.[226] 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 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 non-union employees, giving added legitimacy to unions and worker representatives. IFA-covered employees could organize minority union "on steroids" – a novel organizational form for working class collective representation in the U.S. This leads us to our fourth set of hypotheses:

> *Hypothesis 4a: Employees of an employer who have signed an IFA are less likely to be permanently replaced during a strike.*
>
> *Hypothesis 4b: If strikers are not permanently replaced by an employer that has signed an IFA, the striking employees*

[225] 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 87, at 641, note 5.

[226] *Id*.

> *will be more likely to effectively press their collective demands at work.*
>
> *Hypothesis 4c: If workers and unions are more effectively pressing their demands at work, it is more likely that non-union workers will recognize the legitimacy of unions as worker representatives, aiding unionization.*

Of course, convincing employers not to permanently replace striking workers when they have the legal right to do so in the U.S., 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 of international labor norms will easily live up to their commitments when embroiled in real industrial disputes.[227] 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. As explained earlier, IFAs are part of "continuing bargaining processes" between the firms and the national unions and works councils that lie behind global unions and global works councils that formally sign the IFAs. It is up to these real 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 hypothesis:

> *Hypothesis 4d: If the parties which, in reality bargained and signed the IFA (national unions and works councils in the signatory firm's home country) police the IFA assertively, then the probabilities of effective compliance with the IFA at a global level will increase.*

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[227] Compa & Feinstein, *supra* note 87, at 641 (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, "[w]e are likely to wait in vain" before any of those companies condemn permanent strike replacements in the U.S.")

Concurrently,

> *Hypothesis 4e: If the parties which, in reality bargained and signed the IFA (national unions and works councils in the signatory firm's home country) do not police the IFA assertively, then the probabilities of effective compliance with the IFA at a global level will decrease.*

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.[228] Moreover, it is this author's 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, it is likely that employers would likely stop making global commitments in IFAs if they risk legal liability across the globe. Second, the historical record has shown that courts' protection of labor rights is fickle. In the U.S., courts have readily undermined collective labor rights when issues of property rights percolate into cases and controversies.[229] 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.[230] National security has also been used to undermine workers' rights.[231] Narrow readings of procedural rules have also been used by the Roberts' Supreme Court to undermine collective action lawsuits involving workplace equality.[232] And things are not better elsewhere. In the EU, market freedoms have undermined collective rights.[233] While "hard" law could be

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[228].

[229] See James Atleson, Values and Assumptions of American Labor Law 5-9 (1980); See also Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 1937-1941, 62 MINN. L. REV. 265 (1978); See ELLEN DANNIN, TAKING BACK THE WORKERS' LAW, HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS 58-59 (2006).

[230] See Christopher David Ruiz Cameron, 51 UCLA L. REV. 1 *Borderline Decisions: Hoffman Plastic Compounds, the New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy* (2003-2004).

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

[232] See Michael J. Zimmer, *Wal-Mart v. Dukes: Taking the Protection out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409, 428 (2012).

[233] See ANDREAS BUCKER & WIEBKE WARNECK (EDS.), RECONCILING FUNDAMENTAL SOCIAL RIGHTS AND ECONOMIC FREEDOMS AFTER VIKING, LAVAL AND RUFFERT 3-18

used to compel employers to live up to their IFA commitments, nothing will beat solidarity and collective action.

### C. IFAs Can Support Organization if 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 forces that do not follow such principles. Theory tells us that anti-union politics create serious difficulties for union growth. The UAW has experienced such anti-union politics in the U.S. South. The union's campaign seems to aim at the political targets through a political coalition with employers who pledge to live by the principles of freedom of association and effective collective bargaining. 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 5a: If an employer has signed an IFA, there is an increased likelihood that the employer will coalesce 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 5b: If an employer and a union coalesce to defend freedom of association and effective collective bargaining, there will be a diminished likelihood that a "politically hostile terrain" for unions will pervade.*

A different and more complicated scenario seems to exist in the security services industry. The traditional industrial action strategy for the

