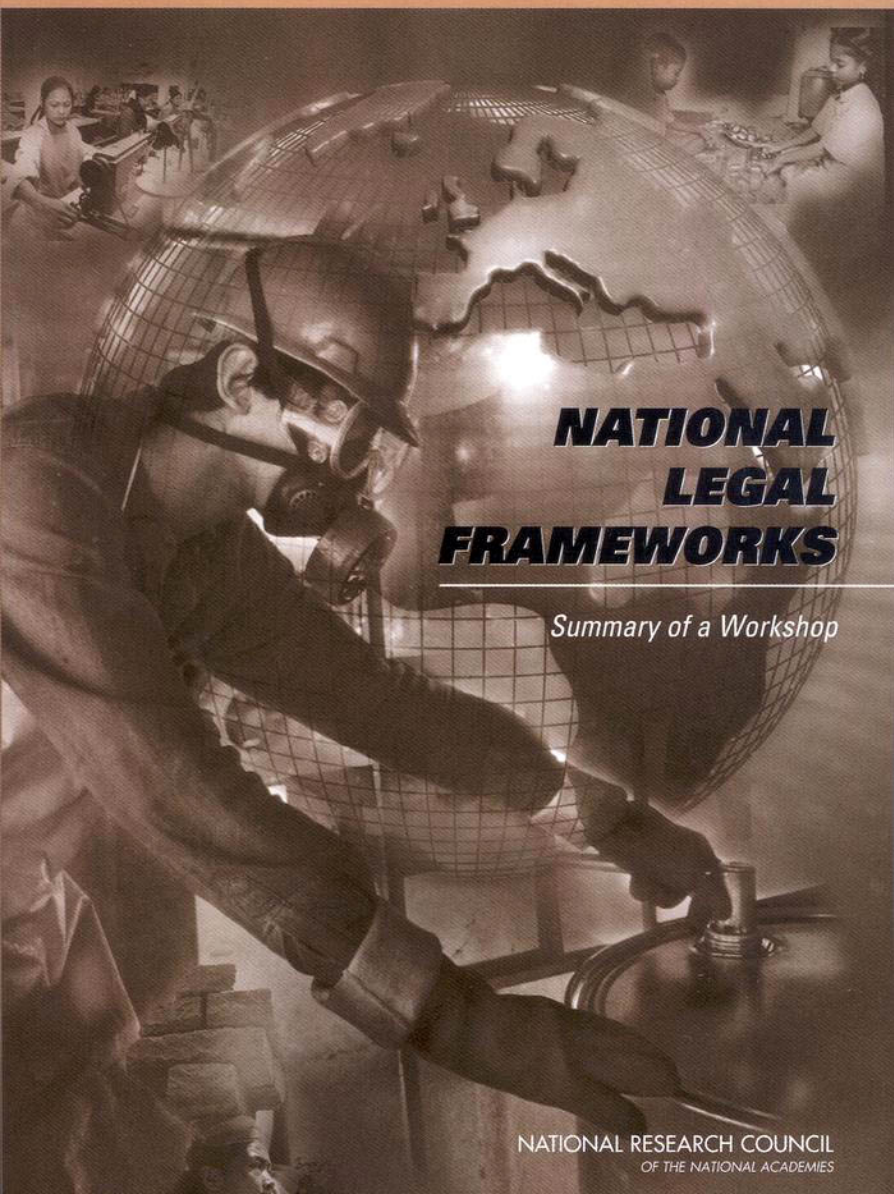
MONITORING INTERNATIONAL LABOR STANDARDS



NATIONAL LEGAL FRAMEWORKS

Summary of a Workshop

NATIONAL RESEARCH COUNCIL
OF THE NATIONAL ACADEMIES

MONITORING INTERNATIONAL LABOR STANDARDS

NATIONAL LEGAL FRAMEWORKS

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Crispin Rigby, Editor

Division of Behavioral and Social Sciences and Education

Policy and Global Affairs Division

NATIONAL RESEARCH COUNCIL
OF THE NATIONAL ACADEMIES

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This workshop summary has been reviewed in draft form by individuals chosen for their diverse perspectives and technical expertise, in accordance with procedures approved by the Report Review Committee of the National Research Council. The purpose of this independent review is to provide candid and critical comments that will assist the institution in making its published report as sound as possible and to ensure that the report meets institutional standards for objectivity, evidence, and responsiveness to the charge. The review comments and draft manuscript remain confidential to protect the integrity of the process.

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Although the reviewers listed above provided many constructive comments and suggestions, they were not asked to endorse the content of the report nor did they see the final draft of the report before its release. The review of this report was overseen by Milton Goldberg, Education Commission of the States, Washington, DC. Appointed by the National Research Council, he was responsible for making certain that an independent examination of this report was carried out in accordance with institutional procedures and that all review comments were carefully considered. Responsibility for the final version of this report rests entirely with the author and the institution.

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List of Acronyms

AFL-CIO	American Federation of Labor and Congress of Industrial Organizations
AGOA	African Growth and Opportunity Act
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CMILS	Committee on Monitoring International Labor Standards
DOL	U.S. Department of Labor
EU	European Union
GSP	Generalized System of Preferences
HR	Human Resources
HRM	Human Resources Management
ICFTU	International Confederation of Free Trade Unions
ICSE	International Classification of Status in Employment
ILAB	Bureau of International Labor Affairs
ILO	International Labour Organization
ILS	international labor standards

LMC	labor–management council
MFA	Multi-Fiber Agreement
NAFTA	North American Free Trade Agreement
NAS	National Academy of Sciences
NLRC	National Labor Relations Commission
NRC	National Research Council
OPIC	Overseas Private Investment Corporation
PAC	Project Advisory Committee
SOLAIR	Center for Labor Justice (Philippines)
TPSC	Trade Policy Staff Committee
UAW	United Auto Workers
UN	United Nations
UP	University of the Philippines
USTR	U.S. Trade Representative
WTO	World Trade Organization

1

Introduction

Over the past half-century, the international flow of goods, services, and capital has grown rapidly. Globalization creates new economic, cultural, and social opportunities but also poses the challenge of ensuring that workers throughout the world share in these opportunities. Responding to this challenge, the U.S. government carries out a variety of policies and programs aimed at encouraging greater recognition of workers' rights around the globe.[1] The U.S. Department of State monitors workers' rights abroad and reports on the status of those rights as part of its annual report to Congress in the *Country Reports on Human Rights Practices.* Building on this history of monitoring and encouraging workers' rights around the world, the Trade Act of 2002 includes on the list of overall trade negotiating objectives of the United States "promote respect for worker rights."[2]

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[1]For example, U.S. laws governing the Generalized System of Preferences (GSP) and the Overseas Private Investment Corporation (OPIC) include provisions promoting workers' rights. The GSP program is designed to boost the economies of some of the least developed nations by providing preferential, duty-free entry for more than 4,650 products from approximately 140 designated countries and territories. OPIC, a government agency, issues political risk insurance and loans to help U.S. businesses invest and compete in emerging markets and developing nations. By law, countries or companies that fail to provide workers with internationally recognized workers' rights may be ineligible for GSP and/or OPIC benefits. More information on the GSP and OPIC programs can be found at www.ustr.gov/gsp/general.shtml and www.opic.gov.

[2]H.R. 3009, the Trade Act of 2002, Subtitle B, Section 2102.

Carrying out this commitment to workers' rights requires an understanding of labor conditions and country-level compliance with international labor standards. The U.S. Department of Labor (DOL) has contracted with the National Research Council (NRC) of the National Academies to enhance its understanding of these issues.

THE NATIONAL ACADEMIES PROJECT

The NRC has convened the Committee on Monitoring International Labor Standards (CMILS) to provide expert, science-based advice on monitoring compliance with international labor standards. The committee has undertaken a two-year project with multiple intersecting activities that will

- identify relevant, valid, reliable, and useful sources of country-level data on labor standards and incorporate them into a database tailored to the current and anticipated needs of DOL's Bureau of International Labor Affairs (ILAB);
- assess the quality of existing and potential data and indicators that can be used to systematically monitor labor practices and the effectiveness of enforcement in order to determine compliance with national labor legislation and international standards;
- identify innovative measures to determine compliance with international labor standards on a country-by-country basis and to measure progress on improved labor legislation and enforcement;
- explore the relationship between labor standards compliance and national policies relating to human capital issues; and
- recommend sustainable reporting procedures to monitor countries' progress toward implementation of international labor standards.

The substantive scope of the CMILS's study includes national compliance with the international standards identified in the 1998 Declaration on Fundamental Principles and Rights at Work of the International Labour Organization (ILO), which are

1. freedom of association and the effective recognition of the right to collective bargaining;
2. the elimination of all forms of forced or compulsory labor;
3. the effective abolition of child labor; and
4. the elimination of discrimination in respect of employment and occupation.

Additionally, the committee will examine issues related to "acceptable conditions of work," as defined in U.S. trade law, including minimum wages, hours of work, and occupational safety and health.

Workshop on National Legal Frameworks and Enforcement Mechanisms

The committee is charged with assembling information on country compliance with international labor standards and organizing these data into an easily accessible, web-based format for use by the DOL. As one step in this process, the committee held a workshop in November 2002 to discuss national legal frameworks and the challenges of measuring the extent to which international standards have been incorporated into national laws and practices. The goal of this workshop summary is to communicate the key ideas and themes that emerged from the workshop presentations and discussions.

Participants in the workshop were selected on the basis of their expertise in international, comparative, and domestic law, as well as their practical experiences with monitoring and assessment programs of international institutions and the U.S. government. Several presenters prepared papers for the workshop, which are available at the project website, www.nas.edu/internationallabor.

Although members of the CMILS identified speakers and developed the agenda of the workshop, they did not participate in writing this summary. This summary does not contain any deliberations, conclusions, or recommendations of the committee but presents the content of each participant's presentation.

2
International Labor Standards in the National Context: Legal Frameworks and Monitoring

The opening session of the workshop focused on the complex relationship between international labor standards and national legal structures. To assist the National Academies' Committee on Monitoring International Labor Standards (CMILS) in examining legal aspects of labor standards compliance, the two presenters, Arturo Bronstein (International Labour Office) and Marley Weiss (University of Maryland), offered their perspectives on some of the challenges of incorporating international norms into national systems and discussed methods of assessing the extent to which this has been accomplished.

Arturo Bronstein
Senior Labour Law and Policy Advisor, ILO

Mr. Bronstein opened his presentation with an overview of the role of the ILO within the United Nations system and its relationship with member states. While the main task of the ILO is the formulation of labor standards, he added that these standards call for implementation, which most often comes in the form of statutory law. "Very few countries in the world really can implement labor standards by means other than state intervention," he said. When "intervention" does come in the form of a revision or creation of national labor laws or policies, states often turn to the ILO for assistance. Because national laws should not be an "abstract

production," Mr. Bronstein said, the ILO always attempts to include in the process the social partners—representatives of workers and employers.

The Role of the ILO in the Framing of National Legislation[1]

Mr. Bronstein discussed the ILO's historical role in working with nations to adopt or revise labor laws. In the 1960s, this included extensive cooperation with newly independent countries emerging from colonialism. In the 1980s, as an increasing number of countries—particularly in Africa and Latin America—made efforts to democratize their political systems, the ILO offered assistance in reorganizing legislation to match shifts in industrial relations. In the 1990s, newly independent states in Eastern Europe sought assistance from the ILO in making the transition away from centrally planned economies. "They needed to assess their collective labor legislation in order to take into account the fact that a basic assumption of the labor relations system in a market economy is freedom of association." The "transition countries" of Central and Eastern Europe have also requested assistance from the ILO to integrate the *acquis communautaire*.[2] Several recent examples of ILO technical assistance in the field of labor law can be found in Box 2-1.

Currently, according to Mr. Bronstein, member states call on the ILO for assistance in revising their labor law for a number of reasons:

1. implementation of ratified ILO standards;
2. reorganization of their labor legislation so that it is consistent with a different pattern of economy;

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[1]"The International Labour Office is the permanent secretariat of the International Labour Organization and focal point for the overall activities that it prepares under the scrutiny of the Governing Body and under the leadership of a Director-General, who is elected for a five-year renewable term. The Office employs some 1,900 officials of over 110 nationalities at the Geneva headquarters and in 40 field offices around the world. In addition, some 600 experts undertake missions in all regions of the world under the programme of technical cooperation. The Office also constitutes a research and documentation centre and a printing house issuing a broad range of specialized studies, reports and periodicals." *About the ILO*, "Structure of the ILO," available at www.ilo.org/public/english/depts/fact.htm.