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(2011). For a historical and comparative account of the role of courts and labor rights see K.W. WEDDERBURN, THE WORKER AND THE LAW 24 (2nd ed. 1981) (Courts were inimical to trade unions in Great Britain, leading unions to advocate for non-intervention of the state in industrial relations); OTTO KAHN-FREUND, ET AL., KAHN-FREUND'S LABOUR AND THE LAW 12-13 (3D ED. 1983) (Courts should play limited role in safeguarding workers' rights given the way that courts historically favor employers. Law's real impact on workplace regulation is also marginal given the realities of social power (employers against workers) and markets in industrial and employment relations).

organization of security guards would entail already unionized employees, such as union doormen and janitors, striking and picketing buildings whose security firms hire non-union 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.[234] And yet, the "fortuitous business arrangement" caused by contracting out work, which creates situations where union and non-union workers are compelled to work side-by-side,[235] undermining the power of the union and workers' capacity to act in concert, remains a reality that goes against the principles of the NLRA.[236] Professor Ellen Dannin has proposed that labor's

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[234] *See NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951) (A labor organization commits an unfair labor practice within the meaning of § 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 non-union security firm and hire a union security firm.

[235] This was, precisely, Justice Douglas' dissent in *Denver Building & Construction Trades Council*. 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 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 s 8(b)(4) and § 13 by reading the restrictions of s 8(b)(4) to reach the case where an industrial dispute spreads from the job to another front.

*Id*. at 693-694.

[236] The NLRA states in relevant part that,

> Employees 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

reinvigoration requires "taking back the workers' law," the NLRA, through a litigation strategy aimed at convincing the courts to reverse decisions that contradict with the stated purposes of the labor law.[237] Such strategies, however, are beyond the purview of this article on IFAs. However, we can conclude that there are real limits regarding the promise of IFAs given the "hard" rules against worker collective action in the U.S. In this manner, IFAs can be useful and effective at the margins of the law.

### D. Exploring Ways to Stretch Freedom of Association to its Limit

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 legal realities in the form of Taft-Hartley and court-imposed restrictions on workers' rights seem to 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 to organize minority unions "on steroids" – with full strike and secondary activity rights– and coalesce 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 far from unquestionable, unions have not exhausted the global agreements' possibilities as organizing tools. Amidst diminishing union membership, globalization, a restrictive labor law and revival of anti-union 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.

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> activities for the purpose of collective bargaining or other mutual aid or protection….

U.S.C.A. § 157. NLRA § 7.

[237] *See* DANNIN, supra note 230.

## APPENDIX:
## LIST OF INDIVIDUALS INTERVIEWED BY AUTHOR FOR THIS ARTICLE

### Interviewed in Person

- Alice Dale, Property Services, UNI Global Union, Nyon, Switzerland (July 9, 2012).[238]

- 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).

- Thomas Metz, Staff of the General Works Council, Daimler AG (September 4, 2012)[239]

- 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).

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[238] Only follow-up email from interview cited in this article.
[239] Interview used to corroborate general facts. Interview not cited in this article.