[2]The *acquis communautaire* is the body of European laws that a country must adopt, implement, and enforce in order to be allowed to join the European Union. This includes treaties, regulations, and directives passed by the European institutions as well as judgments of the Court of Justice.

BOX 2-1
Some Examples of ILO Labour Law Policy Advice to Member States

BAHAMAS: The Office provided advice on the Employment Protection Act and the Minimum Wages and Health and Safety at Work Acts, both adopted in 2001.

CAMBODIA: The Labour Code of Cambodia, 1996, was adopted on the basis of a draft prepared with ILO advice. In 2001 the government was urged to adopt regulation to address trade union representation and collective bargaining at the enterprise level, as the Labour Code had assumed that the country's trade union structure was to be based on industry-level trade unions. An ILO expert was invited to visit the country and, in collaboration with officials appointed by the government, prepared a draft text, on the basis of which a decree was prepared and adopted in December 2001.

GUATEMALA: On the basis of advice provided by the Office, the Congress of the Republic adopted Legislative Decree No. 13-2001 of 25 April and Legislative Decree No. 18-2001 of 14 May, which settle a number of issues raised by the Committee of Experts concerning non-application of Convention No. 87. In its report to the ILO Conference in 2002 the Committee of Experts acknowledged this as a "case of progress" though certain issues remain outstanding.

KOSOVO: The UN administration in Kosovo received ILO technical advice on an Essential Labour Law, which entered into force in 2001.

SERBIA: The government of Serbia received ILO assistance to prepare a Law on Employment, adopted in December 2001.

SOUTH AFRICA: Advice given by the Office, on the basis of the ILO Code of Good Practice on HIV/AIDS and Employment, was adopted in December 2000 under the Employment Equity Act.

3. structural adjustment—seeking advice on how to address labor and social issues within the context of a more open and internationally competitive economy; and

4. creation of labor law "from scratch."

The last example, rare cases in which ILO assistance is requested for the initial drafting of labor legislation, is not the preferred method because it tends to reduce the state's sense of "ownership." More often, the ILO works to identify how to assist a member state in carrying out its own "responsibility of creating labor law for [its] citizens." In this process, the nonbinding technical advice of the ILO is made "in light of international labor standards, ratified or unratified Conventions." Mr. Bronstein added that Recommendations "are not second-class instruments, they are first-class guidelines for countries to help them address labor law issues."[3] In addition to referencing international standards, ILO guidance also considers aspects of comparative labor law. On this issue, Mr. Bronstein said, "It's important for a country, before it takes a decision on a new labor law, to know how such and such labor law problem is tackled in a would-be competitor country or in a country which shares a number of cultural or historic values."

There are several basic elements of the ILO's approach to addressing labor legislation in such a wide array of countries. Mr. Bronstein said that the ILO, in its work to assist countries in revising their labor law, does not promote any particular kind of framework for labor market regulation. Because the aim of the ILO is to promote the protection of workers, technical advice "must seek a balance between the needs of capital and the needs of labor." To achieve this balance, a basic feature of ILO assistance is to involve workers, organized labor, and organized management in the process. Mr. Bronstein said that labor law must be realistic and applicable. This requires legislation that is consistent with the particular economic and social environment, and each country has the right to structure its labor law regime in line with its own values. And finally, labor law should be able to generate predictable behavior from those covered by the labor laws.

The ILO's technical assistance in the realm of labor law may be impacted by a broad array of factors, both within a country and globally. Mr. Bronstein said that social and political stability within a member state could greatly influence the types of reforms that might be recommended in par-

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[3]An ILO Recommendation "is an instrument not open to ratification but which lays down general or technical guidelines to be applied at the national level. They often provide detailed guidelines to supplement principles set out in Conventions, or they may provide guidance on subjects which are not covered by Conventions." ILO Glossary of Terms Related to International Labour Standards, available at www.ilo.org/public/english/standards/norm/sources/glossry.htm#r.

ticular cases. And the prevalence of market-oriented economies necessitates awareness of the aspects of national labor law that could potentially impact the international competitiveness of the state requesting assistance. Because of the wide variety of national political and economic settings, the ILO has to handle a broad range of technical requests. Mr. Bronstein listed some of the recurring issues of ILO assistance in labor law development:

- How to regulate the contract of employment has become an increasingly important subject for policy advice from the ILO because of the increase in "atypical forms of employment."[4]
- The transfer of enterprises, managing mergers and takeovers, also calls for careful assessment and regulation.
- Termination of employment is "perhaps the most emotional individual employment relations problem."
- Hours of work is a very important issue, particularly among countries that have recently applied for European Union (EU) membership. These nations must integrate a critical European directive on working time before they can join the EU, and they have sought ILO assistance in understanding the subtleties of the directive.
- Remuneration, minimum wages, and "protection of wages" are among the issues raised most often by member states.[5]
- Other topics that arise include maternity issues, protection of young workers, safety and health, and training.

Within the realm of industrial relations, Mr. Bronstein said, it is "clear that the most important issues are those of freedom of association, collec-

[4]"Atypical forms of employment" generally refers to those forms that may not be covered by labor laws, collective bargaining agreements, and social security systems. Examples include contributing family members, subsistence workers, and some temporary, part-time, or self-employed workers. See International Labour Office, "Developing a conceptual framework for a typology of atypical forms of employment: Outline of a strategy," paper submitted to Joint UN Economic Commission for Europe, Statistical Office of the European Communities, International Labour Organization Seminar on Measurement of the Quality of Employment, Geneva, May 27–29, 2002. Available at www.unece.org/stats/documents/ces/sem.48/3.rev.1.e.pdf.

[5]"Protection of wages" refers to remuneration issues such as the forms (e.g., legal tender), methods, and periodicity of wage payments; allowable deductions or assignment of wages; and notification of wage conditions. The ILO Protection of Wages Convention 1949 (No. 95) contains additional information on the topic.

tive bargaining, and dispute settlement." On freedom of association, the ILO receives frequent requests for policy advice on trade union recognition, trade union structure, and trade union protection. While there are a few cases of states imposing a single union structure, Mr. Bronstein added, most member states have a multi-union structure, which can exist at both the national and enterprise level. This can lead to "cases of inter-union rivalry," complicating the issue of trade union recognition and leading to numerous requests for advice from the ILO.

In addressing questions of trade union structure, the ILO makes it clear that workers are to determine the structure of their organization. Mr. Bronstein said that governments cannot impose a given trade union structure, but there is the possibility of "framework legislation" that proposes different patterns of trade union structure to member states. States may then offer this range of possibilities, with the understanding that it will be up to the workers themselves to make a final determination on how they want to organize themselves. Where trade unions have already been formed, requests for advice on protection of trade union leaders and members from anti-union discrimination are received very frequently. In terms of addressing trade union leverage, Mr. Bronstein highlighted the fact that the right to strike is highly debatable in many countries, and the ILO finds itself in the position of trying to propose a balance between the needs of workers to have at their disposal a fundamental means of trade union activities and the need of the state to have the right to strike organized in an orderly fashion.

The ILO advice to member states on collective bargaining issues generally covers procedures, structures, and the legal effects of collective bargaining. Mr. Bronstein said that the question of legal effect is particularly relevant in countries in which the legal system permits the extension of collective agreements to workers and employers who do not belong to the associations that have initially signed the agreement. The ILO is also asked to provide advice on mechanisms for social dialogue at the national and enterprise levels, addressing issues such as labor–management cooperation, consultation rights, and the relations between trade unions and non-unionized workers.

In conclusion, Mr. Bronstein said that, in addition to advice on the content of national labor laws, the ILO provides assistance to member states on the enforcement of national law. This involves several key institutions. The first is the national labor inspectorate, which must be empowered and adequately equipped to carry out its responsibilities effectively. Law en-

forcement agencies, such as the police force, and specialized judicial machinery can also play critical roles in implementing national efforts to protect workers; there are approximately 100 countries that have specialized labor courts. Finally, there are alternative dispute settlement procedures and machinery that often require the advisory services of the ILO.

Marley Weiss
Professor, University of Maryland School of Law

Professor Weiss began her presentation by polling the workshop audience to determine how many were lawyers or economists. Finding that most of the audience fell into one or the other of these categories, she said that the issues of concern in assessing national compliance with international labor standards are at the intersection of law and economics with a "little dash of politics and sociology." It is this combination that makes the task so complicated.

Assessing National Compliance with International Obligations

In attempting to assess whether an international norm has been transposed into a national legal obligation, she said, we need to ask some basic questions that are often overlooked. The first concerns the basis for the international obligation. How obligated is the government? Is the norm "soft law," created to be hortatory or advisory in nature? Deviating from this norm "may be less than optimal behavior, it might not be either economically or morally the best behavior, but from the point of view of talking about monitoring and using enforcement mechanisms in international law, there isn't any justification for going further than treating these things as advisory." A related question concerns the clarity of the norm. Sometimes international standards can be extremely vague, and this vagueness often tends to coincide with the "soft law" instruments, "as opposed to the firmer, harder, more prescriptive bodies that are more likely to be tied to serious monitoring, compliance enforcement, and, in some cases, sanctioning regimes."

Professor Weiss described four stages of assessing national compliance with international obligations:

1. Assessment of the transposition of the international standard into domestic national law. While some governments consider treaties to be

self-executing and automatically incorporate the standard into a national legal obligation, most states require enactment of a law. Once the standard has been enacted, interested actors, such as employers, workers, and trade unions, may then use domestic machinery more readily to enforce their rights.

2. Assessment of the broader legal context into which the norm is transposed, including procedures and remedies as well as other legal provisions that will interact with the transposed norm and either promote or impede its effectiveness.

3. Assessment of the government's post-enactment efforts to enforce the transposed measure, including allocation of resources to agencies that inspect, investigate, prosecute, and adjudicate these matters.

4. Assessment of direct and indirect measures of compliance by employers, including labor statistics, litigation rates, and prevalence of labor disputes.

In discussing the incorporation of international norms into domestic bodies of labor and employment law, Professor Weiss made the comparison between the federal and state levels in the United States. She described the methodology of Title VII[6] discrimination cases, in which there are two fundamental questions:

- Are the laws "facially discriminatory"? Does the text itself provide for different treatment of similarly situated people based on race, sex, age, nationality, religion, or other status? Professor Weiss offered the example of a U.S. Supreme Court case that held that an employer who relied on sex-segregated mortality tables to develop a pension plan, paying different benefits based on gender, was engaging in facial discrimination.[7]
- Are the laws discriminatory in practice? While the law may look okay as written, do the procedures, remedies, or context render it ineffective or in conflict with another regulation?

Professor Weiss cautioned, "If all you do is read the words on paper and say 'oh, this all looks good,' and there isn't anything conflicting, you

[6] Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, and national origin.

[7] *City of Los Angeles Department of Water and Power* v. *Manhart,* 435 U.S. 702 (1978).

will miss an awfully high proportion of the more difficult situations." Therefore, after the initial assessment based on the facial meaning and the context of the law, one must determine whether there is a "disparate impact," measuring the violation of the law or norm by the effects. Professor Weiss gave the example of the U.S. Supreme Court case addressing a facially neutral employer policy that required all janitors to have a high school diploma. The Court ruled that because this could operate to disproportionately exclude members of one racial group or another in some parts of the country, and could not be justified on grounds of job-relatedness, the policy was "fair in form, but discriminatory in operation."[8]

Disparate impact may be by design or by accident, which leads to several consequences. The first is that some international norms are based on the outcomes, and there is "a large tendency in the literature about monitoring to assume that it's the outcomes that we're measuring," Professor Weiss said. This may be effective in the determination of disparate impact, but "once you move away from a norm designed in terms of outcomes, you have this very big gap about how well the outcomes measure compliance or noncompliance with the norm." Using outcome measures to determine domestic implementation of international norms is complicated further by the need to examine two different layers. First, what is the government doing, and second, what are domestic actors, such as employers, doing? Understanding each of these layers can be very difficult for an outside assessor because of language, cultural, and legal differences. Professor Weiss offered a domestic example of contextual factors that can lead to different outcomes. In Maryland, a plaintiff's lawyer in a wage and hour case may often choose to file in the U.S. District Court, which is geared toward enforcing the rights of creditors against debtors. That court will view the worker as a creditor and be very quick and effective in enforcing those rights. However, in federal court or in the general jurisdiction Maryland Circuit Court, where workers' cases often address wrongful discharge and discrimination, the court is more accustomed to viewing the worker "in the posture of someone challenging the employer's need for efficiency, economy, productivity, and so on." Because of this, Professor Weiss said, "the exact same norm, even with the same formal remedies and procedures, will get very different treatment in those different forums."

This example highlights the difficulty that an external assessor faces in

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[8] *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 431, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971).

measuring contextual factors. Although in certain cases an examination of available procedures or remedies may provide facial evidence of compliance or noncompliance with a norm, often "insider information" is needed. Professor Weiss emphasized the need to recruit experts who are knowledgeable about the domestic body of law in question. This expertise must extend beyond the statutory scheme to knowledge of the procedural and remedial structure of the courts as well as the industrial relations context in which these laws and institutions operate. Without in-depth knowledge of these issues, legal data—the published documentation of the legal system in operation—may conceal many of the less blatant cases.

An examination of employer compliance poses even greater problems. A plethora of "confounding variables that have to do with social attitude, employee choices, very peculiar interactions with other bodies of law" led Professor Weiss to conclude that the four-stage approach described above can be used to detect only the most blatant cases. There is a choice between monitoring compliance "at this very superficial level" and developing the expertise to "get below the surface" of law, economics, and sociology. As an example of the latter, Professor Weiss mentioned the EU's efforts to monitor legal developments of member states. However, even with ample resources, these efforts do not fully reveal the extent of compliance. To do that, Professor Weiss said, would require recruiting insiders, perhaps through complaint procedures or partnership arrangements, who will "shed a different kind of light on what's going on than what governments usually supply."

DISCUSSION

The discussion period allowed members of the CMILS and other attendees to ask Mr. Bronstein and Professor Weiss for clarification of certain points in their presentations and to explore other related issues. T.N. Srinivasan, a professor of economics at Yale University, asked several questions about the representativeness of the ILO's tripartite structure. First, "given the fact that a significant number of ILO members are not participating in democracies in any sense of the term, how seriously should one take their nominations of employer representatives and worker representatives to the ILO?" Mr. Bronstein said that the ILO has no clear criteria on representativeness, but challenges can be made to the Credentials Committee, which reports to the annual International Labour Conference. In addition, representatives of questionable independence would not be likely to

receive the nominations from other worker or employer group members when the Governing Body is appointed, thus limiting their influence on the organization. Offering the example of one Central American country, Mr. Bronstein added that if member states exclude certain organizations from their delegations to the ILO, the Governing Body might still appoint a representative from that organization.[9]

Mr. Srinivasan asked how well the ILO represents workers in the informal economy—a large share of the workforce in developing countries—and how this impacts advice to governments if labor laws may cover only 10 percent or less of the workforce. Mr. Bronstein responded that, in some cases, there is "no practical possibility for the labor law to apply." However, the ILO's fundamental Conventions do not distinguish between the formal and informal economies; although there are some issues of the informal economy that can be addressed through these instruments, others will require different approaches. Mr. Bronstein emphasized that the problem of narrow coverage in national labor law is not limited to developing economies. According to Mr. Bronstein, the increase in the "contingent workforce"—including temporary, part-time, or subcontracted labor—in the developed world calls for "serious reflection" on the coverage of labor law in all settings.

Mo Rajan (Levi Strauss & Co.) asked the presenters, given the "vagaries of the Conventions" and the latitude given to member states in their application, how does the ILO advisory process address whether a country's laws are currently consistent with a particular Convention? Mr. Bronstein responded, "In practice, when I see how the texts are discussed, I will say the cases of real vagary are an exception. The Conventions often call for implementation 'according to national law and practice,' which may mean that countries can assert flexibility to implement Conventions." Laws that may be inconsistent with a Convention can be brought to the attention of

[9]"The Governing Body is the executive council of the ILO and meets three times a year in Geneva. It takes decisions on ILO's policy. It establishes the programme and the budget, which it then submits to the Conference for adoption. It also elects the Director-General. It is composed of 28 government members, 14 employer members and 14 worker members. Ten of the government seats are permanently held by States of chief industrial importance. Representatives of other member countries are elected at the Conference every three years, taking into account geographical distribution. The employers and workers elect their own representatives respectively." Structure of the ILO, available at ilo.org/public/english/depts/fact.htm.

the ILO supervisory mechanisms and lead to recommendations for legislative changes. Mr. Bronstein added that, in addition to the member states' own reports to the ILO on ratified Conventions and the observations of the Committee of Experts, the ILO Constitution provides other procedures. Article 24 allows national and international workers' and employers' organizations to make a "representation" that a member state has "failed to secure the effective observance" of a ratified Convention. Article 26 procedures, which are "very rarely used," allow the complaint to be made by another member state that has also ratified the Convention in question.

Professor Weiss added that many international norms, including ILO Conventions, "are in the form that says we will specify the ends to be accomplished, the moral principle to be observed. And we will leave it up to you, the member states, to figure out the right way, the means, to make that work in your system." While "ILO Conventions are frequently relatively precise," like other international norms, they must "leave a lot of room to accommodate the different needs of countries that in good faith and with vigorous efforts wish to implement the standard." Thus, as Professor Weiss said at the beginning of her presentation, it is a complicated task to determine whether a member state's chosen means—within its legal, economic, and political context—are compatible with a norm that defines ends. She added, "There is tremendous value in having an authoritative body to interpret the international norm. The ILO, at least partly, has that in its system," and the EU has the European Court of Justice to fill that role. As an example, Professor Weiss said that the lack of a similar body in the North American Free Trade Agreement Labor Side Agreement was indicative of structural problems found in many systems. "If you don't have an adjudicator, then you only have withdrawal from one side or the other from the treaty or contract as a vehicle to coerce the other to accept your interpretation."

Professor Weiss responded to a question from Kimberly Ann Elliott (Institute for International Economics) on the utility of examining complaints as a measure of compliance problems. Citing the difference in the large numbers of complaints the ILO has received from Latin America, compared to the relative absence of those received from China, Ms. Elliott asked, "What alternative mechanisms can you use where people don't have the opportunity to blow a whistle?" Professor Weiss agreed that complaints are "inadequate" as a measure, adding, "It's another one of these indicators that works if there's a lot. But if you don't have a lot of complaints, it just may mean that people are too scared."

Professor Weiss reiterated her point concerning the critical need to obtain information from within countries. "Part of my bottom line is that it's really important to have both some systematic monitoring and some vehicle to receive complaints that will get you direct information. If you can buttress that in a way by developing a core of people with real comparative law expertise, then you have an inside domestic source and you can actually get some good information" on the cases that warrant further attention after an initial screening of national laws and data.

3

Implementing International Standards at the National Level

The second session of the workshop provided more concrete examples of assessing compliance with international standards, expanding on relevant issues at both the national and sectoral levels. The presenters, Juan Amor Palafox (University of the Philippines) and Lejo Sibbel (International Labour Organization [ILO]-Cambodia), provided the National Academies Committee on Monitoring International Labor Standards (CMILS) with a more indepth look at some of the critical factors affecting the coverage and implementation of national laws in the Philippines as well as the lessons learned from the unique role of the ILO in monitoring garment factories as part of a U.S. trade agreement with Cambodia.

Juan Amor Palafox
Dean, School of Labor and Industrial Relations,
University of the Philippines

Mr. Palafox began with a brief background of socioeconomic conditions in the Philippines. He noted that the contextual data for the Philippines (Box 3-1) are essential to understanding the country's experience with core international labor standards. Especially significant is the Philippines' high population growth rate, which tends to exacerbate socioeconomic problems. In the transition from agriculture to services, the Philippines seems to have skipped the development of manufacturing. "But even if the service sector has captured most of the employment share, it's not lost on

BOX 3-1
Philippines Data

- Population: 80 million
- Labor force: 33.91 million
- Unemployment: 3.8 million (11.2%)
- Growth: 4.1%
- Poverty rate: 34.2%
- Population growth: 2.3%

Gross Domestic Product (GDP) Share

	1960	2000
• Agriculture	30%	20%
• Manufacturing	29%	25.5%
• Services	15%	50%

Employment Share

	1960	2000
• Agriculture	60%	37%
• Manufacturing	12%	10%
• Services	28%	50%

SOURCE: Data from Department of Labor and Employment, Philippines.

our economists that it's a very poor kind of employment share" with marginal jobs in certain parts of the Philippines service sector, such as retail trade, small transport, and personal services. Mr. Palafox added that another important element of the economy of the Philippines is the large number of overseas workers, approximately six million, who send more than $6 billion home annually.

Labor Law and Implementation in the Philippines

After providing this contextual information on the labor market in the Philippines, Mr. Palafox turned to the legal framework, which he described as "the most strict, the most complete, most comprehensive set of social labor legislation." All of the ILO's fundamental rights are addressed in the

Constitution and national laws of the Philippines. However, as Professor Weiss discussed earlier, assessing the coverage and implementation of these rights in practice requires a more thorough analysis than can be obtained by simply looking at the content of the laws. For example, only 3.8 million workers (or 12 percent of the labor force) are unionized, and even a smaller number, less than half a million, are covered and protected by collective bargaining agreements. Mr. Palafox said that monitoring whether a sector is "organizable" or not may require examining larger enterprises in the formal sector separately. He estimated, for example, that if one looks at enterprises of 200 or more employees in the Philippines, almost 80 percent of these enterprises are organized. More types of data are needed to fully understand the nature of workers' organizations and their activities in the Philippines. For example, in many cases, Mr. Palafox contends that unions are organized "not by expanding membership, but rather by raiding from other federations," but data on certification elections and challenges are lacking. Similarly, data on the causes—rather than the mere occurrence—of strikes are needed because it may be the case that there are "more strikes arising out of inter-union conflicts than out of bargaining [issues]."

Turning to the problems of implementation, Mr. Palafox said that certain provisions of the law allow the Secretary of Labor to intervene in strikes by assuming jurisdiction and mandating a settlement if the Secretary views the industry involved in the strike as "vital to national security." Another problem is the significant backlog of cases received by the National Labor Relations Commission (NLRC). Each year the NLRC receives more than 20,000 cases, and the 150 adjudicators are able to dispose of only 60 percent of those cases. Institutional capacity of the inspectorate is also an issue, with only 183 inspectors covering 80,000 enterprises. Mr. Palafox said that each year nearly half of these enterprises are cited for violations, most often relating to wages. While the Philippines does have a minimum wage, for the majority of non-union workers, the minimum wage most often serves as a ceiling. The legality of providing "wages in kind"—in the form of lodging, meals, and products—has also offered employers a method of significantly reducing take-home wages. He added that employers have also been known to withhold benefits simply because the workers are not aware of what is due to them under the law.

Mr. Palafox discussed several issues relating to specific worker categories that often fall outside the coverage of national labor law. First he described the "grim picture" (see Box 3-2) of child labor in the Philippines, citing poverty as the primary cause. He then turned to protections in the

BOX 3-2
Philippines National Statistics Office

Survey of Working Children, 2001

- More than 26% (2.7 million) households had children 5–17 years old working in their own household-operated business or in other households in 2001, just a slight decline of 1.3% from the 1995 survey.
- There were 24.8 million children during the survey period.
- Four million (16.1%) were economically active in 2001; 3.6 million in 1995.
- A Filipino working child was mostly male, an elementary grader whose median age was between 10 to 17 years, and usually rural based.
- Majority of working children worked as laborers and unskilled workers.
- More than 50% of the working children were in agriculture, hunting, and forestry. Others in wholesale and retail, repair of motor vehicles, and personal/household services.
- 37% worked only during school vacation, while one in every four working children were considered permanent workers.
- Almost 60% of working children were unpaid workers in their own household- or family-operated farm or business.
- One in every four children worked in evening or during the night time.
- An estimated 60% of the working children were exposed to a hazardous environment.
- One-fifth of the children considered work to be risky or dangerous.
- Twenty-three percent experienced injuries at work, and another 19% suffered from work-related illnesses.
- Seven in every ten working children attended school; most claimed no effect on schooling.
- Two in every five children dropped out of school.

SOURCE: National Statistics Office, Philippines (2001).

Philippine labor code that result from the high rate of overseas workers. These are primarily in the form of regulating recruitment agencies, including the requirement that contracts must be filed with the government. In practice, however, overseas workers still face many violations of their rights, such as "contract switching," underpayment or nonpayment of wages, lack of rest days or vacation leave, unsafe working conditions, and physical and sexual harassment.