**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)

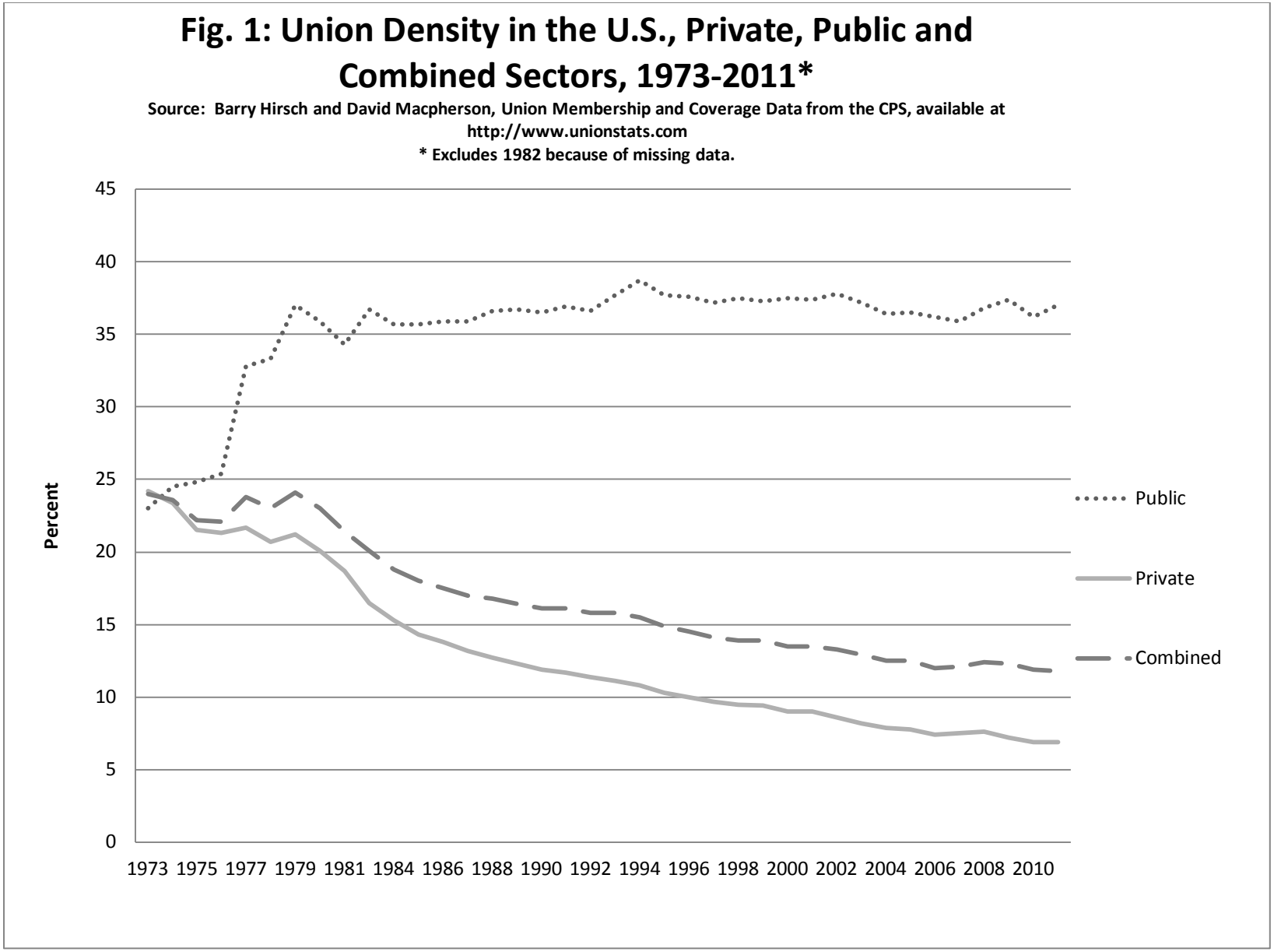
Fig. 1: Union Density in the U.S., Private, Public and Combined Sectors, 1973-2011*
Source: Barry Hirsch and David Macpherson, Union Membership and Coverage Data from the CPS, available at http://www.unionstats.com
* Excludes 1982 because of missing data.
Percent
45
40
35
30
25
20
15
10
5
0
1973 1975 1977 1979 1981 1984 1986 1988 1990 1992 1994 1996 1998 2000 2002 2004 2006 2008 2010
Public
Private
Combined