Mr. Palafox concluded by listing several issues to consider for an improved understanding of national compliance with international labor standards, based on the experience of the Philippines:

- Population growth, levels of poverty, unemployment, and economic development should always be the context for a deeper understanding of compliance with international labor standards.
- The effectiveness of implementation of social legislation hinges on the development of the formal sector. With a large informal sector, employment becomes a matter of survival, rather than job quality.
- The Philippines social and labor legislation is geared primarily toward the wage and salaried sector, yet more than half of the country's workforce are in agriculture or small or micro-enterprises or are own-account workers.[1] The government needs to be aggressive in its campaign to include these workers in its social protection.
- The inspectorate arm of the government is considered too small and ineffective to be taken seriously. The funds allocated toward implementation of standards would probably be an excellent measure of a country's commitment to enforcing labor standards.
- Another measure would be developmental (education, awareness programs, and campaign) strategies in core areas.
- Recognizing the role of the informal sector in the economic development of the country would provide more incentives for regulation and, at the same time, encourage people involved in this sector to comply with minimum standards.

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[1]According to the International Classification of Status in Employment (ICSE), "Own-account workers are those workers who, working on their own account or with one or more partners, hold the type of job defined as a 'self-employment job,' and have not engaged on a continuous basis any 'employees' to work for them during the reference period. (The partners may or may not be members of the same family or household.)" Further information on the ICSE is available at www.ilo.org/public/english/bureau/stat/class/icse.htm.

- Poverty is the root of child labor. Until poverty is reduced to minimal levels, no amount of program funds can totally eliminate child labor.
- There must be more guarantees of protection for overseas workers. There are rampant violations of standards that are supposedly protected in the Philippines, but once abroad, the Filipino worker is at the mercy of the employer. Recipient countries must recognize parallel rights among foreign workers and their local counterparts.

Lejo Sibbel
Chief Technical Advisor, ILO Garment Sector Working Conditions Improvement Project in Cambodia

Mr. Sibbel began his presentation by providing some background information on the U.S.–Cambodia Bilateral Textile Agreement of 1999. As part of this agreement, the ILO was asked to assist in ensuring the availability of information on Cambodia's compliance with international labor standards. The agreement set export quotas from Cambodia to the United States for 13 categories of textiles and allowed a 14 percent annual bonus increase in that quota as long as Cambodia supported "the implementation of a programme to improve working conditions in the textile sector, including recognised core labour standards, through the application of Cambodian labour law." The original three-year agreement was extended for an additional three years at the end of 2001, and the possible annual bonus was increased to 18 percent.

Monitoring Working Conditions in Cambodia

While the initial ILO project was to include three components—capacity building, monitoring of working conditions, and legislation and education—Mr. Sibbel's primary focus has been on the monitoring component. The ILO has recruited and trained eight Cambodian monitors, and there are currently 195 factories registered for the project. Participation of factories in this "voluntary" program has been increased by the requirement instituted by the Cambodian Ministry of Commerce that factories must be registered before they can export items to the United States. But the ILO monitors do not have any enforcement powers. They "can advise on what the law is, what the law says, and how improvements can be made, but they cannot hand out fines or slap employers on the wrist." Monitors are trained to look for violations of the following: minimum age; forced labor; free-

dom of association; collective bargaining; wages; hours of work; leave; and hygiene, sanitation, safety, and health. Monitoring activities are generally carried out through half-day or one-day visits to the factories. The factory size, which ranges from 35 employees to 7,000, dictates the amount of time required for the visit. Each monitor uses a checklist of 156 questions (not including subquestions) to interview managers, worker representatives, and the workers themselves, both on and off the premises as necessary to provide confidentiality. Monitors also perform a physical inspection of the enterprise. Visits are unannounced.

Mr. Sibbel said that the task of monitoring the application of both Cambodian law and core ILO standards is simplified by the fact that the Cambodian law was drafted with assistance from the ILO (in particular Arturo Bronstein, a speaker in the first session of the workshop). This has led to an assumption that the relevant international standards are incorporated into the national law, but there are still cases in which there are gaps or the national legislation is unclear. To overcome this, the ILO has used a tripartite Project Advisory Committee (PAC) to review all of the 156 items from the monitoring checklist. This protects the project from criticism about the standards applied in its work. Complaining factory owners are told that the Garment Manufacturers Association of Cambodia, through the PAC, has endorsed the checklist.

After a review of the information provided by the monitors, a report is drafted and sent to the management of the factory. As Mr. Sibbel said, "At face value we believe more or less what the workers tell us." But providing a copy of the report to factory management gives management the opportunity to dispute or disprove any allegations with additional documentation. The final report, which is sent to the parties of the trade agreement and posted on the ILO website, describes problems, makes recommendations for improvements, and notes whether the factory management has agreed with the ILO's findings.[2] Four synthesis reports were produced between November 2001 and September 2002. The third report contained information for 30 factories, gathered after a three- to four-month "grace period" and follow-up monitoring visits to the factories. Box 3-3 contains samples of the implementation status by subject and by factory from that report. Table 3-1 contains key findings from the first three ILO reports.

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[2]The synthesis reports are available at www.ilo.org/public/english/dialogue/ifpdial/publ/cambodia.htm.

BOX 3-3
Sample Information from ILO Monitoring of Cambodia's Textile Sector

Implementation Status by Subject

Suggestion
Management should ensure that workers understand their wage calculations.

Implemented: Eternal Way, Cung Sing, F.Y. Cambodia, P.Y.L. Cambodia, USA Fully Field, United Faith, Yubin, Winner

In process: Grace Sun

Not implemented: Quality Textile, San Lei Fung, Shelby, S.H. International

Implementation Status by Factory

Belgian: Of the 31 suggestions made, 8 had been implemented, 1 has been dropped because of duplication, 1 has been dropped because it was addressed to shop stewards, and 21 suggestions had not been implemented. Five new suggestions were made.

Bumin: Of the 15 suggestions made, 1 had been partly implemented, and 14 suggestions had not been implemented. Thirty-three new suggestions were made. (NB: A full first visit could not be conducted due to lack of cooperation from the factory, preventing monitors from gathering all information required. Following a change in management, full access was granted, and a full follow-up visit was undertaken. Hence, the number of new suggestions made.)

City New: Of the 30 suggestions made, 12 had been implemented, 2 were in the process of being implemented, 3 were dropped because they were addressed to shop stewards or no longer relevant, and 13 had not been implemented. Six new suggestions were made.

TABLE 3-1 Key Findings from ILO Monitoring Reports on Textile Sector in Cambodia

November 2001	April 2002	June 2002
1. No evidence of child labour	1. No evidence of child labour, except one minor incident	1. No evidence of child labour
2. No evidence of forced labour	2. No evidence of forced labour	2. No evidence of forced labour
3. No evidence of sexual harassment	3. No evidence of discrimination, except three incidents of sexual harassment	3. No evidence of discrimination, including sexual harassment
4. Incorrect payment of wages occur with some frequency	4. Incorrect payment of wages occurs frequently	4. Improvement with regard to the incorrect payment of wages
5. Nonvoluntary overtime work occurs in a substantial number of factories	5. Nonvoluntary overtime work occurs in a substantial number of factories	5. Improvement with regard to ensuring that overtime work is undertaken voluntarily
6. Overtime hours beyond legal limit occurs in a substantial number of factories	6. Overtime hours beyond legal limit occurs in a substantial number of factories	6. Improvement with regard to ensuring that overtime hours are within legal limits
7. Freedom of association is a problem in some factories	7. Freedom of association is a problem in some factories	7. Improvement with regard to ensuring freedom of association
8. Strikes not organized in line with the law	8. Strikes not organized in line with the law	8. Strikes not organized in line with the law

According to Mr. Sibbel, when his project team provides suggestions for improvement, the team tries to find practical solutions, often looking at whether the *intent* of the law has been satisfied, rather than applying formalistic requirements. Mr. Sibbel admitted that he was a bit surprised at the level of improvements that have occurred thus far. He attributed this success in part to the ILO project but also acknowledged that there are other nongovernmental organizations working on these issues. He concluded that the combined effort of all of these actors, along with the "carrot" (increased quotas) and the "stick" (publication of factory names), has promoted positive change in Cambodia's garment industry.

Mr. Sibbel attributed the success of the ILO project to several factors. The first is the independence and credibility of the ILO, which he believes has led to greater access for ILO monitors than provided to others undertaking unannounced visits. Second, because the project covers the entire garment sector, the ILO has created a "level playing field." Each factory is held to the same standard, rather than having wide variations when different codes of conduct are applied to individual factories. Limiting application of the standard to a sector that is "relatively small" has also facilitated consistency and contributed to a successful start.

The monitoring program has encountered some problems, however. First, it had to confront disparate expectations of various stakeholders. The unions thought that the ILO would serve as an intermediary in industrial disputes, and the employers "thought that we would nail them to the cross." Mr. Sibbel explained that the perceived lack of transparency in the process of determining bonus allocations by the United States can continue to frustrate factory managers and call into question their incentives to participate in the monitoring program. The Cambodian government has taken the view that ILO monitors can replace the ineffective national labor inspectors and has ceased inspections in participating factories. Inspectorate institutions have been weak for a variety reasons, one of them being the absence of political will. The fact that factories can be managed and owned by government officials significantly complicates enforcement. For example, one factory is owned entirely by the military, and "No labor inspector dares go inside that factory."

Mr. Sibbel referred to monitoring as a means to an end. "You use that information to identify problems and then build capacity so that the people directly involved—management, workers, government—can fix those problems by themselves." He concluded by noting that the ILO is not necessarily a better monitor than any other institution performing these functions. As noted above, the relative success of this ILO project seems to derive from the existence and leverage of the trade agreement and the small size of the sector being monitored. Therefore, while some aspects of this program may be replicable in other countries, "each country requires its own model."

DISCUSSION

The discussion period was led by Mo Rajan. He asked the presenters to elaborate on the issues of political will and the motivations of employers to participate in the quota program, particularly in light of the upcoming

abolishment (in 2005) of all existing textile quotas under the Multi-Fiber Agreement (MFA) of the World Trade Organization (WTO). Mr. Sibbel responded that the motivation for factory managers stems from the desire to create a positive image in the hope of securing a share of the market before 2005 "when people expect big sucking sounds from China." Employers are starting to put pressure on the Cambodian government to enforce the laws because they realize that several bad actors could reflect badly on the sector as a whole when future sourcing decisions are made. Mr. Sibbel added that the majority of employers "are not necessarily of ill will but they simply don't know what the law is, and without knowing the law, they don't necessarily know how they can make sure that their procedures and practices are in line with what the law wants." Once they understand the law, he said, often the assistance required to ensure compliance is minimal, and there is no resistance on the part of the managers. Employers are also hoping, Mr. Sibbel said, that improved conditions would lead to fewer strikes, which are planned during the "high season" to impose the greatest cost on the businesses.

Mr. Palafox, referring to greater resistance to compliance in the Philippines, said, "It is a common belief among Philippine employers, at least in small and medium enterprises, that compliance costs money. And, therefore, there's no motivation toward voluntary monitoring, inspection, or compliance." In the Philippines, greater productivity has not accompanied increases in nominal or real wages, so employers have not been encouraged to improve their compliance in that regard. Nor have they embraced voluntary monitoring. Mr. Palafox reported that he knows of only six international companies with codes of conduct and third-party monitoring, while no local enterprises have engaged in similar programs.

Mr. Rajan also asked a question concerning the availability and quality of information relating to compliance with labor standards. Mr. Palafox responded that the Department of Labor in the Philippines gathers a great deal of information but focuses solely on the formal sector, which comprises perhaps only 10 percent of the workforce in the Philippines.

Responding to a question from Theodore Moran, a professor at Georgetown University and chair of the CMILS, Mr. Palafox discussed the relationship between unions and labor–management councils (LMCs) in the Philippines. He noted that almost all American companies, particularly in the electronics sector, are using "positive HRM [human resources management], which means they mimic unions, they offer competitive wages, they offer participatory mechanisms for decision-making, good

working conditions, benefits, so I think consciously there have been efforts to prevent unions." Regulation of LMCs is included in national labor laws, but there have been conflicting government policies in promoting them. The Philippines Department of Labor encourages LMCs only in organized or unionized sectors, where the law stipulates that the unions will automatically be represented on the LMC. However, the Philippines Department of Trade and Industry promotes LMC formation in nonunionized sectors. Mr. Palafox added that there is "spotty information" on the effect of LMCs. Both Mr. Palafox and Mr. Sibbel pointed out that the evidence presented on this issue, perhaps not surprisingly, has been contradictory. According to Mr. Palafox, organized labor, which has "always looked at LMCs as conflicting, contradictory forms of mechanisms," provided evidence this year that LMCs have not improved conditions. On the other hand, Mr. Sibbel, who attended an annual conference of LMCs in the Philippines, said that the evidence presented at that meeting showed that LMCs "were functioning in some way or another, including improving working conditions."

Professor Srinivasan asked about the costs associated with the monitoring program in Cambodia. Mr. Sibbel responded that the program has a budget of $1.4 million for three years of monitoring. The funding comes from three different sources—$1 million from the U.S. government and $200,000 each from the Cambodian government and the Garment Manufacturers Association of Cambodia. The number of workers employed in the factories is approximately 190,000, so the cost per worker of the program is less than $2.50 per year.

Participants addressed the question of whether there have been efforts in Cambodia to share the information and expertise of the ILO project with inspectors and other monitors. Mr. Sibbel said that when the ILO monitors are investigating child labor cases, they have occasionally brought government inspectors with them to the villages. However, he reminded participants of his earlier point: The government's initial perception was that ILO monitors may replace inspectors. And he added that they have tried to distinguish the information-gathering role of monitors from the enforcement function of inspectors. On the question of sharing information with other monitors, Mr. Sibbel said that there is a "distinct monitoring fatigue" as numerous monitors repeat the same questions covering an array of codes. However, the ILO signs a memorandum of agreement with factories, agreeing not to share any information except that contained in the public synthesis reports.

The discussion then focused on the distinction between compulsory overtime and forced labor; the summary of findings from the reports (Table 3-1) showed that compulsory overtime was a problem in a substantial number of factories, but there was no evidence of forced labor. According to Mr. Sibbel, the basic distinction was that employees were free to refuse the overtime, even though the result might be that they lost the job. Forced labor cases involved a "menace of a penalty" beyond unemployment, such as penal sanctions or other losses of rights and privileges. "The economic reality is that a lot of workers do not have that freedom because they need that job, but from a legal ILO point of view, there is a difference between forced labor and forced overtime," Mr. Sibbel said.

4

Methods of Assessing National Laws and Enforcement Mechanisms

The third session of the workshop addressed various methods of assessing national compliance with international labor standards. The presentation by Janice Bellace (The Wharton School) examined the institutional approach of the International Labour Organization's (ILO) Committee of Experts on the Application of Conventions and Recommendations (CEACR), while David Tajgman (Labour in Development) provided a framework for assessment based on his work in the field, stressing the importance and challenges of ensuring legitimacy, consistency, and independence in the process.

Janice Bellace
Professor, The Wharton School of the University of Pennsylvania

Professor Bellace opened her presentation with a brief history of the CEACR. Established in 1926, the CEACR currently has 20 members from around the world. The diverse membership offers a variety of international perspectives and a range of legal expertise that extends beyond labor law. The CEACR forms part of the *supervisory* mechanisms of the ILO; it is not a court or tribunal, and it does not issue enforceable judgments. Professor Bellace has been a member of the CEACR since 1994.

CEACR Assessments of National Law and Practice

One of the primary roles of the CEACR is to determine the meaning of Conventions when questions of application are raised in the reports that ratifying governments must submit periodically on national law and practices. Professor Bellace said that the CEACR considers and comments only on reports submitted by countries that have ratified particular Conventions. The CEACR also writes a general survey each year, examining in greater depth a particular Convention or group of Conventions, which has been determined by the Conference. Finally, in its "individual observations" and direct requests, the CEACR gives an opinion on whether a government is applying the provisions of ratified Conventions. The individual observations are published in the CEACR's annual report, but the direct requests are not made public. However, the annual report includes a list of countries that have received direct requests.

Country reports on fundamental Conventions[1] are due to the ILO every two years, and report forms are provided to the responsible parties to indicate the types of information requested.[2] Reports on any other ratified Conventions generally follow a five-year cycle. When government reports are drafted, they are supposed to be shared with the employer and worker organizations of that country, but Professor Bellace said that in practice this is not always done. These organizations can also submit information directly to the CEACR, although this is rarely done, perhaps because organizations aren't aware of this option. If the CEACR intends to comment on the information received from employer and worker organizations, it will request a response from the government involved.

Country reports are first reviewed by ILO staff and analyzed in light of prior reports and any observations or direct requests from the CEACR on the issue. According to Professor Bellace, it is difficult to understand the full context of a CEACR report without doing a review of past observations. She described the process as one of ongoing dialogue between the CEACR and the government. This dialogue is made public through the

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[1]Eight ILO Conventions—addressing freedom of association and the right to collective bargaining, forced labor, child labor, and discrimination—have been identified by the ILO's Governing Body as fundamental to the rights of human beings at work, irrespective of levels of development of individual member states.

[2]The report forms for the fundamental Conventions can be found at www.ilo.org/public/english/standards/norm/sources/reptforms/index.htm.

annual release of the CEACR report *Application*, which contains a general report and observations concerning particular countries. This report can be very difficult reading and is most accessible to those who know the Conventions well. Additionally, understanding the language used by the CEACR, which tends to be "very diplomatic," is critical to understanding the content of the report. For example, if the Committee "notes with concern" or "notes with regret" that a government has taken (or failed to take) a particular action, this indicates a more serious problem. Alternatively, if the Committee "notes with satisfaction" that legislation has been passed or that other steps have been taken to apply the Convention, this is a clear indication of progress. Professor Bellace explained that this language is intended to avoid embarrassing particular countries and is geared toward maintaining the dialogue and cooperation that may be required to improve a problematic situation. In addition to understanding the language used, as noted above, it is critical for an assessor to understand the "state of dialogue." This requires that the assessor be familiar with past observations concerning a particular country so that he or she will understand whether the issues have been resolved, ignored, or allowed to deteriorate over time.

The CEACR's observations after a country's first report upon ratifying a Convention are generally more thorough than later reports, but in no way are these observations intended to be comprehensive. "The Committee's focus is on major elements of noncompliance, pointing out major areas that either have been just skipped, that nothing in national law or practice seems to cover, or situations where the legislation actually seems to be counter to the Convention." One clear indication of a potential problem is when the CEACR recommends a case to the Conference Committee on the Application of Standards. These cases are discussed at the International Labour Conference, and a record of them is published on the ILO website. Professor Bellace noted that delegates can raise complaints or offer defenses related to particular countries at this time, and a record of these statements is publicly available through the *Provisional Record* of the Conference, which has the final say on matters of country implementation.

Professor Bellace closed her presentation by making four points on the CEACR's role in assessing compliance with international labor standards. The first is that the CEACR deals only with governments and country-level compliance, engaging in dialogue rather than making determinations on individual cases of labor standards violations. Although the CEACR may consider information received from sources other than governments, it has

no fact-finding machinery. The CEACR, therefore, is limited to considering the overall record or pattern of a government's application of a Convention. Second, there is often a lack of accurate data on actual applications. As the government is the primary source of data, countries with weak data-gathering capacity simply cannot supply the information necessary for assessing implementation of Conventions. It is difficult if not impossible to examine discrimination in the absence of statistics on the size of the labor force, its composition (by sex, age, and race), and wages by gender. Another problem is that in many countries, although workers in the informal economy outnumber those in the formal economy, these workers are not included in the government data or covered in the national labor legislation. Third, the CEACR does not produce a "scorecard" or ranking of country compliance but looks at each country individually with the aim of improving compliance with a Convention over time. Last, as noted above, not all of the materials of the CEACR are published. The public can read the observations and the *General Survey*, but the direct requests, which contain "some of the most interesting material," are not currently available, and it is unlikely that they will be made available in the future.

David Tajgman
Consultant, Labour in Development

Mr. Tajgman began his presentation by acknowledging that assessing compliance with international standards is not a simple process. It can be complicated on both the technical and the political level, particularly when assessments are being done unilaterally and externally. He outlined three steps in the assessment process.

Methods of Assessing National Laws

The first is to determine the relevant labor standards. Deciding on these standards requires knowledge of their content and the institutional frameworks in which they operate. There are many sources of international labor standards. Individual Conventions of the ILO, the European Union's special incentive arrangement on labor rights, and various provisions of U.S. trade law all provide varying formulations of labor standards. For assessment purposes, Mr. Tajgman said, specific reference to ILO Conventions is much more precise. A definition of forced labor, a minimum working age, even requirements of the more broadly phrased Conventions

on freedom of association and collective bargaining can help an assessor generate specific elements that can operate as a compliance checklist.

The existence of alternatives to Conventional law raises the question of whether countries that have not ratified particular Conventions should be held to a lesser standard. But Mr. Tajgman cautioned that any unilateral attempt to assess compliance runs the risk of being perceived as an undermining of the ILO's system of ratification and regular supervision. When an assessment is being conducted, the source of the standard is an important element because it is often the source that enhances perceptions of legitimacy and confidence in the objectivity of the assessor. Mr. Tajgman strongly recommended use of the ILO Conventions as a reference because they are "multilateral instruments supervised by the international supervisory bodies.... Jurisprudence has developed around these standards, and they are universally recognized." But when the assessor decides unilaterally what a particular standard means, subjectivity enters the assessment process in the earliest stages. Instead, if flexibility is desired, "It can be achieved not by selecting standards of looser content but by adjusting the level of compliance required." The African Growth and Opportunity Act, for example, uses the requirement that a country "has established, *or is making continual progress* toward establishing protection of internationally recognized labor rights."[3]

In terms of developing the expertise to examine national compliance, Mr. Tajgman said that understanding the content of international labor standards for the purposes of assessment is similar to understanding any other body of law. "Many people with socioeconomic backgrounds can very well document and describe what may be happening to a group of workers in some country as exploitation. Doing an assessment based on international labor standards requires the ability to know whether the particular exploitative situation is compliant or noncompliant with international labor standards. Practices that are exploitative are not automatically contrary to international standards, and things that are contrary to international standards are not necessarily exploitative."

With a thorough knowledge of the relevant standards, the second step of a country assessment is to examine whether the country's national laws comply with the standards. Finding a country's laws can be difficult, but

[3]AGOA §104(a)(1)(F). {italics added.}

the Internet has simplified the search. However, there are still several issues to consider concerning examination of national laws. First, translations of a country's laws should come from the country itself whenever possible, particularly when noncompliance is alleged concerning specifics of the text, as in cases of facial discrimination. Second, Mr. Tajgman noted that in many countries the laws, including subsidiary rules and regulations, are constantly changing and can be voluminous in nature. Staying current requires a combination of investigative skills, knowledge of the relevant standards, and "the goodwill of the country involved, which makes possible the friendly asking of questions."

The third step in the process of assessing national compliance with international labor standards is to examine the actual practices. Ideally, Mr. Tajgman said, this assessment should take place within the country with the assessor speaking with the parties involved in the relevant issues. However, views may differ between these parties, which means the assessor will face the challenge of finding corroborating evidence on disputed points. Depending on the country, sources of information may be scarce or plentiful, and the quality and extent of collection and documentation may also vary widely. Sources to consider include employers' organizations and national trade unions, and Mr. Tajgman described national trade unions as "the most useful in this area." However, he cautioned, "Trade unions in faraway places can behave in ways that are quite foreign. Workers' interests are not always at the head of the priorities, and the dynamics involved can vary tremendously from country to country. To broadly generalize the problem, keep in mind that the American system of trade unionism that has a clear separation between political parties and trade unions is not the usual international situation." In addition, national labor administrations can be a very valuable source of local information. Many of these have been "decimated by structural adjustment, although one can be pleasantly surprised by systems that remain operational thanks to dedicated civil servants." Again, Mr. Tajgman noted, a "welcomed assessor" is likely to be more successful at obtaining information directly through these agencies.

Turning to the assessment of national enforcement efforts, Mr. Tajgman referred to earlier presentations that had mentioned the financial and human resource constraints impacting compliance in many developing countries. He asked, "Is a good faith effort enough? This can boil down to a judgment call, but things like negligible penalties, systemic arrangements for the judiciary or law enforcers that produce conflicts of interest, absolute absence of evidence of enforcement, these are things obviously to take into

consideration." Sources for this type of information include local legal practitioners and academics, and, as Professor Weiss noted earlier, an assessor should incorporate this local expertise as much as possible when trying to understand national legal frameworks and enforcement efforts.

Mr. Tajgman added that the three steps discussed above—determining the relevant standards, assessing the law, and examining actual practices—should also incorporate several practical considerations. First, there should be some distance between the technicians making the assessment and the decision makers using that assessment. "Since some assessment frameworks lead ultimately to an on/off result, GSP [Generalized System of Preferences] is withdrawn, special incentive arrangements are granted, quota is given or not, decision makers may need to be able to judge how bad problems are. This is a very tricky area, one where the technician benefits from not having to draw the final conclusion." In order to determine the severity or extent of noncompliance, Mr. Tajgman suggested that an assessor take into account issues such as the significance of the sector, the numbers affected, the "real impact," and the ease or availability of a remedy. He also emphasized that it is beneficial if the assessors and the assessed have the opportunity to exchange views, as Professor Bellace described in discussing the CEACR's efforts to engage in dialogue with a country on compliance issues. This consultation is another way of checking facts, and it is also important "as a matter of fair play, especially if an assessment is being done unilaterally and with significant consequences beyond its own result." These consultations may properly set the stage for working toward improvement.