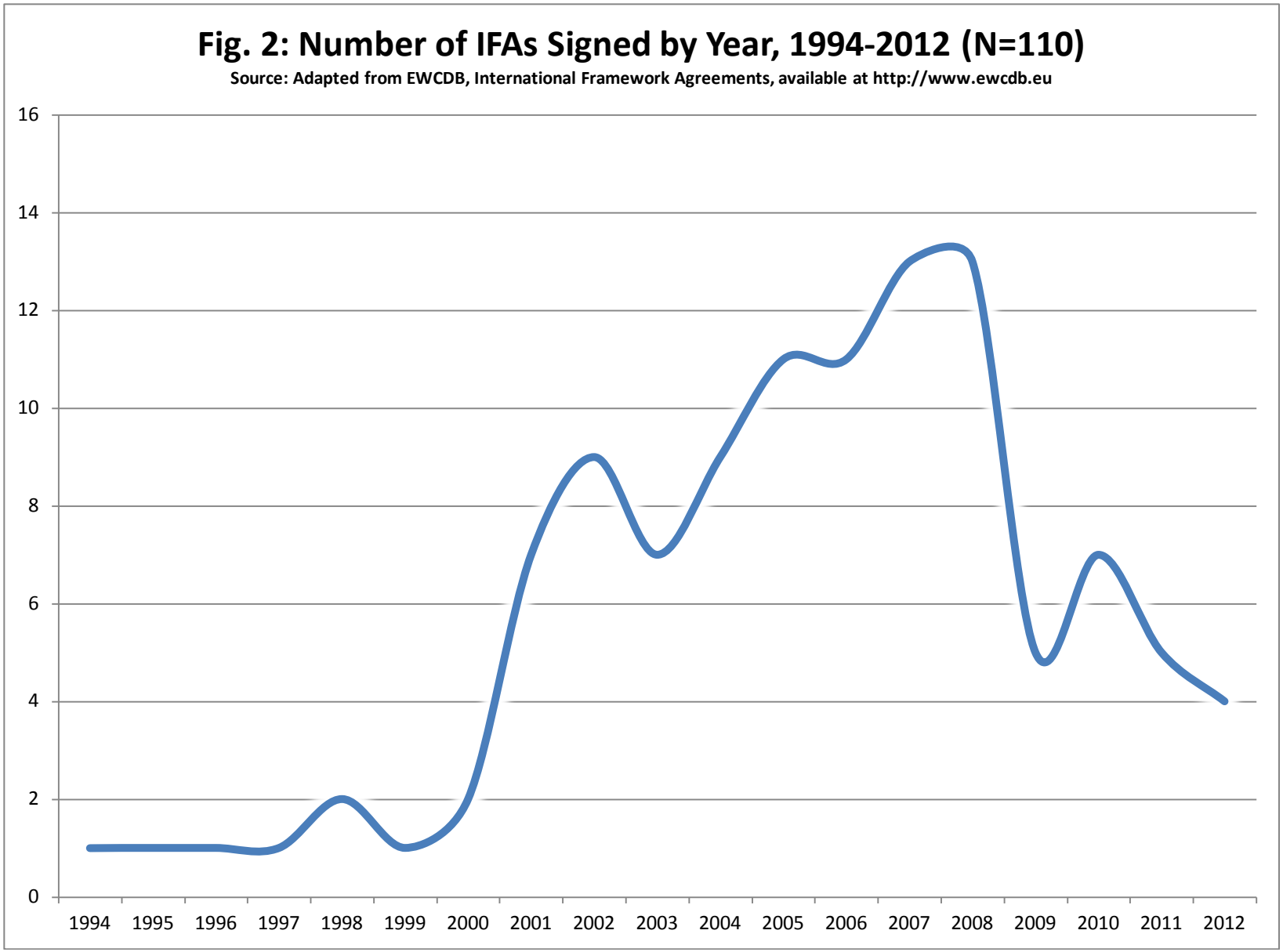
Fig. 2: Number of IFAs Signed by Year, 1994-2012 (N=110)
Source: Adapted from EWCDB, International Framework Agreements, available at http://www.ewcdb.eu
16
14
12
10
8
6
4
2
0
1994
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012

## Fig. 3: Number of IFAs, by Firm Country of Origin, Through 2012 (N=109)*

**Source: Adapted from ETUI, International Framework Agreements, available at http://www.ewcdb.eu**
***Excludes Olympia Flexgroup due to the firm's dissolution.**