Although assessing compliance with international standards is technically and politically complicated, Mr. Tajgman said, it is not an impossible task. The ILO has been doing it for 90 years, and while the ILO works relatively slowly, its outputs are generally accepted as being objective, consistent, and geared toward correcting problems. However, even the ILO runs the risks that face all international assessment mechanisms: that they might not be seen as independent and fair or that the standards themselves have become unacceptable. Mr. Tajgman said that assessors should be prepared to face the fact that many countries are content with their current law and practice. "Countries' approaches to their social and labor norms may be bad, but they are their own bad norms. Unilateral mechanisms aimed at affecting these national norms ought, at the very least, to have the highest possible degree of credibility, something that can only be developed

by the proper selection of international standards and mechanisms for assessing compliance with them."

DISCUSSION

The discussion period allowed the presenters to elaborate on points made in their presentations and to address specific questions from the audience. Thea Lee (AFL-CIO) asked for additional input on the relative advantages of directly incorporating ILO standards instead of the formulation of "internationally recognized workers' rights" found in U.S. trade law. Mr. Tajgman responded that the universal acceptance of ILO standards and the extensive jurisprudence and analysis relating to national application of specific Conventions make these instruments more precise and consistent for both the assessor and the assessed. Professor Bellace agreed, noting, "If you say something like freedom of association, unless you have a specific Convention, what does it mean? It's such a broad concept, and so trying to pinpoint something that's internationally agreed upon by a respected body to me has such merit versus a unilateral determination, which can be attacked by others simply saying, 'well, that's your political view.'"

Professor Srinivasan initiated a discussion of member states' motivations to ratify ILO Conventions; he wondered if the CEACR supervisory process and the examination of national application serve as a form of disincentive. Professor Bellace responded that some countries might indeed wish to avoid opening themselves up for criticism, but she noted that the decision to ratify or not to ratify might also depend on the legal tradition of the country. "Common law countries tend to have more of a view that you shouldn't ratify something unless you're in compliance, whereas civil law countries seem to have the view that [ratification] is an aspiration, and some day you will reach it, but that shouldn't stop you from ratifying to express your commitment to moving toward that goal." Mr. Tajgman added that, in practice, countries have not shied away from ratification, as shown in Table 4-1. Additionally, member states that choose not to ratify Conventions still have reporting requirements, particularly under the ILO's follow-up mechanism to the 1998 Declaration on Fundamental Principles and Rights at Work. Countries that have not ratified one or more of the fundamental Conventions are asked each year to provide information "on any changes which may have taken place in their law and practice." These reports are commented on by the ILO Declaration Expert-Advisors and published in an Annual Review. The contents of these reports also serve as

TABLE 4-1 ILO Member State Ratifications of Core Conventions

	Forced Labour		Freedom of Association		Discrimination		Child Labour	
	C. 29	C. 105	C. 87	C. 98	C. 100	C. 111	C. 138	C. 182
Africa	50	51	45	52	49	50	37	40
Americas	32	35	32	31	32	32	23	26
Arab States	11	9	3	5	7	10	6	10
Asia	20	17	13	15	22	17	11	18
Europe	48	47	48	49	50	49	44	3
Total	161	159	141	152	160	158	121	132

SOURCE: ILO (2003).

the basis of the Director-General's Global Report, which covers one of the four categories of rights each year.[4] Professor Bellace noted that the Global Report is written in a "much more accessible way" because of its promotional nature and the inclusion of less legal analysis than is found in the CEACR reports on ratified Conventions.[5]

[4]The Annual Review, Global Reports, and report forms of the ILO are available at www.ilo.org/public/english/standards/decl/reports/index.htm.

[5]The Declaration's "promotional" nature means that it does not impose any new legal obligations. Unlike Conventions, it is not open for ratification. It is based on the ILO Constitution and aims to support countries in their efforts to realize fundamental principles and rights, primarily through technical cooperation and advisory services.

5
U.S. Government Approaches to Assessing National Protection of International Labor Rights

The final workshop session allowed current and former employees of the U.S. government to discuss U.S. assessments of other countries' performance in the area of labor rights. The presenters, William Clatanoff (USTR), George White (U.S. Department of State), and Sandra Polaski (Carnegie Endowment for International Peace), also offered their advice and recommendations on improving monitoring of international labor standards, discussing in particular how the Committee on Monitoring International Labor Standards (CMILS) study may contribute to this effort.

William Clatanoff
Assistant U.S. Trade Representative for Labor

Mr. Clatanoff opened his presentation with a discussion of the U.S. trade preference programs in which developing countries are given greater access, either through increased quotas or through tariff rate reductions. Although the implementing legislation for these programs may have slightly different wording in the clauses linking labor rights to these preferences, the "classic one," from the Generalized System of Preferences (GSP) is that the president of the United States shall not designate a country as a beneficiary if "such country has not taken or is not taking steps to afford internationally recognized worker rights to workers in that country."[1] Another

[1]GSP §502(b)(G).

formulation, from the Caribbean Basin Trade Partnership Act, permits the president to designate a country as a beneficiary by taking into consideration "the extent to which the country provides internationally recognized worker rights."[2] The Trade Act of 2002 adds that countries shall not be designated if "such country has not implemented its commitment to eliminate the worst forms of child labor." Mr. Clatanoff noted that a literal interpretation of this last point would allow a country that has not ratified the ILO's Convention 182 on the Worst Forms of Child Labour, and "therefore has no commitments, [to] engage in slavery at will."

Assessing Country Compliance with Worker Rights' Provisions of U.S. Trade Programs

Mr. Clatanoff explained that the process for determining country eligibility for GSP benefits revolves around a subcommittee of the Trade Policy Staff Committee (TPSC). The TPSC has representatives of 19 U.S. government agencies, including the Departments of State, Labor, Commerce, Justice, and Customs; the Trade Representative; Office of Management and Budget; National Security Council; and the Council of Economic Advisors. The GSP subcommittee meets when trade legislation is reauthorized and in response to a petition process. Each year, a notice is published in the *Federal Register* requesting petitions on country or product eligibility. This procedure is available to "interested parties or foreign governments," and the GSP subcommittee evaluates each petition to determine whether it warrants further review. The Office of the U.S. Trade Representative (USTR) also has the authority to self-initiate country eligibility reviews, but this rarely has been used.[3]

Mr. Clatanoff described the procedures of the TPSC as relatively informal, collegial, and unstructured, noting that there are rarely more than 7 of the 19 member-agencies represented at a country eligibility meeting. The starting point for these meetings is a review of the workers' rights section of the State Department's annual *Country Reports on Human Rights Practices*. This is supplemented by information from Department of Labor staff mem-

[2]CBTPA §211(b)(5)(B)(iii).

[3]Mr. Clatanoff offered the case of Chile as an example of a USTR-initiated review, resulting in the removal of benefits after General Pinochet assumed power. After Chile restored democratic rule, the USTR again initiated a review and restored country eligibility.

bers, who compile reports from the ILO and other relevant sources. In almost all cases, the reports of the International Confederation of Free Trade Unions (ICFTU) are also reviewed. Mr. Clatanoff also noted that he regularly turns to his "informal sources" such as contacts at the AFL-CIO. If the review has been initiated as the result of a petition, the information and sources cited in the petition are included in the deliberations. In these cases, the government of the country in question is offered an opportunity to respond to the contents of the petition. The petition is also sent to the U.S. embassy in the country, and the labor attaché or labor reporting officer is asked to comment on or update relevant information.[4]

If the petition appears to have merit, often the next step is to ask the government concerned what will be done to address the situation, that is, the petition is used to "extract some promises from the government." Sometimes the requested actions are simple and direct, but often they are long-term in nature. According to Mr. Clatanoff, one of the most difficult problems is the limitation on the types of requests that the U.S. government can make of the executive branch of another government. For example, in a country with a separation of powers, the executive branch cannot be required to ensure that the judiciary or legislative branches act in a particular way. In cases where the national law does not appear to be consistent with applicable standards, the executive branch may be asked to draft or introduce legislation. A common approach to this issue is to ask the country to accept an ILO mission so that it can receive ILO recommendations on legislative changes. Mr. Clatanoff said that ILO involvement is appreciated because the United States is generally averse to recommending labor laws to other countries. If a petition is accepted, a more thorough investigation and further consultation with the country follow. However, the final decision on any eligibility is, in Mr. Clatanoff's words, "a judgment call" based on assessing outcomes and the "totality of the facts." As an extreme example, he offered what he termed the "Clatanoff Rule" for determining whether there is a lack of freedom of association. "If someone tries to form a union, they can't get shot, fired, or jailed. I'm sorry; I know there are thousands of pages of ILO jurisprudence that I am not going to read [but] that's my criteria—shot, fired, or jailed, you're not given freedom of association."

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[4]Each American embassy has either a labor attaché or labor reporting officer, who is generally responsible for drafting the workers' rights section of the State Department *Country Reports on Human Rights Practices.*

Mr. Clatanoff concluded by noting that there is no scale or ranking of compliance, nor does he think that one would be advisable. As he said earlier in his presentation, he does not think that many compliance issues are measurable, and he questioned where you would "draw the line if you could do it." In addition, refraining from a scale or ranking approach "avoids the huge philosophical question of whether you are trying to measure it in the absolute or are you trying to measure changes, particularly in the way our law is written. If a country moves from 93 to 89, do we pull GSP? But another country moves from 37 to 39, so it's okay?"

George White
Director, Office of International Labor Affairs, U.S. Department of State

Mr. White opened his presentation by saying that although government policies are guided and often shift from one administration to another, labor policy has been quite consistent over the past decade as the North American Free Trade Agreement (NAFTA), the Caribbean Basin Initiative, the African Growth and Opportunity Act (AGOA), and a bilateral agreement with Jordan, among others, have been negotiated. "Underlying our efforts in these areas is the principle of trying to use trade incentives, opening to the U.S. market, or other benefits that other countries derive from these agreements as a way to induce better performance in their country on worker rights, human rights, and other issues like that." The broader U.S. interest, he said, is the promotion of broader economic and political development "in which globalization has some of the rough edges taken off so it promotes more stability, and we have ways in which we can hope to get rid of some of that political alienation and economic envy that drives anti-Americanism around the world."

Promoting Workers' Rights Through U.S. Trade Agreements

Mr. White described how trade agreements provide tremendous leverage even before they are signed. The U.S. embassies and the State Department can take advantage of the opportunities to talk to these governments about some of the commitments they have already assumed—under GSP, for example, or the Caribbean Basin Initiative or through an ILO program—but may not have fully implemented. One of the general principles in these discussions is whether or not the laws themselves are adequate and whether they are enforced in any meaningful way. Mr. White added that

this dialogue, while built on the leverage of the United States in the negotiations, might also offer some leverage to government ministries. "In many cases, governments may have the best of intentions, may have decent laws on the books, but they're not enforcing them or they're faced with tremendous political pressure not to do so. Often times this occurs with free trade zones, export processing zones, or others where powerful political and economic interests within the country own large shares of these areas and want to make sure that they maximize their profit." Ministries of labor may therefore be in a better position to carry out their inspection and enforcement roles if they are backed by the knowledge that failing to regulate conditions in those zones will lead to reduced access to the U.S. market.

Mr. White noted that discussions on workers' rights focus on issues such as "the true right to collective bargaining, the right to freedom of assembly, and discrimination." Indicators of problems in these areas include an absolute lack of collective bargaining agreements or the absence of shop stewards on the factory floor in export processing zones. While these seem to be obvious examples of potential problems, it is often not so simple, and the State Department, like many other organizations, is "grasping for indexes and ideas" that would be useful in determining compliance. As Mr. Clatanoff pointed out in the preceding presentation, there are staff at all U.S. embassies who gather information and report on workers' rights, but their experience and knowledge of the issues can vary widely. The United States has only 48 labor attachés, who cover labor issues in their particular country or region. The rest of the embassies have labor reporting officers, "some of whom know very little about labor issues." Mr. White pointed out that the labor reporting officers often require additional training and briefing materials to fulfill their obligations in this area, primarily the drafting of the workers' rights section of the *Country Report on Human Rights Practices*.

Mr. White addressed the inclusion of American corporations in the discussions of country performance on labor rights. "Some of our most valuable allies in this are American companies which have codes of conduct and want to protect their corporate image, their brand names, and are willing to talk to their suppliers to make sure that they do indeed adhere to the codes." Mr. White sees this as very important because the suppliers then realize that their purchasing partners are genuinely interested in promoting appropriate policies and conduct.

There is still a great deal of work to be done in promoting labor rights abroad, Mr. White said. Various programs, such as AGOA, GSP, and the

textile agreement with Cambodia, are part of that process, but he noted that the State Department is looking forward to receiving suggestions on other methods of carrying out the mandate of examining and promoting country compliance with labor standards.

Sandra Polaski
Senior Associate, Carnegie Endowment for International Peace

Ms. Polaski's presentation continued the discussion of the system of U.S. assessments of other countries' labor laws and practices and included suggestions for improving the assessments. She discussed the list of workers' rights that the United States includes in its assessments, contending that the inclusion of "acceptable conditions of work," which is not among the ILO fundamental rights, is a critical component of examining labor practices worldwide. As an example, she referred to Lejo Sibbel's presentation on the ILO monitoring program in Cambodia. "When the ILO goes into factories and inspects, what it finds, at least in the formal sector, is not forced labor, is not gender discrimination, is not race discrimination—it's a failure to pay wages properly, it's a failure to allow people to have voluntary overtime, it's a requirement for overtime hours that go beyond what's permitted by law." Therefore, although Ms. Polaski supports the incorporation of the rights considered under the ILO Declaration, she said that the standards found in U.S. law, by adding "acceptable conditions of work," more fully address the "real problems for real workers." She also added that U.S. assessments of other countries' labor practices are always made for a practical purpose—determining "whether to grant benefits that a country doesn't currently receive, whether to maintain benefits that have already been granted, whether to negotiate a trade agreement. It's not for the sake of passing judgment on somebody else, but it's a question of whether that country meets an acceptable standard of behavior as defined by our list of rights for the purpose of taking some practical action."

Ms. Polaski addressed the issue of whether the incentive programs found in U.S. trade law can be truly classified as "unilateral," as discussed by David Tajgman. While many bilateral trade agreements include reciprocal opportunities for greater market access, these programs promise greater access to the U.S. market in exchange for heightened respect for the rights of workers. "Countries step up and say 'we would like to get these benefits, we would like the access to your market, we won't open our market, but we agree that we will respect the rights of our workers.' Therefore,

these programs are bilateral in effect." Ms. Polaski said that trade agreements in recent years have moved away from the idea of the United States conducting a unilateral assessment of another country's performance. The NAFTA Labor Side Agreement requires a determination by a neutral settlement panel if disputes arise, as do the trade agreement with Jordan and the Trade Act of 2002. Additionally, in practice, the reliance on the reports and information of the ILO in any assessment provides a multilateral dimension to these trade programs. While the State Department's annual *Country Reports on Human Rights Practices* may be the starting point of an evaluation, ILO materials are also a key information source for the assessment, and Ms. Polaski suggested that greater deference should be given to ILO judgments on these matters. However, the ILO supervisory machinery moves "fairly slowly, and in some cases where the United States is responding to egregious violations of workers' rights—kidnappings, murders, etc.—sometimes it's simply not possible to wait for the ILO to act." In less urgent cases, Ms. Polaski said, the United States frequently asks potential program beneficiaries to request technical assistance from the ILO. For example, the considerable assistance that the ILO provided to Cambodia and Guatemala in revising their labor laws coincided with "active involvement by the U.S. government asking those countries to implement further steps in order to effect respect for worker rights in those countries."

Improving U.S. Assessments of Compliance with International Labor Standards

To improve U.S. assessments, Ms. Polaski first called for greater transparency for the inputs and outputs of the process. For example, while public hearings are not unusual when GSP petitions are filed, she suggested that these hearings should occur in all cases. This would allow petitioners and all interested parties to present their views. In terms of output, while decisions made by the United States are reported, "the reasons for the decision usually are very compressed, they are not fully communicated, and I think that this makes it difficult both for people in this country and in the other country involved to really know what has been expected, what has been asked, what has been committed by the government of the second country." A second improvement to the current assessment process, according to Ms. Polaski, would be more in-depth, highly organized country-level information. Noting that this is one of the tasks of the National Academies' CMILS, she said, "The work that this committee does can have

an enormous impact on the quality and consistency of the decisions that are made by the U.S. government in future determinations of unilateral or bilateral agreements with respect to worker rights."

Finally, according to Ms. Polaski, the biggest improvement to the U.S. process would be "greater consistency in the determinations." This has been difficult to achieve partly because of the inherent challenges of measuring both the current level of compliance with workers' rights standards and the direction of change, which may vary from context to context. However, Ms. Polaski also pointed out that there have been "real inconsistencies" resulting from "variations in the political will of different administrations. And I would not claim that it goes strictly from party to party. I don't think that's been the case at all, but I think that there has been variation in the amount of attention that is paid to the issue of workers' rights internationally and the commitment to make it a higher priority in making decisions about granting benefits to countries." As examples of inconsistencies in policy, Ms. Polaski cited the cases of Guatemala and Colombia. Over the past three years, petitions filed on Guatemala have been pursued very actively, while claims of similar abuses from 1985 to 1990 were not acted upon in the same manner. In Colombia it is also "a political determination not to act on the petitions which are filed about the gross violations of the human rights of the workers in Colombia." Greater consistency, Ms. Polaski concluded, "is something which ultimately will have to be brought into the system for it to have true international credibility. And to the extent that the United States can borrow from multilateral organizations like the ILO and write neutral dispute settlement panels into its agreements, I think all of those steps that help to bring that kind of consistency will strengthen the program and will produce better results in terms of raising labor standards around the world."

DISCUSSION

The discussion period allowed the presenters to elaborate on their views on the current challenges facing the U.S. assessment process and how this process might be improved. In particular, the discussion addressed the question posed by Theodore Moran (Georgetown University) on how the work of the CMILS might be most useful to assessors. Mr. Clatanoff reiterated his earlier point that "ultimately this all boils down to a judgment decision," but there are significant informational needs. The general lack of reliable data and the "huge differences" in the amount of information

available from various countries means that the United States is often working in an "informational void." As a follow-up, Thea Lee (AFL-CIO) asked whether assessors simply need "more information, or do you need the information better organized, or do you need the people collecting the information, the labor officers, to be better trained [or] come into that job with some expertise and experience in labor?" Mr. White responded that there is a need for "all of the above." To be more specific, he added that embassy staff might benefit if the collection and organization of more information were accompanied by further examination of which economic or other indirect indicators could be useful in determining whether there are problems in a particular country. Correlating the data to certain kinds of abuses could, in some cases, serve as a proxy measure when other indicators are not present. For example, Mr. White suggested that "once you get certain levels of adult unemployment, say around 40 percent, you begin to see horrendous increases in child labor." Sets of indicators could also be tailored to certain regions to "indicate systematic problems that are likely to be found throughout similar economies in the area or perhaps attitudinal problems that are based, sometimes—and I don't want to say this in a negative kind of way—... on culture."

Ms. Polaski added that for the CMILS database to have "value added for the U.S. government, it need[s] to provide some sorting functions, whether that's a quantitative sort of ranking or way of arranging the data." Rather than simply compiling a great deal of information, a valuable resource must "capture a dynamic element" of change within countries and "ideally would order the information in terms of relative authority, suggesting 'this is likely to be most useful to you, this would be second most useful,' and so on."

The discussion also addressed the current capacity and training needs of labor attachés and labor reporting officers posted in U.S. embassies overseas. Mr. White noted that some embassies have staff with considerable expertise, while "others have people who are out there dealing with labor issues for the first time in their career and who have no real background in it." Mr. Clatanoff said it was "ridiculous" that the training offered to labor reporting officers only lasts three weeks and added that he often hears that labor "gets downgraded at embassies because the Ambassador, the [deputy chief of mission], the economic counselor doesn't think they do anything for them, they don't get value added out of a labor officer." However, in his view, that is because "most labor officers don't know what the hell a labor officer is or should do." Additionally, at smaller embassies, labor officers

may be "tasked with a lot of different things and not have the time to truly reflect and try to figure out what are the things they should be looking for."

Eric Biel (Fontheim International) initiated a discussion of the possible diminution of the impact of unilateral trade preference programs as the number of bilateral free trade agreements rises. Ms. Polaski agreed that there is a trend in that direction but said that it will take a very long time to negotiate bilateral agreements with all U.S. trading partners. As bilateral agreements replace preferences in particular countries, she said, protections for workers' rights should "produce a much higher level of protection because the free trade agreements will be complete free trade agreements, not just preferences on some products, but all products eventually will be admitted, and therefore the advantages that are accorded to workers should be greater." Ms. Polaski also pointed out that in addition to addressing workers' rights, provisions in U.S. trade agreements call for efforts to distribute the benefits of trade, raising the living standards in the trading partners. "Protecting workers from abuses at work is a mechanism for distributing the benefits of trade more broadly so I think there's a very, very high burden now on the U.S. government to implement this guidance from Congress in the trade negotiations that are under way." Mr. Clatanoff added that according to the instructions from Congress in the Trade Act of 2002, it is quite clear that the United States should ensure that countries incorporate international labor standards into their laws and that they do not fail to enforce these laws. "And the intriguing part, the difficult part when it really gets down to negotiating the clause in a trade agreement with most of our trading partners, is the provision that all principal negotiations of a trade agreement should be treated equally, equipped with equivalent remedies and equal access to dispute settlement, etc. The fact is the world at large fears American protectionism and fears the use of labor standards in trade agreements as protectionist."

The session concluded with further discussion of the role of the CMILS, particularly in its charge to create an information resource for the U.S. Department of Labor within the broader context of U.S. assessments of country labor practices. Mr. Clatanoff emphasized the point made by earlier speakers: Whoever collects and maintains the information should be independent from the "decision makers." Referring to Mr. Sibbel's presentation on ILO monitoring of Cambodia's garment sector, Mr. Clatanoff said, "If anybody in Cambodia thought the ILO was the one that was going to decide upon textile quotas, you would get very different results in compliance and behavior and everything to do with their project. I want their

information, I want their monitoring, but keep them at arm's length from that economic position." Similarly, Ms. Polaski advised the National Academies' committee to focus on organizing information in a useful way, rather than making "a judgment about whether benefits will flow from that or not."

Appendix A

Workshop Agenda

On November 15, 2002, the National Academies' Committee on Monitoring International Labor Standards held a workshop on national legal frameworks and assessing compliance with international norms. The agenda of the workshop follows:

8:00 a.m. *Continental Breakfast*

8:30 a.m. *Welcoming Remarks*

Kimberly Ann Elliott
Committee Member, Institute for International Economics

Nevzer Stacey
Study Director, The National Academies

9:00 a.m. **Session I: International Labor Standards in the National Context: Legal Frameworks and Monitoring**

Discussion Leader:
T.N. Srinivasan, Committee Member, Yale University

Panelists:
Marley Weiss, Professor of Law, University of Maryland
"Monitoring to Maximize Implementation and Compliance with International Labor Agreements"

Arturo Bronstein, Senior Labour Law and Policy Advisor, ILO
"The Role of the International Labour Office in the Framing of National Labour Legislation"

10:30 a.m. *Break*

10:45 a.m. **Session II: Implementing International Standards at the National Level**

Discussion Leader:
Mo Rajan, Committee Member, Levi Strauss & Co.

Panelists:
Juan Amor Palafox, Dean, School of Labor and Industrial Relations, University of the Philippines; Director, Center for Labor Justice
"The Philippine Experience with International Core Labor Standards: Commitment on Paper; Need for More Serious Implementation"

Lejo Sibbel, Chief Technical Advisor, ILO Garment Sector Working Conditions Improvement Project in Cambodia

12:15 p.m. *Lunch*

1:00 p.m. **Session III: Methods of Assessing National Laws and Enforcement Mechanisms**

Discussion Leader:
Auret Van Heerden, Committee Member, Fair Labor Association

Panelists:
David Tajgman, Labour in Development
"On Assessment of National Legal Frameworks and Enforcement Mechanisms in Determining Compliance with International Labor Standards: Some Practical Observations"

Janice Bellace, Professor of Law, The Wharton School; Member, ILO Committee of Experts on the Application of Conventions and Recommendations

2:30 p.m. *Break*

2:45 p.m. **Session IV: U.S. Government Approaches to Assessing National Protection of International Labor Rights**

Discussion Leader:
Thea Lee, *C*ommittee Member; AFL-CIO

Panelists:
William Clatanoff, Assistant U.S. Trade Representative for Labor

George White, Director, Office of International Labor Affairs, U.S. Department of State

Sandra Polaski, Senior Associate, Carnegie Endowment for International Peace

4:30 p.m. *Adjourn*

Appendix B

Workshop Speaker Biosketches

Janice Bellace is the Samuel Blank Professor of Legal Studies, and professor of Legal Studies and Management at The Wharton School of the University of Pennsylvania, where she joined the faculty in 1977. She is also director of the Huntsman Program in International Studies and Business, a unique four-year undergraduate course of study that integrates business education, advanced language training, and a liberal arts education. From 1994–1999, she served as Wharton's deputy dean, the school's chief academic officer. In July 1999, Professor Bellace took a leave of absence from Penn to become the first president of Singapore Management University, Singapore's newest university, which matriculated its first students in August 2000. The author of numerous books, chapters, articles, and papers, Dr. Bellace's research interests are in the field of labor and employment law, both domestic and international. Her most recent article on a non-American topic is "The ILO Declaration of Fundamental Principles and Rights at Work." Dr. Bellace is a member of the Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organization (ILO), a group of 20 scholars from around the world who report on compliance with fundamental labor and human rights standards. She received her bachelor's and law degrees from the University of Pennsylvania. She holds an M.Sc. degree from the London School of Economics, which she attended as a Thouron Scholar.

Arturo Bronstein is the senior labour law and policy advisor for the International Labour Office in Geneva. He has received law training at the Faculty of Law, University of Buenos Aires, Argentina, from which he graduated as an attorney at law in 1967. He practiced law for several years in Buenos Aires, specializing in labor law. Between 1972 and 1974, he pursued doctoral studies at the University of Paris, where he also lectured on comparative social security. He joined the ILO in 1974 in the Labour Law and Labour Relations Branch. In 1987 he was appointed Head of the Labour Legislation Section in the ILO, and in 1996 he took up a field position, as Director of the ILO Multi-Disciplinary Team for Central America, Cuba, Mexico, Haiti, Panama and the Dominican Republic, based in San José, Costa Rica. In April 2000 he returned to the ILO Headquarters in Geneva, as deputy director of the Government, Labour Law and Labour Administration Department; in April 2002 he was named senior ILO labour law policy advisor. He has authored many publications in the field of labor law and labor relations. In addition to his position in the ILO, he is the current Secretary General of the International Society for Labour Law and Social Security.

William Clatanoff is the assistant United States trade representative for labor. Mr. Clatanoff was the counselor for Labor Affairs at the American Embassy in Tokyo from August 1996 to May 2001. He has had extensive experience working to improve the equity and efficiency of labor markets, having served with the International Labor Affairs Bureau of the U.S. Department of Labor, the International Labour Organization in Geneva (1992–1995), and the District of Columbia Department of Employment Services. Prior to entering government service, he taught economics at Mary Washington College in Fredericksburg, Virginia. A native of Annapolis, Maryland, Mr. Clatanoff received a B.A. from Duke University and an M.A. from the University of Maryland, both in economics.

Juan Amor F. Palafox is the dean and associate professor of the School of Labor and Industrial Relations at the University of the Philippines (UP), where he teaches courses in both the human resources (HR) and labor management specialization fields, such as basic theory courses and advanced special subjects in training and development; HR administrative processes; and labor laws with implications on HR processes. He is also director of the Center for Labor Justice (SOLAIR). He earned his B.S. from the University of the Philippines, *cum laude*, and his Master of Labor and Indus-

trial Relations from the University of Illinois at Urbana-Champaign. He is on leave from doctoral studies in educational psychology at UP and is currently serving as the Coordinator of the Yearly Update on Labor Jurisprudence, a seminar that tackles all labor-related Supreme Court-decided cases on an annual basis. He is one of UP SOLAIR's most active faculty members in the training and development circuit.

Sandra Polaski is a senior associate at the Carnegie Endowment for International Peace. Her work focuses on international labor policy in the context of trade, development, and multilateral relations. Until April 2002, Ms. Polaski served as the U.S. Secretary of State's special representative for international labor affairs, the senior State Department official dealing with such matters. In that capacity she played a leading role in the development of U.S. government policy on international labor issues and integrated those issues into U.S. foreign policy. Among other responsibilities at the State Department, she served as the lead negotiator in establishing labor provisions in the U.S.–Jordan Free Trade Agreement, considered a model for future agreements. Ms. Polaski was responsible for the development and implementation of the State Department's innovative "Partnerships to Eliminate Sweatshops" program, providing grants to private-sector groups to promote corporate social responsibility and good labor standards in workplaces around the globe. Previously, Ms. Polaski was the director of economic and labor law research for the Secretariat of the North American Commission on Labor Cooperation, a NAFTA-related intergovernmental body.

Lejo Sibbel is the chief technical advisor of the International Labour Organization (ILO) Garment Sector Working Conditions Improvement Project in Phnom Penh, Cambodia**.** Previously, he worked in the ILO Multi-Disciplinary Team in Manila, the Philippines, as an associate expert on standards, advising governments and workers' and employers' organizations on the contents of ILO Conventions and their incorporation into national law and practice. He has also worked in Geneva in the ILO's Standards Department as an associate expert on human rights and for the United Nations Centre for Human Rights (now the Office of the UN High Commissioner for Human Rights).

David Tajgman is the principal behind an international consultancy, Labour in Development, which is based in Århus, Denmark. The

consultancy specializes in concrete downstream use of international labor standards (ILS) as a reference for policy making and activity and program implementation. He has been engaged in a range of projects, including work for the European Commission in establishing a methodology for assessing applications for special arrangements relating to labor standards. He has conducted assessments of Russia, Ukraine, and Sri Lanka under the European Union regulations. He has authored and co-authored a number of books and materials on the use of ILS, including *Parliamentarians' Guide to Convention No. 182* (ILO, 2002), *A Users' Guide to Freedom of Association* (ILO, 2000), *Labour Policies and Practices in Labour Based Infrastructure* (ILO, 1997), and *Child Labour Briefing Materials* (ILO, 1999). During his professional career outside the United States, he has drafted labor laws for a number of African countries, assessed wage systems and prepared generalized guidelines on food for work programs, advised on the application of labor standards in employment creation programs in South Africa and Namibia, prepared policies papers on ILS and employment, and prepared training materials and courses on maritime labor standards, procedural aspects of ILS, ILS and productivity, and the ILO's Declaration on Fundamental Principles and Rights at Work. He collaborates regularly with the International Training Center of the ILO in Turin, Italy. Before his incarnation as a consultant, he was recruited in 1987 into the International Labour Office and worked in the International Labour Standards Department in Geneva until 1992 and in Harare from 1992 to 1996. Prior to that he was a staff lawyer for the National Labor Relations Board in Los Angeles, California, and for the Directors Guild of America in Hollywood. He holds a B.S. in industrial and labor relations from Cornell University and a J.D. from the University of California, Hastings College of the Law. He is a member of the California Bar. Mr. Tajgman is currently finishing a master's degree in financial economics at the School of Oriental and African Studies of the University of London.

Marley Weiss is a professor of law at the University of Maryland. In 1984, Professor Weiss left the position of associate general counsel of the United Auto Workers (UAW) to join the Maryland faculty as associate professor of law. She had worked in the UAW Legal Department since her graduation from Harvard Law School. Professor Weiss spent her sabbatical leave in 1993–1994 as a visiting professor at the Eötvös Loránd University Faculty of Law in Budapest, Hungary, and returned there as a Visiting Fulbright Lecturer for the spring 1997 semester. She served as chairperson

of the National Advisory Committee to the U.S. National Administrative Office for the NAFTA Labor Side Agreement from 1994–2001. She served as secretary-elect (1996–1997) and as secretary (1997–1998) of the American Bar Association Section of Labor and Employment Law. Professor Weiss specializes in all facets of labor and employment law, including comparative and international aspects, and has published on a wide range of related topics. She has a B.A. from Barnard College and a J.D. from Harvard Law School.

George White is the director of the Office of International Labor Affairs at the U.S. Department of State.

Appendix C

Audience List

Janice Bellace
Wharton School

Eric Biel
Fontheim International

Arturo Bronstein
ILO-Geneva

Christopher Candland
Committee on Ways and Means

Cyra Choudhury
The National Academies

William Clatanoff
U.S. Trade Representative

Carol Corillon
The National Academies

Mary Covington
ILO-DC

Linda DePugh
The National Academies

Ockert Dupper
Harvard University

Kimberly Ann Elliott
Institute for International Economics

Alex Foxley
Embassy of Chile

Chantenia Gay
Department of Labor

Anthony Giles
Commission for Labor Cooperation

Celeste Helm
Department of Labor

Peter Henderson
The National Academies

Margaret Hilton
The National Academies

Elizabeth Briggs Huthnance
The National Academies

Erin Klett
Verité

Tambra Leonard
Department of Labor

Viondette Lopez
Department of Labor

Amy Luinstra
World Bank

Fay Lyle
Solidarity Center

Theodore H. Moran
Georgetown University

Eileen Murriugui
Department of Labor

E.J. Murtagh
Department of Labor

Juan Amor Palafox
University of the Philippines

James Perlmutter
Department of Labor

Carol Pier
Human Rights Watch

Sandra Polaski
Carnegie Endowment

S.M. (Mo) Rajan
Levi Strauss & Co.

Tanya Rasa
Department of Labor

George Reinhart
The National Academies

Crispin Rigby
The National Academies

Markley Roberts
AFL-CIO (Retired)

Charlotte Roe
Department of State

Gregory Schoepfle
Department of Labor

Jim Shea
Department of Labor

John Shephard
The National Academies

Lejo Sibbel
ILO-Cambodia

John Sislin
The National Academies

Donna Smith
ILO

Connie Sorrentino
Department of Labor

T.N. Srinivasan
Yale University

Nevzer Stacey
The National Academies

Jill Szczesny
Department of Labor

David Tajgman
Labour in Development

Elizabeth Taylor
Bureau of Labor Statistics

Mito Tsukamoto
ILO

Matt Tuchow
Office of U.S. Congressman Sander Levin

Auret Van Heerden
Fair Labor Association

Clementina Vargas
Commission for Labor Cooperation

Jeff Vogt
International Labor Rights Fund

Chris Watson
Department of Labor

Marley Weiss
University of Maryland

George White
Department of State

Fahrettin Yagci
World Bank

Anne Zollner
Department of Labor

Appendix D
The Committee on Monitoring International Labor Standards (2002-2003) and NRC Staff

THEODORE H. MORAN (*Chair*), Marcus Wallenberg Chair, School of Foreign Service, Georgetown University, Washington, DC

JARL BENGTSSON, Consultant, Organisation for Economic Co-operation and Development, Paris, France

MARIA S. EITEL, Vice President and Senior Advisor for Corporate Responsibility, Nike; President, Nike Foundation, Beaverton, OR

KIMBERLY ANN ELLIOTT, Research Fellow, Institute for International Economics, Washington, DC

GARY FIELDS, Chairman, Department of International and Comparative Labor, School of Industrial and Labor Relations, Cornell University, Ithaca, NY

THEA LEE, Assistant Director for International Economics, Public Policy Department, AFL-CIO, Washington, DC

LISA M. LYNCH, Academic Dean and Professor of International Economic Affairs, The Fletcher School of Law and Diplomacy, Tufts University, Medford, MA

DARA O'ROURKE, Assistant Professor of Environmental Policy, Department of Urban Studies and Planning, Massachusetts Institute of Technology, Cambridge, MA

HOWARD PACK, Professor of Business and Public Policy, The Wharton School of Business, University of Pennsylvania, Philadelphia, PA

EDWARD POTTER, International Labor Counsel, U.S. Council for International Business; Attorney-at-Law, McGuiness, Norris & Williams, LLP, Washington, DC

S.M. (MO) RAJAN, Former Director, Labor and Human Rights, Worldwide Government Affairs and Public Policy Department, Levi Strauss & Company, San Francisco, CA

GARE SMITH, Partner, Foley, Hoag & Eliot Attorneys at Law, Washington, DC

T.N. SRINIVASAN, Samuel C. Park, Jr. Professor of Economics, Department of Economics, Yale University, New Haven, CT

AURET VAN HEERDEN, Executive Director, Fair Labor Association, Washington, DC

FAHRETTIN YAGCI, Lead Economist, Africa Region, The World Bank, Washington, DC

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Nevzer Stacey, *Study Director*
Linda DePugh
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Crispin Rigby
John Shephard
Monica Ulewicz

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Peter Henderson, *Deputy Study Director*
Elizabeth Briggs Huthnance
Stacey Kozlouski
George Reinhart
John Sislin